Environmental Hearing Board

Adjudications
and
Opinions

1989

Volume I

PAGES 1-452

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1989

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Member .....WILLIAM A. ROTH
(Resigned March 31, 1989)

Member .....ROBERT D. MYERS

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Secretary.....M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1989 EHB 1

FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1989.

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

1989

ADJUDICATIONS

OPINIONS AND ORDERS

1989 DECISIONS

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 BOA

COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**EHB Docket No. 88-090-CP-W**
	:	
v.	:	
	:	
TEXAS EASTERN GAS PIPELINE COMPANY,	:	
TEXAS EASTERN TRANSMISSION CORPORATION	:	**Issued:** January 4, 1989

OPINION AND ORDER
SUR PRELIMINARY OBJECTIONS

Synopsis

Preliminary objections based on Pa.R.C.P. No. 1019(a), which requires that the material facts on which a cause of action or defense is based be stated in a concise and summary form, will be sustained when affirmative defenses are not accompanied by factual allegations. The Board will not require strict compliance with Pa.R.C.P. No. 1022 when no real prejudice is shown and when each defense, not already dismissed, has been separately pleaded elsewhere in conformance with Pa.R.C.P. No. 1022.

OPINION

This matter was initiated by the Department of Environmental Resources' (Department) March 16, 1988 filing of a complaint for civil penalties under the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL), and a petition for abatement of costs 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). The complaint for civil penalties

alleges that Texas Eastern Transmission Corporation and its division, Texas Eastern Gas Pipeline Company (collectively Texas Eastern) violated various provisions of the CSL and the regulations promulgated thereunder relating to discharging industrial wastes into the waters of the Commonwealth, while the petition for abatement of costs alleges violations of the SWMA and the regulations promulgated thereunder relating to the management and disposal of residual and hazardous wastes.

On April 5, 1988, Texas Eastern filed its Answer and New Matter to the complaint and petition, asserting 12 affirmative defenses. In response, on April 25, 1988, the Department filed preliminary objections to Texas Eastern's twelfth affirmative defense pursuant to Pa.R.C.P. No. 1017(b)(2) and a reply to Texas Eastern's new matter. The preliminary objections are now before the Board.

Texas Eastern's twelfth affirmative defense reads:

> 123. Paragraphs 1 through 122 of Texas Eastern's Answer are hereby incorporated by reference as though fully set forth herein.
>
> 124. The claims set forth in the Complaint and Petition are barred, in whole or in part, by laches, waiver, compromise, settlement, release, res judicata and estoppel, to the extent that any of these defenses have not already been asserted above.
>
> 125. The Complaint and Petition fails to set forth a claim upon which relief can be based.
>
> WHEREFORE, Texas Eastern respectfully requests the Honorable Board to issue an Order dismissing the Complaint and Petition with prejudice and awarding Texas Eastern its attorneys' fees, costs and any other relief this Honorable Board deems just and appropriate under the circumstances.

The Department objects, arguing that the affirmative defenses set out in the twelfth affirmative defense do not conform to Pa.R.C.P. No. 1019 or Pa.R.C.P No. 1022. Alternatively, the Department moves for a more specific

pleading, requesting that the Board order Texas Eastern to set out the factual allegations giving rise to these defenses.

On May 16, 1988, Texas Eastern filed its answer to the Department's preliminary objections, claiming that Paragraphs 124 and 125 speak for themselves and that the allegations in the Department's preliminary objections are conclusions of law requiring no responsive pleadings and are denied.

Rule 1019(a) of the Pennsylvania Rules of Civil Procedure states:

> The material facts on which a cause of action or defense is based shall be stated in a concise and summary form.

Rule 1019(a) requires a complaint to set out the material facts in a succinct but sufficiently descriptive manner to allow a defendant to prepare a defense. Goodrich-Amram 2d §§1019(a):5, 1019(a):16. Likewise, a defense must be stated in a concise and summary form.

As quoted above, Paragraph 124 pleads several defenses but fails to support these defenses with facts, thus violating Rule 1019(a). However, most of the defenses contained in Paragraph 124 have been separately pleaded with the necessary supporting factual allegations elsewhere. While we sustain the Department's preliminary objection on the above ground, we note that this has a limited effect. It strikes the defense of res judicata, which has not been properly pleaded elsewhere in the Answer and New Matter. And, to the extent that the defenses of waiver, compromise, settlement, and release go to the stipulated agreement mentioned in Paragraphs 81-85, these defenses are allowed; to the extent these defenses are based on other facts not pleaded, they are dismissed.

The Department also objects to Paragraph 125, alleging that Texas Eastern did not state, in a concise and summary form, the material facts on

which it bases its assertion that the complaint and petition failed to set forth a claim upon which relief could be granted, as required by Rule 1019(a). We will sustain the Department's objection to Paragraph 125. See 5 Pa. Practice 2d §25:55.

The Department's objection that Texas Eastern failed to separately plead each allegation as required by Rule 1022 is overruled. Rule 1022 provides:

> Every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation.

While a technically correct pleading would conform to the requirement that "each paragraph shall contain, as far as practicable, only one material allegation," violations of this rule will be ignored if no real prejudice is shown. Goodrich-Amram 2d §1022:1 (citations omitted). Because the defenses not already stricken have been separately pleaded elsewhere in Texas Eastern's Answer and New Matter, we do not believe the Department has suffered any harm.[1]

In light of our holdings on the Department's first three preliminary objections, will overrule the Department's fourth preliminary objection.

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[1] A general test is whether there will be difficulty answering the complaint or, in this situation, the affirmative defenses. We do not feel that the Department had any such difficulty. See generally, Goodrich-Amram 2d §1022:1.

O R D E R

AND NOW, this 4th day of January, 1989, it is ordered that:

1) The Department's first preliminary objection is sustained, and the affirmative defenses in Paragraph 124 of Texas Eastern's Answer and New Matter which have not been separately pleaded elsewhere are dismissed consistent with this opinion;

2) The Department's second preliminary objection is sustained; and Texas Eastern's afffirmative defense in paragraph 125 is dismissed;

3) The Department's third preliminary objection is overruled; and

4) The Department's fourth preliminary objection is overruled.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: January 4, 1989

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

JOSEPH R. AMITY, t/d/b/a
Amity Sanitary Landfill :
:
v. : EHB Docket No. 88-318-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: January 4, 1989

OPINION AND ORDER
SUR
APPELLANT'S REQUEST FOR DECISION ON THE MERITS

Synopsis

Appellant's request to have the Board issue a decision on the merits on the basis of the record before it is granted where the only issue is whether a proposed solid waste disposal area was permitted prior to April 9, 1988, and that issue could be resolved on the basis of the parties' stipulation and a consent order and agreement. The Department's refusal to permit the lateral expansion of a landfill into a 4.5 acre area under 25 Pa. Code §271.112(d)(2) was not an abuse of discretion where that area was not approved for disposal under the terms of a consent order and agreement which superseded the appellant's 1973 and 1983 waste disposal permits.

OPINION

This matter was initiated on August 16, 1988 with the filing of a notice of appeal by Joseph R. Amity, t/d/b/a Amity Sanitary Landfill (Amity), contesting the Department of Environmental Resources' (Department) July 18, 1988, denial of approval sought by Amity to laterally expand his landfill in

the borough of Taylor, Lackawanna County. Amity sought the Department's approval pursuant to 25 Pa. Code §271.112(d), a provision of the newly-effective municipal waste management regulations, and contended that the Department improperly applied the regulation in disapproving his request.

Amity's notice of appeal was accompanied by a petition for supersedeas to which were appended numerous exhibits. The Department responded to Amity's petition on August 22, 1988, by filing a motion to deny the supersedeas request. The Department contended that the relief sought by Amity--authorization to expand its landfilling activities--was an alteration of the status quo ante, and, therefore, the Board could not grant a supersedeas. The Board then, on September 2, 1988, issued an opinion and order denying Amity's petition for supersedeas for the reasons advanced by the Department in its motion to dismiss.

On September 21, 1988, Amity, pursuant to 25 Pa. Code §21.122, filed a motion for reconsideration of the Board's denial of his petition for supersedeas. Amity contended that the Board misstated the crucial facts in its decision and, as a result, committed an error of law in applying Hepburnia Coal Co. v. DER, 1985 EHB 713. Amity contended that it should have had the opportunity to present evidence at a hearing and that it was denied an opportunity to respond to the Department's motion to deny the petition for supersedeas.

The Department responded to Amity's motion for reconsideration on September 30, 1988, arguing that the Board's conclusion was correct and presenting a June 9, 1986 consent order and agreement executed by the Department and Amity and a May 20, 1987 amendment thereto (collectively,

Consent Order and Agreement) in support of its argument that the 4.5 acre expansion sought by Amity was not previously permitted and, therefore, the supersedeas sought by Amity would be an alteration of the status quo ante.

The Board, by order dated October 12, 1988, scheduled an evidentiary hearing "for the sole purpose of determining where the 4.5 acre area in question falls on Exhibit A to the June 9, 1986 Consent Order and Agreement entered into by Amity and the Department." The parties were also given the opportunity to present oral argument on their respective positions after the conclusion of the evidentiary hearing.

The evidentiary hearing was conducted on October 21, 1988. The parties stipulated that the 4.5 acre area into which Amity proposed to expand fell entirely within Area 1-D of Exhibit A to the Consent Order and Agreement. Amity also argued that the Consent Order and Agreement did not operate to change the boundaries of Amity's permit area. Therefore, since the 4.5 acre proposed expansion was always permitted, the Department's refusal to approve the expansion under 25 Pa. Code §271.112(d) was an abuse of discretion. As relief, Amity requested that the Board remand Amity's permit application to the Department for review. Amity also requested that the Board reach a determination on the merits based on the record made in the supersedeas proceedings.

The Department asserted a contrary interpretation of the Consent Order and Agreement, noting that the parties never contemplated disposal in Area 1-D of Exhibit A to the Consent Order and Agreement and claiming that even if they had, Amity chose to request expansion under the new municipal waste management regulations, rather than under the procedures set forth in

the Consent Order and Agreement. The Department, by letter dated October 26, 1988, opposed Amity's request for a determination on the merits based on the record currently before the Board.

By order dated December 7, 1988, the Board granted Amity's request that the matter be resolved on the present record before the Board and ordered the parties to submit memoranda of law in support of their respective positions. Amity and the Department both filed their memoranda of law on December 15, 1988, and the memoranda largely re-iterated the positions taken by the parties at the October 21, 1988 hearing. In addition, the Department submitted the affidavits of John C. Dernbach, a Department attorney serving as a special assistant in the Bureau of Waste Management, who had primary responsibility for drafting the regulations at issue, and David J. Lamereaux, the Wilkes Barre Regional Solid Waste Manager.

We granted Amity's request that a determination on the merits be reached on the basis of the record presently before the Board because the resolution of this matter turns solely on interpreting the Consent Order and Agreement and the language of 25 Pa. Code §271.112(d). In reaching our determination, we have considered Amity's notice of appeal, Amity's petition for supersedeas and Attachments A through F thereto,[1] the Department's response to Amity's motion for reconsideration and the attachments thereto, the stipulation reached by the parties during the October 21, 1988 evidentiary hearing, the arguments of the parties during the course of the October 21, 1988 hearing, and Mr. Lamereaux's affidavit. We have not considered Mr. Dernbach's affidavit, since it is testimony concerning what interpretation should be placed on 25 Pa. Code §271.112(d), and, as such, is impermissible

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[1] Attachments G through I are relevant only to the petition for supersedeas.

opinion testimony on a question of law. McCormick et al., Evidence §12(3d. ed. 1984). However, before dealing with the merits, we wish to address several issues raised in Amity's motion for reconsideration.

Amity contends that the Board improperly acted upon its petition by denying it without hearing and before Amity had a chance to respond to the Department's motion. The Board's rules of practice and procedure provide at 25 Pa. Code §21.77(c)(4) that a petition for supersedeas may be denied sua sponte, without hearing, in instances where the petitioner has failed to state grounds sufficient for the granting of a supersedeas. The Board's denial of Amity's petition certainly fell within that category. As to Amity's allegation that it should have had the opportunity to respond to the Department's motion prior to the Board's ruling, we must point out that the Department's motion was an answer to Amity's petition under 1 Pa. Code §35.54 and that no reply is permitted under 1 Pa. Code §35.55.

As to Amity's argument that the Board misstated the crucial facts in reaching its decision, we conclude that, to the extent the Board was provided with such facts, it did not. Neither party brought the Consent Order and Agreement to the Board's attention until the Department appended the document to its response to Amity's motion for reconsideration. And, as the following discussion demonstrates, the terms of the Consent Order and Agreement do not change the Board's conclusion.

We turn now to our determination on the merits. In a letter dated July 7, 1988, Blazosky Associates, Inc., on behalf of Amity, requested the Department's approval to laterally expand its sanitary landfill into a 4.5 acre area. The letter stated, in pertinent part, that:

> On behalf of the Amity Sanitary landfill we hereby request approval of additional lateral area in accordance with Section 271.112(d)(2) of the PaDER regulations.

Currently the area being filled, commonly known as the "Seventeen Acre Area" is near completion. It is estimated that only approximately 22,000 cubic yds. of air space remain at the present time.

On January 15, 1988 a request to amend the existing waste management permit was submitted to the PaDER. This application requests approval to convert approximately 56.1 acres of the permitted area to a double-lined landfill. It is our understanding that this application is currently under your review. We also realize that the April 9, 1988 regulations may require additional changes to this submission. Nevertheless, we fully anticipate permitting of the proposed lined disposal area in the near future.

In the interim, this landfill needs to expand laterally to maintain its current operation which serves local communities. This interim disposal area, approximately 4.5 acres includes the former lumber drying building. As you are aware, this building and all of its contents were recently destroyed by fire.

The area was fully permitted by the PaDER under the August 17, 1973 Solid Waste Disposal Permit. However no refuse has been placed in this area. Additional permitted areage, including areas surrounding the landfill office and maintenance building will not be utilized for disposal.

This request is made to allow a limited volume of local refuse (1500 cubic yds. per day) for an interim period allowed under the current rules and regulations of the Department.

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(Exhibit E, Amity petition for supersedeas)
(emphasis added)

The Department responded to Amity's request with a July 18, 1988 letter which stated:

Dear Mr. Blazosky:

Two submissions[2] by you (dated July 7, 1988) to David J.

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[2] The Department letter also responded to another July 7, 1988 submission by Blazosky Associates, Inc. which is not pertinent to our determination.

Lamereaux have been referred to me for response. This letter is intended to respond to both.

1. The most important issue raised in the two letters focuses on Joseph Amity's request to expand laterally into areas which have not previously received waste. Landfills which were permitted prior to the April, 1988 cutoff date which have not utilized all lateral permitted space are allowed, under the new regulations, to seek such approval from the Department if certain conditions exist. Primarily, the permittee must have expansion space available which has been evaluated and permitted under regulatory requirements in existence prior to the April cutoff date.

   As you are aware, regulatory requirements have changed since the 1973 issuance date of Permit No. 100932. The space where Joseph Amity is presently conducting operation has undergone extensive review to ensure compliance with regulatory requirements of Chapter 75. The area you now propose for expansion has not been evaluated and has not received approval prior to the April, 1988 cutoff date.

   The Department will not review submissions under the old regulations. It is anticipated that review capability by the Department will be taxed heavily due to the obligations mandated by the new regulations. Your request could only be approved if the area you propose for expansion had been reviewed and approved in a manner similar to the procedure which took place involving the currently operating location. The Department will attempt to review the application for the lined portion of the facility in an expeditious manner.

*****

Your submission of 7/7/88 will be returned to you. Your request for expansion cannot be granted due to the new regulatory requirements and the status of the proposed expansion area.

(Exhibit F, Amity petition for supersedeas) (emphasis added)

25 Pa. Code §271.112(d), the regulation relevant to Amity's submission and the Department's denial, provides that:

(d) An operator may not dispose of waste on permitted disposal areas where waste was not disposed on April 9, 1988, unless one of the following applies:

(1) The area is subject to a Department-issued permit that is consistent with the requirements of this article for facilities permitted after April 9, 1988.

(2) The Department approves the continued disposal of waste on the area, based on a written request from the operator filed with the Department by July 11, 1988. Approval will be subject to the following:

(i) The approval will be limited to the minimum lateral area that would be filled in 2 years to final permitted elevations as of December 15, 1987, based on daily waste volumes received at the facility on July 1, 1987.

(ii) The approval will not be granted unless the operator requires the additional lateral capacity in order to operate for 2 years at the daily volumes received at the facility on July 1, 1987, pending Department review of preliminary and complete applications for permit modification submitted under §271.111, whichever is earlier.

(iii) The approval will be void if the operator fails to comply with §271.111 and this section.

(iv) The approval will terminate April 9, 1990, or when the Department approves or denies a complete application for permit modification under §271.111, whichever is earlier.

Thus, before the Department makes a determination that the area in question falls under §271.112(d)(1) or §271.112(d)(2), the Department must make a threshold determination that the area was permitted under the regulatory scheme in place prior to April 9, 1988 and that waste was not disposed thereon. An examination of the Consent Order and Agreement and Amity's permit is necessary to ascertain the status of the 4.5 acre area in question.

Paragraphs 2 and 4 of the June 9, 1986 Consent Order and Agreement provide:

2. The permit boundaries of the areas under Permit #100932 for disposal of municipal and residual solid wastes shall be as set forth in Exhibit A, attached hereto and incorporated herein as if fully set forth. The boundaries so designated shall be deemed to define areas approved for landfilling, in accordance with this agreement.

*****

4. All prior solid waste management permits authorizing landfill operations under permit identification number 100932 are hereby suspended and replaced by this Consent Order and Agreement, and are declared to represent those areas set forth in Paragraph 2, and Exhibit A.

(emphasis added)

At the October 21, 1988 evidentiary hearing, the parties stipulated that the 4.5 acre area in question fell entirely within Area 1-D of Exhibit A to the Consent Order and Agreement.

Exhibit A contains a legend keyed to the 1973 permit area (Area 1-A through 1-I) and the 1983 permit area (Area 2). The proposed extent of landfilling is indicated on the exhibit by a — - - — line. The legend for Area 1-D states "Landfilling is not proposed in this area," and Amity admitted as much during the October 2, 1988 hearing. And, Area 1-D is not encompassed by the — - - — line indicating the proposed extent of landfilling. In fact, Area 1-D is the only area on Exhibit A not enclosed within the — - - — boundary area denoting the proposed extent of landfilling.[3]

Despite its admission that the 4.5 acre area was not intended for disposal at the time of execution of the Consent Order and Agreement, Amity has argued that this area has always been permitted and that the Consent Order and Agreement did not change the boundaries of the permit area. We find these arguments to be disingenuous, given the explicit language of the Consent Order and Agreement, language which Amity assented to and waived its right to

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[3] The other areas on Exhibit A were in various stages: e.g. completion (Area 1-A), ongoing waste disposal (Area 1-B), waste disposal intended but not initiated (Areas 1-C and 2).

appeal. Amity cannot now attack the language of the Consent Order and Agreement. Fiore v. Department of Environmental Resources, 96 Pa. Cmwlth. 477, 508 A.2d 371 (1986).

Given the notations on Exhibit A and the explicit language in Paragraphs 2 and 4 of the Consent Order and Agreement, we believe that Area 1-D was not an area approved for disposal as of the date of execution of the Consent Order and Agreement. Since the Consent Order and Agreement, by virtue of its terms, and not the 1973 or 1983 permits, was the operative document to define areas approved for disposal, the 4.5 acre area was not "permitted" prior to April 9, 1988, and the pre-requisite for approval under 25 Pa. Code §271.112(d)(2) was not satisfied. Therefore, the Department's return of Amity's application was not an abuse of discretion.

ORDER

AND NOW, this 4th day of January, 1989, it is ordered that The partment of Environmental Resources' return of Joseph R. Amity's application sustained, and the appeal of Joseph R. Amity is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

TED: January 4, 1989

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Kurt J. Wiest
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M. DIANE SMITH
SECRETARY TO THE BOA

LOR CAN, INC. :
:
v. : EHB Docket No. 88-323-F
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: January 4, 1989

OPINION AND ORDER SUR MOTION TO DISMISS

Synopsis

A motion to dismiss filed by the Department of Environmental Resources (DER) is granted in a case involving the appeal of a civil penalty assessment. The Board lacks jurisdiction to supersede the requirement that an appellant must prepay the amount of the assessment, or post a bond in a like amount, in order to file a valid appeal. Commonwealth Court has held that the prepayment requirement does not constitute a denial of due process of law. Boyle Land and Fuel Co. v. Commonwealth, Environmental Hearing Board, 82 Pa. Commw. 452, 475 A.2d 928 (1988), affirmed, 507 Pa. 135, 488 A.2d 1109 (1985).

OPINION

This proceeding involves an appeal filed by Lor Can, Inc. (Lor Can) from a civil penalty assessment (CPA) by the Department of Environmental Resources (DER). Lor Can filed a petition for supersedeas along with the appeal. In the order appealed from, DER assessed a penalty of $46,000 against Lor Can for several alleged violations of the 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., and the regulations promulgated under those laws.

This Opinion and Order addresses the Motion to Dismiss filed by DER on September 1, 1988.[1] In its motion, DER asserts that Lor Can did not file an appeal bond or cash equal to the amount of the assessment within 30 days of DER's order, as required by 25 Pa. Code §86.202(c). DER argues that without prepayment of the assessment or the filing of a bond in the amount of the assessment within 30 days of its order, the Board lacks jurisdiction to hear this appeal, citing William J. McIntire Coal Co. v. DER, EHB Docket No. 87-433-W (Opinion and Order dated April 15, 1988) and Sugar Hill Limestone Co. v. DER, EHB Docket No. 87-336-R (Opinion and Order dated February 26, 1988). Therefore, DER requests the Board to dismiss the appeal.

Lor Can filed a response to DER's motion to dismiss. Lor Can admits that it did not file a bond or prepay the amount of the civil penalty assessment. However, it asserts that the Board could grant its petition for supersedeas, thereby obviating the need to prepay the assessment or file a bond pending the outcome of the hearing. In support of this argument, Lor Can cites Benjamin Coal Co. v. Commonwealth, DER, 100 Pa. Commw. 1, 513 A. 2d 1120 (1986). Lor Can alleges that it does not have the resources to prepay the assessment or post a bond to perfect its appeal, and that it would be deprived of its constitutional rights if the Board were to hold that it lacks jurisdiction to entertain the appeal.

In Boyle Land and Fuel Company v. Commonwealth, Environmental Hearing Board, 82 Pa. Commw. 452, 475 A.2d 928 (1984), Commonwealth Court (affirmed

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[1] DER has asked the Board to rule on its motion to dismiss before considering the petition for supersedeas, since the motion asks the Board to dismiss the entire appeal for lack of jurisdiction.

per curiam by the Supreme Court, 507 PA. 135, 488 A.2d 1109 (1985)) held that the prepayment of a civil penalty assessment levied under the same two statutory provisions involved in the present case, or the posting of an appeal bond of equal amount, is a prerequisite to invoking the Board's jurisdiction and does not constitute a denial of due process of law.

While it was stipulated in the Boyle case that the petitioner (against whom the penalty was assessed) had the financial capacity to post the appeal bond, that circumstance did not appear to control the Court's decision. In fact, the Court acknowledged that the requirement of posting security may deprive "a poor man of his right of appeal." 475 A. 2d 929, 930 The Court went on to hold, consistent with decisions of the Federal Courts under Section 518(c) of the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C.A. §1268(c), that the informal conference provisions of 25 Pa. Code §86.201(b) were sufficient to satisfy the requirements of due process of law.

Commonwealth Court expressly reaffirmed its decision in the Boyle case in Tracey Mining Company v. Commonwealth, ___ Pa. Commw. ___544 A. 2d 1075 (1988). In response to the argument that some persons may be unable to post an appeal bond or deposit the penalty amount in escrow, Commonwealth Court indicated that requesting a supersedeas simultaneously with filing the appeal was a solution to the problem, citing Benjamin Coal Company v. Commonwealth, Department of Environmental Resources, 100 Pa. Commw. 1, 513 A.2d 1120 (1986). Lor Can relies on this portion of the Benjamin decision in seeking a supersedeas in the present case.

With all due respect to Commonwealth Court, we believe the Court confused the requirement for an appeal bond with the requirement, under other statutory provisions, for a performance bond to be kept in effect while a permit remains outstanding. It was the performance bond requirement that was

involved in Benjamin. Commonwealth Court held that, where DER orders a permit holder to replace bonds on which the surety has become insolvent, the Board has the power to supersede DER's order until an appeal to the Board has been resolved.

A performance bond, such as involved in Benjamin, is not a prerequisite to the Board's jurisdiction. An appeal bond or escrow deposit is a jurisdictional prerequisite, however, as held in Boyle and as reaffirmed in Benjamin. The Board simply does not have the power to supersede a requirement essential to its own jurisdiction. Consequently, the Board will ignore the supersedeas language of Benjamin and apply the ruling of the Boyle case as controlling. Accordingly, DER's Motion to Dismiss will be granted.

ORDER

AND NOW, this 4th day of January, 1989, it is ordered that the Department of Environmental Resources' motion to dismiss is granted, and the appeal of Lor Can, Inc. at EHB Docket No. 88-323-F 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: January 4, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

M. C. ARNONI	:	
	:	EHB Docket No. 87-416-W
v.	:	EHB Docket No. 87-418-W
	:	EHB Docket No. 87-468-W
COMMONWEALTH OF PENNSYLVANIA	:	EHB Docket No. 87-469-W
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	Issued: January 5, 1989

OPINION AND ORDER
SUR
MOTIONS TO DISMISS

Synopsis

Department of Environmental Resources' (Department) motion to dismiss appeals as untimely is denied where the Department has failed to support its allegations that the appeals were untimely. The Department's motion to dismiss appeals of a penalty assessment and letters of the Allegheny County Health Department (ACHD) for lack of jurisdiction is also denied because the Department has failed to plead any facts which would establish the nature of the ACHD's relationship with the Department and thus enable the Board to determine whether ACHD is acting as an "authorized representative" of the Department as that term is used in §103 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.103 (SWMA).

OPINION

These motions were initiated with the filing of notices of appeals by M. C. Arnoni Company (Arnoni) from four penalty payment demand letters issued

by the ACHD pursuant to a Consent Order and Agreement (CO&A) executed by Arnoni, the Department and ACHD on April 18, 1986, and approved by the Board in settlement of Arnoni's appeal at EHB Docket No. 85-192-G on June 20, 1986. Arnoni is the owner and operator of a solid waste disposal facility in South Park Township, Allegheny County. Arnoni appealed ACHD's August 18, 1987 demand letter on September 28, 1987, and that appeal was docketed at No. 87-416-W. The August 26, 1987 demand letter was appealed by Arnoni on September 29, 1987 and docketed at No. 87-418-W. The October 6, 1987 letter was appealed by Arnoni on November 5, 1987 and docketed at No. 87-468-W, while ACHD's October 19, 1987 demand letter was appealed by Arnoni on November 5, 1987, and docketed at No. 87-469-W.

On January 20, 1988, the Department filed motions to dismiss the four appeals, arguing that the Board has no jurisdiction over these appeals, since the SWMA, which authorizes county health departments to administer and enforce its provisions, does not specifically confer jurisdiction over appeals from actions of the county health departments on this Board.

The Department also raised the question of the timeliness of Arnoni's appeals at Docket Numbers 87-416-W and 87-418-W. In these two these appeals, Arnoni failed to state the date on which it received the penalty payment demand letter. In both cases, the Department assumes the letter was received the same day it was mailed by ACHD and, therefore, argues that the appeals filed with the Board were received after the thirty-day time period for filing such appeals had tolled.

On March 7, 1988, Arnoni filed its response in opposition to the motions to dismiss, arguing that the express provisions of the SWMA, as well as the expressed legislative intent, establish that the Board has jurisdiction over actions taken by the ACHD under delegated authority pursuant to a

statutorily authorized contractual agreement (the COA), and that §§103 and 108 of the SWMA extend the Board's jurisdiction to actions of the Department and its authorized representative, such as the ACHD, by virtue of the definition of "Department" in §103 of the SWMA. Arnoni contends that the Department's assumption that it received the penalty payment demand letters on the same date they were mailed is without factual basis, averring that it received them no earlier than two days after they were mailed, thus making both appeals timely under 25 Pa. Code §21.52(a).

We will first dispose of the Department's contention that Arnoni's appeals at Docket Numbers 87-416-W and 87-418-W were untimely. We cannot find Arnoni's Notice of Appeal to be untimely on the facts contained in the record thus far. Although the Department assumes that Arnoni received the penalty payment demand letters the same day they were mailed, it provides no evidence supporting this contention. Since we must view the Department's motion in the light most favorable to Arnoni, we must deny this portion of the Department's motion to dismiss.

We must also deny that portion of the Department's motion which contends that we have no jurisdiction over Arnoni's appeals of the actions of the ACHD. In support of its motions to dismiss, the Department relies on McKeesport Municipal Water Authority v. DER, 1987 EHB 775, wherein the Board held it did not have jurisdiction over an appeal of a civil penalty assessment issued by ACHD under the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. 721.1 et seq. (Safe Drinking Water Act) since the statute had no explicit language conferring jurisdiction on the Board. The Board noted the contrast in the language used in the Dam Safety and

Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.17(c) which expressly provides for a review mechanism for actions taken by delegated agencies.

We find the issues in McKeesport to be distinguishable from the instant case. The Safe Drinking Water Act defines "Department" as "Department of Environmental Resources" only. 35 P.S. §721.3. By contrast, §103 of the SWMA defines the term "Department" as the "Department of Environmental Resources of the Commonwealth of Pennsylvania and its authorized representatives." If we follow through with a reading of the Act incorporating this definition of Department, it is clear that the Board has jurisdiction over actions of "authorized representatives" of the Department.

However, the Department has pleaded no facts in its motion which would enable us to ascertain the ACHD's relationship to the Department in issuing the penalty demand letters at issue herein. We do not know whether the ACHD is acting pursuant to an arrangement with the Department under §106 of the SWMA, or is acting pursuant to some other arrangement with the Department, or is acting independently of the Department. And, because we must again view this aspect of the Department's motion in the light most favorable to Arnoni, we must deny it.

ORDER

AND NOW, this 5th day of January, 1989, it is ordered that:

1) The Department of Environmental Resources' motion to dismiss the appeals of the M. C. Arnoni Company as untimely and for lack of jurisdiction is denied;

2) Docket Nos. 87-416-W, 87-418-W, 87-425-W, 87-468-W, and 87-469-W are consolidated at Docket No. 87-416-W; and

3) Arnoni shall file its pre-hearing memorandum on or before February 6, 1989.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: January 5, 1989

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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M. DIANE SMITH
SECRETARY TO THE BOAI

M. C. ARNONI COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-425-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 5, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Motion to dismiss an appeal of a notice of violation is denied where the letter affects the recipient's duties and obligations and, therefore, constitutes an adjudication.

OPINION

This matter was initiated by the October 2, 1987 filing of a notice of appeal by the M. C. Arnoni Company (Arnoni) from the Allegheny County Health Department's (ACHD) August 27, 1987 Notice of Violation. The ACHD cited Arnoni, the owner and operator of a solid waste disposal facility, for violations 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), and an April 18, 1986 Consent Order and Agreement which was executed by the ACHD, Arnoni and the Department of Environmental Resources (Department) in settlement of Arnoni's appeal at Docket No. 85-192-G and approved by the Board on June 20, 1986.

On January 15, 1988, the Department filed a motion to dismiss Arnoni's appeal, arguing that the Board lacks jurisdiction over this appeal since the SWMA does not include specific language conferring jurisdiction over appeals from actions of county health departments with this Board. The Department further alleges that this Notice of Violation detailing the results of an inspection and regulations being violated does not constitute an action or adjudication from which Arnoni can appeal.

In its March 7, 1988 response in opposition to the Department's motion, Arnoni argues that the express provisions of the SWMA, as well as the expressed legislative intent, establish the Board's jurisdiction over actions of county health departments under delegated authority pursuant to the SWMA. As support for this contention, Arnoni points to the definition of "Department" in §103 of the SWMA, which reads, "Department of Environmental Resources and its authorized representatives." Arnoni avers that ACHD is just such an authorized representative. Also, Arnoni alleges that the August 27, 1987 notice of violation constitutes an order of an authorized agent of the Department, and as such, is an appealable action and adjudication.

Consistent with our opinion of this date relating to the Department's motion to dismiss Arnoni's appeals at Docket Nos. 87-416-W, 87-418-W, 87-468-W, and 87-469-W, we will deny that portion of the Department's motion relating to our jurisdiction over actions taken by the ACHD.

As for the Department's contention that the ACHD's August 27, 1987 notice of violation is not an appealable action over which the Board has jurisdiction, the Board has previously held that notices of violation, absent some action affecting the violator's rights or duties, are not appealable. Perry Brothers Coal Company v. DER, 1982 EHB 501. Actions of the Department are appealable only if they affect the personal or property rights,

immunities, duties, liabilities, or obligations of the party. Chester County Solid Waste Authority v. DER, 1987 EHB 523.

The operative language in the ACHD's notice of violation reads as follows:

> In order to abate these violations, the discharging of leachate onto the relocated haul road adjacent to drainage ditch #1 and also into the relocated stream shall cease immediately upon your receipt of this Notice. In addition, drainage ditch #1 is unable to perform as originally constructed due to the excessive accumulation of sediment via erosion activity and, therefore, must be totally reconstructed to original design specifications. The reconstruction shall be performed within thirty (30) days of your receipt of this Notice.

In a similar case, Robert H. Glessner, Jr. v. DER, EHB Docket No. 82-198-R, (Opinion and Order dated September 8, 1988), the Board held that a letter from the Department which notes violations and directs the permittee to undertake specific corrective actions was an appealable action, notwithstanding its being characterized as a notice of violation. In addressing language in the Glessner letter similar to that quoted above, the Board stated that "the inclusion of the word "shall" at several places. . . imposes a clear unmistakable and immediate obligation upon Glessner to begin corrective work on the discharge violations. . . " The Board concluded in Glessner, as we do here, that the notice of violation was, in reality, an order.

Here, Arnoni was informed of leachate discharge violations, ordered to cease the discharging immediately and required to reconstruct a drainage ditch within 30 days of the date of the letter. The ACHD's letter certainly affected Arnoni's duties and obligations, and, as a result, constitutes an action reviewable by the Board.

ORDER

AND NOW, this 5th day of January, 1989, it is ordered that:

1) The Department's motion to dismiss is denied;

2) This appeal is consolidated with Docket Nos. 87-416-W, 87-418-W, 87-468-W and 87-469-W at Docket No. 87-416-W; and

3) Arnoni shall file its pre-hearing memorandum on or before February 6, 1989.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: January 5, 1989

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

NEW HANOVER TOWNSHIP, et al.	:	
v.	:	**EHB Docket No.** 88-119-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 5, 1989
and		
NEW HANOVER CORPORATION		

OPINION AND ORDER
SUR
MOTION FOR A PROTECTIVE ORDER

Synopsis

A motion for a protective order is granted to the extent a party is seeking non-witness expert testimony regarding facts and opinions formulated in anticipation of litigation and is denied to the extent it seeks information experts possess as ordinary fact witnesses.

ORDER

This is the most recent discovery dispute in the appeal by New Hanover Township (Township) challenging the Department of Environmental Resources' (Department) issuance of permits to New Hanover Corporation (Corporation) authorizing the construction and operation of a municipal waste landfill. The procedural history of this matter is described more fully in the Board's September 22, 1988 Opinion and Order dealing with various other discovery disputes.

On November 8, 1988, the Corporation served subpoenas on Steven Jones, Barbara Rochat, Steffan Helbig and Alan Robinson, all employees of BCM

Eastern, Inc., an environmental consulting firm. The subpoenas noticed depositions and requested production of documents.

On November 21, 1988, the Township filed a motion for a Stay and Protective Order prohibiting these depositions and the production of documents. The Township argues the four BCM employees are experts retained in anticipation of litigation and preparation for a Board hearing, but not identified as experts who will testify at the hearing, and are, thus, protected by Pa. R.C.P. 4003.5(a)(33). Further, the Township alleges that in order to depose expert witnesses who will testify at trial, the inquiring party must first make a showing to the court that it needs further discovery by means other than interrogatories pursuant to Pa. R.C.P. 4003.5(a)(2). The Township maintains the Corporation has not made the requisite showing to the Board nor has it obtained a Board order authorizing the depositions.

By order dated November 21, 1988, the Board stayed the depositions pending the disposition of the Township's motion for protective order.

On December 7, 1988, the Corporation filed its memorandum in opposition to the motion for a protective order. The Corporation argues that each of the BCM employees was involved in the permitting process prior to the permit issuance and, therefore, each is a fact witness regarding his/her direct role in the permit process. The Corporation concedes that any opinions the experts have formulated in anticipation of litigation may not be inquired into unless the Township has identified the individuals as experts by the time of their depositions. Finally, the Corporation alleges that the Township has subpoenaed and deposed the Corporation's consultants who were actively involved in the permit process.

Discovery practice before the Board is generally governed by the Pennsylvania Rules of Civil Procedure, 25 Pa. Code §21.111. Pa. R.C.P. No. 4003.5(a)(3) provides that:

> A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, except a medical expert as provided in Rule 4010(b) or except on order of court as to any other expert upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means, subject to such restrictions as to scope and such provisions concerning fees and expenses as the court may deem appropriate.

At present, the Township has not identified any of the four BCM employees as witnesses to be called at the hearing. Accordingly, we are bound by the limits of Pa. R.C.P. No. 4003.5(a)(3).[1] This rule protects these experts from having to testify regarding facts or opinions in a case where they have been retained in anticipation of litigation, but not identified to be called at hearing. However, this rule does not provide blanket protection for these four BCM employees.

In the case of PECO v. Nuclear Energy Ins. Assn., 10 D & C 3d 340 (Phila. 1979), the Philadelphia Court of Common Pleas held that experts with knowledge as fact witnesses are not immunized from discovery as a result of being subsequently retained as experts for trial. PECO, at 347. Similarly

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[1] F.R.C.P. 26(b)(4) parallels this provision of the Pennsylvania Rules of Civil Procedure. The Note of the Advisory Committee on Civil Rules cautions as follows:

> It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Tahoe Insurance Co. v. Morrison - Knudsen Co, 84 F.R.D. 362 (D.Id. 1979), at 363.

here, to the extent the four BCM employees participated in the permitting process, they can be considered fact witnesses and are subject to discovery regarding that involvement, despite the fact they were later retained as experts in anticipation of litigation.

Consistent with the PECO opinion, we will grant the Township's motion for a protective order to the extent it pertains to any discovery regarding expert opinion formulated in anticipation of litigation. We will, however, permit discovery of the four BCM employees regarding their participation in and knowledge of the permit process prior to permit issuance.

ORDER

AND NOW, this 5th day of January, 1989, it is ordered that New Hanover Township's motion for a protective order relating to the depositions of Steven Jones, Barbara Rochat, Steffen Helbig and Alan Robinson is granted insofar as it relates to any non-witness expert opinion prepared in anticipation of litigation. The depositions may otherwise proceed in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: January 5, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

CHARLES BICHLER and
MR. & MRS. JOHN KORGESKI :

v. : **EHB Docket No.** 86-552-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued:** January 6, 1989

OPINION AND ORDER
SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

Synopsis

Summary judgment will be granted in part and permit conditions stricken where the Department of Environmental Resources has abused its discretion in issuing a solid waste permit contingent upon a municipality's determination that certain traffic considerations raised by the Pennsylvania Department of Transportation have been satisfactorily addressed by the permittee.

OPINION

This matter was initiated by the filing of Notices of Appeal with the Board by Charles Bichler, owner and operator of the Bichler landfill, on September 29, 1986, and by Mr. and Mrs. John Korgeski on October 6, 1986. Both parties were appealing from the Department of Environmental Resources' (Department) issuance of a modification to Solid Waste Permit No. 100976 permitting the operation of a demolition waste landfill by Bichler in the Borough of Taylor, Lackawanna County. The permit modification, which was

issued on September 2, 1986, under the provisions of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 et seq. (SWMA), designated the access road to the Bichler Landfill as Hickory Lane via the approach route of Laurel Lane and Walnut Street.

In his appeal, which was docketed at No. 86-552-W, Bichler challenged three specific conditions, numbers 1, 2, and 4, contained in the permit modification. The Korgeskis' appeal, which was docketed at No. 86-562-W, maintained that the permit modification was arbitrary and capricious and violative of the law.

Bichler, who was the permittee in the Korgeskis' appeal and who would be responsible for defending its issuance under the policy of the Department's Office of Chief Counsel, requested that the two appeals be consolidated. The Korgeskis objected to Bichler's request, and, by order dated April 20, 1987, the Board denied it.

The Board conducted a site view on September 9, 1987, and, after the view, suggested to the parties that motions for summary judgment or judgment on the pleadings could dispose of some or all of the issues. The Board also indicated to the parties that it would, on its own motion, consolidate the two appeals, as disposition of one would affect disposition of the other. By Board order dated October 13, 1987, the two appeals were consolidated at Docket No. 86-552-W.

On October 29, 1987, Bichler filed a motion for summary judgment, alleging that conditions 1, 2, and 4 of the permit were arbitrary and unlawful and should be stricken. The challenged conditions were as follows:

> 1. The items set forth in a letter from Penn DOT dated May 16, 1986 (copy attached) must be addressed to the satisfaction of Taylor Borough.

2. The Department is provided certification that the items mentioned in the PennDOT letter dated May 16, 1986 have been considered by a qualified engineer in determining the feasibility of Walnut Street and Laurel Lane as the approach route to the landfill.

4. The Department is provided written documentation that Taylor Borough is satisfied that the items mentioned in the Penn DOT letter dated May 16, 1986 have been satisfactorily addressed.

Bichler argues that the SWMA did not intend municipalities to have the power to regulate the operation of a landfill. Bichler acknowledges that traffic safety is a legitimate consideration when issuing a permit and argues that traffic safety issues were addressed elsewhere in the permit conditions, but finds the Department's action in making the permit subject to the approval of Taylor to be unreasonable and not authorized by the SWMA.

On December 17, 1987, the Department filed a cross motion for summary judgment, alleging that it has broad discretionary powers under §§102(17), and 502(f) of the SWMA to formulate permit conditions to effectuate the goals of the SWMA and protect the public health and welfare. In support of its motion, the Department alleges it had a factual basis for imposing the challenged conditions based on the Department of Transportation's (PennDOT) May 16, 1986 advisory letter detailing certain concerns with the access areas to the landfill. The Department argues that it has a duty under Article 1, Section 27 of the Pennsylvania Constitution to assess the environmental harm that will potentially result from the solid waste disposal facility and that traffic safety is part of this assessment. The Department asserts that after receiving PennDOT's May 16, 1986 letter, it justifiably required Bichler to address the concerns by imposing the challenged permit conditions. As for Bichler's contention that the Department was illegally abdicating its permitting authority to Taylor, the Department asserts that, by virtue of the

Borough Code, the Act of February 1, 1966, P.L. (1965), No. 581 as amended, 53 P.S. §45101 et seq., Taylor has the primary responsibility to regulate conditions on its streets.

On December 21, 1987, the Korgeskis filed their response in opposition to Bichler's motion for summary judgment, arguing that Bichler had failed to show the absence of any dispute as to material fact. While the Korgeskis did not address conditions 1, 2, and 4 of Bichler's permit modification, they did contend that the permit modification was violative of 25 Pa. Code §§75.21(f), 75.21(h), 75.21(i), 75.26(g), 75.26(n), and 75.29(j)(9).

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. The Department and Bichler do not dispute any material facts, but the Korgeskis do, in general. In any event, the issue before us is whether the Department, in imposing Conditions 1, 2, and 4, acted contrary to its authority under the SWMA.

The PennDOT letter which gave rise to the contested permit condition reads in pertinent part:

> Dear Mr. Williams:
>
> Reference is made to our previous correspondence of 22 January 1986 and your most recent correspondence of 2 May 1986 regarding the above mentioned subject. We would like to take the opportunity to expand and be more specific on items that we believe should be considered but not limited to when undertaking such a study:

1. The structural integrity of Laurel Lane and Walnut Street should be determined by taking core borings.

2. The compatability of truck traffic to surroundings - children playing, no sidewalks, residential in nature.

3. Width of roads involved and parking restrictions that may or may not exist.

4. Accident data review on Walnut Street and Laurel Lane.

   a. Number of accidents, types of accidents, causation factors.

5. If my memory is correct, there is no posted speed limit - Therefore, the safe and realistic speed limit for the subject roadways should be determined according to the elements in PennDOT Publication 201.

6. Cornering sight distances along Laurel Lane and Walnut Street at various intersections should be addressed according to the established speed limit and general roadway geometrics.

7. The turning radius at Walnut Street and Laurel Lane - serious consideration should be given in determining what wheel base vehicles can be accommodated at this "main" intersection. Furthermore, the pavement structure does not meet to form a consistent edge of pavement.

In closing, the Department would like to reiterate our original position in that Taylor Borough should solicit a qualified consulting engineer(s) to review the previously listed items and/or any other pertinent data prior to determining the feasibility of these roads for access to such a landfill.

The language of the three contested permit conditions is somewhat ambiguous. Condition 2 requires that a "qualified engineer" assess the feasibility of Walnut Street and Laurel Lane as the access route to the landfill in light of the seven concerns enumerated in the PennDOT letter and so certify to the Department. Conditions 1 and 4 require that Bichler address the concerns in the PennDOT letter to the satisfaction of Taylor and provide written

documentation of Taylor's satisfaction. We believe that the Department has unlawfully abdictated its permit issuance authority to Taylor in the case of conditions 1 and 4 and will grant Bichler's motion for summary judgment on these two conditions and deny the Department's motion.

Section 104(7) of the SWMA empowers the Department to "issue permits,...and specify the terms and conditions thereof,..." Section 502(f) of the SWMA provides that in issuing permits, "the Department may require such other information, and impose such other terms and conditions, as it deems necessary or proper to achieve the goals and purposes of this act." The regulations promulgated under the SWMA provide at 25 Pa. Code §75.22(d) that the Department shall issue a permit when it determines that the permit application is complete and meets all the requirements of the relevant statutes and regulations.

The regulations promulgated under the SWMA contain specific, limited criteria regarding access roads to a landfill. 25 Pa. Code §75.21(i) states "Access roads suitable for use in all types of weather by loaded collection vehicles shall be provided to the entrance of the site or facility." The Board has previously held in Township of Indiana, 1984 EHB 1, that the Department had not abused its discretion as it related to traffic concerns by granting a landfill permit where the Department had requested information on effects of traffic, referred the information to PennDOT for evaluation, and deferred to PennDOT's evaluation. Here, the Department did not defer to PennDOT's evaluation, but rather required Bichler to satisfy PennDOT's concerns to the satisfaction of Taylor.

While Taylor may have a great stake in the safety of its roads, the SWMA limits its role in the permit issuance process to one of review and

comment under §504 or to appeal under §108 of the SWMA and §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21. The Department, not Taylor, has the ultimate authority to issue, deny, or condition a permit. Here, the Department avoided making what was undoubtedly a controversial decision by placing it, in essence, in the municipality's lap.

As for Condition 2, it, in and of itself, does not cede responsibility to Taylor and we will not grant summary judgment to Bichler. However, we will not grant the Department's cross-motion on this condition, for we believe, as the Korgeskis do, that its propriety may be dependent on material facts not before us. We stress also that granting summary judgment to Bichler on Conditions 2 and 4 does not affect the validity of the Korgeskis' claims.

ORDER

AND NOW, this 6th day of January, 1989, it is ordered that:

1) Charles Bichler's motion for summary judgment is granted with respect to Conditions 1 and 4 of the September 2, 1986 modification to Solid Waste Permit No. 100976 and denied with respect to Condition 2;

2) The Department's cross-motion for summary judgment 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: January 6, 1989

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

ROBERT D. AND ELIZABETH L. CROWLEY	:	
	:	
v.	:	EHB Docket No. 88-221-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 9, 1989

OPINION AND ORDER
SUR
MOTIONS FOR SUMMARY JUDGMENT

Synopsis

The Department of Environmental Resources (DER) has no basis, in statute or regulation, for its position that the 120-day review period for an Official Plan revision under 25 Pa. Code §71.16 does not begin to run, with respect to a proposed land development extending into two or more municipalities, each with its own Official Plan, until DER has received a duly adopted Official Plan revision from each of the affected municipalities. Despite this conclusion, an Official Plan revision was not approved by default, since DER had a legally cognizable reason for deferring action and communicated it to the developers in a timely manner. Whether DER committed a subsequent default and whether the developers waived the regulatory time limits is uncertain, because of the absence of material facts. Summary judgment can not be entered in favor of either party.

OPINION

On June 2, 1988, Robert D. Crowley and Elizabeth L. Crowley, together with Middle Creek Bible Conference (collectively called Appellants), filed a Notice of Appeal from the May 2, 1988, action of the Department of Environmental Resources (DER), disapproving a proposed Official Plan revision for Middle Creek Conference and Retreat Center (the Development) on the basis that it had not been approved by the two affected municipalities, Liberty Township and Freedom Township, Adams County. In their Notice of Appeal, Appellants claimed, inter alia, that the Official Plan revision was deemed approved as to Liberty Township because DER did not act within 120 days as required by 25 Pa. Code §71.16.

On September 6, 1988, DER filed a Motion for Summary Judgment, maintaining that, because the Official Plan revision pertained to two municipalities, both municipalities had to give their approval. Since Freedom Township had not done so, the Official Plan revision could not be approved by DER. In response to DER's Motion, Appellants filed their own Motion for Summary Judgment on October 5, 1988, arguing that the facts justify the entry of judgment in Appellants' favor. DER answered Appellants' Motion on October 7, 1988, basically reiterating the legal position set forth in its own Motion.

Neither Motion is accompanied by affidavits but both have exhibits attached. Since a Motion for Summary Judgment is not required to be answered by the opposing party (Goodrich-Amram 2d §1035(b):1), the averments of the Motion cannot be used against the opposing party. However, they may be treated as admissions by the party filing the Motion. Similarly, Appellants' averments in their Notice of Appeal and pre-hearing memorandum also may be treated as admissions. When the record is reviewed in this fashion, the following facts appear.

The Development is a proposed land development on property owned by Appellants straddling the boundary between Liberty and Freedom Townships, Adams County. As part of the Development, Appellants intend to construct private sewage collection and treatment facilities. On May 13, 1986, DER responded to Appellants' postcard application for approval of a sewage planning module for the Development, enclosing module forms, giving general instructions and listing 17 specific requirements. The letter stated that the project "appears to be a revision to the Official Plan of Liberty and Freedom Townships," and that proof of municipal adoption of the Official Plan Revision was required.

Liberty Township approved the Official Plan Revision on or about November 4, 1986. At or about the same date, a Planning Module for Land Development was submitted to DER in connection with the Development. This Module, as assumed by DER in its letter of May 13, 1986, contained revisions to the Official Plans of both Liberty and Freedom Townships. While proof of Liberty Township's adoption was enclosed, no proof was submitted of adoption by Freedom Township. On March 10, 1987, DER responded to the filing, noting the requirement of municipal adoption by Freedom Township and advising that the 120-day review period could not begin until proof of such adoption was submitted.[1]

Appellants diligently sought the approval of Freedom Township; but despite their efforts, the Board of Supervisors of Freedom Township refused to act on the Official Plan revision either affirmatively or negatively. By letter of April 12, 1988, Appellants requested DER to "retain the project on

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[1] The letter also advised Appellants that they need to obtain and submit comments of the Adams County Planning Commission, as mentioned previously in DER's letter of May 13, 1986, and as required by 25 Pa. Code §71.16 (b) (2).

an active basis and not deny it" until Freedom Township's Board of Supervisors made a decision. The Board of Supervisors once again failed to make a final decision at their April 13, 1988, meeting; and, as a result, DER disapproved the project on May 2, 1988. The sole reason cited by DER in support of its disapproval was the failure of Freedom Township to adopt the Official Plan revision. Appellants requested DER to rescind the disapproval while Appellants pursued a mandamus action against Freedom Township, but there is no evidence that a rescission ever took place.

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 "officially adopted plan for sewage services" and to submit to DER, from time to time, such revisions to the plan as may be required by DER's regulations. This section authorizes joint municipal plans and sets forth specific items to be addressed by all Official Plans and revisions. DER is given authority to approve or disapprove Official Plans within one year of submission and to approve or disapprove revisions "within such lesser time as the regulations shall stipulate."

DER's regulations governing Official Plans are set forth in 25 Pa. Code §71.11 et seq. Section 71.16 provides, in pertinent part, as follows:

> (a) No plan or revision will be approved by the Department [DER] unless it contains the information and supporting documentation required by the Act [SFA] and this Chapter.
> (b) No official plan or revision will be considered for approval unless accompanied by the following:
> (1) Evidence that establishes municipal adoption.
> * * * *
> (c) Within 120 days after submission of the official plan or revision, the Department will either approve or disapprove the plan or revision.

> (d) Upon failure of the Department to approve an official plan within 120 days of its submission, the official plan shall be deemed to have been approved, unless the Department informs the municipality that an extension of time is necessary to complete review.

Both the SFA and 25 Pa. Code §71.16 make it clear that municipal adoption is absolutely essential to an Official Plan and to any revision thereof. DER has no power to approve or disapprove until an officially adopted Official Plan or revision is submitted to it.[2] For this reason, there is some basis for DER's argument that the 120-day review period should not begin to run until proof of municipal adoption is submitted. After all, any "deemed" approval by DER is meaningless if the revision has not been adopted by the municipality. This argument, sound as it may be, does not solve the present controversy. Here, DER had proof of municipal adoption by Liberty Township. However, DER insisted that the 120-day review period would not begin to run on Liberty Township's revision until Appellants submitted proof that Freedom Township adopted a revision to its Official Plan.

The SFA and DER's regulations support that approach when the Official Plan is a joint undertaking by two or more municipalities (Section 5 (c) of the SFA, 35 P.S. §750.5 (c); 25 Pa. Code §71.13), but there is no statutory or regulatory basis for it when the municipalities have their own Official Plans. It is understandable why DER would want all of the Official Plan revisions in its hands before commencing its review of a Planning Module for a land development extending into two or more municipalities. In many developments of that type, the proposed sewage system would be integrated to the point where it could not be divided along municipal boundaries and reviewed in

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[2] Even under Section 5 (b) of the SFA, 35 P.S. §750.5 (b), and 25 Pa. Code §71.17, DER can only order the municipality to revise its Official Plan. DER cannot dictate the details of the revision.

segments. In some cases, however, the segments might be independent of each other and self-sufficient, enabling them to be reviewed separately.[3]

The problem facing the Board is that the SFA and DER's regulations are silent on this subject. No guidance at all is given to us or, for that matter, to DER, the affected municipalities or the developer of such a project. All of us are forced to bend the existing regulations, if possible, in order to fit them into a factual context they obviously were not intended to cover.[4] The instructions given by DER in its letter of May 13, 1986, did not fill the regulational gap. While quite detailed and prefaced by the mention of both municipalities, the instructions consistently refer to "the municipality." Appellants are advised near the end of the letter that, upon receipt of the module from "the municipality," DER will review it and give its comments or approval within 120 days. Nowhere is it stated that the 120-day review period as to one revision will not begin until proof of municipal adoption of both revisions is submitted. The impression given is that DER will review the project in municipal segments.

The Board holds that DER has no statutory or regulatory basis for ruling that, with respect to all proposed multi-municipality developments, the 120-day review period will not begin to run until proof is submitted that an Official Plan revision has been adopted by each affected municipality. Despite this holding, the Board is not prepared to say that the Liberty Township revision must be deemed approved under 25 Pa. Code §71.16 (d).

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[3] The Board has not been provided with the Planning Module in this case and does not have sufficient facts to determine whether the proposed sewage system is capable of being reviewed in municipal segments.

[4] DER and the Environmental Quality Board are strongly urged to remedy this deficiency by adopting regulations specifically applicable to multi-municipality developments.

According to the evidence, Liberty Township adopted its revision "on or about" November 4, 1986, and it was submitted to DER "on or about" the same date. DER's first response to this submission was a letter dated March 10, 1987. This date is 126 days after November 4, 1986, and appears to fall outside the 120-day review period allowed by the regulations. However, since the date of submission was not established and the variance is only six days, the Board cannot conclude that the letter was untimely.

DER's March 10, 1987, letter specifically advised Appellants of the need for proof of adoption of a revision by Freedom Township and of the need for comments from the Adams County Planning Commission; and made it clear that the 120-day review period for the project as a whole would not begin until these items were submitted. The letter does not state specifically that "an extension of time is necessary to complete review," the language used in 25 Pa. Code §71.16 (d), but the substance of the letter is to that effect. Butera v. DER, 1981 EHB 53; Beaver Construction Company v. Commonwealth, Dept. of Environmental Resources, No. 1767 C.D. 1980 (unreported opinion and order of Commonwealth Court issued October 2, 1980).

If DER's insistence on an officially adopted revision for Freedom Township was simply a reiteration of DER's policy on multi-municipality developments, it had no statutory or regulatory basis, as noted above. If, on the other hand, it was based upon a determination that Liberty Township's revison was too dependent upon Freedom Township's proposed revision to be approved separately, the insistence on having both revisions was proper. The record sheds no light on DER's motives and, consequently, the Board cannot rule on this point.

Even if one of the reasons for deferral cited by DER in its letter of March 10, 1987, may not have had a statutory or regulatory basis, the other

reason did have legal support. 25 Pa. Code §71.16 (b) (2) expressly requires the submission of comments from the "appropriate planning agency with area-wide jurisdiction." DER brought this requirement to Appellants' attention in its letter of May 13, 1986. Appellants' failure to satisfy this requirement provided ample reason for DER to defer action on Liberty Township's revision until the deficiency was corrected. The March 10, 1987, letter was, therefore, a timely response to the filing and effectively suspended the running of the 120-day review period.

The record does not disclose whether Appellants ever submitted to DER the comments of the Adams County Planning Commission.[5] In fact, the Board has no knowledge of anything that transpired between the March 10, 1987, letter and the disapproval letter of April 12, 1988, other than Appellants' efforts to get the approval of Freedom Township to an Official Plan revision. On this latter date, Appellants' engineering consultant requested DER to "retain the project on an active basis and not deny it" until Freedom Township makes a final decision. It is apparent from this letter that Appellants, instead of pressing DER for action, were asking DER to defer its decision. The May 24, 1988, letter from Appellants' attorney to DER sought the same thing -- a rescission of the disapproval and a further deferral of a decision.

The time limits and "deemed approved" consequences set forth in 25 Pa. Code §71.16 (c) and (d) are similar to provisions in Sections 508 and 908, of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10508 and §10908. Commonwealth Court decisions construing

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[5] The Board notes that a March 22, 1988, letter from the Adams County Planning Commission implies that the Commission's comments had been issued on May 6, 1987. The Board notes also that DER did not mention this deficiency in the disapproval letter of May 2, 1988. While these facts suggest that the comments were submitted to DER, the Board does not know this as a fact. Nor does the Board know the date on which they might have been submitted.

these sections of the MPC have held that a party may waive the time limits expressly by words, Brauns v. Borough of Swarthmore, 4 Pa. Cmwlth. 627, 288 A.2d 830 (1972), and impliedly by conduct. Such conduct includes a "massive" failure to comply with filing requirements (Gorton v. Silver Lake Township, 90 Pa. Cmwlth. 63, 494 A.2d 26 (1985)), the filing of revisions (DePaul Realty Company v. Borough of Quakertown, 15 Pa. Cmwlth. 16, 324 A.2d 832 (1974); Morris v. Northampton County Hanover Township Board of Supervisors, 39 Pa. Cmwlth. 466, 395 A.2d 697 (1978); Wiggs v. Northampton County Hanover Township Board of Supervisors, 65 Pa. Cmwlth. 112, 441 A.2d 1361 (1982)), the tardy submission of requested additional data (Swedeland Road Corporation v. Zoning Hearing Board of Upper Merion Township, 107 Pa. Cmwlth. 611, 528 A.2d 1064 (1987)), and proceeding on the merits of the case after the time limits had run (In re Appeal of Grace Building Co., Inc. et al., 39 Pa. Cmwlth. 552, 395 A.2d 1049 (1979)).

These decisions, while not controlling, are highly persuasive. The Board holds that a party who submits an Official Plan revision and requests DER to defer its decision waives the time limits for DER action and the "deemed approved" consequences of 25 Pa. Code §71.16 (c) and (d). The Board holds further that a waiver also occurs when a party acquiesces in DER's demand for additional information or documentation, either by submitting the information or by taking steps to obtain it. This waiver can easily be avoided, as noted by the Court in the DePaul and Wiggs cases, supra, by the party notifying DER that he considers his submission to be adequate and wishes to have it judged on that basis.

Appellants' letter of April 12, 1988, appears to be a waiver, as does Appellants' efforts to obtain Freedom Township's approval to an Official Plan

revision. Nonetheless, the Board is unwilling to grant summary judgment in favor of DER without knowing its motives for insisting upon Freedom Township's revision and without knowing what transpired during the 13 months preceding the April 12, 1988, letter. These are material facts, in our view, and must be resolved before a final judgment can be entered. If the facts are not in dispute, we invite the parties to enter into a stipulation and present it along with renewed Motions. Otherwise, it may be necessary to schedule a hearing.

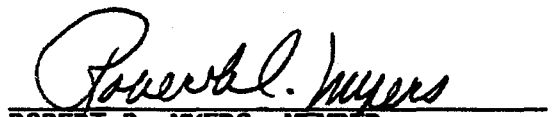
ORDER

AND NOW, this 9th day of January, 1989, it is ordered as follows:

1. The Motion for Summary Judgment, filed by the Department of Environmental Resources on September 6, 1988, is denied.

2. The Motion for Summary Judgment, filed by Robert D. Crowley and Elizabeth L. Crowley, together with Middle Creek Bible Conference, on October 5, 1988, is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: January 9, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Central Region
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M. DIANE SMITH
SECRETARY TO THE BOAF

C & L ENTERPRISES AND CAROL RODGERS	:	
	:	
v.	:	**EHB Docket No. 86-626-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 10, 1989

OPINION AND ORDER SUR
PETITION FOR LEAVE TO CONDUCT DISCOVERY

Synopsis

A Department of Environmental Resources Petition to Conduct Discovery is granted only insofar as it pertains to an expert witness not identified in Appellant's pre-hearing memorandum.

OPINION

This matter was initiated by the November 10, 1986 filing by C & L Enterprises (C&L) of a notice of appeal from a Department of Environmental Resources (DER) order that alleged violations 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 Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101, in connection with C&L's operation of its gasoline service station in Richland Township, Allegheny County, and ordered corrective action. Specifically, DER alleged that gasoline leaked from C&L's underground gasoline storage tanks and polluted the ground and surface waters of the

Commonwealth. A petition for supersedeas was filed concurrently with C&L's notice of appeal and a hearing was held on November 24 and 25 and December 2, 1986. The Board ultimately denied C&L's supersedeas request in a February 12, 1987 Opinion and order. A hearing on the merits was scheduled for Jamuary 30 through February 3, 1988, but was later cancelled for various reasons.

On December 8, 1988 DER filed a petition for leave to conduct additional discovery via its first set of interrogatories. DER stated that the interrogatories request the identity of witnesses C&L intends to call and that the discovery would not be burdensome, since C&L is required to provide the information in any event. DER also stated that C&L had recently hired an expert, but had not yet provided DER with the expert's report. C&L replied that the expert's report would be supplied to DER as soon as it was received and further objected to the answering of the interrogatories as being prejudicial and a waste of time.

At the outset, we note that DER served its first set of interrogatories after the hearing on the merits was scheduled and more than 14 months after C&L filed its pre-hearing memorandum. As to non-expert witnesses, DER asks C&L to identify each and every witness it will call (Interrogatory No. 7), state the subject matter to which each person will testify (Interrogatory No. 8) and summarize each person's testimony (Interrogatory No. 9). C&L's pre-hearing memorandum clearly lists a number of witnesses it anticipated it might call and we have no idea why DER waited over 14 months to decide it needed the discovery sought through Interrogatories 7, 8 and 9. Since the discovery period has long since closed and since DER has offered no reason why it did not promptly seek discovery when C&L's witness list became known, we believe C&L will, at the very least, be burdened by Interrogatories 7, 8 and 9, and we will deny this discovery.

We also find that, at this late date, Interrogatory No. 1 would tend to be burdensome since it seeks the identity of each and every expert C&L consulted. For the reasons stated in the preceding paragraph, we will deny the petition with regard to Interrogatory No. 1.

Interrogatories Nos. 2, 3, 4, 5 and 6 all concern the expert witnesses C&L intends to call. For the reasons stated above, discovery related to any experts identified in C&L's pre-hearing memorandum is denied. However, the expert recently hired by C&L, and matters related to that expert's testimony, will be discoverable since DER has only recently learned of this witness.

ORDER

AND NOW, this 10th day of January, 1989, it is ordered that the Department of Environmental Resources' petition for leave to conduct discovery is denied with respect to Interrogatories 1, 7, 8 and 9. It is also ordered that said petition is granted with respect to Interrogatories 2, 3, 4, 5 and 6 only as they pertain to Appellant's recently hired expert.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 10, 1989
cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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M. DIANE SMITH
SECRETARY TO THE BOARD

C & L ENTERPRISES AND CAROL RODGERS	:	
	:	
v.	:	**EHB Docket No. 86-626-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 10, 1989

OPINION AND ORDER SUR
PETITION TO INCORPORATE SUPERSEDEAS TESTIMONY
AND EXHIBITS INTO HEARING ON THE MERITS

Synopsis

Testimony from an earlier supersedeas hearing will not be incorporated into the record of a hearing on the merits where the Appellant opposes the request. Appellant's case may now be significantly different due to the availability of a recently hired expert witness. Further, at the supersedeas hearing, the Appellant had the burden of showing, in part, the strong likelihood that the appealed-from Department of Environmental Resources (DER) order was an abuse of discretion. However, at the hearing on the merits, DER will have the burden of showing that the order was a proper exercise of its discretion. Thus, the nature of the cases may now be entirely different.

OPINION

This matter was initiated by the November 10, 1986 filing by C & L Enterprises (C&L) of a notice of appeal from a Department of Environmental

Resources (DER) order that alleged violations 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 Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101, in connection with C&L's operation of its gasoline service station in Richland Township, Allegheny County, and ordered corrective action. Specifically, DER alleged that gasoline leaked from C&L's underground gasoline storage tanks and polluted the ground and surface waters of the Commonwealth. A petition for supersedeas was filed concurrently with C&L's notice of appeal, and a hearing was held on November 24 and 25 and December 2, 1986. The Board ultimately denied C&L's supersedeas request in a February 12, 1987 opinion and order. A hearing on the merits was scheduled for January 30 through February 3, 1988, but was postponed at the request of the parties.

On December 8, 1988, DER filed a petition to incorporate the supersedeas testimony and exhibits into the record of the hearing on the merits, arguing that repeating the supersedeas testimony at the hearing on the merits would be wasteful of the parties' time and finances and that the witnesses may fail to recall their earlier testimony. C&L's December 29, 1988 response opposes DER's request, contending that repetition of this testimony would refresh the recollection of the Board Member sitting as hearing examiner and, further, would allow the other Board members to become familiar with the case.

The Board denies DER's petition for two reasons. First, the Board denied a C&L request for continuance of a supersedeas hearing, which effectively precluded it from using any expert testimony to address the merits of its petition for supersedeas. Since C&L has now retained an expert, the nature of its case on the merits may be entirely different and might require a different presentation by DER. Second, and most important, during the

supersedeas hearing, C&L had the burden of showing, in part, that it had a strong likelihood of prevailing on the merits of its appeal, i.e., that DER abused its discretion in issuing the order. See 25 Pa.Code §21.78. However, in the hearing on the merits, DER will have to show that its order was a proper exercise of discretion, 25 Pa.Code §21.101(b)(3), and the nature of both parties' cases may be quite different.

ORDER

AND NOW, this 10th day of January, 1989, it is ordered that the Department of Environmental Resources' Petition to Incorporate Supersedeas Testimony and Exhibits into Hearing on the Merits is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: January 10, 1989

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

ELMER R. BAUMGARDNER, BAUMGARDNER OIL CO., ECONO FUEL, INC., and WASTE-OIL PICKUP AND PROCESSING	:	EHB Docket No. 88-343-F
V.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 10, 1989

OPINION AND ORDER
SUR MOTION FOR RECONSIDERATION OF
ORDER GRANTING SUPERSEDEAS

Synopsis

A petition for reconsideration filed by the Department of Environmental Resources (DER) from a supersedeas order is granted. DER has submitted new evidence not available at the previous hearing--laboratory reports of soil and liquid samples taken from the site showing contamination by hazardous wastes--which establishes that there is a danger of environmental harm from the continued operation of the facility. In addition, the evidence of contamination discredits the testimony of the Appellant, and leads to a conclusion that there is no credible evidence that the Appellant will handle either used oil (a solid waste) or sludge (a hazardous waste) in an environmentally safe manner. DER's evidence presents "exceptional circumstances" which warrant reconsideration and recision of the order granting a supersedeas.

OPINION

1. Background

This is an appeal by Elmer R. Baumgardner, et al (Baumgardner) from an order of the Department of Environmental Resources (DER) dated August 29, 1988. Baumgardner owns and operates the Baumgardner Oil Co. and Econo Fuel, Inc. (both are Pennsylvania corporations) and Waste-Oil Pickup and Processing (a sole proprietorship) at a facility located at Fayetteville, Franklin County, Pennsylvania. In its August 29, 1988 order, DER determined, among other things, that the used oil being transported and processed by Baumgardner constituted "solid waste" under Section 103 of the Solid Waste Management Act (SWMA), 35 P.S. §6018.103; thus, Baumgardner was acting illegally by operating without a permit to process, treat, and dispose of solid waste. In addition, DER determined that the "sludge" which Baumgardner generates as a byproduct of his recycling process was a hazardous waste (EP toxic for lead), and that Baumgardner's containment of this sludge in tanks for over one year constituted "disposal" under Section 103 of the SWMA, 35 P.S. §6018.103. Therefore, DER determined that the disposal of hazardous waste without a permit was a violation of Section 401(a) of the SWMA, 35 P.S. §6018.401(a). As a remedy for the alleged violations, DER ordered that Baumgardner immediately cease and desist from processing, transporting, and accepting solid waste in connection with his operation at Fayetteville. DER also ordered that he cease hindering DER inspections of his facility, that he conduct hazardous waste determinations on solid wastes at the facility, and that he dispose of solid wastes at permitted facilities.

Baumgardner filed a petition for supersedeas along with its appeal. This petition sought a supersedeas of paragraphs A, B, C, and F of DER's Order;

these were the paragraphs which directed him to cease handling solid waste and to file an application for a solid waste permit. Baumgardner did not seek a supersedeas of paragraphs G and H, which required him to conduct a hazardous waste determination on all solid wastes at the plant and to dispose of sludge at permitted facilities. Nor did Baumgardner seek to supersede paragraph D, which ordered him to cease hindering DER employees in conducting inspections of his facility.

A hearing on the petition for supersedeas was held on September 9, 1988. On September 16, 1988, the Board--per the undersigned Hearing Examiner--issued an Opinion and Order granting a supersedeas. In the Opinion, we found that Baumgardner had satisfied the three criteria for granting a supersedeas.[1] Specifically, the opinion stated that while DER was likely to prevail on the issue of whether used oil was a solid waste, DER abused its discretion by announcing this new definition of solid waste in an order closing Baumgardner's entire recycling operation. With regard to the likelihood of injury to the public, the opinion stated that since Baumgardner was not seeking to supersede the portions of DER's order regulating Baumgardner's handling of sludge (allegedly, a hazardous waste), the danger of environmental harm from the handling of sludge did not justify closing the entire recycling operation. We also found the evidence of environmental harm to be inconclusive,

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[1] Those criteria are 1) irreparable harm to the petitioner, 2) the likelihood of the petitioner's prevailing on the merits, and 3) the likelihood of injury to the public. 25 Pa. Code §21.78(a). In addition, a supersedeas may not be issued where significant pollution or a threat to the public health would exist or be threatened during the time the supersedeas would be in effect. 25 Pa. Code §21.78(b). Evaluation of the three criteria requires the Board to conduct a balancing test. Chambers Development Co., Inc. v. DER, EHB Docket No. 87-464-W (Opinion and Order issued February 16, 1988), Pa. PUC v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983).

because while David Parks had testified regarding the dumping of sludge into the ground (Notes of Transcript I, 225-226, 234-236)[2], Elmer Baumgardner had explained that the sludge was processed to remove the "grits" or "grit solids," which were tested and found to be nonhazardous, and that it was the grits which were mixed with cement and placed in the ground. (N.T. I, 253)

2. DER's Motion for Reconsideration

DER filed a Motion for Reconsideration En Banc on September 26, 1988. This motion raised two primary arguments. First, DER argued that the September 16, 1988 decision granting the supersedeas was legally flawed and was not supported by the evidence introduced at the hearing; thus, the motion requested that the Board, En Banc, reconsider the decision and amend it to deny the supersedeas. Second, DER argued that reconsideration should be granted based upon new evidence which DER had obtained after the September 9 hearing--laboratory reports of soil and water samples from Baumgardner's site which allegedly proved that hazardous wastes had been improperly disposed of on site.

On September 27, 1988, the Board, En Banc, issued an order denying DER's request to reconsider and amend the September 16 Opinion and Order. However, the Board referred the motion to the undersigned Hearing Examiner to determine whether the new evidence alleged by DER warranted reconsideration or rehearing.

A hearing on the motion for reconsideration was held on November 14, 1988. DER presented testimony by Anthony Rathfon (a Solid Waste Specialist),

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[2] Separate transcripts were prepared for the September 9 hearing on the Petition for Supersedeas and the November 14 hearing on DER's Motion for Reconsideration. The transcript for the September 9 hearing shall be referred to as "N.T. I"; the transcript for the November 14 hearing shall be referred to as "N.T. II."

Dr. Alan Bruzel (Section Chief of the Organic Chemistry Section, Bureau of Laboratories), and Robert D. France (a Compliance Specialist, Bureau of Waste Management). Baumgardner presented testimony by Dirk L. Baumgardner, a Baumgardner employee who oversees the day-to-day operation of the recycling facility.

In its post-hearing memorandum of law, DER alleges that the new evidence regarding laboratory tests of samples taken on-site is admissible and that it justifies reconsideration of the decision granting a supersedeas. DER alleges that this evidence constitutes a "compelling and persuasive reason" for granting reconsideration. See 25 Pa. Code §21.122(a). DER argues that the hazardous substances found at the site constitute a threat to public health and welfare. DER also contends that the new evidence negates the finding in the September 14, 1988 Opinion and Order that there was no conclusive evidence of environmental harm from Baumgardner's operations. DER further argues that the new evidence warrants closing Baumgardner's entire recycling operation--not just his handling and disposal of sludge--because Baumgardner has not shown that the alleged contamination is a result of his handling of sludge.[3] Finally, DER contends that the laboratory results could not have been introduced at the September 9, 1988 hearing because DER did not become aware of the contamination until September 8, 1988.

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[3] DER makes two alternative arguments on the source of the contamination. In its motion for reconsideration, DER stated that the laboratory results discredit Elmer Baumgardner's testimony that the grits were tested and found nonhazardous (Motion, para. 10). This implies that the contamination resulted from the burial of the grits, or sludge. DER also argues, however, that if the grits were nonhazardous--as Elmer Baumgardner testified--then the contamination must have resulted from some other aspect of Baumgardner's operation. (DER post-hearing memorandum of law, pp. 13-14, 31) As we will explain below, the record supports a finding that the burial of the grits was the source of the contamination.

In its post-hearing memorandum of law, Baumgardner argues, first, that DER's evidence is inadmissible, and, second, that the evidence does not warrant granting reconsideration. Regarding the admissibility of the evidence, Baumgardner criticizes the methods used in collecting the soil and water samples taken from the site. Baumgardner also argues that the laboratory test reports are inadmissible because they were not properly authenticated (the computer printouts and graphs produced during the tests were not put in the record) and because they are hearsay (the chemist who performed the tests did not testify). In addition, Baumgardner contends that the test results are inadmissible because DER could have conducted tests at the site earlier and introduced the evidence at the September 9, 1988 hearing. Finally, Baumgardner contends that DER has not shown the required "exceptional circumstances" to warrant reconsideration, because DER's evidence relates to Baumgardner's handling of alleged hazardous wastes (sludge), and Baumgardner has not sought a supersedeas of those portions of DER's order regulating the handling of hazardous waste.

The Board will grant reconsideration of a decision only for "compelling and persuasive reasons." 25 Pa. Code §21.122(a). The Board generally will only take this action where the decision rests on a legal ground not considered by the parties, or where new facts justify reversal of the decision and such facts could not, with due diligence, have been offered at the hearing.[4] Id. In addition, the Board has held that orders granting a supersedeas are interlocutory orders, and that such orders will only be

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[4] The Board's regulation governing reconsideration (25 Pa. Code §21.122) is less than clear--it seems to use the terms "reconsideration," "rehearing," and "reargument" interchangeably. These are, in fact, distinct remedies which apply to different situations. To the extent that DER's petition is based upon new evidence, it would probably be more accurate to label it a petition for rehearing.

reconsidered where "exceptional circumstances" are present. Old Home Manor, Inc. and W. C. Leasure v. DER, 1983 EHB 463, see also Magnum Minerals, Inc. v. DER, 1983 EHB 589.

To rule upon DER's motion for reconsideration, we must address two issues. First, was the evidence presented by DER regarding the sampling and the laboratory tests admissible? Second, if the evidence was admissible, does the evidence warrant a conclusion that exceptional circumstances are present to justify reconsideration? For the reasons which follow, we conclude that the evidence presented by DER was admissible and that exceptional circumstances are present in this case. Therefore, we will grant DER's motion and rescind the supersedeas imposed in the September 16, 1988 Opinion and Order.

3. Admissibility of DER's Evidence

At the hearing on November 14, 1988, we withheld ruling on the admission of DER's laboratory reports of the soil and water samples taken from Baumgardner's site (Exhibits C-6 through C-10). After reviewing the arguments of the parties, we now conclude that the laboratory reports are admissible.

(A) DER's Sampling Methods

Baumgardner first argues that the laboratory reports are inadmissible because DER did not properly authenticate the soil and water samples on which the laboratory tests were conducted. We disagree. Although Anthony Rathfon, the DER employee who testified regarding the samples, did not take the samples himself, he did watch Joel Steigman (of DER) and Michael Zentichko (of the Attorney General's Office) collecting the soil and water samples (N.T. II, 9-10, 16, 20-21, 28, 32, 35, 37). Baumgardner criticizes the soil samples because they were "composites," arguing that composites are "inherently

unreliable" and that "individual discrete samples" should have been taken. (Baumgardner Memorandum of Law, pp. 11-12). Since Baumgardner did not provide any evidence to support this criticism, its argument lacks merit.[5]

Baumgardner next criticizes Mr. Rathfon's testimony that the liquid samples (Exhibits C-6 and C-9) were of "groundwater" (N.T. II, 14), arguing that since the local depth to groundwater was not established, that the liquid could have been "vadose water" (water below the ground but above the water table) or runoff. In our view, the important point with regard to the liquid samples is not whether they were taken from "groundwater," but whether they tend to prove that hazardous waste was dumped in the ground. It is clear from the photograph of the liquid in the excavation pit (Exhibit C-5), from Mr. Rathfon's testimony that the liquid seeped through the walls of the pit, and from his testimony that the liquid had a black appearance and "gasoline solvent type smell" (N.T. II, 14-16) that the liquid had assumed the characteristics of the sludge in the ground. In addition, the laboratory tests of the liquid showed the presence of hazardous wastes (Exhibits C-6, C-9, N.T. II, 25-27, 32-35). Specifically, these samples contained toluene, 1-1 Dichloroethane, Benzene, trichloroethylene, 2-Butanone, Acetone, isomers of xylene, and trace amounts of Methylene Chloride (Exhibit C-6 also showed a trace of Tetrachoroethylene). All of these substances are hazardous wastes under federal regulations, and are incorporated by reference into state law. See 40 CFR §§116.4, 261.31, 302.4; 25 Pa. Code §75.261(h). Thus, even if the liquid samples were not taken from "groundwater," they are still admissible and

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[5] In addition, when Mr. Rathfon referred to the soil samples as "composites," he meant composites of the soil-sludge mixture (N.T. II, 16, 28). Since the sludge (or grits) was placed into the ground, it is difficult to see how the samples could have been anything but composites. Baumgardner's argument seems to be addressed to an inapposite situation where two soil samples from different areas of a site are mixed together.

relevant because they tend to prove the presence of hazardous waste in the ground.

(B) DER's Laboratory Testing Procedure

Baumgardner also argues that the laboratory reports (Exh. C-6 through C-10) are inadmissible because they were not properly authenticated and because they were based upon hearsay evidence. We disagree.

In order to authenticate the laboratory reports containing the test results, DER was required to show that the test itself was accurate and reliable and that the test was properly conducted by a qualified person. See Commonwealth v. Dugan, 252 Pa. Super. 377, 381 A.2d 967, 969-970 (1977). Baumgardner does not question the validity of the test itself, nor does it question the qualifications of either David Clemens (who conducted the test) or Dr. Bruzel (who testified regarding the test).[6] Instead, Baumgardner argues that there was insufficient evidence to establish that the test was conducted properly because the chemist who conducted the test (David Clemens) did not testify, because "stories" (notes) printed at the bottom of the laboratory sheets were illegible, and because key documentation such as computer printouts and graphs were not put into evidence by DER.

We do not agree that DER's failure to present testimony by Mr. Clemens was fatal to the admissibility of the laboratory reports. The test applied

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[6] Baumgardner does, however, argue that Anthony Rathfon was not qualified to testify that the substances found in the test results constitute hazardous wastes. (N.T. II, 22-27, 30, 33, 36). We do not agree because Mr. Rathfon's testimony was based simply upon his knowledge that these materials were listed in the regulations as hazardous wastes. (N.T. II, 27). See 40 CFR §§116.4, 261.31, 302.4. Although there was discussion on the record of whether the presence of listed hazardous wastes in the soil and water also rendered the soil and water hazardous wastes, this question does not affect the outcome of this case.

here is a standard technique known as a gas chromatograph--mass spectrometer test (GC-MS test) (N.T. II, 49-51). This test, which is also known as Environmental Protection Agency (EPA) Method 624, is employed to determine the presence of volatile organic compounds in soil and water (N.T. II, 49-51). In the test, a stream of helium purges volatile organic compounds out of the sample and carries the compounds into a gas chromatograph where they are analyzed on a mass spectrometer (N.T. II, 49-51).

Mr. Clemens' testimony was not necessary because Dr. Bruzel testified that a computer both identifies and quantifies the compounds, subject to the tester's checks for aberrances and discrepancies and correction for any dilution or concentration of the sample. (N.T. II, 74-78). Thus, it is the equipment which plays the key role in analysis of the samples. The reliability of DER's equipment was buttressed by Dr. Bruzel's testimony that the equipment is checked every morning, and that the DER laboratory has passed EPA quality checks. (N.T. II, 52-53) Furthermore, to establish how the test was conducted by Mr. Clemens, Dr. Bruzel testified regarding the entries by Mr. Clemens in the log book. (N.T. II, 52) Dr. Bruzel testified that Mr. Clemens took special precautions by running blanks between the samples to eliminate the possibility of carryover from one sample to the next. (N.T. II, 52)

In our view, DER was not required to introduce any additional documentation--such as the computer printout and graphs--to authenticate the laboratory reports. Dr. Bruzel's testimony established both the method of conducting the test and the underlying accuracy of the test; requiring additional documentation when there is no evidence to cast doubt upon the test results is unnecessary.

In addition, the illegibility of some of the stories at the bottom of the laboratory reports is not a sufficient reason to conclude that the reports

were not properly authenticated. Dr. Bruzel testified that these stories relate to handling of the sample--for example, whether dilution or concentration was necessary to conduct the tests. In regard to the samples involved here, a story which was legible on Exhibit C-6 indicated that the sample was diluted before testing. (N.T. II, 67). Dr. Bruzel testified that this would be done because, in accord with the laboratory's usual practice, the "overpowering aroma" of the sample led to a concern that it would overwhelm DER's instruments, which are set up to detect parts per billion. (Id.). This story certainly does not lead us to doubt the accuracy of the laboratory reports. In addition, in response to questions from the bench regarding the importance of the stories in evaluating the validity of the test results, Dr. Bruzel gave only one example of when the stories would be necessary to evaluate the validity of the results--when a surrogate is added to a sample in semivolatile analysis (N.T. II, 67-68). This example does not appear to have any relevance to the tests conducted here.

Baumgardner also objects to the laboratory reports on the basis that they were based upon inadmissible hearsay evidence. We agree with DER that Dr. Bruzel's testimony regarding the laboratory reports and Mr. Clemens' entries in the log book qualify for the business records exception to the hearsay rule. Dr. Bruzel testified that these records were kept in the regular course of business (N.T. II, 51, 63), and as explained above, Dr. Bruzel's testimony provided sufficient evidence relating to the accuracy, preparation, and maintenance of the records to justify a presumption of trustworthiness. See 42 Pa. C.S. §6108(b), In re Indyk's Estate, 488 Pa. 567, 413 A.2d 371 (1979).

(C) Whether DER's Evidence Should Have Been Introduced at the Earlier Hearing

Finally, we disagree with Baumgardner's argument that the samples are inadmissible because DER could have taken soil samples during its visits to Baumgardner's facility in 1986 and 1987. While it is true that DER could have taken soil samples during those earlier visits, these particular samples were taken from the area where Baumgardner had disposed of the grits. (See footnote 8, infra) DER did not have any particular reason to test the soil in that spot before it learned of the disposal there. In this case, DER gathered the samples on September 13, 1988 (N.T. II, 9), a mere four days after David Parks, a former Baumgardner employee, testified that he had seen sludge or grits being mixed with cement in a hole in the ground. (N.T. I, 225, 226). Indeed, since Parks testified that the disposal took place in July, 1988 (N.T. I, 225), the condition did not even exist at the time of DER's prior visits. Therefore, it would be unreasonable to hold DER accountable for not taking samples in time to analyze them for the September 9, 1988 hearing.

In summary, we find that the laboratory reports offered by DER--Exhibits C-6, C-7, C-8, C-9, and C-10--are admissible evidence.

4. Whether the Evidence Submitted by DER Warrants Reconsidering and Rescinding the Opinion and Order Granting a Supersedeas

Having ruled that DER's laboratory reports are admissible, we now must decide whether this evidence warrants reconsideration and recision of the supersedeas granted on September 16, 1988. As stated above, reconsideration of an interlocutory order will be granted only where "exceptional circumstances" are present. Old Home Manor, Inc. and W. C. Leasure v. DER, 1983 EHB 463, Magnum Minerals, Inc. v. DER, 1983 EHB 589. We find that there are exceptional circumstances in this case because DER's laboratory reports discredit the testimony of Elmer Baumgardner and refute Baumgardner's argument

that there is no danger to the public of environmental harm from his recycling operation.

In the decision granting a supersedeas, we found that DER had not established that Baumgardner's operation would cause environmental harm, and to the extent that there may have been a danger of such harm due to Baumgardner's handling of hazardous waste, that Baumgardner was not seeking a supersedeas of the portions of DER's order which addressed hazardous waste. (Opinion, p. 5) Evaluating the evidence as a whole, we concluded that the closing of Baumgardner's operation was likely to harm the public. (Opinion, pp. 3-5). This conclusion was based upon the public benefits of recycling used oil, the interest of the purchasers of the recycled oil, and the interest of Baumgardner's 110 employees.

DER's evidence affects our previous conclusion in two ways. First, DER's laboratory reports show the presence of hazardous materials in the ground at Baumgardner's facility; this is direct evidence that Baumgardner's operation presents a danger of environmental harm.[7] This danger is mitigated, but not eliminated, by the fact that Baumgardner has agreed to clean up the contaminated area. Second, the laboratory reports discredit Elmer Baumgardner's testimony that the sludge, or grits, was tested and found to be nonhazardous

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[7] We are chagrined by Baumgardner's statement in its Memorandum of Law that "localized environmental concerns are often found at industrial sites." (Memorandum of Law, p. 20). Baumgardner's dumping of hazardous materials into the ground was a callous and improper method of disposal, and we need not wait until someone's well has been contaminated to recognize the danger that this behavior presents to the public.

before it was buried on site.[8] In our view, this destroys Elmer Baumgardner's credibility and leads us to conclude that there is no credible evidence that Baumgardner will handle either used oil or the sludge in an environmentally sound manner.[9] Thus, the argument that Baumgardner has not sought a supersedeas of those portions of DER's order addressing the sludge is not a defense to DER's contention that the entire used oil recycling operation should be closed.

In light of the new evidence, we conclude that Baumgardner is no longer entitled to a supersedeas of DER's order. First, Baumgardner has not met its burden of proof with regard to the likelihood of injury to the public. 25 Pa. Code §21.78(a)(3). Although we do not lightly dismiss the public benefits of used oil recycling, these benefits are more than offset by the disposal practices exhibited here. Second, we conclude that a supersedeas should no longer issue because there would be a significant threat of pollution or

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[8] We are convinced that the area where DER took its samples is the same area where the grits were buried in the ground. Baumgardner implies this in its Memorandum of Law, stating that it is addressing DER's environmental concern in the "former process tank area," and that DER's evidence of environmental harm relates to the same matter as David Parks' testimony at the previous hearing (Memo. of Law, pp. 19, 22). In addition, the photograph introduced at the November 14 hearing showing the area where the soil and liquid samples were taken (Exh. C-1) obviously shows the same area as the photograph of the process tank area introduced at the September 9 hearing (Exh. A-15, N.T. I, 257-258). Therefore, we conclude that DER's samples were taken from the same area where the sludge, or grits, was buried.

[9] There are additional discrepancies between Mr. Baumgardner's testimony and other evidence in the record which, in combination with the evidence cited above, support our adverse finding on Mr. Baumgardner's veracity. First, Mr. Baumgardner's testimony with regard to Exhibit C-1 at the September 9, 1988 hearing seems questionable. Exhibit C-1 was a cover letter and laboratory results concerning sludge (the results showed that the sludge was hazardous due to its lead content) which were sent to DER by a Baumgardner employee. The cover letter stated: "Please find enclosed a copy of Lab. Analysis performed on our sludge." Mr. Baumgardner testified that the sludge referred to in the letter was not Baumgardner's sludge; it was a client's sludge which he was handling on a "brokerage basis" (N.T. I, 114-115). Second, Mr. Baumgardner testified that

hazard to the health of the public during the period that the supersedeas would be in effect. 25 Pa. Code §21.78(b). Finally, we no longer believe that Baumgardner is likely to succeed on the merits of his appeal. 25 Pa. Code §21.78(a)(2). The evidence of illegal dumping appears to justify the remedy chosen by DER--the closing of Baumgardner's entire recycling facility. Thus, we will rescind the supersedeas entered in our September 16, 1988 order.

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[9] (cont'd) John Moyer, DER's Regional Director, had told him in the early 1980's that the Fayetteville recycling facility did not need a permit from DER (N.T. I, 52-53, 113). But Mr. Moyer testified that he had never spoken with Mr. Baumgardner about the plant (N.T. I, 187-188). Third, Mr. Baumgardner testified that he had never denied DER inspectors access to his recycling plant. (N.T. I, 118). However, DER witness Calvin Kirby stated that he had been denied access twice when he went to the facility (N.T. I, 148-150). Furthermore, Mr. Kirby testified that following DER's receipt of the cover letter and laboratory results (Exhibit C-1), he called Mr. Baumgardner on the telephone and asked if he could conduct a hazardous waste determination on the sludge in Baumgardner's process tanks, but Mr. Baumgardner said that the sample was not a true composite sample of the sludge and that he would rather that DER waited until Baumgardner had made its own determination on the waste (N.T. I, 150-153).

ORDER

AND NOW, this 10th day of January, 1989, it is ordered that:

1) Commonwealth Exhibits C-6, C-7, C-8, C-9, and C-10 introduced at the November 14, 1988 hearing are admitted into evidence.

2) The Department of Environmental Resources' (DER) Motion for Reconsideration is granted.

3) The supersedeas entered in this proceeding on September 16, 1988 is rescinded, and paragraphs A, B, and C of DER's order dated August 29, 1988 shall be effective, as of the close of business on January 13, 1989.

4) Elmer R. Baumgardner shall comply with paragraph F of DER's Order (requiring submission of an application for a permit to process or treat solid waste) by February 10, 1989.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: January 10, 1989

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John R. McKinstry, Esq./Central
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M. DIANE SMITH
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GEORGE REINERT	:	
	:	
v.	:	**EHB Docket No. 87-508-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 12, 1989

OPINION AND ORDER
SUR
MOTIONS TO DISMISS

Synopsis

Motion to dismiss an appeal of a letter advising a municipality of deficiencies in a plan revision submitted under 25 Pa.Code §§71.14 - 71.16 as a non-appealable action is denied where the appellant is also asserting that the letter was a nullity because the plan revision was deemed approved under 25 Pa.Code §71.16(d). Motion to dismiss appeals as moot is denied because, although the plan revision was subsequently approved, the approval was conditional. Thus, if the Board ruled in the appellant's favor on the deemed approval issue, the imposition of the conditions was void and the Board could grant relief.

OPINION

This matter was initiated by the December 9, 1987 filing of a notice of appeal by George Reinert, the developer of a residential subdivision in Lower Nazareth Township (Lower Nazareth), Northampton County, seeking the Board's review of a November 10, 1987 letter to Lower Nazareth Township from

the Department of Environmental Resources (Department). The letter advised Lower Nazareth that the proposed plan revision submittal for Reinert's development, known as Hillside Acres Phase II, did not contain all the information required by §5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965), 1535, as amended, 35 P.S. §750.5, and the regulations adopted thereunder at 25 Pa.Code §§71.13 to 71.16 and that the Department was returning it, as it could not review the proposed revision until all of the required information had been received. The Department further informed the Township that its 120 day review period under 25 Pa.Code §71.16 would not begin to run until the information was submitted. Among other things, Reinert contended that the Hillside Acres submittal should have been treated as a plan supplement, rather than a plan revision, and that even if the submission were properly a plan revision, it was deemed approved because the Department had returned it as incomplete after the expiration of the 120 day review period. This appeal was docketed at No. 87-508-W.

On January 22, 1988, the Department received additional information; however, it determined that 25 Pa.Code §§71.13 - 71.16 required submission of still more information and by letter dated February 3, 1988, so notified Lower Nazareth. Finally, by letter dated February 24, 1988, the Department advised Lower Nazareth that it had approved the revision for 50 of the 85 lots and that additional hydrogeologic testing would have to be performed before the plan revision for the remaining 35 lots could be approved. Reinert appealed both of these letters to the Board on March 3, 1988, incorporating his objections at Docket No. 87-508-W and further objecting to the Department's basis for requiring additional hydrogeologic evaluations. Although Reinert captioned his notice of appeal as a "supplemental" appeal, it was separately docketed at No. 88-066-W.

On March 23, 1988, the Board ordered the two appeals consolidated at Docket No. 87-508-W.

The Department moved to dismiss Docket No. 87-508-W in a motion filed March 25, 1988, contending, in the alternative, that the November 10, 1987 letter was not an appealable action and that, in any event, the matter had become moot by virtue of the Department's February 24, 1988 approval of the plan revision. Reinert responded to the Department's motion on April 4, 1988, disputing both of the Department's contentions.

Before the Board could rule on the Department's March 25, 1988 motion at Docket No. 87-508-W (unconsolidated), the Department, on August 22, 1988, filed a motion to dismiss the consolidated appeals as moot. In support of its motion, the Department cited its February 24, 1988 letter approving the plan revision for 50 lots of the Hillside Acres Phase II subdivision, as well as a June 28, 1988 letter approving the plan revision for the remaining lots of the subdivision. Reinert did not appeal the Department's June 28, 1988 letter. Reinert responded to the Department's motion by letter dated September 9, 1988, incorporating his objections to the previous motion to dismiss at Docket No. 87-508-W (unconsolidated). In essence, Reinert is arguing that since the plan revision was deemed approved by the Department's failure to act within 120 days of submission, any subsequent Department action was void.

For the reasons set forth below, we will deny both of the Department's motions.

As for the Department's motion that its November 10, 1987 letter was not an appealable action, as it merely advised Reinert of the requirements of the Sewage Facilities Act, the Department's assertion is correct as far as it relates to the letter. However, Reinert's notice of appeal questions both the deficiencies noted in that letter, as well as its underlying assertion that

any further action by Reinert is necessary because of what Reinert believes is a deemed approval. That, we believe, is an appealable action, as it certainly affects Reinert's rights, duties, and obligations.

As for the Department's assertion that the appeals are moot because of the subsequent approvals of the plan revision, we also disagree with that assertion. The Department's February 24 and June 28, 1988 letters do approve the plan revision for the 50 and 35 lot portions of the subdivision and, from that standpoint, the matter is moot. However, both these letters impose a condition on the testing of the lots for on-site disposal permits. If the plan revision were deemed approved, as Reinert very clearly contends in both notices of appeal, then the Department may not have had the authority to impose the conditions it did in its February and June, 1988 letters and the Board could, in fact, grant Reinert relief.[1]

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[1] The Department letter which originally gave rise to the appeal at Docket No. 87-508-W indicated that the Department had received the plan revision submittal on July 9, 1987. The Department's letter was dated November 10, 1987, 124 days after receipt of the submission. As we have recently noted in Ingrid Morning v. DER, Docket No. 88-094-M (Opinion and order issued October 6, 1988), we have not addressed the question of whether a letter sent by the Department "after the expiration of 120 days, enumerating deficiencies in the submission, is adequate to toll the running of the 120-day review period." However, that issue is not before us at this time.

O R D E R

AND NOW, this 12th day of January, 1989, it is ordered that the Department of Environmental Resources' motions to dismiss George Reinert's appeals at Dockets No. 87-508-W (unconsolidated) and 87-508-W (consolidated) are denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: January 12, 1989

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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ANDERSON W. DONAN, M.D. SHIRLEY M. DONAN, EDWARD M. BRODIE, and JOANNE M. BRODIE	:	
v.	:	EHB Docket No. 88-375-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAGNUM MINERALS, INC., Permittee	:	Issued: January 12, 1989

OPINION AND ORDER SUR
MOTION FOR PROTECTIVE ORDER AND STAY OF DISCOVERY

Synopsis

The Appellant's motion for protective order and stay of discovery is granted because the permittee has filed an application to transfer the mining permit. Until the transfer application is resolved, any discovery conducted by the appellant may be meaningless, and discovery conducted against him would subject him to unreasonable annoyance, burden, and expense. Pa. R.C.P. 4012

OPINION

This case involves an appeal by Anderson W. Donan, M.D., et al (Donan) from the Department of Environmental Resources' (DER) grant of a surface mining permit to Magnum Minerals, Inc. (Magnum). The basis for the appeal is that surface mining in the area covered by the permit will allegedly degrade springs and brooks which are located on Donan's property. Donan alleges that these springs and brooks provide high quality potable water, and that the water from them is bottled and sold for human consumption.

Donan filed a petition for supersedeas along with the appeal. However, on October 27, 1988, the parties (Donan, DER, and Magnum) filed a stipulation which, in effect, provided for holding the petition for supersedeas in abeyance. This stipulation stated that Magnum did not intend to commence mining operations at the time, and that Magnum would provide Donan with thirty days notice prior to initiating mining. The stipulation was accepted by the Board--per the undersigned--on November 2, 1988.

The instant Opinion and Order addresses Donan's Motion for Protective Order and Stay of Discovery, which was filed on November 14, 1988. In its motion, Donan contends that Magnum should be barred from conducting discovery due to an application, which is pending before DER, to transfer the permit from Magnum to another entity. Donan alleges that the transfer application precludes him from conducting effective discovery; therefore, he should not be subject to discovery until the transfer of the permit is completed.

Magnum filed a response opposing Donan's motion. Magnum asserts that Donan will be able to conduct effective discovery because the grounds alleged in the appeal are the same whether the permit is transferred or not. Magnum further argues that allowing discovery to proceed will not subject Donan to unreasonable burden or expense. See Rule 4012, Pennsylvania Rules of Civil Procedure (Pa. R.C.P.). Finally, Magnum contends that discovery should continue because this may allow the case to be decided on the merits before Magnum commences mining, so that Magnum need not risk losing part of its investment by commencing operations before a final decision is issued by the Board.[1]

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[1] This assumes that the Board would deny Donan's petition for supersedeas, thus allowing mining before a final decision is issued.

The Board's rules provide that the Board may issue protective orders regarding discovery as authorized by Pa. R.C.P. 4012. See 25 Pa. Code §21.111(e). Rule 4012 provides for protective orders to "protect a party or person from unreasonable annoyance, embarrassment, oppression, burden, or expense . . . ."

In the instant case, Donan's motion will be granted. We believe that there is an application pending before DER to transfer the permit from Magnum to another entity. Donan asserts that there is a transfer application (Motion, para. 5, 7), and Magnum, while denying generally the allegations in Donan's motion, does not specifically deny that Magnum is seeking to transfer the permit. Moreover, the pending transfer application has been mentioned in telephone conference calls between the undersigned and the parties, and the Board also became aware of the application when attempting to contact Magnum regarding this appeal.[2]

Until DER rules on the transfer application, Donan cannot be sure that any discovery he conducts will not be a waste of his time and resources. For example, if the transfer is granted, the transferee may decide to retain different expert witnesses or to present a different type of defense. In this event, Donan would have squandered his resources by conducting discovery against Magnum. While it may be that Magnum and the potential transferee have coordinated their efforts to defend this permit, there is no assurance of this on the record. It is true that Donan's discovery may be effective if Magnum and the transferee have coordinated their defense of the permit, or if the transfer is denied, but this situation has been created by Magnum, and the risk that discovery will be ineffective should not fall upon Donan. Nor

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[2] If Magnum denies that there is a pending transfer application, we invite Magnum to file a petition for reconsideration.

should Donan be subjected to discovery when there is a substantial risk that the discovery he conducts will be ineffective.

Under the circumstances, we find that a protective order staying discovery until the transfer application is resolved is necessary to protect Donan from "unreasonable annoyance, ... burden or expense" Pa. R.C.P. 4012.

ORDER

AND NOW, this 12th day of January, 1989, it is ordered that the Motion for Protective Order and Stay of Discovery filed by Anderson W. Donan, M.D., et al is granted, and discovery in this matter is stayed until the Department of Environmental Resources rules upon the application to transfer the permit currently held by Magnum Minerals, Inc.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: January 12, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES E. MARTIN and AMERICAN INSURANCE COMPANY	:	
v.	:	**EHB Docket No. 85-120-R (Consolidated Appeals)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 13, 1989

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION OR REHEARING

Synopsis:

A petition for reconsideration or rehearing will be denied where the petitioner fails to show that the Board's adjudication rested on a legal ground not considered by any party or that the crucial facts set forth in the petition are not as stated in the adjudication. If a party fails to present sufficient evidence at the time of hearing to sustain its burden of proof, the Board has no duty to reopen the record so that the party whose case was lacking may then present additional evidence which might alter the Board's adjudication.

O P I N I O N

On December 20, 1988, the Board issued its adjudication of the appeals of James E. Martin (Martin) and the American Insurance Company (Surety) which were taken from the Department of Environmental Resources'

(DER) forfeiture of bonds Martin had posted for several of his surface mining operations, three of which were written by the Surety. The reader is directed to our adjudication for a complete discussion of these matters.

On January 9, 1988, DER timely filed a petition for reconsideration or rehearing[1] pertaining to that portion of the adjudication that sustained the appeals as to the forfeiture of the following bonds posted for Martin's Valray site:

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

To understand DER's petition, a brief review of the rationale for the Board's decision as to these bonds is necessary. The Board concluded that DER had established that, on Mining Permit 419-4(C), violations of reclamation requirements exist with respect to rills and gullies, a haul road, an impoundment, and water-collecting depressions and that these violations justify forfeiture. However, in keeping with prior decisions, the Board held it was also necessary for DER to show that it properly determined the amounts of the bonds that could be forfeited.

These violations did not occur uniformly over the area of Mining Permit 419-4(C), but were identified as being in discrete and identifiable locations. The permit area was supported by the five bond instruments listed above and each was written for a specific acreage. We concluded that DER neglected to present any evidence to show on which of the five bonds the

---

[1] Section 21.122(a) of the Board's rules of practice and procedure, 25 Pa.Code §21.122(a), provides that motions for rehearing or reconsideration may be made within 20 days after a decision of the Board has been rendered.

several demonstrated violations existed. For this reason, we held that DER did not establish that it properly determined the amount of the bonds its was entitled to forfeit and thus sustained the appeals as to these bonds.

Section 21.122(a) of the Board's rules of practice and procedure, 25 Pa.Code §21.122(a), specifies the criteria for reconsideration or rehearing. In relevant part, §21.122(a) provides that reconsideration or rehearing

> . . . will be taken only for compelling or persuasive reasons, and will generally be limited to instances where:
>
> (1) The decision rests on legal grounds 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 hearing.

DER gives five reasons why reconsideration or rehearing is warranted and we will deal with each in turn. First, DER contends that the Board erred as a matter of law by ordering the return of bonds when violations have been shown to exist. DER notes that the duty to forfeit a bond is mandatory when violations are shown to exist, citing Morcoal Coal Company v. Commonwealth, DER, 74 Pa.Cmwlth. 108, 459 A.2d 1303 (1983). Because of the mandatory nature of DER's forfeiture, it contends that the Board has an obligation to reopen the case to hear more evidence to relate the proven violations to specific bonds. Furthermore, DER contends that the issue of whether the Board can legally return bonds, even though violations have been proven, was not raised during the hearing. DER contends that this issue was crucial to the Board's determination and, accordingly, its omission qualifies DER for reconsideration pursuant to 25 Pa.Code §21.122(a)(1).

We believe that DER does not understand the nature of our adjudication. Contrary to DER's suggestion, the Board neither returned Martin's bonds nor ordered DER to return the bonds. In a review of a mandatory DER action, the Board's task is to either uphold or vacate the action. Morcoal, supra.; Warren Sand & Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). Our order vacated the forfeiture of the bonds for Mining Permit 419-4(C) and in no way returned or directed the return of Martin's bonds.

More astounding is DER's claim that the Board should have reopened the record to hear more evidence. Regardless of the nature of DER's action, this Board is an adjudicative tribunal whose role it is to view the evidence presented by each party and make findings of fact based on that evidence. If we upheld DER's reasoning, the Board would essentially function as its inquisitional adjunct and guide the presentation of evidence necessary to prove DER's case. Such an arrangement is in direct contravention of the fundamental principles of our adversarial system of justice. This Board exists to serve neither the interests of DER nor those of appellants but, rather, to serve the interests of justice. It has been and will remain the duty of the parties to make their cases.

DER's second argument is that the Board improperly imposed a second element in DER's burden of proof. DER tacitly acknowledges that even before this case was decided, DER's twofold burden with respect to the forfeiture of proportionate bonds was to show that site conditions justify forfeiture and that it properly determined the amount of the bond to be forfeited. DER complains that the Board improperly extrapolated the second prong of DER's burden to include a showing of which violations accrue to specific bonds. It contends that this is a new standard not considered by any party, one which

the parties should have had an opportunity to brief and, therefore, qualifies for reconsideration.

A determination of the amount of a bond to be forfeited necessarily requires that, in the first instance, a violation attributable to that bond be identified, a notion that is hardly new. The Board dealt with an analogous situation in Coal Hill Contracting Company, Inc. v. DER, 1984 EHB 374, where DER sought to justify the forfeiture of several bonds partly on the basis that Coal Hill affected 3 acres adjacent to its mine but not covered by any mining permit or bond. DER argued that since the terms of the bonds for the permitted areas provided that Coal Hill must abide by the terms of applicable law, and since mining off a permit site is prohibited by law, a forfeiture was justified. The Board rejected that reasoning, holding that the bond, by its terms, applies only to specifically designated acres and the Board could not extend liability beyond the terms agreed to by DER and Coal Hill. The Board ruled that forfeiture of the bonds on the basis of violations that occurred off a bonded area was an abuse of discretion.

Here, DER seems to be suggesting that a violation anywhere on Mining Permit 419-4(C) accrues to all of the bonds posted thereunder. As we noted in our adjudication, each bond was written for a specific acreage and this Board has previously held the terms of the bond control the rights and liabilities of the parties. Coal Hill, supra.; Yellow Run Energy Company v. DER, 1986 EHB 171. Thus, for example, in order for the forfeiture of the Surety's Bond No. 2383399 to be proper, DER would have to show that appropriate violations existed on the acreage covered by that bond. Having failed to make such a showing, the Board was hardly in a position to hold that forfeiture of that bond was justified. We thus reject DER's second argument.

DER's third argument is that it has met the Board's extended burden

of proof, pointing to the testimony at Transcript pages 32-51, stipulated Board Exhibit 2 and Commonwealth Exhibit 19. As to the testimony cited, DER put on ample testimony that violations existed on Mining Permit 419-4(C). However, there is not one word to relate any of this testimony to any of the several bonds that supported Mining Permit 419-4(C). It is true that Martin stipulated to the accuracy of the information contained in Board Exhibit 2. However, that exhibit shows, by mine drainage permit and mining permit, the acreage involved, the bond liability at the time of forfeiture, the liability as to acreage and stages of reclamation for which liability is to be charged, and the bond document and original amount. The document does not establish that there are violations that would justify forfeiture. If no violations can be attributed to a bond, the fact that it was stipulated that present bond liability is $X means nothing other than that DER is still holding $X of the bond.

As to Commonwealth Exhibit 19, which depicts the boundary of Mining Permit 419-4(C), DER's witness placed numerous markings on it to show the locations of violations. However, there was no testimony that explained how to determine the boundaries of the several bonds within the permit area and, no matter how long or closely we study the document, we are unable to divine any bond boundaries. We thus reject DER's claim that it met its burden.

Fourth, DER argues that the twofold burden adopted by the Board is not the legislatively established one and is not the one previously used by the Board. For the reasons discussed above, DER's burden in this case is no different than in any other bond forfeiture case.

Finally, DER points out that Mining Permit 419-4(C) was completely affected and that it did not have to prove that sub-areas were affected. The fact that an area was affected is not, by itself, grounds for forfeiture.

Even if an area covered by a bond was totally affected, DER would still have to show that there were appropriate violations on the specific area covered by the bond in order to justify forfeiture. We thus reject this fifth point.

The Board has prepared this opinion without the benefit of Martin's response to DER's petition. Nonetheless, because we can find no merit in DER's petition, we have little difficulty in entering the following order.

O R D E R

AND NOW, this 13th day of January, 1989, it is ordered that the Department of Environmental Resources' petition for reconsideration or rehearing of the Board's Adjudication in the above captioned matter 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: January 13, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

KIRILA CONTRACTORS, INC.	:	
	:	
v.	:	**EHB Docket No. 87-282-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 13, 1989

OPINION AND ORDER
SUR
MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND FOR SANCTIONS

Synopsis

Appellant is ordered to respond to discovery requests by the Department of Environmental Resources (DER) and to file a statement as to its intentions to prosecute its appeal.

OPINION

This action was initiated by the July 20, 1987 filing by Kirila Contractors, Inc. (Kirila) of a notice of appeal from a Department of Environmental Resources (DER) assessment of a $3500.00 civil penalty for allegedly mining without a license in violation of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and 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.

On December 2, 1988 DER filed a motion to compel answers to interrogatories and for sanctions (motion), stating that on September 10, 1987

DER filed its first set of interrogatories and request for production of documents. As of September, 1988, DER alleges, Kirila failed to answer the interrogatories. After several attempts, DER reached Kirila's counsel and proposed a settlement of the appeal. Because Kirila's counsel failed as promised to respond to the settlement offer, on November 16, 1988, DER sent a letter to Kirila's counsel requesting both answers to its discovery requests and a response to its settlement offer. It also threatened to file a motion for sanctions with the Board if it received no response in 12 days. DER received no response whatsoever and argues that it has been severely prejudiced in its case preparation by Kirila's failure to answer its discovery and settlement proposal requests. Kirila failed to respond to DER's motion even after it was notified of its pendency.

The Board has authority to compel a party to provide full and complete answers to interrogatories. Pa.R.C.P. 4006, incorporated by reference in 25 Pa.Code §21.111. Additionally, the Board has the authority, pursuant to 25 Pa.Code §25.124, to impose sanctions where appropriate.

Kirila appears to have established a pattern of unresponsiveness to both DER and the Board. DER is entitled to have its discovery requests fulfilled, something Kirila has not yet done. However, we note that Kirila's failure to respond to DER's discovery requests did not prevent DER from filing its pre-hearing memorandum on March 21, 1988. Furthermore, while answers to discovery requests are due within 30 days of service on the other party, DER waited over a year to request sanctions. This case has not yet been scheduled for hearing. In an appeal of an assessment of a civil penalty, DER bears the burden of proof. 25 Pa.Code §21.101(b)(1). At this point, we will defer the imposition of a harsh sanction and will simply order Kirila to answer DER's discovery request within 30 days of the date of this order. In addition, we

will order Kirila to inform the Board of its intention to prosecute this appeal. However, we warn Kirila that failure to comply with this order will result in harsher sanctions, possibly including dismissal of the appeal.

ORDER

AND NOW, this 13th day of January, 1989, it is ordered that Kirila Contractors, Inc. shall respond to the Department of Environmental Resources' first set of interrogatories and request for production of documents on or before February 13, 1989 and that Kirila shall file a statement with the Board stating its intentions to prosecute its appeal on or before January 28, 1989.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 13, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

BVER ENVIRONMENTAL, INC.	:	
	:	
v.	:	**EHB Docket No. 87-292-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 17, 1989

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY
AND PARTIAL SUMMARY JUDGMENT

Synopsis

The Board grants a hazardous waste transporter's motion for summary judgment, holding that the Department of Environmental Resources could not hold the transporter liable for omissions of information on copies of the manifest which were retained by the generator for its own records and transmission to regulatory agencies.

OPINION

This matter was initiated by the July 22, 1987 filing of a notice of appeal by BVER Environmental, Inc. (BVER), a licensed transporter of hazardous waste pursuant to License No. PA-AH023H, seeking the Board's review of a $2000 civil penalty assessed by the Department of Environmental Resources (Department) on July 10, 1987, 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 Department's assessment was for accepting and transporting hazardous waste without a completed manifest, in violation of 35 P.S. §6018.403(b)(5) and (8),

35 P.S. §6018.610(4) and (9), and 25 Pa.Code §75.263(d)(1). Specifically, the Department contended that BVER accepted a hazardous waste shipment for transportation without a properly completed manifest.

BVER raised a number of objections to the assessment of the civil penalty, among them that it had complied with all regulations which were applicable to transporters and that the Department had unlawfully ascribed to BVER the violations of the generator in not properly completing the manifest. It further alleged that even if violations had been committed by BVER, there would have been no wilfulness, no damages, no costs, no savings, or other relevant factors to justify the imposition of the assessment.

On March 17, 1988, BVER filed a motion for summary judgment. The Department responded to BVER's motion and filed a cross-motion for partial summary judgment on April 18, 1988. For purposes of these motions, the parties have stipulated to the facts which follow.

On July 17 and July 18, 1986, BVER accepted and transported nitric and hydrofluoric acid from Titanium Metals Corporation (Titanium) in Toronto, Ohio, to Mill Service in Bulger, Pennsylvania; the wastes were identified by manifest numbers PAB0130383 and PAB01303816, respectively. BVER's driver signed both manifests as acknowledgement of receipt of the waste and received copies one through five of both manifests from the generator, Titanium.

Titanium then sent the number six copies to the Department, the number seven copies to the Ohio EPA, and retained the number eight copies for its records. On delivery of the waste to Mill Service, the BVER driver gave copies one through five to the disposal facility for signature, certifying its receipt of the waste. Mill Service then sent the number one copies to the Department, the number two copies to the Ohio EPA, the number three copies to the generator, Titanium, and retained the number four copies for its records.

BVER kept the number five copies of the manifests. Items 13 and 14, total quantity and unit weight per volume, respectively, were completed on copies one through five, but not on copy six, the copy sent to the Department by Titanium.

In support of its motion, BVER argues that all five copies of the manifest which accompanied the waste were completed. It was the copy that did not accompany the waste, which was sent to the Department by the generator, that was not completed. BVER maintains that it is the generator who must complete the manifest under 25 Pa.Code §75.262(e) and that, as a transporter, it must only ensure that the manifests accompanying the waste are complete.

In response to BVER's motion, the Department argues that 25 Pa.Code §75.263(d)(1) requires any hazardous waste accepted by a transporter to be accompanied by a manifest completed and signed by the generator. The Department insists that even if the generator keeps copies six through eight, 25 Pa.Code §72.263(d)(i) precludes the transporter from accepting the waste unless all eight copies have been completed. Since BVER did accept the waste, and copies number six were incomplete, BVER was not in compliance with 25 Pa.Code §75.263(d)(i). The Department further maintains that, by virtue of non-compliance with 25 Pa.Code §75.263(d)(1), §403(b)(5) and (8) and §610(4) and (9) of the SWMA were also violated. Therefore, the Department claims it properly assessed a civil penalty pursuant to §605 of the SWMA.

In support of its cross-motion for partial summary judgment, the Department asserts that 25 Pa.Code §75.263(d)(1) indirectly imposes the requirements of 25 Pa.Code §75.262 on the transporter because that section precludes the transporter from accepting waste unless the generator has com-

plied with 25 Pa.Code §75.262.[1]

According to the Department, 25 Pa.Code §75.263 imposes a concurrent obligation on the transporter and the generator to ensure the manifest is properly completed before the waste is transported. The Department argues that this requires the transporter to check all eight copies to make sure each is complete and legible. Therefore, the Department maintains that even if items 13 and 14 simply did not go through the carbons onto copies number six, BVER would not have complied with its obligation.

The Board may grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. No. 1035(b), Summerhill Borough v. DER, 34 Pa.Cmwlth 574, 383 A.2d 1320. All the facts necessary to the determination of this motion have been stipulated; therefore, the issue on which the determination turns is whether the transporter, as a matter of law, is responsible for ensuring that the generator properly completes all eight copies of the manifest or whether, as a matter of law, the transporter is only responsible for ensuring those copies, one through five, accompanying the waste shipment are complete.

In order to rule on the motions, it is necessary to examine the relevant portions of the applicable regulations, 25 Pa.Code §§75.262 and 75.263. The manifest requirements for generators are found at 25 Pa.Code §75.262(e), which, in relevant part provides:

---

[1] The Department maintains that it has no way of knowing when copies one through five were completed, or even if they were properly completed, prior to BVER's acceptance of the waste from the generator. Because the parties stipulated that copies one through five were complete, this is not at issue.

(e) *Manifest.*

(1) A generator who transports, or offers for transportation, hazardous waste for off-site treatment, storage, or disposal shall prepare a manifest according to the instructions supplied with the manifest.

* * * * *

(7) The generator shall provide the following information on each manifest he prepares before the off-site transportation of the manifested waste occurs:

(i) The generator's EPA ID Number and the unique five digit number assigned to this manifest by the generator--EPA manifest document number.

(ii) Total number of pages used to complete the manifest.

(iii) The name, mailing address, and telephone number of the generator.

(iv) The State manifest document number assigned by the Department.

(v) Each Transporter's company name, EPA ID Number, Pennsylvania Hazardous Waste Transporter License Number, and telephone number.

(vi) The designated facility's name, site address, EPA ID Number, and telephone number.

(vii) The U.S. Department of Transportation Proper Shipping Name, Hazard Class, and ID Number--UN or NA--for each waste identified by 49 CFR §§171-177 (relating to hazardous materials regulations).

(viii) The number of containers and container type, and the total quantity of the waste by either weight or volume.

(ix) The hazardous waste numbers for each waste.

(x) The physical state and hazard codes for each waste.

(xi) Special handling instructions and

any necessary additional information for proper handling and treatment of the waste during transportation.

(xii) The generator's written certification stating: "I hereby declare that the contents of this consignment are fully and accurately described above by proper shipping name and are classified, packed, marked, and labeled, and are in all respects in proper condition for transport by highway according to applicable international and national governmental regulations, and all applicable State laws/regulations."

"Unless I am a small quantity generator who has been exempted by statute or regulation from the duty to make a waste minimization certification under Section 3002(b) of RCRA, I also certify that I have a program in place to reduce volume and toxicity of waste generated to the degree I have determined to be economically practicable and I have selected the method of treatment, storage, or disposal currently available to me which minimizes the present and future threat to human health and the environment."

(xiii) The printed or typed name and the signature of the generator's authorized representative and the date of shipment.

(xiv) The printed or typed name and the signature of each transporter's authorized representative and each date of receipt.

(xv) The printed or typed name and the signature of the designated facility's authorized representative and the date of receipt.

(xvi) A continuation sheet, EPA Form 8700-22A, when there are more than two transporters, or for lab packs when there are more than four different waste streams in one shipment.

* * * * *

(9) The manifest shall consist of eight copies.

(10) The generator shall read and sign by hand the certification statement on the manifest.

(11) <u>The generator shall obtain the printed or typed name, the handwritten signature of the</u>

initial transporter, and the date of acceptance on the manifest before the shipment is transported off-site.

(12) The generator shall detach Copies 6, 7 and 8 of the manifest.

* * * * *

(14) A generator located outside this Commonwealth and designating a facility in this Commonwealth shall submit copy 6 of the manifest to the Department and copy 7 to the generator state within 7 days of the date of the shipment and retain copy 8 for his records under subsection (h).

* * * * *

(17) The generator shall ensure that the required information on all copies of the manifest is capable of being read.

(18) The generator shall give the transporter the remaining copies of the manifest.

(emphasis added)

The manifest requirements imposed on transporters of hazardous waste are set forth in 25 Pa.Code §75.263(d), which provides, in pertinent part, that:

(1) A transporter may not accept hazardous waste from a generator or another transporter unless it is accompanied by a manifest which has been completed and signed by the generator under §75.262.

(2) Before transporting the hazardous waste, the transporter shall print or type his name, sign, and date the manifest and, by his signature, acknowledge his acceptance of the hazardous waste from the generator. Before leaving the generator's property the transporter shall return to the generator the appropriate number of signed copies of the manifest according to the instructions supplied with the manifest.

(3) The transporter shall ensure that the manifest accompanies the hazardous waste.

(4) A transporter who delivers a hazardous waste to another transporter or to the designated facility shall:

(i) Obtain on the manifest the date of delivery, the printed or typed name, and the handwritten signature of the subsequent transporter or of the owner, operator or authorized representative of the designated facility.

(ii) Retain one copy of the manifest according to the instructions supplied with the manifest under subsection (f).

(iii) Give the remaining copies of the manifest to the accepting transporter or designated facility.

* * * * *

(emphasis added)

Thus, in this appeal, we are asked to construe whether 25 Pa.Code §75.263(d)(1) imposes an obligation upon the transporter to assure that all copies of the manifest, even the three which do not accompany the waste shipment, are properly completed. We believe, after examination of the language in 25 Pa.Code §§75.262(e) and 75.263(d), that it does not.

Of particular relevance to our conclusion are subsections (e)(1), (e)(7)(viii), (e)(11), (e)(12), (e)(14), (e)(17), and (e)(18) of 25 Pa.Code §75.262(e) and subsection (d)(2) of 25 Pa.Code §75.263, all of which are quoted above. Those subsections require, *inter alia*, the generator to prepare the manifest (§75.262(e)(1)) and to provide information concerning the type and number of containers and the quantity of waste (§75.262(e)(7)(viii)). The generator is to obtain the name of the transporter, its signature, and the date the waste is accepted by the transporter (§75.262(e)(11). The transporter, after providing that information, returns "the appropriate number of signed copies according to the instructions on the manifest" (§75.263(d)(3)). The appropriate number of copies is all eight in light of the language of §75.262(e)(12), (14), (17), and (18), as the generator must assure that all

copies contain the required information (§75.262(e)(17)), detach copies six, seven, and eight (§75.262(e)(12)), give the transporter copies one through five (§75.262(e)(18)), and, in the case of an out-of-state generator such as Titanium Metals, send copy six to the Department and copy seven to the Ohio Environmental Protection Agency and retain copy eight (§75.262(e)(14)). The transporter, with copies one through five given to it by the generator, then leaves the generator's facility (§75.262(d)(2)). Given the explicit and lengthy language in §75.262(e) regarding the generator's obligations in preparing the manifest and distributing it to the various parties involved in the transportation, disposal, and regulation of hazardous waste, we cannot construe the general language of §75.263(d)(1) as imposing a joint burden on the transporter under the circumstances presented herein.

The Department cites two previous adjudications, Refiners Transport and Terminal Corporation v. DER, 1986 EHB 400, and Southwest Equipment Rental, Inc. v. DER, 1986 EHB 465, in support of its position that liability may be imposed on the transporter for the generator's omissions in preparing the manifests. Refiners Transport involved appeals of civil penalty assessments for primarily transporting hazardous wastes without a license. The Department did assess penalties on Refiners Transport for transporting five shipments of waste without properly completed manifests. The information was missing on the copies of the manifests accompanying the waste shipments (Findings of Fact 33-35), namely, copies one through five. Furthermore, the appellant in Refiners Transport did not raise the issue of generator liability for the alleged violations. Southwest Equipment Rental dealt with a civil penalty assessment for unlicensed transport of hazardous waste, and not with this

particular issue. Our holding here is that liability cannot be imposed on the transporter for the generator's failure to supply mandated information on copies of the manifest which are solely the generator's responsibility.

There being no material facts in dispute, we find that BVER is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 17th day of January, 1989, it is ordered that:

1) BVER Environmental Inc.'s motion for summary judgment is granted;

2) The Department of Environmental Resources' cross-motion for partial summary judgment is denied; and

3) The appeal of BVER Environmental, Inc. is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
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DATED: January 17, 1989

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SECRETARY TO THE BOARD

ELMER R. BAUMGARDNER, BAUMGARDNER OIL CO., ECONO FUEL, INC., and WASTE-OIL PICKUP AND PROCESSING	:	
v.	:	EHB Docket No. 88-343-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 17, 1989

OPINION AND ORDER SUR MOTION FOR STAY AND PROTECTIVE ORDER, and MOTION FOR SANCTIONS AND ATTORNEY'S FEES

Synopsis

An appellant's motion to stay discovery, due to the filing of a motion for summary judgment by the Department of Environmental Resources (DER), is denied. Under the facts of this case, discovery will not impose an unreasonable burden or expense upon the appellant. Also, a motion for sanctions and attorney's fees filed by DER in response to the appellant's motion to stay discovery is denied.

OPINION

This case involves an appeal by Elmer R. Baumgardner, et al., (Baumgardner) from an order of the Department of Environmental Resources (DER) dated August 29, 1988. The background of this proceeding is described in the Opinion and Order Sur Motion for Reconsideration of Order Granting Supersedeas (issued January 10, 1989), and will not be repeated here.

This Opinion and Order addresses Baumgardner's motion for stay and protective order filed on January 6, 1989. In its motion, Baumgardner asserts that discovery should be stayed due to DER's filing of a motion for summary judgment on December 16, 1988. Baumgardner argues that it should not be subjected to the expense of six depositions which DER intends to take of Elmer R. Baumgardner, four of Mr. Baumgardner's employees, and one former employee, because these depositions may turn out to be unnecessary depending upon how the Board rules on DER's pending motion for summary judgment. Finally, Baumgardner asserts that DER's desire to proceed with these depositions is inconsistent with DER's argument in the motion for summary judgment that there are no factual issues which must be resolved to enter a judgment in DER's favor.

DER filed a response to Baumgardner's motion on the same day the motion was filed. DER also filed a motion for sanctions and attorney's fees. In its response, DER asserts that, in a spirit of cooperation, it agreed to have its witnesses deposed first, and that these depositions have now been completed. DER asserts that two of these depositions were conducted after the filing of DER's motion for summary judgment on December 16, 1988. DER argues that Baumgardner's attempt to stay discovery after Baumgardner has completed its depositions, but before DER has had an opportunity to depose Baumgardner's personnel, constitutes "unconscionable conduct." Thus, DER requests that the Board deny Baumgardner's motion to stay discovery, and grant DER's motion for sanctions and attorney's fees.

We will deny Baumgardner's motion for stay and protective order. Proceeding with the depositions of Baumgardner's personnel (current and past) while DER's motion for summary judgment is pending will not, in our opinion, subject Baumgardner to "unreasonable burden or expense." See Rule 4012,

Pennsylvania Rules of Civil Procedure. Baumgardner apparently agreed to a schedule of depositions and stuck to this schedule by deposing two DER employees even after the filing of DER's motion for summary judgment. We will not now step in and meddle with the deposition schedule the parties agreed upon; Baumgardner has accepted the full benefits of discovery and we will not relieve him of the burdens. Finally, we disagree with Baumgardner's argument that it is inconsistent for DER to conduct discovery while, at the same time, arguing in its motion for summary judgment that it is entitled to a judgment based upon facts conceded by both parties. DER could just as easily argue that it is inconsistent for Baumgardner to oppose further discovery while Baumgardner is arguing that DER is not entitled to summary judgment.

We will also deny DER's motion for sanctions and attorney's fees. While we understand DER's righteous indignation, we are not persuaded that this extraordinary relief is warranted.

ORDER

AND NOW, this 17th day of January, 1989, it is ordered that:

1) The motion for stay and protective order filed by Elmer R. Baumgardner, et al, is denied.

2) The motion for sanctions and attorney's fees filed by the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: January 17, 1989

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M. DIANE SMITH
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ALLIED STEEL PRODUCTS	:	
	:	
v.	:	EHB Docket No. 80-184-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 18, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal will be dismissed for lack of prosecution where the appellant demonstrates no intention to either prosecute or otherwise conclude its appeal.

OPINION

This matter was initiated by the October 28, 1980 filing of a notice of appeal by Allied Steel Products Corporation (Allied) seeking review of the Department of Environmental Resources' (Department) September 29, 1980 order directing Allied to abate groundwater pollution at its facility in East Coventry Township, Chester County. The Department alleged that Allied had polluted the groundwater with tri-chloroethylene and other volatile organic compounds that it used in the course of its activities.

On November 17, 1980, the Board issued an order requiring Allied to file a pre-hearing memorandum on or before December 17, 1980. Allied did not

file its pre-hearing memorandum, and there was no activity at the docket until February 19, 1982 when the Department requested the Board to issue an order requiring Allied to file its pre-hearing memorandum. The Board issued such an order on March 1, 1982, requiring Allied to file its pre-hearing memorandum on or before May 17, 1982. Allied filed its pre-hearing memorandum on April 26, 1982, and the Department filed its answering pre-hearing memorandum on May 12, 1982. A pre-hearing conference was scheduled for August 10, 1982, and a hearing on the merits was scheduled for September 21, 1982. At the request of the parties following the pre-hearing conference, the Board cancelled the September, 1982 hearing so that the parties could pursue settlement negotiations.

The Board thereafter requested periodic status reports from the parties. The Department advised the Board in a June 17, 1985 letter that the parties were making no progress toward settlement and that a hearing on the merits should be scheduled. A hearing on the merits was again scheduled for November 12-14, 1985, and during the course of the first day of hearing, the parties requested that they be given another opportunity to discuss settlement. The Board, in an order of November 12, 1985, attempted to move the settlement negotiations along by imposing obligations on each of the parties.

There was no activity at the docket for nearly nine months and the Board on July 25, 1986 issued Allied a rule to show cause why its appeal should not be dismissed for lack of prosecution. The rule was returnable on August 22, 1986. Allied responded to the rule on August 25, 1986, making various assertions that the Department had failed to assist it in its efforts to clean up its site. Perceiving that settlement efforts had broken down, the Board placed Allied's appeal on the hearing list for scheduling a hearing.

On December 30, 1987, the Board requested status reports be filed by the parties on or before January 26, 1988. After receiving no response to its order, the Board, in a March 9, 1988 letter, notified Allied of its default and advised it of possible sanctions if a status report was not filed by March 21, 1988. The Board sent another default letter, dated March 30, 1988, advising Allied that sanctions would be applied unless a status report were filed by April 11, 1988.

The Department filed a status report on April 7, 1988, advising the Board that Allied had not initiated any groundwater abatement efforts and, contrary to its August 25, 1986 representation to the Board, Allied had never requested any assistance from the Department. On the strength of this status report, the Board, on June 10, 1988, ordered Allied to submit a status report by July 11, 1988.

Allied did not submit the required status report and the Board sent an August 7, 1988 default letter to Allied. The Board then received, on August 9, 1988, a letter from Allied requesting an extension of time in which to file a status report in light of its filing of a voluntary petition in bankruptcy on July 6, 1988. The Board, by order dated August 16, 1988, granted Allied's request, requiring it to submit a status report by September 6, 1988 and advising it that no further extensions would be granted.

The Board received a letter from Allied's counsel on September 26, 1988. The letter advised the Board he was no longer counsel and that any further correspondence should be sent directly to Allied or its trustee in bankruptcy.

On October 3, 1988, the Board received a letter from Walter J. Greenhalgh, counsel to Allied as debtor-in-possession. He advised the Board

that he had not been retained to represent Allied before the Board and requested the Board to provide him with an update on the status of the appeal. The Board replied to this request on October 4, 1988, stating that repeated continuances had been granted to the parties on the representation that settlement negotiations were proceeding and directing Mr. Greenhalgh to either arrange to view the Board's file or contact Allied's former counsel or the Department's counsel if he wished to review the status of the appeal. The Board concluded the letter by informing counsel that it had no intention of devoting any more time to prodding Allied into pursuing its appeal.

Finally, the Board issued an order to Allied and its bankruptcy counsel to notify the Board on or before November 4, 1988 whether it intended to pursue its appeal. The order also admonished Allied that failure to respond would subject it to the sanction of dismissal. Allied has not, as of the date of this opinion, responded to the Board's October 4, 1988 order.

This appeal is eight years old and is no closer to resolution than it was on the date of filing in 1980. Allied has been unable to reach an amicable resolution with the Department, yet has demonstrated no willingness to proceed with its appeal before the Board despite repeated urging by the Board. It is not the Board's responsibility to prosecute a party's appeal nor is the Board obligated to divert its resources to repeatedly encourage appellants to go forward with their cases. If an appellant cannot resolve a matter with the Department and will not advise the Board of its intention to proceed, we have little choice but to dismiss its appeal for lack of prosecution under 25 Pa. Code §21.124.

ORDER

AND NOW, this 18th day of January, 1989, it is ordered that Allied Steel Products Corporation's appeal is dismissed as a sanction for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

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WILLIAM A. ROTH, MEMBER

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DATED: January 18, 1989

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M. DIANE SMITH
SECRETARY TO THE BOA

ZINC CORPORATION OF AMERICA

v. : EHB Docket No. 87-483-W

COMMONWEALTH OF PENNSYLVANIA : Original Issue Date: January 12, 1989
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Amended Issue Date: January 18, 1989

AMENDED
OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Material generated from subjecting listed hazardous wastes to the Waelz Kiln process to produce zinc oxide and "iron rich material" is held not to be a hazardous waste under 25 Pa. Code §75.261(b)(3), and appellant's motion for summary judgment is granted.

OPINION

This action stems from an appeal of an October 16, 1987 Notice of Violation issued by the Department of Environmental Resources (Department) to Zinc Corporation of America (ZCA) directing ZCA to immediately cease all offsite use of a residue, referred to as iron-rich material or "IRM," which results from ZCA's Waelz Kiln process at its facility in Palmerton, Carbon County.[1] The Department alleged that because IRM was the residue which

[1] Although the Department's October 16, 1987 letter was denominated a notice of violation and contained all the associated Department disclaimers, the parties stipulated during the course of the December 23, 1987 hearing on ZCA's petition for supersedeas that the Department was treating its letter as a mandatory directive (N.T. 5-6).

resulted from the processing of hazardous waste, it was a hazardous waste under 25 Pa. Code §§75.261(b)(3) and (4) and, therefore, must be managed as hazardous waste. ZCA disputed the Department's characterization of IRM as a hazardous waste and, consequently, its directives that IRM be handled as a hazardous waste in accordance with the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S.§6018.101 et seq. (Solid Waste Management Act), and the rules and regulations adopted thereunder.

A petition for supersedeas was filed on December 8, 1987, and a hearing on the petition was held on December 23, 1987. The Board granted ZCA's petition for supersedeas at the close of the hearing, and an order confirming the ruling was issued on December 24, 1987.

On February 5, 1988, ZCA filed a motion for summary judgment alleging that the Department's notice of violation was based upon an erroneous interpretation of the law and that IRM was not a hazardous waste. ZCA avers that 25 Pa. Code §§75.261(b)(3) and (4), referred to as the "derived from" rule,[2] do not apply to IRM because IRM is a product, rather than a solid waste, and that, even if it were a solid waste, the regulations state that to be hazardous, it must be derived from the "treatment" of a hazardous waste. ZCA contends its use of IRM is not treatment, but rather a use, reuse, recycling and reclamation which is not included in the definition of "treatment."

In its February 29, 1988 response in opposition to ZCA's motion for summary judgment, the Department argues that IRM, the residue from the

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[2] In a notice of supplemental authority filed August 16, 1988 in this matter, ZCA referred the Board to recent U.S. EPA rulings pertaining to land disposal of certain hazardous wastes, including ZCA's feedstock, K061. ZCA failed to provide the Board with the source or identity of the document, so we have not considered it in reaching our decision herein.

Waelzing process, is a solid waste as defined in §103 of the Solid Waste Management Act. Further, the Department alleges that IRM is generated from a process which, as to the component K061, a listed hazardous waste, and other listed hazardous wastes, is "treatment" as defined at 25 Pa. Code §75.260(a) resulting in a change of physical and chemical characteristics of the wastes and rendering them non-hazardous and suitable for recovery.[3]

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.

The facts which are uncontroverted are as follows. ZCA operates a plant for the manufacture of zinc metal, zinc oxide and other zinc compounds in Palmerton. As part of this manufacturing process, Waelz Kilns were, at one time, charged with feedstocks of zinc ore and limestone to produce a Waelz kiln residue and IRM. Prior to 1976, a large portion of the IRM was used as feed for electric arc furnaces to produce an iron and manganese rich product called Spiegeleisen. IRM was also sold to neighboring municipalities for use as an anti-skid agent and road base. When the electric arc furnaces ceased to

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[3] The Board also received a motion for leave to file an amicus brief from Chemical Waste Management on May 26, 1988. The motion was opposed by ZCA and the Department took no position on it. The Board denied the motion in an order dated June 29, 1988, noting that neither our rules nor the General Rules of Administrative Practice and Procedure at 1 Pa. Code §31.1 et seq. provide for such filings. The Board noted that amicus briefs may, in some situations, be useful and that it would be guided by the Pa. R.A.P. in assessing them. The Board concluded that the petitioner's intent was not to provide impartial assistance and denied the request on that basis.

operate, the principal markets for IRM were for use as an anti-skid agent, as a road base, and as an ingredient in concrete block manufacture.

In 1980, New Jersey Zinc Company, ZCA's predecessor, began to supplement its traditional raw material, zinc ore, with secondary materials, including zinc-containing wastes generated by other industries. Some of these secondary materials are listed hazardous wastes, including K061, F019, F006, D006, and D008. Utilizing these materials, the Waelz Kiln process yields crude zinc oxide and IRM. It is the IRM from this process with which we are now concerned.

The regulation at issue, 25 Pa. §§75.261(b)(3) and (4), provides that:

> (3) Unless and until it meets the criteria of paragraph (4):
> (i) A hazardous waste will remain a hazardous waste as identified in this section.
> (ii) Solid waste generated from the <u>treatment</u>, <u>storage</u>, or disposal of a hazardous waste, including sludge, spill residue, ash, emission control dust or leachate - but not including precipitation run-off - is a hazardous waste. Waste pickle liquor sludge generated by lime stabilization of spent pickle liquor from the iron and steel industry (SIC codes 331 and 332) is not a hazardous waste even though it is generated from the treatment of a hazardous waste, unless it exhibits one or more of the characteristics of a hazardous waste identified in subsection (g).
> (4) Solid waste described in paragraph (3) is not a hazardous waste if it meets one of the following criteria:
> (i) In the case of any solid waste, it does not exhibit the characteristics of hazardous waste identified in subsection (g).
> (ii) In the case of a waste which is a hazardous waste listed in subsection (h), contains a hazardous waste listed in subsection (h), or is derived from a hazardous waste listed in subsection (h), if it has been exempted under §75.260.
>
> (emphasis added)

Our task of interpreting this regulation is made somewhat difficult by the

absence of the words "or" or "and" following §§75.261(b)(3)(i) and 75.261(b)(4)(i) and the seemingly indiscriminate and interchangeable use of the terms, "solid waste" and "hazardous waste."[4]

We will first address the relationship of §75.261(b)(3)(i) to §75.261(b)(3)(ii). The Department suggests that subsection (b)(3)(ii) only adds a particularity to the generalization in subsection (b)(3)(i). ZCA, on the other hand, argues that accepting the Department's interpretation would render subsection (b)(3)(ii) mere surplusage, in violation of the tenets of statutory construction, citing Masland v. Bachman, 473 Pa. 280, 374 A.2d 517,523 (1977). We accept ZCA's argument and believe the use of the terms "hazardous waste" in §75.261(b)(3)(i) and "solid waste" in §75.261(b)(3)(ii) supports the notion that each of these subsections was intended to stand on its own and apply to a different type of waste.

As for §75.261(b)(4), we believe that the only logical interpretation of this subsection is to associate §75.261(b)(4)(i) with §75.261(b)(3)(ii), as both refer to "solid waste" and §75.261(b)(4)(ii) with §75.261(b)(3)(i), as both refer to "hazardous waste." Otherwise, the two subsections, (b)(3) and (b)(4), would be circular.

We turn now to a consideration of where IRM falls in this scheme. The Department has not asserted in its October 16, 1987 letter that IRM, in and of itself, is a hazardous waste as otherwise identified in 25 Pa. Code

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[4] In general, we note the difficulty of simply reading, much less interpreting, the hazardous waste regulations. A single section of the regulations will often contain over 20 subsections and numerous subparagraphs within those subsections. The reorganization of these regulations into logical and comprehensible units would benefit the Department, the regulated sector, and the public in general.

§75.261.[5] Therefore, 25 Pa. Code §75.261(b)(3)(i) is not applicable to IRM.

As for IRM's status under 25 Pa. Code §75.261(b)(3)(ii), we must examine the terms "treatment" and "solid waste." Our first task is to determine whether the Waelz Kiln process whereby listed hazardous wastes are combined with raw materials, is "treatment" under the Department's regulations.

"Treatment" is defined at 25 Pa. Code §75.260(a) as

> A method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any waste so as to neutralize such waste or so as to render such waste non-hazardous... suitable for recovery, suitable for storage, or reduced in volume. The term includes activity or processing designed to change the physical form or chemical composition of waste so as to render it neutral or nonhazardous.
>
> (emphasis added)

ZCA contends that this definition does not include use, reuse, recycle or reclamation of hazardous wastes, unlike the definition of "treatment" set forth in the EPA regulations at 40 CFR §260.10(73). It also argues that because the definition refers to "neutralization" of hazardous waste and the purpose of the Waelz Kiln process is to produce a product, the Waelz Kiln process is not "treatment." On the other hand, the Department argues that because the Waelz Kiln process changes the physical and chemical characteristics of the hazardous waste feedstocks and renders them both non-hazardous and suitable for recovery, the process is treatment within the meaning of the definition in §75.260(a). We agree with the Department that "recovery," as used in the definition of "treatment," does encompass the Waelz Kiln process here.

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[5] However, the Department does not discount the possibility that IRM may be hazardous under criteria in §75.261 other than §§75.261(b)(3) and (4). We do not decide that issue herein.

Having determined that the Waelz Kiln process is encompassed by the definition of "treatment," we now examine the status of one of the materials produced by the process, IRM. If IRM is a "solid waste," as the Department contends, it is a hazardous waste under §75.261(b)(3)(ii), as it results from the treatment, through the Waelz Kiln process, of listed hazardous wastes.

ZCA argues that IRM is a product and not a waste because the IRM is sold as a product for several commercial uses and is not discarded, but rather stored until it is needed. The Department counters that large amounts of IRM have been permanently discarded on the cinder bank, the primary waste disposal site at the plant, and that IRM is not a product, since it cannot be used as a road base material or cinder block component in the form in which it emerges from the Waelz Kiln and must first be crushed and screened.

While "solid waste" is defined at §75.260(a) for purposes of the hazardous waste regulations as

> waste, including but not limited to, municipal, residual, or hazardous waste, including solid, liquid, semisolid, or contained gaseous materials.
>
> (emphasis added)

we believe that the use of the terms "solid waste" and "hazardous waste" in §§ 75.261(b)(3) and (4) was not meant to be interchangeable, for the distinctions would be absurd in light of the language. Rather, the use of the term "solid waste" was intended in the broad generic sense.

The term "waste" is not defined in the regulations, so we must look to its common and ordinary meaning. §1903 of the Statutory Construction Act, 1 Pa. C.S.A. §1903. Webster's New Collegiate Dictionary (8th ed.) defines "waste" as "discarded as worthless, defective, or of no use." Applying this definition, we must reject the Department's contention that the IRM is a waste. The IRM is placed on a stockpile and large amounts may accumulate

during the summer months. But the piles are quickly depleted during the winter months when it is sold as an anti-skid agent. The IRM is also sold for use as road base and as a component of cinder block. Even viewing this in the light most favorable to the Department, as we are required to do in disposing of a motion for summary judgment, the fact that the IRM must be further processed by being, e.g. crushed and screened, does not establish that is is a waste. Nor does it defeat the argument that it is a product, since its utility, rather than its size or shape is the critical consideration. Consequently, we do not believe that it falls within 25 Pa. Code §75.261(b)(3)(ii) and, therefore, is not subject to 25 Pa. Code §75.261(b)(4)(i).

Because the material facts are not at issue and we have determined that IRM is not a waste, we will enter summary judgment in ZCA's favor.

ORDER

AND NOW, this 18th day of January, 1989, it is ordered that Zinc Corporation of America's motion for summary judgment is granted and its appeal is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

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DATED: January 18, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

ANDREW SYSAK	:	
	:	
v.	:	EHB Docket No. 88-499-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 18, 1989

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is denied in a case where the Department of Environmental Resources (DER) suspended the appellant's blasters' license for falsification of blast reports and billing documents. The falsification of blast reports is a violation of the Department's regulations (25 Pa. Code §211.56), and constitutes "due cause" for suspension of the license.

OPINION

This matter involves an appeal by Andrew Sysak (Sysak) from a letter of the Department of Environmental Resources (DER) informing him that his blaster's license was suspended. In its letter, DER stated that the suspension was based upon evidence that Sysak participated in a scheme to defraud customers of Harrison Explosives Company by falsifying blasting reports and billing documents. The letter also stated that the suspension

would remain in effect until criminal charges filed against Sysak were resolved, and at that time DER would determine whether to continue the suspension, reinstate the license, or revoke the license.

Sysak filed a Petition for Supersedeas with his appeal; a hearing on this petition was held on December 15, 1988. At the hearing, Andrew Sysak testified that he worked at Harrison Explosives Company for three years (Transcript, page 10, "T. 10"). He expressed concern about retaining his job at Sher-Deb Corporation (the successor to Harrison Explosives Company) because of the suspension of his license (T. 45-46). Upon advice of counsel, Sysak invoked his Fifth Amendment privilege against self-incrimination and refused to answer questions regarding his alleged participation in the fraud scheme. (T. 11, 12-13, 15, 16, 18-24). DER called as a witness Special Agent Joseph Fabey of the Pennsylvania Attorney General's Office. Mr. Fabey testified that Sysak had told him on December 9, 1988 that he (Sysak) had participated in the scheme to overcharge customers for higher amounts of explosives than were actually used, and to substitute less expensive explosives while charging customers for a higher-priced product (T. 28-29, 35). Mr. Fabey also testified that Sysak admitted to falsifying blast reports and invoices (T. 29).

Counsel presented oral argument at the end of the hearing. Counsel for Sysak argued that there was a potential for irreparable harm here because Sysak may lose his employment due to the license suspension (T. 51). Counsel called attention to Mr. Fabey's testimony that Sysak had only participated in the scheme for a short period, and that Sysak did not receive any financial benefit from the scheme (T. 52). He stated that Sysak had not been given the opportunity for a "meaningful" hearing because of the pending criminal charges, which led Sysak to invoke his Fifth Amendment privilege. (T. 61-62). Lastly, counsel argued that DER had not shown "due cause" for suspending the

license because the requirements for a blaster's license do not go to moral fitness, and because Sysak was not charged with violating any specific DER regulation (T. 62-63).

Counsel for DER argued that the standards for granting a supersedeas had not been met (T. 54). Counsel argued that there was no irreparable harm to Sysak because he was still employed by Sher-Deb Corporation (T. 55). Regarding the merits of the appeal, counsel argued that Sysak was not likely to prevail because of Mr. Fabey's testimony that Sysak admitted participating in the scheme, and because the Board is permitted to draw an adverse inference from Sysak's invocation of his Fifth Amendment privilege (T. 55). Counsel contended that Sysak's participation in the scheme was an abuse of the "privilege" granted by the Department (his blaster's license), and that the records falsified by Sysak were records his employer was required to maintain under 25 Pa. Code §211.42(;) (T. 56). Finally, counsel concluded that DER did not abuse its discretion by finding that Sysak's behavior constituted "due cause" for suspension of his license (T. 56, 59-60, 66-67).

In ruling upon a petition for supersedeas, the Board considers the following factors:

1) irreparable harm to the petitioner,

2) the likelihood of the petitioner's prevailing on the merits, and

3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). In addition, a supersedeas may not be issued in cases where a nuisance or a significant amount of pollution, or other hazard to public health, would exist or be threatened while the supersedeas is in effect. 25 Pa. Code §21.78(b). Normally, a petitioner bears the burden of demonstrating that the above factors militate in favor of granting a supersedeas. Lower Providence Township v. DER, 1986 EHB 395. However, it is

not necessary for the petitioner to establish irreparable injury and likelihood of injury to the public when it is shown that DER lacked the authority to take the action at issue. Id., Ny-Trex, Inc. v. DER, 1980 EHB 355, WABO Coal Co. v. DER, 1986 EHB 71.

Applying the above criteria to this case, the petition for supersedeas must be denied. Sysak did not show that he is likely to succeed on the merits of the appeal. DER's letter suspending Sysak's license gave as reasons for the suspension that he had participated in a scheme to defraud customers of Harrison Explosives Company and, more specifically, that he had falsified blast reports and invoices. These allegations were supported by Mr. Fabey's testimony that Sysak had admitted committing these acts (T. 28-29). There was no evidence placed in the record to refute Mr. Fabey's testimony, and we accept it as proving that Sysak participated in the fraud scheme by falsifying blast reports and invoices.

Both the statute and the regulations governing blaster's licenses provide that a blaster's license may be suspended for "due cause." 73 P.S. §165, 25 Pa. Code §210.2(f). We believe that Sysak's falsification of blast reports constitutes "due cause" for suspension of his license. The licensing and regulation of blasters are governed by the Act of July 10, 1957, P.L. 685, as amended, 73 P.S. §164-168. Section 4 of the Act, 73 P.S. §167, gives DER authority to promulgate regulations to effectuate the Act. The regulations governing blasters are contained at 25 Pa. Code Ch. 210, which is entitled

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[1] The Act originally granted authority over blasters to the Department of Labor and Industry. This power was later transferred to DER. See 71 P.S. §510-1(24)

"Use of Explosives." One of the regulations, 25 Pa. Code §210.5(c), states that blasters must also comply with Chapter 211, which governs the "Storage, Handling, and Use of Explosives."[2]

DER argued at the hearing that Sysak had falsified records which his employer was required to keep under 25 Pa. Code §211.42(;) (T.56). This section requires each seller of explosives to keep an accurate record of such sales. Id. Section 211.42 does not seem to apply to this case for two reasons. First, section 211.42(;) requires the seller to keep an accurate record of all sales; therefore, it appears that any action for violation of this section should be against the seller, not the individual blaster. Second, section 211.42(;) contemplates a situation where explosives are sold and the purchaser then uses the explosives. In this case, Harrison Explosives Company performed the blasting operations and then charged its customers for the explosives used. (T. 28-31, 39-40).

We believe the more relevant provision here is 25 Pa. Code §211.56, which requires a record of each blast to be kept. This record must include,

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[2] The regulatory scheme governing blasting and related activities is confusing. As stated above, the licensing and regulation of blasters is governed by the Act of July 10, 1957, P.L. 685, as amended, 73 P.S. §§164-168. This Act is entitled "An Act regulating the use of explosives in certain blasting operations, requiring examination and licensing of certain explosive detonators. . ." The storage and handling of explosives is governed by the Act of July 1, 1937, P.L. 2681, 73 P.S. §151-163, which is entitled "An Act relating to, and regulating the manufacture, storing, and possession of explosives . . ." The regulations relating to blasters are contained in 25 Pa. Code Chapter 210, which is entitled "Use of Explosives." The regulations governing other blasting activities are contained in 25 Pa. Code Ch. 211, which overlaps with Chapter 210 because it contains some requirements for the "use" of explosives. To add to the confusion, the "Authority" listed in the regulations for Sections 210.1 to 210.3 is the "Act of July 1, 1937 (P.L. 2681, No. 537), §11 (73 P.S. §§161, 166, and 167)." This statement of authority is wrong in two respects. First, as explained above, blasters' activities are governed by the 1957 Act, not the 1937 Act. Second, 73 P.S. §§166 and 167 are part of the 1957 Act, not the 1937 Act.

among other things, data on the types and amounts of explosives used in each blast. 25 Pa. Code §211.56(7), (8). Sysak violated this section by falsifying the blast reports. This violation of section 211.56 was, in turn, a violation of 25 Pa. Code §210.5(c), which requires blasters to comply with Chapter 211. We believe that the Board is likely to find that the violation of these regulations constitutes "due cause" for suspension of Sysak's license when it considers the merits of this appeal.

We disagree with Sysak's argument that he was not afforded a "meaningful hearing" because the pending criminal charges led him to invoke his Fifth Amendment privilege in this case. Sysak has not cited any case law in support of this proposition, and we believe that the Commonwealth is entitled to proceed in administrative and criminal forums at the same time. We also disagree with Sysak's argument that DER did not establish due cause for the suspension because it did not cite specific regulations in its letter suspending Sysak's blasters' license. DER's letter charged that Sysak had falsified blasting reports, which certainly provided Sysak with sufficient notice to prepare a defense. The fact that DER did not cite the specific regulation governing blasting reports did not prejudice Sysak.

Since Sysak did not show that he is likely to succeed on the merits of his appeal, it is not necessary for us to consider whether he will be irreparably harmed and whether the public is likely to be injured by a denial of supersedeas. Ralph Bloom, Jr. v. DER, 1984 EHB 685, WABO Coal Co. v. DER, 1986 EHB 71.

ORDER

AND NOW, this 18th day of January, 1989, it is ordered that the petition for supersedeas filed by Andrew Sysak at EHB Docket No. 88-499-F is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: January 18, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kurt J. Weist, Esq.
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For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BO

BRADY'S BEND CORPORATION	:	
	:	
v.	:	**EHB Docket No. 88-306-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and DARMAC COAL, INC., Permittee	:	**Issued:** January 23, 1989

OPINION AND ORDER
SUR
MOTION FOR SANCTIONS TO COMPEL ANSWERS TO INTERROGATORIES and MOTION TO DEPOSE TO PRESERVE TESTIMONY

Synopsis

Appellant's motion for to compel answers to interrogatories is granted to the extent that the Department of Environmental Resources (DER) must respond to two disputed interrogatories with "at-hand" information and without conducting an extensive search of its files. Appellant's motion to depose for purposes of preserving testimony is granted. DER will be able to cross-examine the subject witness at the time of deposition and there are age and health circumstances that make it doubtful that the witness will be able to appear at the hearing on the merits.

OPINION

This matter was initiated by the August 8, 1988 filing of a notice of appeal by Brady's Bend Corporation (Brady) from the July 19, 1988 Department of Environmental Resources (DER) issuance of Surface Mining Permit

No. 03870106 to Darmac Coal, Inc. (Darmac) for the Darmac No. 21 Mine, to be located in Brady's Bend Township, Armstrong County. Brady operates an underground limestone mine and a storage facility for records, vehicles, water craft and other valuables, and part of Darmac's permitted area overlies these operations. Brady contends, among other things, that Darmac does not have the legal right to mine the coal and that the issuance of the permit was improper, alleging that DER failed to adequately determine whether Darmac has the legal right to mine the coal. Brady has filed two motions which are the subject of this opinion and order.

Motion for Sanctions to Compel Answers to Interrogatories (Motion to Compel)

In Brady's October 24, 1988 motion to compel, it states that DER failed to require Darmac to show proof of its right to mine the coal seam in its permit application, as required by 25 Pa.Code §86.64.[1] Brady believes that in order to properly address both this argument and its contention that the regulation has been enforced in a discriminatory fashion, DER must provide more complete answers to Interrogatories Nos. 9 and 10 of Brady's first set of interrogatories, which read as follows:

> 9. In the time period from 1979 to the present has any person ever raised to DER a challenge as to the quality or sufficiency of the title to the coal of a surface mine permit applicant.

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[1] 25 Pa.Code §86.64(a) provides as follows:

> Each application shall contain a description of the documents upon which the applicant bases his legal right to enter and commence coal mining activities within the permit area and whether that right is the subject of pending court litigation.

25 Pa.Code §86.64(b)(2) requires the applicant to provide copies of documents granting the right to extract coal by the surface mining method.

If your answer is yes as to each such instance state:
A. the district office which reviewed the application
B. the application's date and number
C. the applicant's name
D. the name of the party raising the issue if known and
E. the township and county of the proposed mine site

10. As to each such instance referenced in your answer to Interrogatory No. 9 please state the disposition made by DER of the application (if it is pending indicate this - if it is under appeal indicate this) how the issue arose and indicate how DER addressed same if DER's disposition of the application was in any way influenced by challenge to the title of the applicant.

In its responses to these interrogatories, DER objected by stating that they were overly broad as well as irrelevant, and that it would be oppressive and burdensome for the five Bureau of Mining and Reclamation Districts to do the work necessary to respond to such questions.

In its November 3, 1988 response to Brady's motion to compel, DER argues that the regulations merely require an applicant to describe the documents that an applicant is relying upon for the legal right to enter onto property and mine the coal. DER further argues that tracing a chain of title and dealing with any related disputes is not within its jurisdiction, but rather, is a matter for the appropriate Court of Common Pleas. However, DER does state that if the Board finds these interrogatories to be relevant, it would be willing to answer them with its "at hand" knowledge gathered by telephone interviews of the current permit review chiefs in the five offices.

By virtue of §86.64 of DER's rules and regulation, the Board believes that the issue of legal right to mine the coal is relevant to this appeal. An applicant is specifically asked to identify and produce copies of documents to show that it has the legal right to extract coal. At this stage of the proceeding, it is not clear why this information is required or what purpose it serves. However, the Board broadly construes relevancy during discovery.

Tenth Street Building Corporation v. DER, 1987 EHB 154. Accordingly, in order for Brady to adequately prepare its case, it is entitled inquire into the manner in which DER deals with conflicts over an applicant's legal right to mine coal.

However, the Board believes that Interrogatories 9 and 10, as drafted, are overly broad and burdensome. In Magnum Minerals v. DER, 1983 EHB 310, an interrogatory at issue requested the listing of the location of any and all surface mines within a 1 mile radius of a proposed mine where the same coal seam had been mined. The Board found the requested discovery to be overly broad and burdensome and, instead, required DER to answer the interrogatory at issue with its at-hand knowledge and with no implication that it was required to conduct an extensive search in its files or elsewhere. Since we believe the issue to be relevant, we will adopt DER's counter offer, namely, that the Interrogatories 9 and 10 can be answered on the basis of "at hand" knowledge gathered by telephone interviews of the current permit review chiefs in the five DER mining offices.

Motion to Depose for Purposes of Preserving Testimony (Motion to Depose)

On November 1, 1988, Brady filed its motion to depose Ernest McKinney for purposes of preserving testimony. Brady states that Mr. McKinney would be a valuable witness in this matter due to his work with both the Brady's Bend Corporation and its underground operations. However, Mr. McKinney is elderly and his health is stated to be so poor that he cannot travel. Brady requests that it be able to depose Mr. McKinney by videotape or transcript for use in future hearings. DER filed no objection to Brady's Motion to Depose and by telephone consented to this motion. In view of these circumstances, and of the fact that DER will be able to cross-examine Mr. McKinney during the

deposition, we will grant the motion to depose.

ORDER

AND NOW, this 23rd day of January, 1989, it is ordered that Brady's Bend Corporation's motion for sanctions to compel answers to interrogatories is granted consistent with the foregoing opinion and it is ordered that Brady's Bend Corporation's motion to depose for purposes of preserving testimony is granted. It is further ordered that Brady's Bend Corporation's pre-hearing memorandum shall be due on or before April 1, 1989 and that the Department of Environmental Resources' pre-hearing memorandum shall be filed 15 days thereafter.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: January 23, 1989

cc: **Bureau of Litigation**
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Ward Kelsey, Esq.
For Appellant:
Richard Ehman, Esq.
Holinshead and Mendelson
For Permittee:
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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	:	Issued: January 25, 1989

OPINION AND ORDER SUR MOTION FOR PROTECTIVE ORDER

Synopsis:

A motion for a protective order will be granted where an appellant seeks to depose the Secretary and Deputy Secretary of the Department, as depositions would cause unreasonable annoyance and burden to the Department. Although the information sought by appellant is relevant, a less intrusive way of obtaining it should be pursued.

OPINION

This is the most recent discovery dispute in the appeal by New Hanover Township (Township) challenging the Department of Environmental Resources' (Department) issuance of permits to New Hanover Corporation (Corporation) authorizing the construction and operation of a municipal waste landfill. The procedural history of this matter is described more fully in the Board's September 22, 1988 opinion and order dealing various other discovery disputes.

On January 3, 1989, the Department filed a motion for a protective order precluding the depositions of Secretary Arthur Davis and Deputy Secretary Mark

McClellan, arguing that the Township has had the opportunity to depose various other individuals involved in the permit decision, that Secretary Davis and Deputy Secretary McClellan have had little direct knowledge of the Department's actions under appeal, and that these depositions would cause great disruption of government functioning, are unreasonably burdensome, and, therefore, should be prohibited under Pa.R.C.P. No. 4011(b).

On January 9, 1989, the Township filed its response to the motion, citing other deposition testimony taken in this proceeding which stated that Secretary Davis and Deputy Secretary McClellan personally visited the landfill site and toured the proposed facility. This other deposition testimony allegedly established that such a visit was an unusual break with routine and that several permit conditions in the solid waste permit were added late in the process at the instruction of the Department's Central Office in Harrisburg, possibly after the date of the site visit. As a result of this, the Township alleges that Secretary Davis and Deputy Secretary McClellan are in possession of direct and relevant factual information regarding the site which the Township has otherwise been unable to obtain.

Discovery practice before the Board is generally governed by the Pennsylvania Rules of Civil Procedure, 25 Pa.Code §21.111. Pa.R.C.P. No. 4003.1 provides that:

> [A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of any discoverable matter. It is not grounds for objection that the information

> sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Pa.R.C.P. No. 4011(b) also provides that:

> No discovery or deposition shall be permitted which...would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party...

Information relating to the site visit of Secretary Davis and Deputy Secretary McClellan is relevant under Rule 4011. The evidence available to the Board supports the Township's argument that it is unable to obtain information regarding the nature, purpose and circumstances surrounding the site visit, the conclusions made, and amendments added to the permit as a result of this visit without first questioning the two Department officials who made the visit. This information clearly has bearing on the subject matter of this appeal and is relevant under Pa.R.C.P. No. 4003.1. But, we do believe, given the responsibilities of these Department officials, that a less intrusive means of acquiring this information exists, and that is to propound written interrogatories upon Secretary Davis and Deputy Secretary McClellan.

O R D E R

AND NOW, this 25th day of January, 1989, it is ordered that the Department's motion for a protective order precluding the depositions of Arthur Davis, Secretary of the Department of Environmental Resources, and Mark McClellan, Deputy Secretary of the Department of Environmental Resources, is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: January 25, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Eastern Region
For New Hanover Township:
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and
Alan Lee Levengood, Esq.
Pottstown, PA
For Paradise Watchdogs:
John E. Childe, Esq.
Hummelstown, PA
For New Hanover Corporation:
Hershel J. Richman, Esq.
Janet S. Kole, Esq.
Mark A.Stevens, Esq.
COHEN, SHAPIRO, POLISHER
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and
Mark D. Jonas, Esq.
SILVERMAN AND JONAS
Norristown, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

MARK AND ELAINE MENDELSON	:	
	:	
v.	:	**EHB Docket No. 88-336-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 25, 1989
and McNEIL CONSUMER PRODUCTS CO.,	:	
Permittee	:	

OPINION AND ORDER
SUR
APPELLANTS' MOTION TO COMPEL DISCOVERY RESPONSES
AND FOR ENLARGEMENT OF TIME

Synopsis

Requests for admission are not objectionable because they relate to the averments of the Notice of Appeal. Such Requests can perform the useful function of defining the issues. However, where the averments of the Notice of Appeal are framed in broad, "boilerplate" language, they invite denials phrased in equally general terms. Such denials are adequate under Pa. R.C.P. 4014. Interrogatories and requests for production of documents based on this same broad language are objectionable.

OPINION

The Board's time and resources have been called upon to resolve a discovery dispute that should have been settled by the attorneys involved in the case. Mark and Elaine Mendelson (Appellants) filed a Motion to Compel Discovery Responses and for Enlargement of Time on November 28, 1988. McNeil Consumer Products Company (Permittee) filed its Answer to the Motion on December 16, 1988; and Appellants filed their Reply on December 28, 1988. DER

filed no response, despite the fact that the Motion was directed to both Permittee and DER. In their Motion, Appellants request the Board to order, inter alia, that (1) Appellants' Requests for Admission are deemed admitted by Permittee; (2) Permittee's objections to Appellants' discovery are overruled; and (3) Permittee and DER are to respond to Appellants' discovery requests within 30 days.

Appellants' Requests for Admission were served on Permittee on or about October 10, 1988, contained in a document entitled "Request for Admissions of Appellants Directed to Each Appellee with Contention Interrogatories and Requests for Production of Documents." The document consisted of 50 numbered paragraphs, nearly all of which had four subparagraphs. The first 39 numbered paragraphs requested Permittee to admit specific paragraphs or subparagraphs of Appellants' Notice of Appeal. Permittee was then directed to state "each and every fact" supporting its response to the admission request; identify and produce all supporting documents; and identify each person who will testify in support of its response.

There is nothing inherently objectionable about requesting an adverse party to admit specific paragraphs of the Notice of Appeal. That pleading in Board practice assumes the role of a complaint in civil practice. Unlike a complaint, however, averments in the Notice of Appeal do not have to be answered, 25 Pa. Code §21.64 (c). Requests to an adverse party to admit averments of the Notice of Appeal can perform the useful function of determining precisely which averments really are in contention. Unfortunately, Appellants' Requests for Admission do not advance anyone's understanding of what issues are involved in this case. The averments of the Notice of Appeal are framed so broadly, employ such "boilerplate" language,

and overlap so frequently that an adverse party, by admitting them, would find himself on the unfavorable end of a summary judgment order.[1] Consequently, the Requests can only produce equally broad denials, leaving the parties as uninformed on the issues as they were at the outset.

Permittee's objections to Requests for Admission Nos. 1 to 39 are overruled, but its general denial must be considered an adequate response under the circumstances. These Requests are not deemed admitted under Pa. R.C.P. 4014. The same reasoning applies to Requests for Admission Nos. 46, 47 and 48 which, while they do not refer to the averments of the Notice of Appeal, suffer from the same malady. They invite a denial in the most general terms and Permittee's denial is an adequate response to them. They are not deemed to be admitted under Pa. R.C.P. 4014.

Requests for Admission Nos. 40 to 42 state specific facts and are unobjectionable. Permittee has admitted the facts in Nos. 40 and 42, but has objected to No. 41 on the grounds of relevancy. This objection is overruled and Permittee is directed to respond properly to this Request. Permittee has objected to Requests Nos. 43 to 45 on the ground that they relate to an Air Quality Permit which is not involved in the operation of the facilities associated with the Solid Waste Permit prompting the appeal. Permittee has filed a Motion to Dismiss pertaining to the Air Quality Permit and an NPDES Permit which Appellants also have referenced. Appellants' response to this

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[1] The Board's criticism is not directed to the Notice of Appeal. Appellants are free to frame the averments in that document as inclusively as they like. But when they seek to have those averments admitted by an adverse party, without any narrowing of the generalities employed, they must anticipate an across-the-board general denial.

Motion indicates that they are not certain themselves whether these two permits are involved. In view of this state of affairs, Permittee's objections to these Requests are appropriate.

Paragraphs 49 and 50 are not Requests for Admission and need not be addressed in this Opinion and Order.

The subparagraphs contained in Requests for Admission Nos. 1 to 40, 47 and 48 are really in the form of interrogatories and requests for production of documents. The problem here again is the extremely general nature of the language. For example, Appellants requested Permittee to admit paragraph 2(h) of the Notice of Appeal which reads as follows:

> (h) it [DER] granted permits for inadequate reason, based upon insufficient data and/or data which was inadequate, incomplete, misleading and/or false.

In the subparagraphs, Appellants then asked Permittee to provide the following:

> (a) State in detail each and every fact upon which you rely to support the admission, denial or other response.
> (b) Identify and produce a copy of all documents upon which you rely in support of your admission, denial or other response.
> (c) Identify each person who will testify in support of your admission, denial, or other response.
> (d) State each persons residential address, phone number, place of employment and occupation.

Because of the lack of specificity, a litigant would hardly know where to begin in answering such a request or, for that matter, where to end. Discovery's purpose is to inform and narrow the issues. Where its use does not serve that purpose but, instead, promotes unreasonable "oppression, burden or expense" (Pa. R.C.P. 4012),it will not be allowed.

Appellants' Request for Production of Documents (a separate request from that contained in the Requests for Admission), while broad-based, is not

ill-defined. Permittee objected to it[2] but agreed to make its documents available for inspection and copying. We trust that, after this has been done (if it has not been done already), Appellants will be able to frame their further discovery requests in such sufficiently specific language that Permittee will be able to respond without objection.

We recognize that, in many cases, appellants frame their Notices of Appeal in broad, "boilerplate" language in order to cover all potential reasons for appeal that discovey might later disclose. We recognize also that the issues in such appeals will not be drawn in more precise terms until the appellants have had an opportunity to examine and consider the permit application and related documents. This type of situation may explain the broad nature of Appellants' requests in the present case.

Finally, we note that Appellants granted DER an extension of time for responding to the discovery requests. We do not know what extension was granted but assume, from the fact that DER has not opposed Appellants' Motion, that DER is willing to respond within 30 days.

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[2] One objection related to the Air Quality Permit and NPDES Permit which have been mentioned above. Because of the uncertainty surrounding the relevancy of these permits, Permittee's objections are proper in this regard.

ORDER

AND NOW, this 25th day of January, 1989, it is ordered as follows:

1. Appellants' Motion to Compel Discovery Responses and for Enlargement of Time is granted, in part, and denied, in part, as set forth in the following paragraphs.

2. Permittee's objections to Appellants' Requests for Admission Nos. 1 to 39, 46, 47 and 48 are overruled but since the responses given constitute adequate denials, the Requests are not deemed admitted.

3. Permittee's Objections to Appellants' Requests for Admission and the Requests for Production of Documents pertaining to Air Quality Permit No. 46-313-017A and NPDES Permit No. 0012696 are sustained pending a determination of the relevancy of said permits to the issues involved in this appeal.

4. Permittee's objections to subparagraphs (a), (b), (c) and (d) to Appellants' Requests for Admission Nos. 1 to 40, 47 and 48 are sustained.

5. Permittee's objections to Appellants' Requests for Admission No. 41 are overruled and Permittee shall file and serve a proper response to said request within 30 days of the date of this Order.

6. Permittee's objections to Appellants' Requests for Production of Documents are overruled and Permittee shall produce its documents within 30 days of the date of this Order.

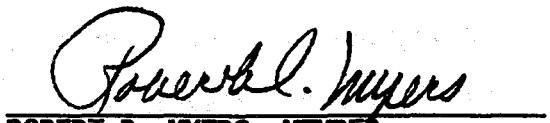
7. DER shall file and serve proper responses to Appellants' discovery requests directed to DER within 30 days of the date of this Order.

8. All discovery shall be completed no later than March 31, 1989.

9. Appellants shall file their pre-hearing memorandum on or before April 14, 1989.

10. All other provisions of Pre-Hearing Order No. 1, issued September 19, 1988, shall remain in effect.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: January 25, 1989

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

COUNTY OF WESTMORELAND	:	
	:	
v.	:	**EHB Docket No. 86-515-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
MILL SERVICE, INC., Permittee	:	**Issued:** January 26, 1989

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment will be denied where there are material facts in dispute. A consent order entered into between the Department of Environmental Resources (DER) and the Permittee, if unappealed by any party, is final and unassailable in this appeal. There is a dispute as to whether releases that have occurred since the execution of the consent order, and the method of dealing with those releases, are a part of the mitigation scheme established by that consent order. Under §503(c) of the Solid Waste Management Act (SWMA), it is a matter of DER's discretion to deny a permit based on prior violations of the law. Section 503(d) imposes a mandatory duty to deny a permit for violations not corrected to DER's satisfaction. In either case, a third party's burden is to show an abuse of discretion or that DER erred in concluding that violations have been corrected to its satisfaction.

OPINION

The County of Westmoreland (the County) initiated this matter by its September 5, 1986 filing of a notice of appeal from DER's issuance of Solid Waste Management Permit No. 301071 (Permit) to Mill Service, Inc. (Mill Service). The permit, 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., (SWMA), authorized the construction and operation of a residual waste disposal facility known as Impoundment No. 6 at Mill Service's Yukon waste disposal site located in South Huntingdon Township, Westmoreland County.

The County, on June 20, 1988, filed a motion for summary judgment. Relying on a May 24, 1985 Consent Order (Consent Order) entered into between DER and Mill Service, and depositions taken of DER or Mill Service officials during discovery in this proceeding, the County asserts that it is undisputed that there has been, and continues to be, unlawful conduct by Mill Service in its operation of Impoundment No. 5, another waste facility at the Yukon site. According to the County, it is undisputed that Mill Service has no authority to discharge hazardous waste from Impoundment No. 5, that there have been repeated discharges of hazardous wastes from the sides and bottom of Impoundment No. 5 and that these discharges are contaminating the surface and underground waters of the Commonwealth. The County further asserts that it is undisputed that whatever abatement measures were undertaken pursuant to the Consent Order were insufficient to correct the hazardous waste discharges. On the basis of these facts concerning Impoundment No. 5, the County argues that the issuance of the permit was improper because, it argues, §503(d) of SWMA, 52 P.S. §6018.503(d), requires DER to deny permits to applicants who have engaged in unlawful conduct, unless the permit applicant demonstrates to the

satisfaction of DER that the unlawful conduct has been corrected. Additionally, the County contends that the Permit's issuance was improper because §503(c) of SWMA, 35 P.S. §6018.503(c), grants DER the discretion to deny a permit when DER finds that the applicant has demonstrated a lack of ability or intention to comply with SWMA or other statutes or permits. The County concludes that it is entitled to judgment as a matter of law.

In its August 15, 1988 response, Mill Service opposes the County's motion with three main arguments. First, Mill Service contends that the Consent Order, which it entered into with DER as a result of a Complaint in Equity, filed in the Commonwealth Court at No. 1406 C.D. 1985, constituted a full and complete settlement of the alleged violations regarding Impoundment No. 5 that occurred before it was executed and the County, having failed to contest the Consent Order or intervene in the Commonwealth Court action, may not now attack any of its remedial provisions. Second, Mill Service charges that the County has applied inapposite statutory and case law to DER's action, contending that the County ignored the impact of the Consent Order as well as DER's override justification that concluded that there were no present or continuing violations at the Yukon site. Further, Mill Service contends that §503(c), and not §503(d), applies in this situation, citing Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, and argues that DER had no mandatory duty to deny the permit. Mill Service maintains that the County cannot challenge the issuance of the Permit on the basis of alleged unlawful conduct related to Impoundment No. 5 since, it asserts, it is complying with the provisions of the Consent Order. Thirdly, Mill Service argues that any alleged violations of Mill Service's NPDES permit do not show an inability or that it lacks the intention to comply with the NPDES permit or that a 1986 spill incident demonstrates its inability or unwillingness to comply with

applicable environmental laws.

DER, in its August 18, 1988 response, states that while there have been and continue to be discharges of leachate and hazardous wastes from Impoundment No. 5, this activity does not compel the conclusion that, under §503 of SWMA, Mill Service is not entitled to a permit. DER states that the migration of wastes will continue for an indeterminate period of time but asserts that the Consent Order establishes a scheme for minimizing environmental and public health problems posed by these conditions and for eventually eliminating the problem. Moreover, DER points out that the Consent Order specifically provides that as long as Mill Service complies with the terms and obligations of the Consent Order, it has sufficiently complied with §503 of SWMA, 35 P.S. §6018.503, and that DER may not deny any permits to which Mill Service is otherwise entitled. DER also argues that the County may not collaterally attack the Consent Order, contending that the Commonwealth Court's determination as to how Mill Service's compliance history will be construed has a res judicata effect.

In its November 9, 1988 reply brief, the County states that its appeal is based on undisputed discharges of pollutants that have occurred after the Consent Order was executed. The County contends that the Consent Order did not address discharges that have occurred since May 24, 1985 and, therefore, the provisions of §503 apply to the continuing discharges.

The Board is authorized to grant summary judgment when there is no genuine dispute as to material fact and the moving party is entitled to judgment as a matter of law. Summer Hill Borough v. Commonwealth, DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). The Board may examine the pleadings and any depositions, answers to interrogatories, admissions on file and supporting affidavits. Olivia M. Bell, et al. v. DER, 1986 EHB 273.

There seems, as the County asserts, to be little question that releases of substances from the sides and bottom of Impoundment No. 5 have occurred since the Consent Order was signed and will occur for an indeterminate period. See Berman and Duritsa depositions. In answers to the motion, Mill Service has not denied the continued existence of these releases, while DER specifically acknowledged their existence. The Consent Order is binding on DER and Mill Service, and may not be attacked by the County in these proceedings. Lower Paxton Township Authority, et al. v. DER, 1982 EHB 111, at 129. Therefore, the issue is whether these releases fall outside the scope of the Consent Order and, if so, whether their mere existence warrants the denial of the Permit pursuant to §503(c) and/or (d) of SWMA.

An examination of the Consent Order tends to support DER's contention that while releases from Impoundment No. 5 would continue for an indeterminate period of time, the Consent Order provides a scheme to mitigate any resultant impact. Specifically, Mill service must conduct a groundwater monitoring and assessment program (Paragraphs 10 and 16 of the Consent Order) and maintain the quality of groundwater under the Yukon site at background levels (Paragraph 17). If, as Mill Service and DER contend, these releases fall within the framework of the Consent Order, and if Mill Service is in compliance with the Consent Order, it is in sufficient compliance with §503 of the SWMA such that DER may not deny permits to which it might otherwise be entitled. (Paragraph 25)

Even if the releases are not dealt with in the Consent Order, it is far from certain that §503 could be invoked to deny the appealed-from permit merely on the basis of the releases' existence. In relevant part, §503 of the SWMA, 35 P.S. §6018.503, provides as follows:

* * * * *

(c) In carrying out the provisions of this act, the department may deny...any permit if it finds that the applicant...has failed or continues to fail to comply with any provision of this act, . . . "The Clean Streams Law," . . . the "Air Pollution Control Act," and 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...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, order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations....

(d) Any person...which has engaged in unlawful conduct as defined in this act, or whose partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent has engaged in such unlawful conduct, shall be denied any permit...required by this act unless the permit...application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected.

* * * * *

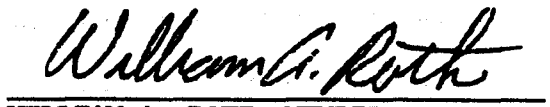
Section 503(c) grants DER discretionary authority but does not mandate denial of a permit due to the mere existence of violations. Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400. Rather, DER must look at several factors and determine whether the denial is reasonable and appropriate. Id, at 456, citing Commonwealth, DER v. Mill Service, Inc., 21 Pa.Cmwlth. 642, 347 A.2d 503 (1975). Section 503(d) does impose a mandatory duty on DER to deny a permit where an application fails to demonstrate to its satisfaction that unlawful conduct has been corrected. Refiner's Transport, at 456. However, the circumstances leading to DER's conclusions remain to be established.

In summary, we find that there is a dispute as to whether the releases that have occurred after the date of the Consent Order fall within or without the framework of the Consent Order. Further, even if the releases fall outsid of the Consent Order, there remain to be established the facts showing that DER abused its discretion by not denying a permit on the basis of the releases or that it erred in concluding that any violations have been corrected to its satisfaction. Because we find that there are material facts in dispute, we may not grant summary judgment in favor of the County and will enter the following order.

ORDER

AND NOW, this 26th day of January, 1989, it is ordered that the County of Westmoreland's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: January 26, 1989

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M. DIANE SMITH
SECRETARY TO THE BO

WEST PENN POWER COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-341-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 27, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS AS MOOT

Synopsis

Even though the Appellant complied with an order of the Department of Environmental Resources (DER), its appeal may not be dismissed as moot, since DER may still assess a civil penalty, thus giving the Appellant a stake in the outcome of the appeal.

O P I N I O N

This matter was initiated by West Penn Power Company's (West Penn) August 14, 1987 filing of an appeal from a July 15, 1987 Department of Environmental Resources (DER) order alleging that West Penn's energized electrical transmission line which crosses a pit on a coal surface mine operated by Gary-John Associates (Gary-John) was precluding Gary-John from completing its required reclamation obligations and directing West Penn to disconnect, remove and de-energize its transmission line within 30 days to permit Gary-John to complete reclamation at the mine site. The transmission

line referred to in DER's order connects West Penn's Yukon and Bethelboro substations and transverses Gary-John's mine located in South Huntingdon Township, Westmoreland County. The order was issued pursuant to 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).

On February 16, 1988 DER filed a motion to dismiss West Penn's appeal for mootness, stating that, on September 1, 1987, DER and West Penn entered into a consent supersedeas by which West Penn agreed to comply with DER's order. West Penn complied with the terms of the consent supersedeas, Gary-John was able to reclaim the subject site and on December 13, 1987, West Penn re-energized its transmission line. DER states that since West Penn has no further obligations to DER under the order, there is no relief to be granted and that the instant matter is moot. West Penn failed to respond to the motion, even after it was notified of its pendency. However, in its pre-hearing memorandum, West Penn did acknowledge its compliance with the order but contended that the order was moot and should be withdrawn.[1]

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). As even West Penn admits, it has fully complied with and has discharged its duties under DER's order. Nonetheless, this matter has not been mooted, since the order was issued under SMCRA and DER may be required under 25 Pa.Code

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[1]There are several readily apparent means of resolving this matter and removing it from the Board's docket. Why the parties do not avail themselves of these means is a mystery to the Board.

§86.193(b) to assess a civil penalty. Therefore, West Penn still has a stake in the outcome of this matter which precludes the Board from dismissing this appeal. Al Hamilton Contracting Co. v. Com., DER, ___ Pa.Cmwlth. ___, 494 A.2d 516 (1985). Therefore, we will deny DER's motion.

O R D E R

AND NOW, this 27th day of January, 1989, it is ordered that the Department of Environmental Resources' motion to dismiss is denied and that DER shall file its pre-hearing memorandum on or before February 13, 1989.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 27, 1989

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

CUBBON LUMBER COMPANY	:	
	:	
v.	:	**EHB Docket No. 88-507-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 27, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS AND
PETITION TO FILE APPEAL NUNC PRO TUNC

Synopsis

A motion to dismiss an appeal filed beyond the 30 day appeal period is granted. A petition for leave to file an appeal nunc pro tunc is denied where a petitioner fails to allege good cause such as fraud or breakdown of the Board's operations. Receipt of an appeal by the Department of Environmental Resources (DER) within the 30 day appeal period does not constitute receipt by the Board and does not establish the Board's jurisdiction. Failure of the Postal Service does not constitute good cause.

O P I N I O N

This matter was initiated by the December 9, 1988 filing by Cubbon Lumber Company (Cubbon) of a notice of appeal from a November 3, 1988 DER order issued pursuant to the Oil and Gas Act, the Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 et seq. The order, which Cubbon stated it received on November 8, 1988, required it to comply with the bonding

provisions of the Oil & Gas Act or, in the alternative, cease operation of its gas wells and plug them. Cubbon filed a petition for supersedeas concurrent with its notice of appeal.

On December 21, 1988, after a conference call with the parties in which the Board, sua sponte, noted that the appeal appeared to have been untimely filed, DER filed a motion to dismiss for lack of jurisdiction. DER alleged that Cubbon had filed its notice of appeal 31 days after Cubbon received DER's order. Though Cubbon failed to respond to DER's motion, it did file a petition for leave to file an appeal nunc pro tunc, which we will also treat as Cubbon's response.

In its notice of appeal, Cubbon clearly states that it received the DER order on November 8, 1988. Thus, the Board would have had to receive the appeal no later than December 8, 1988 for it to have been timely. Having been received on December 9, 1988, the appeal was untimely filed by one day.

In its petition, Cubbon states that it mailed copies of its notice of appeal 23 days after the receipt of the DER order to DER's Office of Chief Counsel in Harrisburg, DER's Meadville Office, and presumably to the Board, although the petition does not specifically so state. Cubbon avers that it was informed that its notice of appeal was not received by the Board until December 9, 1988, but that DER Counsel received its copy on December 5, 1988 and that DER's Office of Chief Counsel and the Environmental Hearing Board are located in the same building. Cubbon finally states that it was justified in believing that its notice of appeal would be received in less that one week if mailed by first class mail and that its appeal should be heard.

DER's December 27, 1988 response to Cubbon's petition merely restated that the appeal was untimely filed and the EHB has no jurisdiction to hear it. DER further states that pursuant to 25 Pa.Code §21.53 an appeal nunc

pro tunc can only be granted for good cause shown such as a fraud or breakdown of Board procedure and Cubbon has not made a showing of good cause.

The Board has jurisdiction to hear an appeal from a DER action if the appeal is filed within 30 days after a party receives written notice of the action. Rostosky v. Department of Environmental Resources, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). The date of receipt of appeal by the Board is determinative of timeliness. 25 Pa.Code §21.11(a). 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. Charles Kayal v. DER, 1987 EHB 809.

No such cause has been shown by Cubbon. Its argument that there was de facto timely receipt of its notice of appeal by the Board in Harrisburg, due to DER's receipt of the notice of appeal is meritless, notwithstanding the fact that DER and the Board are located in the same building in Harrisburg. The receipt of an appeal by DER does not constitute receipt by the Board and cannot serve to establish jurisdiction. Jake C. Snyder v. DER, 1987 EHB 388. Further, Cubbon's argument in connection with the failure of the Postal Service has been rejected by this Board before as not constituting "good cause." Shirley E. Gorham v. DER and Sky Haven Coal Company, 1987 EHB 767.

Because Cubbon failed to file its appeal in accordance with 25 Pa.Code §21.52(a), DER's motion to dismiss is granted. Because Cubbon has not shown good cause to allow the filing of an appeal nunc pro tunc, its petition is denied.

O R D E R

AND NOW, this 27th day of January, 1989, it is ordered that the Department of Environmental Resources' motion to dismiss for lack of jurisdiction is granted, that Cubbon Lumber Company's petition to file a petition for appeal nunc pro tunc is denied and that the appeal of Cubbon Lumber 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: January 27, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA **DEPARTMENT OF ENVIRONMENTAL RESOURCES**	:	
v.	:	**EHB Docket No.** 85-411-CP-W
JOHN P. AND ANN M. SUCHANEK	:	
	:	**Issued:** January 30, 1989

OPINION AND ORDER
SUR
PETITION FOR DISMISSAL

Synopsis

A petition to dismiss a complaint for assessment of civil penalties is denied. The death of a co-defendant is not grounds for dismissal.

OPINION

This action was initiated by the October 7, 1985 filing of a complaint for the assessment of civil penalties by 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. (CSL), against John P. Suchanek and his daughter, Ann M. Suchanek (Defendants). The complaint alleges that on or about February 20, 1984, home heating oil was discharged from an oil storage tank, or tubes leading thereto, into an open spring, both located in the basement of an apartment building located at R.D. #1, Box 2234, Jonestown, owned and operated by Ann M. Suchanek, with the assistance of her father, John P. Suchanek, and that this contaminated water was discharged into a nearby stream, in violation of the CSL.

The Complaint further alleges that on or about February 20, 1984, but after the alleged discharge, the Department notified the Defendants not to pump the fuel oil-contaminated water into waters of the Commonwealth without first obtaining permission from the Department. Subsequently, the complaint states, the Defendants discharged or permitted water contaminated with fuel oil to be discharged into the waters of the Commonwealth. This, the Commonwealth argues, was a violation of §§3, 301, 307, 401 and 611 of the CSL and 25 Pa. Code §§97.63 and 101.3 and constituted a public nuisance.

The Defendants filed an answer on October 24, 1985, claiming they did not control, operate or maintain the oil storage tank in that the premises were in the possession of tenants acting on their own. They also claim fuel oil is not an industrial waste under the CSL as alleged by the Department's complaint. As new matter the Defendants maintain that the oil leak was the result of tampering by tenants of the apartment and that, after the Department notified them of the condition, they made a good faith effort to comply with the Department rules and regulations and clean up the fuel oil which had spilled into the basement.

On August 26, 1988, Ann M. Suchanek filed a Petition for Dismissal, individually and as executrix for the estate of John P. Suchanek, who had died on May 12, 1987. This petition asserts that although Ann M. Suchanek was the record owner of the apartment at the time of the incident, John P. Suchanek was actually in control of the premises at that time and that he was the only one who was totally familiar with the incident. Furthermore, the petition asserts, no action has been taken since the original filing of the complaint and the Department has not responded to interrogatories propounded by the

Defendants on January 2, 1987. Finally, the petition avers that if the incident did occur, it resulted from a malfunction in the heating system which was immediately repaired.

In its response, filed October 3, 1988, the Department asserts that Ann M. Suchanek owned and operated the property, citing the Defendants' answer to the complaint. The Department maintains that, at the very least, Ann M. Suchanek was aware of the discharge on February 20, 1984 when the Department informed her not to pump the contaminated water from the basement into the stream. Furthermore, the Department claims that there have been ongoing status reports filed with the Board and settlement negotiations between the parties and states its belief that the interrogatories filed on January 2, 1987 need not be addressed because they were filed long after the discovery period had passed. Moreover, the Department disputes the claim that John P. Suchanek was the only one who was totally familiar with the incident, naming two other persons who have such knowledge. Finally, the Department claims that even if the original discharge of fuel oil into the spring was due to a heating system malfunction, the complaint for civil penalties stems from the discharge of that contaminated water out of the basement and into waters of the Commonwealth.

The Defendants have not alleged any grounds upon which we can justify dismissing the complaint for civil penalties.

The fact that John P. Suchanek has since died is not sufficient grounds to dismiss the complaint. The Department argues, and we agree, that 42 Pa. C.S. §8302 preserves a cause of action even after the death of one or more joint defendants. Neither will we dismiss the complaint based on Ann M. Suchanek's assertion that her father is the only one who was totally familiar with the incident. The Department bears the burden of proof in this

proceeding; it claims other persons have such knowledge, and it should be able to present its witnesses, which the Suchaneks can cross-examine. The contention that the complaint is essentially moot because the malfunction of the heating system leading to the incident has been corrected is irrelevant, since the Defendants are cited for unlawfully discharging the water contaminated from that malfunction.[1]

Since we find none of the grounds set forth in the petition for dismissal compelling, we will deny it.

---

[1] We also point out that §605 of the CSL provides that a penalty may be assessed whether or not the violation was willful.

ORDER

AND, NOW this 30th day of January 1989, it is ordered that Ann M. Suchanek's petition for dismissal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: January 30, 1989

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M. DIANE SMITH
SECRETARY TO THE BOA

WAWA, INC.	:	
	:	
v.	:	EHB Docket No. 88-220-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 2, 1989

OPINION AND ORDER SUR
MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND ANSWERS TO INTERROGATORIES

Synopsis

A motion to compel production of documents and answers to interrogatories is denied where no grounds for grant of the motion are provided by the moving party.

OPINION

This matter was initiated by Wawa, Inc.'s (Wawa) filing of a notice of appeal seeking review of the Department of Environmental Resources' (Department) denial of Wawa's application for renewal of NPDES Permit No. PA 0012246 which authorized a discharge from Wawa's facility in Middletown Township, Delaware County. The Department denied the permit renewal because the discharge had been eliminated and because of Wawa's past noncompliance with the permit.

On September 13, 1988, Wawa propounded interrogatories and requested production of documents. The Department answered these discovery requests on

December 5, 1988. On December 30, 1988, Wawa filed a motion to compel answers to interrogatories and to compel production of documents, asking that the Department be compelled to supplement its responses. Alternatively, Wawa requested the Board to order the Department to identify personnel who can be subpoenaed to testify to departmental procedural and policy matters.

Wawa's motion to compel answers to interrogatories is denied. Wawa claims that the Department's objections based on relevancy and privilege do not justify withholding the requested information and says it will set forth the reasons for that belief in a brief in support of its motion. This brief was never filed. Wawa does not provide us with any clue as to which interrogatories are insufficient. Since we feel the Department fully answered some interrogatories and partially answered others, we hesitate to issue an order which would compel supplemental answers generally.

As for the motion to compel production of documents, Wawa has failed to provide us with any information, let alone a copy of the request for production. Without more than the Department's response to the request for production, we are powerless to compel supplemental responses.

Likewise, we deny the alternative request that the Department be ordered to identify Department personnel to be subpoenaed for testimony into procedural and policy matters. What procedural and policy matters sought are unknown, and, therefore, the issuance of such an order would be impossible and improper.

ORDER

AND NOW, this 2nd day of February, 1989, it is ordered that Wawa's motion to compel is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: February 2, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

ELMER R. BAUMGARDNER, BAUMGARDNER OIL CO., ECONO FUEL, INC., and WASTE-OIL PICKUP AND PROCESSING	:	
v.	:	EHB Docket No. 88-343-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 2, 1989

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS AND STAY, MOTION FOR REHEARING AND RECONSIDERATION

Synopsis

A petition for supersedeas and stay, motion for rehearing and reconsideration is denied. The new evidence which allegedly justifies the relief sought was previously available and should have been introduced at an earlier hearing.

OPINION

The background of this appeal has been stated in two Opinions and Orders dated September 16, 1988 and January 10, 1989, and will be repeated here only in summary form. On September 16, 1988, we issued an Order granting Baumgardner's petition for supersedeas; our order had the effect of allowing Baumgardner's oil recycling facility in Fayetteville to remain open. DER then filed a motion for reconsideration, alleging that new evidence (laboratory results allegedly showing the presence of hazardous substances in the ground at Baumgardner's site) warranted withdrawal of the supersedeas. A hearing was

held on November 14, 1988 to receive the new evidence. On January 10, 1989, we issued an Opinion and Order granting reconsideration and withdrawing the supersedeas. On January 13, 1989, however, Baumgardner filed a "petition for supersedeas and stay, motion for rehearing and reconsideration"; this pleading alleged that Baumgardner had received new evidence (laboratory results) from DER which undermined the conclusion stated in our January 10, 1989 Opinion and Order. Due to the unavailability of the undersigned, and to the fact that the Fayetteville facility would otherwise cease operating, Chairman Woelfling entered an order on January 13 which stayed the January 10, 1989 Order. Therefore, the Fayetteville recycling facility has been permitted to continue operating pending consideration of Baumgardner's petition and motion. DER filed an answer to Baumgardner's petition and motion on January 20, 1989. Baumgardner filed a response to DER's answer on January 25, 1989.

Baumgardner alleges that on January 10, 1989, it received from DER laboratory results which prove--contrary to our conclusion in our January 10 opinion--that the material buried on-site was not hazardous, and that Elmer Baumgardner was a credible witness. Baumgardner argues that these laboratory results were improperly withheld from Baumgardner for more than five days after the testing. See Section 608 of the Solid Waste Management Act, 35 P.S. §6018.608(3). Baumgardner contends that the new laboratory results show that Baumgardner's sludge was not EP Toxic for lead, and that when Elmer Baumgardner testified at the September 9, 1988 hearing that the material was tested and found to be nonhazardous, he was referring only to the lead content. In addition, Baumgardner has attached to its petition an affidavit from Mr. Dwight Worley, an environmental scientist, who stated that based upon his review of the January 10 laboratory results and the laboratory results introduced at the November 14, 1988 hearing, the sludge was not hazardous

based upon either its lead content or due to organic constituents. This was because the level of lead and organic constituents in the sludge was less than that prescribed in the relevant federal regulations--40 C.F.R. §261.24 and 40 C.F.R. §261.31.

For the reasons set out below, Baumgardner's petition and motion must be denied.

First, we are not persuaded by Baumgardner's argument that we should reconsider our January 10, 1989 Opinion and Order because of DER's recent laboratory results showing that the buried material was not EP toxic for lead. If Baumgardner wanted to provide documentary evidence on this point, it should have provided, at the November hearing, the laboratory results from the tests its consultants conducted on the material (N.T. I, 263-264). Since, according to Elmer Baumgardner's own testimony, these test results were available for the earlier hearing, DER's laboratory results cannot be considered "new evidence." They are simply additional evidence on a point which Baumgardner failed to prove before.[1]

Moreover, it is not completely clear that Elmer Baumgardner's testimony that the material was nonhazardous was predicated solely upon the lead content of the material. At certain points, he referred to the material's lead content in stating that the material was nonhazardous (N.T. I, 252, 255, 263-264). At other times, he seemed to make unqualified statements that the material was nonhazardous (N.T. I, 253-254, 260). However, even if we accept that Baumgardner's testimony was based solely upon lead content, the question which we must ask is "why did Baumgardner have the material tested

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[1] With regard to Baumgardner's argument that DER was tardy in supplying the test results to him, this argument--even if true--does not affect our conclusion here.

for lead, but not for organic constituents?" Baumgardner has not provided any evidence to answer this question. We believe that burial of this material without testing it for the full scope of constituents which could render it "hazardous" reflects negatively on Baumgardner's environmental practices, and constitutes sufficient justification for DER's order so that we will not supersede DER's decision to close the Fayetteville facility.

Baumgardner's second argument is that Mr. Worley's affidavit establishes that the material buried on site was not hazardous based upon its organic constituent content, because the concentrations of organic constituents in the material were lower than those specified in the federal regulations. We do not believe that this contention justifies Baumgardner's dumping of the material, but, in any event, we will not consider it since it should have been raised at the November 14, 1988 hearing. DER's laboratory reports showing the presence of organic constituents in the ground on Baumgardner's site were attached to DER's motion for reconsideration filed on September 26, 1988. Baumgardner had six weeks to prepare for the hearing at which this evidence was received. We will not permit Baumgardner to wait until it receives an adverse decision, and then come forward with evidence which it should have introduced at the previous hearing. To do so would make a sham of the Board's hearing procedures.

The same principle cited in the previous paragraph applies to the affidavits (relating primarily to Elmer Baumgardner's credibility) attached to Baumgardner's response. DER's motion for reconsideration could hardly have been more clear in raising the issue of Elmer Baumgardner's credibility (motion, para. 10, 11). If we were to consider these affidavits, the precedent created would prevent us from ever issuing a definite and final decision. The losing party would keep coming back with additional evidence to

support arguments which the Board rejected based upon the record developed at the hearing.

Because the evidence which Baumgardner cites in support of its petition and motion could have been introduced at the earlier hearing, the petition and motion must be denied.

ORDER

AND NOW, this 2nd day of February, 1989, it is ordered that:

1) Baumgardner's petition for supersedeas and stay, motion for rehearing and reconsideration is denied.

2) Paragraphs A, B, and C of DER's order dated August 29, 1988 shall be effective as of the close of business on February 3, 1989.

3) Baumgardner shall comply with paragraph F of DER's order by March 1, 1989.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: February 2, 1989

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LEECH TOOL AND DIE WORKS, INC.	:	
	:	
v.	:	EHB Docket No. 88-460-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 2, 1989

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is denied in a case in which the Department of Environmental Resources (DER) ordered the petitioner to take certain actions to define the extent of, and to clean up, contamination of soil and groundwater by trichloroethylene (TCE). The petitioner did not prove that it is likely to succeed on the merits of its appeal because it did not prove that DER abused its discretion in choosing the remedies listed in its order.

OPINION

This case involves an appeal by Leech Tool and Die Works, Inc. (Leech) from an order of the Department of Environmental Resources (DER) dated October 17, 1988. In this order, DER found that Leech had released an undetermined amount of trichloroethylene (TCE) from its facility in West Mead Township, Crawford County, Pennsylvania, and that the TCE had contaminated soil on the site and groundwater beneath the site and downgradient of the site. To remedy this situation, DER ordered that Leech remove 28 barrels of

hazardous waste stored at the facility, stop discharges emanating from a ten-inch drain line (and submit a plan to identify the source of the discharges), install a total of seven additional monitoring wells into the Olean-Shenango aquifer (the shallow aquifer) and the Sharpsville aquifer (the intermediate aquifer), and monitor residential wells downgradient of the site. DER also ordered Leech to submit a clean-up plan after Leech had gathered data from the above wells. The plan was required to provide for clean-up of contaminated soil at the site, and clean-up of contaminated groundwater under the Leech site and downgradient of the site. In addition, Leech was required to submit a plan for removing the source of the discharge from the ten-inch drain line.

This Opinion and Order addresses Leech's petition for supersedeas,[1] which was filed along with its appeal. A hearing on this petition was held on November 28, 1988. Leech presented testimony by Thomas E. Leech, Secretary-Treasurer of the corporation, and Dr. Samuel Harrison, a professional hydrogeologist and environmental geologist. DER presented testimony by James

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[1] Leech has clarified in its brief that it is seeking only a partial supersedeas of DER's order. Specifically, Leech has complied with DER's order to remove the 28 barrels of hazardous waste, and to stop the discharge from the 10-inch drain line (Leech has sealed the line). (Leech's brief, pp 1-2)

Sturm, a hydrogeologist in the Bureau of Water Quality Management,[2] and James Williams, a compliance specialist in the same bureau. Both parties filed post-hearing briefs.

Leech argues in its brief that it has met the standards for granting a supersedeas. With regard to the merits of its appeal, Leech argues that DER's plan for studying the extent of the TCE contamination of soil and groundwater is unduly burdensome upon Leech, and is not necessary to protect groundwater users in the area. Leech argues that the clean-up requirement in DER's order is premature, and that Dr. Harrison should first be permitted to study the extent of the problem under the plan he described as "Phase II" in his testimony (T. 50).[3] Under this plan, Leech would monitor existing wells on Leech's property, monitor residential wells more frequently than DER ordered, drill one additional monitoring well (into the Olean-Shenango aquifer), and conduct further investigations of contaminated soils and of the source of the discharge from the ten-inch drain line (T. 50-55, Petitioner's Exhibit 1).

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[2] Leech argued during the hearing, and again in its brief, that Mr. Sturm is not qualified to testify as an expert in the field of hydrogeology (T. 132-133). The primary basis for Leech's argument is that Mr. Sturm's undergraduate degree is in petroleum geology, not hydrogeology. (Id.) However, DER brought out that Mr. Sturm has been employed by the Bureau of Water Quality Management since February of 1986, and that he has participated in roughly 200 groundwater investigations since that time (T. 129-130). In addition, he has attended four or five four-day training courses on subjects involving hydrogeology, and five or six one-day courses (T. 130-132). It is clear that Mr. Sturm, based upon his experience and training, has a reasonable pretension to specialized knowledge of hydrogeology; therefore, arguments regarding his qualifications must go the weight, not the admissibility, of his testimony. See, 15 Pa. Law Encyclopedia, Evidence §402, Rukavina v. Commonwealth, 56 Pa. Commw. 435, 425 A.2d 472 (1981), Kuisis v. Baldwin-Lima-Hamilton Corp., 457 Pa. 321, 338, 319 A.2d 914, 924 (1974).

[3] Dr. Harrison referred to an earlier, preliminary study he conducted as "Phase I" (T. 50). The report (and attachments) which grew out of this earlier study were introduced as Petitioner's Exhibits 3A-3D (T. 46).

Leech also argues that granting a supersedeas will not endanger the public health or safety, because those residents in the area whose wells have been contaminated by TCE have been supplied with filtering devices by Leech.[4] Finally, Leech argues that, without a supersedeas, both Leech and others are likely to be irreparably injured, because 1) drilling three monitoring wells into the Sharpsville aquifer--from which some residents draw their water--may cause that aquifer to be contaminated by TCE from the more shallow Olean-Shenango aquifer, 2) removing soils from Leech's site before Leech has been able to determine how the soils were contaminated is likely to lead to further contamination, and 3) attempting to clean up groundwater beneath the Leech site and downgradient of the site may not improve water quality and may cause some residential wells to dry up.

DER argues in its brief that the standards for granting a supersedeas have not been met in this case. First, DER contends that Leech has not shown that it will be irreparably harmed by DER's order. Specifically, DER alleges that Leech failed to demonstrate that the studies and clean-up ordered by DER would impair Leech's business operations. Second, DER argues that Leech is not likely to succeed on the merits of its appeal. DER contends that its order requiring studies and clean-up of the pollution is supported by both the facts of this case and the policy favoring elimination of pollution contained in the Clean Streams Law, 35 P.S. §691.1 et seq. DER argues specifically that

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[4] These filtering devices have reduced the level of TCE in the water below five parts per billion, which the Environmental Protection Agency has established as the maximum contaminant level in public drinking water systems. 40 C.F.R. §141.61(a). DER seems to believe that five parts per billion is an appropriate standard in this case (DER's brief, pp. 9-10, footnote 11). Leech, on the other hand, states in its brief that it will contest in this case what levels of TCE constitute "pollution," though it did not present evidence on this point at the supersedeas hearing (Leech brief, pp. 13-14). For the purposes of this opinion, we shall adopt the five parts per billion standard.

wells can be dug into the Sharpsville aquifer without risking cross-contamination from the Olean-Shenango aquifer, that Leech has only been ordered to remove TCE from the soil (not necessarily to remove contaminated soil from the site), and that pumping and aeration of groundwater will not affect residential wells because the water can be reinjected into the aquifer after aeration. Third, DER argues that a supersedeas would harm the public because the present soil and groundwater contamination is likely to spread without clean-up.

In ruling upon a petition for supersedeas, the Board will consider the following factors:

1) irreparable injury to the petitioner,

2) the likelihood of the petitioner's prevailing on the merits, and

3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). In addition, a supersedeas will not be issued in cases where a nuisance or significant pollution, or other hazard to public health, would exist or be threatened while the supersedeas is in effect. 25 Pa. Code §21.78(b). The petitioner bears the burden of demonstrating that the standards for granting a supersedeas have been met. Lower Providence Township v. DER, 1986 EHB 395.

Applying the above standards to this case, the petition for supersedeas must be denied because Leech has not shown that it is likely to succeed on the merits of its appeal.

The merits of this case raise two issues--how to determine the scope

of the contamination problem, and how to remedy it.[5] Leech proposes to monitor existing wells (including both residential wells and wells dug on the Leech site for monitoring purposes), dig one additional monitoring well on-site, and defer decisions on whether (or how) to clean up the contamination until additional information is gathered through monitoring (T. 50-55), (Petitioner's Exhibit 1). Leech claims that its goal in addressing this problem is to protect the groundwater users in the area (T. 56, 60-63, 102). Leech suggests that the installation of filtration systems is adequate protection for the people whose wells have been affected (T. 59-60, Petitioner's brief, p. 7). In addition, Dr. Harrison expressed skepticism about the effectiveness of any attempt to clean-up the groundwater contamination (T. 120-121).

DER's reaction to the TCE contamination reflects a greater sense of urgency than Leech's proposal. DER's monitoring and clean-up requirements are designed to identify promptly the scope of the contamination and to eliminate it at the source by removing the TCE from the groundwater and the soil. DER does not believe installation of filtering devices is an adequate response to the problem; it states in its brief that the necessity of cleaning up the TCE contamination is "unarguable" (DER brief, pp. 3-4).

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[5] It is clear to us that Leech's facility is the source of the TCE contamination. Thomas Leech testified that Leech used a degreaser which contained TCE from 1982 to 1986 (T.8). In addition, Dr. Harrison's initial study found high concentrations of TCE in the soil on the Leech site (T. 75-76). DER bases its argument that Leech caused the contamination upon an admission contained in a letter to DER from Leech's counsel (Dep't Exhibit 1). Leech argued at the hearing, and again in its brief, that this letter was inadmissible because it was an "offer to compromise." We disagree. Even a cursory reading of the letter dispels the notion that the letter was an offer to compromise; the letter reiterates Leech's proposal to address the contamination and declines to adopt DER's plan. Since the letter was not an offer to compromise, it was admissible. See, Rochester Machine Corp. v. Mulach Steel Corp., 498 Pa 545, 449 A.2d 1366 (1982).

Leech did not prove that it is likely to succeed on the merits of its appeal because it did not show that DER abused its discretion by imposing the study and clean-up plan contained in its order. With regard to studying the extent of TCE contamination, we accept Mr. Sturm's testimony that the seven additional monitoring wells ordered by DER are necessary to define the horizontal and vertical extent of the contamination (T. 136-143). Mr. Sturm also testified that Dr. Harrison's plan (the "Phase II" plan described above) is inadequate to define the extent of soil and groundwater contamination (T. 136). Dr. Harrison did not appear to dispute that the additional wells will provide a clearer picture of the extent of soil and groundwater contamination, he simply questioned whether this information would help the owners of the residential wells, presumably because he is skeptical about clean-up efforts (T. 61, 102-103). Dr. Harrison also admitted that the wells DER ordered drilled into the Sharpsville aquifer could be constructed in a manner which would prevent cross-contamination from the more shallow Olean-Shenango aquifer, although he opined that these wells would be "expensive" (T. 104).

With regard to DER's order that Leech submit a plan to clean-up the soil and groundwater contamination, we find Leech's proposal to defer a clean-up until Dr. Harrison completes "Phase II" of his investigation to be inadequate. Dr. Harrison testified that a decision on clean-up should be delayed until enough information is gathered to determine if a clean-up is necessary (T. 120-121). The irony of this argument is that, as stated above, Leech's plan to collect additional data is wholly inadequate to determine the extent of pollution. Leech's desire to delay a decision on clean-up is probably attributable to its skepticism that a clean-up will be effective, and to its apparent belief that installing filters on wells which become affected is an adequate response to the problem. As to whether a clean-up of the

groundwater is feasible, Dr. Harrison did not provide specific facts to support his pessimism about removing the TCE from the groundwater (T. 121, 123).[6] Apparently, his doubts were not based upon his experience at other sites, because he stated that the other cases he has been involved with as a consultant did not get to the point of clean-up (T. 74). As to the suggestion that installing filtering devices on individual wells is a sufficient response to the TCE contamination, we agree with DER that, as a general proposition, it is preferable to remove the source of pollution, rather than merely to mitigate its effects. Leech did not provide sufficient evidence to persuade us that removal of the source of the pollution is not feasible, nor did Leech submit any proof of the cost of clean-up, let alone the effect this cost would have upon Leech's business operation.

In summary, Leech's petition for supersedeas must be denied because Leech did not prove that it is likely to succeed on the merits of its appeal. Leech did not show that DER abused its discretion by imposing the study and clean-up measures contained in DER's order. Since Leech did not show that it is likely to succeed on the merits of its appeal, it is unnecessary for us to consider whether Leech will suffer irreparable injury and whether the public is likely to be injured by a denial of supersedeas.[7] Ralph Bloom, Jr. v. DER, 1984 EHB 685, WABO Coal Co. v. DER, 1986 EHB 71.

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[6] DER also ordered that the contaminated soil be cleaned up. (DER Order, paragraph 5). Leech's argument that DER is requiring it to remove contaminated soil before the source of contamination is known is unpersuasive. Before any clean-up is implemented, Leech must submit and implement a plan to define the extent of soil contamination. In addition, clean-up of the soil does not necessarily entail removal of the soil itself (T. 145).

[7] Although we will not address irreparable injury and injury to the public separately, it is obvious that much of our discussion on the merits of the appeal relates to these other criteria as well. We would have no hesitation in concluding that Leech did not provide sufficient evidence to meet these criteria.

ORDER

AND NOW, this 2nd day of February, 1989, it is ordered that the petition for supersedeas filed by Leech Tool and Die Works, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: February 2, 1989

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COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	EHB Docket No. 88-090-CP-W
	:	
v.	:	
	:	
TEXAS EASTERN GAS PIPELINE COMPANY,	:	
TEXAS EASTERN TRANSMISSION CORPORATION	:	Issued: February 7, 1989

OPINION AND ORDER
SUR
MOTION TO COMPEL

Synopsis

A motion to compel answers to interrogatories and requests for production of documents is granted in part and denied in part. Discovery requests which are relevant and not burdensome must be answered. Pa. R.C.P. No. 4011 places limits on discovery by excluding information which is unreasonably burdensome to produce. This Board will not recognize the deliberative process privilege. A party need not produce information over which it has no possession, custody or control. A party need not research the files of a third party when answering discovery requests.

OPINION

This matter was initiated by the March 16, 1988 filing of a complaint for civil penalties under the Clean Streams Law, the Act of June 22, 1937, P.L. 987, as amended, 35 P.S. §691.1 et seq. (CSL), and a petition for abatement costs 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), by the Department of Environmental Resources (Department) against Texas Eastern Transmission Corporation and its division, Texas Eastern Gas Pipline Company (collectively, Texas Eastern). This action is docketed at 88-090-W. Texas Eastern also filed notices of appeal of the assessment of civil penalties under the SWMA at EHB Docket No. 88-145-W, of the issuance of a groundwater remediation order at EHB Docket No. 88-146-W, and the issuance of a disposal area assessment and remediation order at EHB Docket No. 88-147-W.

Discovery in the four matters has been consolidated at Master Docket No. 88-090-CP-W for pre-hearing purposes pursuant to a case management order issued June 29, 1988.

Many discovery requests and answers have been filed. The motion presently before us for disposition is Texas Eastern's November 17, 1988 motion to compel answers to its first set of interrogatories propounded on May 18, 1988 and to compel the production of documents requested on May 18, 1988.[1] The Department filed its response to this motion on December 7, 1988.

Discovery is available regarding any matter, not privileged, which is relevant to the subject matter of the action. Pa. R.C.P. No. 4003.1. For purposes of discovery, relevance is construed broadly. William Fiore v. DER, EHB Docket No. 86-665-W (Opinion and order issued February 13, 1988) and Envirosafe Services of Pa. v DER, EHB Docket No. 83-101-W (Opinion and order

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[1] While these discovery requests were separately filed and objected to, both parties seem to treat the request for production as part of the interrogatories; in fact, Texas Eastern's motion only mentions the request itself in passing. Our opinion will discuss only two requests, No. 4 and 5, to which the Department has specifically objected. If Texas Eastern finds it necessary to obtain a further ruling, it may make the appropriate motions.

issued October 31, 1988).[2] Regardless of relevance, Rule 4011 places limitations on discovery, including that which "would cause unreasonable annoyance, embarrassment, oppression, burden or expense..."or that which "would require the making of an unreasonable investigation..." Pa. R.C.P. No. 4011(b) and (e).

For convenience, we will address the interrogatories in groups, as presented in Texas Eastern's motion to compel.

Interrogatories 21(f), 21(g), 22(b) and 23 at Docket No. 88-146-W and Interrogatory 21 at Docket No. 88-147-W seek, inter alia, information concerning other situations where a party allegedly violated certain sections of the CSL or SWMA and cases in which the Department ordered similar clean-up levels and whether the party complied with the order.[3]

Interrogatory 25(c) at EHB Docket No. 88-146-W and Interrogatories 30(f) and 48(a) at EHB Docket No. 88-147-W request the Department to identify other cases where it required similar characterization of a site.[4]

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[2] We are mindful of a case which the Department cites, Alan Wood v. DER, 1975 EHB 452, for the proposition that information concerning other actions is irrelevant to the present action; however, we feel the approach taken in Magnum, infra, and Tenth Street Building, infra, is more appropriate here. Since discovery is so broadly defined, we will err on the side of too many, rather than too few, discovery opportunities.

[3] The Department ordered Texas Eastern to clean up contaminants in on-site and off-site groundwater. The order stated, "The clean-up plan shall be designed to clean up all contaminants to the cancer risk level of 10 to the negative 6 risk for all contaminants for which such levels are known. For all other contaminants the clean-up shall be designed to clean up all contaminants to background levels." See order at EHB Docket No. 88-146-W.

[4] "Characterization means site sampling and assessment." See the Department's Memorandum in Support of its Response, p. 15. However, the Department's response states at page 14 that "Characterization does not necessarily mean soil sampling exclusively. There are several ways a site can be characterized."

Interrogatories 22(c), 24(a) and 24(d) at EHB Docket No. 88-146-W seek information concerning the clean-up levels imposed, including the identification of other cases where the Department imposed a 10^{-6} cancer risk level for all contaminants for which such levels are known and required clean-up to background levels for other contaminants.

Interrogatories 14(c), 16(c), 18(c), 19(c), 22(c), 24(c), 26(c) and 27(c) at EHB Docket No. 88-090-W; Interrogatories 6(c), 20(c), 21(b), 22(c), 23(b), 23(c), 23(d), 24(c), 25(b), 25(c), 26(c), 30(c), 31(b), and 53(a) at EHB Docket No. 88-145 W; Interrogatories 8(b), 8(c), 17(c), 18(c), 18(d), 19(b), 20(b), 20(c) and 20(d) at EHB Docket No. 88-146-W; and Interrogatories 8(b), 8(c), 17(c), 18(b), 19(b), 19(c), 20(b), 20(c), 25(e) and 26(c) at EHB Docket No. 88-147-W seek, inter alia, information concerning other cases where the Department imposed penalties for similar violations of the CSL and SWMA and how these penalties were determined.

The Department objected to most of these interrogatories[5] on June 20, 1988, stating that the interrogatories request information which is irrelevant, not reasonably calculated to lead to admissible evidence, overbroad, oppressive, and unreasonably burdensome and which would require an unreasonable investigation. Despite its objections, the Department answered most of these interrogatories by stating that it had not reviewed its files in response to the interrogatories but would provide certain files for Texas Eastern's review as agreed in a July 12, 1988 letter, from the Department to

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[5] No objection was lodged against Interrogatory 19(c) at EHB Docket No. 88-090-W; Interrogatories 6(c) and 22(c) at EHB Docket No. 88-145-W; and Interrogatories 22(b) and 24(a) at EHB Docket No. 88-146-W.

Texas Eastern.[6]

Texas Eastern claims these interrogatories are relevant and necessary to show the reasonableness of the clean-up levels imposed and cites other cases where different levels were imposed. It seeks this information to prove that the Department had no technical or scientific basis for requiring those particular clean-up levels in order to show the unreasonable nature of the clean-up levels, arguing this information is relevant because the reasonableness of the order affects Texas Eastern's willingness to cooperate, a factor the Department considers in assessing penalties.[7] Additionally, Texas Eastern claims that the 10^{-6} cancer risk level is arbitrary and capricious, as well as premature, since the full extent of contamination is unknown. Texas Eastern also offers to draft a short questionnaire to be answered by Department personnel in order to obviate the file-by-file review which the Department argues would be necessary to answer these

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[6] That letter was not originally submitted to the Board. The Department, after an oral request by the Board, subsequently provided the Board with a copy of that letter. The letter explained that the Department's files were not centralized but that the Department agreed to make a search to determine the location and format for the various documents and records requested. We note that Texas Eastern argues Alan Wood v. DER, supra, states the Department should at least indicate who in the Department has custody of the information sought. The Department did agree to determine the location of some of the information. We will not require more of the Department, as we feel that would be unreasonably burdensome.

[7] Texas Eastern claims that the past actions of the Department are relevant to determine the reasonableness of this action. This is important, Texas Eastern claims, because the Department takes cooperation into consideration when assessing a civil penalty and Texas Eastern's cooperation is affected by the reasonableness of the Department's action. However, Texas Eastern cannot claim to have been uncooperative as a result of the Department's action before the Department took that action. Thus, the reasonableness of the Department's action could not have logically influenced Texas Eastern's behavior prior to the assessment. However, we have found the information requested relevant on other grounds.

interrogatories. Furthermore, Texas Eastern claims the Department had recognized the relevancy of the information requested when it sought to intervene in litigation between Texas Eastern and EPA (Docket No. H-88-1917 (S.D. Texas)) and requested discovery on these matters.

The Department's response to the motion to compel argues that discovery into the basis for the clean-up levels should not be permitted, since the clean-up levels were not unreasonable even if no scientific based standard had been established by the Department. It distinguished the other situations cited by Texas Eastern where different clean-up levels were imposed, distinguished its request in the Texas Eastern-EPA litigation from Texas Eastern's present requests, and argued its groundwater clean-up level was not imposed prematurely, since the desired clean-up level will remain a constant, regardless of the extent of groundwater contamination. The Department also rejects Texas Eastern's offer to draft and circulate a questionnaire, arguing this amounts to propounding the same interrogatories in a different fashion. Moreover, the Department refutes Texas Eastern's representations that the Department would allow Texas Eastern to conduct a blind file-by-file review because the Department would first have to review each file for any confidential, privileged or non-discoverable information. Additionally, the Department argues that since Texas Eastern did not allege unlawful discrimination, discovery into past actions should not be allowed.

The information requested in the above-mentioned interrogatories is quite broad, covering a large time period. While the information may be relevant to Texas Eastern's claim that the clean-up levels imposed are arbitrary or otherwise unreasonbable or inconsistent with past practice, requiring the Department to search every file is burdensome. The question we must determine is whether it is unreasonably burdensome. Commonwealth of Pa., Game

Commission v. DER, 1983 EHB 355. We feel that it is. In other cases this Board has ordered the Department to answer discovery requests with that information readily at hand without further obligation to conduct file searches. See Magnum Minerals v. DER, 1983 EHB 310; Tenth Street Building Corporation v. DER, 1983 EHB 151; and County of Westmoreland v. DER, 1987 EHB 633. We believe such an approach is appropriate here.

Therefore, the Department is ordered to fully answer the following interrogatories, to the extent it has not already done so, with all information it has readily available, with no obligation to conduct further investigation: Interrogatories 14(c), 16(c), 18(c), 22(c), 26(c), and 27(c) at EHB Docket No. 88-090-W; Interrogatories 20(c), 21(b) 23(b), 23(c), 23(d) 24(c), 25(b), 25(c), 26(c), 30(c), 31(b), and 53(a) at EHB Docket No. 88-145-W; Interrogatories 8(b), 8(c), 17(c), 18(c), 18(d), 19(b), 20(b), 20(c), 20(d), 21(f), 21(g), 23, and 25(c) at EHB Docket No. 88-146-W; and Interrogatories 8(b), 8(c), 17(c), 18(b), 19(b), 19(c), 20(b), 20(c), 25(e), 26(c), 30(f) and 48(a) at EHB Docket No. 88-147-W.[8]

With regard to Interrogatories 19(c)[9] at EHB Docket No. 88-090 and Interrogatories 6(c) and 22(c) at EHB Docket No. 88-145-W, Texas Eastern's motion is denied. The Department has fully answered those interrogatories and no further response is required.

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[8] We are aware of the Department's argument that even summary discovery would require it to perform a thorough file search in order to present an accurate picture. However, we feel the production of information already available is appropriate. If the Department feels it must conduct further investigation, it is free to do so, but any information gathered from that investigation must be made available for Texas Eastern since that production would no longer be unreasonably burdensome.

[9] This interrogatory was answered by reference to documents submitted to EPA by Texas Eastern. The Department is under no obligation to produce records under the control of third parties. See discussion, infra.

With regard to Interrogatory 24(c) at EHB Docket No. 88-090-W, Texas Eastern failed to include this interrogatory or answer thereto in Exhibit A of its motion. Therefore, the Board is unable to rule on the motion to compel as it relates to this interrogatory. Texas Eastern is free to renew its motion as to this interrogatory.

Interrogatory 22(b) at EHB Docket No. 88-146-W asks the Department to state the basis for the background level clean-up requirement for soil contaminants. Interrogatory 24(a) at EHB Docket No. 88-146-W asks the Department to state the documents consulted before imposing the 10^{-6} cancer risk level.

The Department responded that these were policy decisions. As for Interrogatory 22(b), we order the Department to state the basis on which the policy was decided, including any documents upon which it relied. If no basis exists, the Department should so state. As for Interrogatory 24(a), we also believe this answer is inadequate; however, the answer to Interrogatory 24(c) at the same docket number, stating that the Department did not consult any specific documents other than sampling results prior to setting the 10^{-6} cancer risk clean-up level, does partially answer this question. The Department is ordered to identify and produce the sampling reports consulted prior to setting that clean-up level.

Interrogatory 24(f) at EHB Docket No. 88-146-W seeks documents relating to the basis for the 10^{-6} cancer risk clean-up level requirement. The Department identified two such documents, a Proposed Cancer Risk Management Policy and a Groundwater Management Proposal; however, it refused to produce them, asserting a deliberative process privilege.

Texas Eastern argues that the Board does not recognize such a privilege, and while the Department admits that, in the past, the Board has not

acknowledged this privilege, it requests the Board recognize it now.[10] Furthermore, the Department claims it did not rely on these documents in answering Interrogatory 24(f) but noted their existence, since they related to the general subject of the risk management policy in the Department.

Even if the Department did not rely on these documents, we cannot say they are irrelevant to the subject matter of the pending action. H.L. Kennedy v. DER, 1979 EHB 291, especially since relevancy is broadly construed for purposes of discovery. Relevant information is discoverable unless limited by, inter alia, a privilege. Since the Board does not recognize the deliberative process privilege, Kocher Coal v. DER, 1986 EHB 945, we cannot hold these documents privileged.[11] Neither do we find the request objectionable in other ways. The request is for two distinct identifiable documents which will cause no undue burden or unreasonable investigation to produce. The Department is ordered to produce its Proposed Cancer Risk Management Policy and Groundwater Management Proposal.

Interrogatory 49 at EHB Docket No. 88-090-W and Interrogatory 22(a) at EHB Docket No. 88-147-W seek information concerning other Commonwealth agencies which regulate or monitor the Texas Eastern gas pipeline system in Pennsylvania. Interrogatory 50 at EHB Docket No. 88-090-W and Interrogatory 56 at EHB Docket No. 88-145-W ask whether any inspections conducted by the

---

[10] The Department cites Steele v. Department of Environmental Resources, __Pa. Commonwealth __, 548 A. 2d 1337 (1988), for this proposition. The Commonwealth Court did not address any of the privilege claims raised by the Department.

[11] The Department submitted a copy of an opinionless order in U.S. v. Atlas Powder Co., No. 86-6984 (E.D., Pa.), which allegedly upholds the Commonwealth's assertion of a deliberative process privilege. We decline to rely on this order as precedent.

Department or by other agencies of the Commonwealth at the Pennsylvania site resulted in any citations, fines, violations or warnings. Interrogatory 52(b) at EHB Docket No. 88-146-W asks for documents relating to the Department's visits, inspections or investigations of other gas transmission or gas pipeline companies operating in Pennsylvania for contaminated groundwater.

The Department objected to these interrogatories, asserting that they sought information which was irrelevant, not reasonably calculated to lead to admissible evidence, overbroad, oppressive, unreasonably burdensome and requires an unreasonable investigation, and that it sought information about and from third parties.

Interrogatories 48 and 51 at EHB Docket No. 88-090-W were included in Texas Eastern's motion to compel, but not included in Exhibit A to that motion; therefore, we cannot rule on these interrogatories. Interrogatory 50 was answered by reference to the response to Interrogatory 42, which was not provided in Exhibit A; therefore, we cannot rule on this interrogatory. Again, if Texas Eastern wishes a ruling on its motion to compel responses to these interrogatories, it may renew its motion, including with it, a copy of the interrogatories and answers thereto.

With regard to Interrogatories 49 at EHB Docket No. 88-090-W and 22(a) at EHB Docket No. 88-147-W, Texas Eastern argues the information requested is crucial to its defense to show that its operation and maintenance activities were known to various Commonwealth agencies, including the Department, thus disputing the Department's claims that Texas Eastern never gave the Commonwealth notice of its activities at those sites and asks that we compel responses. Alternately, Texas Eastern requests the Board to issue subpoenas to the agencies which have the information.

The Department argues that it has no obligation to provide information from other state agencies and claims it should only be required to produce the records it has in its possession, citing U.S. Steel Corporation v. DER, 1978 EHB 316. We agree. The Department's argument that Texas Eastern has records from 1975 of all other agency visits does not relieve the Department of its obligation to comply with this request; however, the Department is not responsible for searching the files of other Commonwealth agencies and is ordered to produce information to the extent that information is in its possession, custody or control. See Pa. R.C.P. No. 4009(a)(1). At this time we will not issue subpoenas. If Texas Eastern wishes to obtain subpoenas, it must make a separate request to the Board, identifying which agencies are to be subpoenaed, and what documents are sought.

Interrogatory 56 must be answered to the extent that it requests information about the Department's inspections resulting in citations, fines, violations or warnings, but not with respect to other agencies' inspections. We feel that Interrogatory 56 was properly answered by the Department and will not compel further response. Likewise, we will not compel further response to Interrogatory 52(b) at EHB Docket No. 88-146-W, since the Department agreed to make the individual documents requested available for review at the regional offices.

Interrogatory 54 at EHB Docket No. 88-090-W, and Interrogatory 57(c) at EHB Docket No. 88-145-W request information about the use of PCB's or PCB spills by or at any facilities of the Commonwealth. Interrogatory 47(a) at EHB Docket No. 88-146-W seeks information concerning all cases since 1950 where a Commonwealth owned, operated, or leased facility has become contaminated with any substance covered by the CSL or the SWMA.

Interrogatory 50 at EHB Docket No. 88-146-W and Interrogatory 22 at EHB Docket No. 88-147-W ask for the identification of all other Commonwealth agencies which have the responsibility for regulating or monitoring the operations and/or cleanup of Texas Eastern's Pennsylvania site.

Texas Eastern seeks this information to determine whether similar omissions by Commonwealth officials were deemed to be willful violations by the Department and claims the information is relevant to the reasonableness of the Department's claim that Texas Eastern's failure to notify the Department of its activities contributed to the harm to the environment.

The Department objected to Interrogatory 54 at EHB Docket No. 88-090-W, Interrogatory 57(c) at EHB Docket No. 88-145-W, and Interrogatory 47(a) at EHB Docket No. 88-146-W, stating the information requested is irrelevant, not reasonably calculated to lead to admissible evidence, overbroad, oppressive, burdensome and requires an unreasonable investigation. It objected to Interrogatory 50 at EHB Docket No. 88-146-W and Interrogatory 22 at EHB Docket No. 88-147-W, stating they seek information from third parties.

However, the Department did state it would provide information gathered in a limited oral search in response to Interrogatory 57(c) at EHB Docket No. 88-145-W and Interrogatory 47(a) at EHB Docket No. 88-146-W for review at its Harrisburg regional office. We find Interrogatory 54 at EHB Docket No. 88-090-W and Interrogatory 57(c) at EHB 88-145-W, specific and relevant and, therefore, will compel discovery.

Interrogatory 47(a) is unreasonable. We will, therefore, sustain the Department's objection and will not compel any further response.

We will not compel Department responses to Interrogatory 50 at EHB Docket No. 88-146-W or Interrogatory 22 at EHB Docket No. 88-147-W because it is not

the Department's responsibility to inform Texas Eastern about the activities of other agencies.

Interrogatory 52 at EHB Docket No. 88-090-W seeks information concerning the Department's inspections of other gas pipeline companies in Pennsylvania prior to 1987 and Interrogatory 53 at EHB Docket No. 88-090-W seeks the identification of each gas transmission or gas pipeline company currently operating in Pennsylvania.

Texas Eastern wants this information to show that when the Department did obtain actual notice of operation and maintenance activities which harmed the environment, it did not take any enforcement action. The Department again objects that the information sought is irrelevant, not reasonably calculated to lead to admissible evidence, overbroad, oppressive, unreasonable burdensome to produce, and requires an unreasonable investigation.

Notwithstanding these objections, the Department claims it provided documents in the possession of the division responsible for gas transmission pipeline cases. It claims other information is at either the central or regional offices and would be burdensome to produce.

Texas Eastern argues that the Department's answers are not sufficient because it did not produce documents received directly from other gas transmission companies; however, Texas Eastern did not specifically request such documents. From a review of the interrogatories and answers thereto, provided by Texas Eastern in Exhibit A to its motion, we believe the Department fulfilled its obligation to respond. If Texas Eastern wants more information, it should propound more specific interrogatories.

As we mentioned earlier, Texas Eastern's Request for Production has been treated as part of its interrogatories for purposes of this motion. However,

Requests 4 and 5 were separately objected to by the Department, and we will discuss them briefly at this time.[12]

Request 4 requests the production of "All newspaper articles which relate to the assessment and Remediation Order and the Pennsylvania sites." The Department objected to it, asserting general objections as to relevency admissibility, burdensomeness, etc., but also arguing that the articles are in the public domain and, thus, generally available to Texas Eastern. We agree. These newspaper articles are not under the Department's control, and Texas Eastern can obtain the newspaper articles as easily as the Department.

Request 5 asks for production of "All press releases or documents prepared by DER or any agency of the Commonwealth which relate to Texas Eastern or the Assessment and Remediation Order." The Department again asserted general objections as to relevancy, admissibility, burdensomeness, etc. and more specifically observed that the requests seek information from third parties beyond the control of the Department.

We agree in part. To the extent this request involves press releases or documents prepared by an agency of the Commonwealth other than the Department, the motion to compel is denied. The Department must provide any press releases it has prepared that relate to Texas Eastern or the assessment and remediation order. However, the request for "documents" is too broad, as it fails to define "documents."

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[12] Requests 4 and 5 are the same in each request filed under EHB Docket Nos. 88-090-W, 88-145-W, 88-146-W and 88-147-W, as are the objections filed by the Department to those requests.

ORDER

AND NOW, this 7th day of February, 1989, it is ordered that Texas Eastern's motion to compel discovery is granted in part and denied in part. On or before February 28, 1989, the Department shall respond to Texas Eastern's interrogatories in a manner consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: February 7, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

ACF INDUSTRIES, INC.	:	
	:	
v.	:	EHB Docket No. 87-188-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 8, 1989

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

Synopsis

Cross-motions for summary judgment are denied where material facts are either at issue or not established.

OPINION

This matter was initiated by the May 15, 1987 filing of a notice of appeal by ACF Industries, Inc. (ACF) seeking review of the Department of Environmental Resources' (Department) April 10, 1987 issuance of Air Quality Permit No. 49-318-024 for the operation of ACF's railroad car painting facility in Milton, Northumberland County. The permit, which was issued by the 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.*, classified ACF's facility as a "new source," as defined in 25 Pa.Code §121.1.[1] In 1986, ACF modified its facility which now houses the coating line, an operation which paints and coats railroad cars, in order to bring all emissions from its operations into

[1] ACF mistakenly cites 25 Pa.Code §121.4 in its appeal and arguments. We will assume that it is referring to the definition of "new source" in 25 Pa.Code §121.1.

compliance with applicable regulations.[2] The Department's determination that the facility was a new source, rather than a modified source, subjected ACF to more stringent requirements and, hence, this appeal.[3]

On May 27, 1988, ACF moved for summary judgment, and on June 27, 1988, the Department filed a cross-motion for summary judgment. Both parties maintain that summary judgment is appropriate and that determination of this motion depends on the interpretation of the definition of new source in 25 Pa.Code §121.1; however, both parties advance a different interpretation. ACF argues, and we must agree, that the definition of "new source" depends on the interpretation of "new components" and "to construct."

25 Pa.Code §121.1 defines "new source" as

> A stationary air source which:
>
> (i) was constructed and commenced operation on or after July 1, 1972.
>
> (ii) was modified, irrespective of a change in the amount or kind of air contaminants emitted, so that the fixed capital cost of new components exceeds 50% of the fixed capital cost that would be required to construct a comparable entirely new source; fixed capital

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[2] ACF manufactures railroad cars. One aspect of this involves spray painting the exterior and applying liner coatings to the interior of the center flows. Before this is done the surface metal must undergo a cleaning process which is done by the shot and grit blasting method. Prior to 1986, the exterior coatings and their primers were ambient air dried. The liners were dried and cured using forced warm air. After the modification in 1986, the entire coating line was brought indoors and the whole facility had to be altered so that each coating was dried with forced warm air.

[3] The Department states in its answer and cross-motion for summary judgment that this is the only unresolved issue on review. ACF devotes its entire brief to this issue as well. We will, therefore, contain our discussion to this issue.

costs means the capital needed to provide the depreciable components.

(emphasis added)[4]

ACF would then have the cost comparison include the structure housing the coating systems but exclude the actual equipment used in the coating process, unless that equipment was considered necessary to the modification. ACF wants the cost of equipment excluded from the comparison and argues that costs of equipment are variable, since equipment is a matter of choice, and, therefore, any comparison would be distorted. On the other hand, the Department claims it was correct to include the cost of new equipment installed in the modified facility in the comparison equation; however, it maintains that the cost of the building should be excluded.

Both parties rely on Internal Revenue Service (IRS) regulations and U.S. Environmental Protection Agency (EPA) guidelines to support their respective interpretations.[5] We do not feel these arguments based on EPA and IRS guidelines and/or regulations merit further discussion.[6] While the Department may legitimately look to EPA's interpretation of analogous federal

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[4] The parties are bringing these motions based on the second part of the definition. Neither party disputes that ACF began operation before July 1, 1972.

[5] The Department cites to EPA guidelines incorporating IRS regulations at 36 FR 19132, 19133, which determine which part of a facility is a pollution control facility for tax purposes and asserts that both the Department and the federal government rely on the IRS regulatory interpretations to determine whether or not the building structure is an air control device for purposes of the definition of new source (how the federal government uses this is unclear since "new source" is defined differently in the applicable federal regulations).

[6] While the EPA guidelines do incorporate IRS regulations, stating, "...most questions as to whether a facility is a 'building,' and, if so, whether it is 'exclusively' devoted to pollution control are resolved by §1.169-2(b)(2) of the Treasury Department regulation," 36 FR 19133, we are not faced with determining whether the coating system facility is a building, but rather with what of the facility or a comparable new facility should be included as part of the cost comparison, i.e., whether the facility itself is a pollution control device.

regulations in interpreting its own regulations, the Department fails to discuss the one interpretation which bears directly on the definition of "new source" as it relates to this appeal, to wit, EPA's definition of "reconstruction." EPA has defined "reconstruction" at 40 CFR §60.15 in terms of the same comparison as used in the definition of "new source" at 25 Pa.Code §121.1. 40 FR 58417 contains a discussion of the definition of reconstruction. In describing the term "fixed capital cost," it states

> The term "fixed capital cost" is defined as the capital needed to provide all the depreciable components and is intended to include such things as the costs of engineering, purchase, and installation of major process equipment, contractors' fees, instrumentation, auxillary facilities, buildings, and structures. Costs associated with the purchase and installation of air pollution control equipment (e.g., baghouses, electrostatis precipitators, scrubbers, etc.) are not considered in estimating the fixed capital cost of a comparable entirely new facility unless that control equipment is required as part of the process (e.g., product recovery).
>
> (emphasis added)

As the above language shows, the costs of components in the modified facility include buildings and that equipment which is considered major process equipment. Costs of constructing a comparable, entirely new facility do not include the costs of air pollution control equipment, unless that equipment is mandated by the new process.

Summary judgment is appropriate when "the pleadings, depositions, answers on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. No. 1035(b).

We cannot grant either party's motion for summary judgment because there are questions of fact outstanding, such as whether or not the equipment

was mandated by the new process and whether the equipment is considered major process equipment, as well as the question of whether the building itself is part of the process equipment, an argument advanced by ACF.[7] Given these questions of fact, we cannot dispose of this case summarily.

Because there are remaining issues of fact to be determined, and these cross-motions have been denied on that ground, we will not address additional arguments advanced by either party.

O R D E R

AND NOW, this 8th day of February, 1989, it is hereby ordered that:

1) ACF's motion for summary judgment is denied; and

2) The Department's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: February 8, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kimberly K. Smith, Esq.
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For Appellant:
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[7] We also note that some of the factual and legal arguments made appear only in the memorandua attached to the motions. Facts stated only in briefs will not be considered in a motion for summary judgment. Standard Pa. Practice 2nd 32:50. However, since we believe summary judgment is inappropriate in any event, we have set forth relevant arguments which are contained in motions and the memorandum in support of its motion.

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 87-458-W
MARILENO CORPORATION and CUYAHOGA WRECKING CORPORATION	:	Issued: February 9, 1989

DEFAULT ADJUDICATION

Synopsis

The Board will issue a partial default adjudication where defendants fail to respond to a complaint for civil penalties. That default adjudication will be partial because a separate hearing is necessary to determine the proper amount of the penalty. The automatic stay provisions of the Bankruptcy Code do not bar the Board from merely establishing the amount of a civil penalty.

INTRODUCTION

This matter was initiated by the filing of a complaint for civil penalties pursuant to §605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 (Clean Streams Law) by the Department of Environmental Resources (Department) on October 27, 1987. The complaint alleged that Marileno Corporation and Cuyahoga Wrecking Corporation (collectively referred to hereinafter as "Defendants"), through their ownership, operation, maintenance, and control of the Crawford Power Station in Middletown,

Dauphin County, allowed the unpermitted discharge of industrial waste oil from power transformers into the Susquehanna River in violation of various sections of the Clean Streams Law. A standard Notice to Defend, as required by Rules 21.32(b), 21.56(b), 21.64(b) and 21.65(b) of the Board's rules of practice and procedure and Pa. R.C.P. No. 1018.1(b), was attached to the complaint.

On December 2, 1987, the Department received a letter from counsel for the Defendants stating that the Defendants declined to defend the complaint because they were in bankruptcy, and therefore, were protected by the automatic stay provisions of the Bankruptcy Reform Act of 1978, 11 U.S.C. §362(a) (Bankruptcy Code).

On February 16, 1988, the Department filed a motion for default adjudication on the grounds that the Defendants had failed to answer the complaint within 20 days as prescribed by 25 Pa. Code §21.66(a).

The Defendants filed no response to the Department's motion.

As a result of pleadings filed in this proceeding and on the basis of the reasoning that follows, the Board is issuing a partial default adjudication in this matter. We make the following findings of fact, taken from the Department's complaint, as part of our default adjudication. The only remaining issue for determination is the amount of the civil penalty to be assessed.

Findings of Fact

1. The Plaintiff is the Commonwealth of Pennsylvania, Department of Environmental Resources (the "Department"), which brings this action pursuant to Section 605 of the Clean Streams Law.

2. The Defendant Marileno Corporation ("Marileno") is a Delaware corporation doing business in Pennsylvania, with its principal place of business at 310 East Shore Road, Suite 206, Great Neck, New York 11023.

3. The Defendant Cuyahoga Wrecking Corporation ("Cuyahoga") is a Florida corporation doing business in Pennsylvania, with its principal place of business at 310 East Shore Road, Suite 206, Greak Neck, New York 11023.

4. Marileno owns, operates, and otherwise exercises control over property known as the Crawford Power Station in Middletown Borough, Dauphin County.

5. Cuyahoga operates, maintains, and otherwise exercises control over the Crawford Power Station.

6. On or about October 12, 1985, the Defendants caused or allowed the unpermitted and unauthorized discharge of approximately 4,000 gallons of oil, an industrial waste, from power transformers at the Crawford Power Station into a raceway, and thence to the Susquehanna River, which constitute waters of the Commonwealth.

7. The Department expended considerable time and material in an effort to contain the spill. Among other things, booms were placed in the raceway. The Environmental Protection Agency and the U. S. Coast Guard also participated in the cleanup.

8. The Department notified the Defendants of the spill on October 15, 1985, and directed them to take all measures necessary to contain and clean up the spill.

9. The Defendants intentionally and willfully failed or refused to comply with the Department's directive to clean up the spill; the Defendants failed to take those measures that were necessary to contain and clean up their spill.

10. The Defendants failed to take all necessary measures at the Crawford Power Station to prevent the spill from occurring in the first place.

DISCUSSION

The Board's authority to issue a default adjudication is found in various sections of its rules of practice and procedure. Rule 21.64(d), relating to pleadings, provides that:

> Any party failing to respond to a complaint, new matter, petition or motion shall be deemed in default and at the Board's discretion sanctions may be imposed in accordance with §21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such pleading or motion as admitted.

Rule 21.66(c) applies specifically to civil penalty complaints and states:

> Any defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts stated in the complaint for civil penalties may be deemed admitted. Further, the Board may impose sanctions for failure to file an answer in accordance with §21.124 (relating to sanctions).

Finally, Rule 21.124 outlines the Board's ability to impose sanctions as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the Board for repeated or flagrant violation of orders, or such other sanctions as are permitted in similar situations by the Pennsylvania Rules of Civil Procedure for practice before the Court of Common Pleas.
>
> (emphasis added)

Because Pa. R.C.P. No. 1037 allows a court to enter a default judgment where a party fails to answer a complaint within the required time, the Board has the authority under 25 Pa. Code §21.124 to issue a default adjudication where a defendant fails to respond to a complaint for civil penalties. DER v. Canada, PA, Ltd., 1987 EHB 177.

Defendants informed the Department of their opinion that this action was barred by the Bankruptcy Code's automatic stay provisions. We hold otherwise.

The pertinent provisions of 11 U.S.C. §362 state:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of--
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate;
>
> * * * * *
>
> (b) The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay--
>
> * * * * *
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> * * * * *

While the filing of a bankruptcy petition generally operates as an automatic stay of pending actions and the commencement of new actions, this provision

has been held not to apply to actions to enforce a state's police and regulatory powers. 11 U.S.C. §362(b)(4); Penn-Terra Ltd. v. DER, 733 F.2d 627 (3rd Cir. 1984); Southwest Pennsylvania Natural Resources, Inc. v. DER, 1982 EHB 48.

In the Penn-Terra case, the Department brought an equity action in Commonwealth Court seeking a preliminary injunction against Penn Terra to correct various violations of state environmental statutes, including the Clean Streams Law. Commonwealth Court granted injunctive relief to the Department. Penn Terra then filed a petition for contempt in the Bankruptcy Court against the Department for proceeding with the Commonwealth Court action in spite of the automatic stay provision. The Third Circuit held that the Department's enforcement and injunction actions fall squarely within Pennsylvania's police and regulatory power and were exempted from the automatic stay provisions of the Bankruptcy Code. Penn Terra at 274.

A recent decision directly on point was handed down by the United States Court of Appeals for the Sixth Circuit in In Re Commerce Oil Co., 847 F.2d 291 (6th Cir., 1988). In the Commerce Oil case, Tennessee's Commissioner of Health and Environment issued a complaint assessing damages and civil penalties against Commerce Oil for illegal discharges into state waters. Commerce Oil contended it was protected by the stay provisions of 11 U.S.C. §362(a) and threatened contempt proceedings in the Bankruptcy Court if the state did not cease its administrative proceedings. The state then filed an action with the Bankruptcy Court asking for a determination of whether the police power exception to the automatic stay found in 11 U.S.C. §362(b)(4) applied to the state's proceedings to fix liability for civil penalties and damages. The Court of Appeals looked to the statute and, finding it to be primarily remedial in nature, determined the state's action to be exempted

from the stay provisions of the Bankruptcy Code under both the pecuniary purpose and public policy tests.

Similarly, here, the October 27, 1987 civil penalty complaint filed by the Department seeks to enforce compliance with the Clean Streams Law, also an act primarily remedial in nature. Containing an oil spill and assessing damages for the failure to prevent or contain that spill clearly involve a matter of public safety and welfare and have not been undertaken for primarily pecuniary purposes. Furthermore, we believe that the filing of a civil penalties complaint is an attempt to fix damages for violations of a police power statute and not an attempt to collect a money judgment. We conclude this action seeks to enforce the Commonwealth's police and regulatory power and is, therefore, exempted from the automatic stay provisions.

In imposing civil penalties under the Clean Streams Law, we must consider wilfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, the cost of restoration, and other relevant factors. We will enter a partial default adjudication because we cannot compute the amount of penalties to be imposed on the basis of our findings here. A separate hearing will be scheduled to determine the amount of penalties.

CONCLUSIONS OF LAW

1. The Board has the authority, pursuant to Rules 21.64(d), 21.66(c), and 21.124 of its rules of practice and procedure and Pa. R.C.P. No. 1037, to enter a default adjudication.

2. All relevant facts in a complaint for civil penalties are deemed admitted where defendants fail to answer a complaint filed in conformity with Rules 21.56 and 21.57 of the Board's rules of practice and procedure.

3. The imposition of the sanction of a default adjudication is appropriate where a defendant in a civil penalties action states that it has no intention of defending against the complaint for civil penalties.

4. The automatic stay provisions of the Bankruptcy Reform Act, 11 U.S.C. §362, do not bar the Department from instituting an action before the Board to impose civil penalties under the Clean Streams Law because such an action is primarily remedial in nature.

5. The Susquehanna River is a water of the Commonwealth.

6. Sections 301 and 307 of the Clean Streams Law prohibit the discharge of industrial waste into waters of the Commonwealth unless permitted or otherwise authorized by the Department.

7. Section 401 prohibits the discharge of any substance resulting in pollution.

8. Section 402 of the Clean Streams Law authorizes the Department to regulate activities which are potentially polluting.

9. The Defendants caused or allowed the unpermitted and unauthorized discharge of oil, an industrial waste, from power transformers, into a raceway and thence into the Susquehanna River in violation of §§3, 301, 307, 401 and 402 of the Clean Streams Law.

10. 25 Pa. Code §§101.2 and 101.3 require persons to take all necessary measures to prevent polluting substances from entering the waters of the Commonwealth.

11. Defendants' failure to protect the Susquehanna River from pollution and to remove from the ground and affected waters the residual substances from the spill violated 25 Pa. Code §101.2 and constituted a public nuisance.

12. Defendants' failure to take all necessary measures to prevent polluting substances from reaching the waters of the Commonwealth constituted a violation of 25 Pa. Code §101.3 and constituted a public nuisance.

ORDER

AND NOW, this 9th day of February, 1989, it is ordered that judgment is entered against Marileno Corporation and Cuyahoga Wrecking Corporation for the above violations of the Clean Streams Law and a hearing will be scheduled to determine the amount of the civil penalty to be imposed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: February 9, 1989

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H & H COAL COMPANY :
:
v. : EHB Docket No. 87-446-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: February 10, 1989

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where appellant has failed to file its pre-hearing memorandum and correspondence directed to it is returned as undeliverable.

OPINION

This matter was initiated on October 15, 1987, by the filing of a notice of appeal by H & H Coal Company seeking the Board's review of the Department of Environmental Resources' (Department) September 15, 1987 forfeiture of surety bonds relating to Surface Mining Permit No. 56803061 issued to H & H for its operation in Quemahoning Township, Somerset County. H & H's appeal was consolidated with that of the surety, Fidelity and Deposit Company of Maryland, at Docket No. 87-445-W by Board order dated October 26, 1987.

The parties, particularly Fidelity and Deposit and the Department, have engaged in lengthy discovery. Two subsequent forfeitures by the

Department of Fidelity and Deposit surety bonds posted for other H & H operations were appealed by Fidelity and Deposit at Docket Nos. 88-179-W and 88-180-W and consolidated with this matter on August 24, 1988. Appellants were granted five extensions in which to file their pre-hearing memoranda with the last extension requiring the filing of pre-hearing memoranda on or before November 23, 1988.

H & H did not file its pre-hearing memorandum by the required date. On December 8, 1988, the Board received a motion to withdraw as counsel from H & H's counsel of record, and the Board granted counsel's motion by order dated December 13, 1988. Thereafter, the Board directed all correspondence relating to the matter to H & H at the address indicated in H & H's notice of appeal.

After several pieces of correspondence directed to H & H were returned as undeliverable, the Board attempted to secure a current address for H & H. The Board contacted the Department's Bureau of Mining and Reclamation, H & H's former counsel, and the Department of State's Corporation Bureau. After securing a street address for H & H, the Board directed a default letter dated January 17, 1989, to H & H advising it that it had not filed its pre-hearing memorandum as required by the Board's October 21, 1988 order and warning it that sanctions would be imposed if the memorandum were not filed by January 30, 1989. The Board's letter was returned on January 20, 1989, with the notation "Not deliverable as addressed, unable to forward" on the envelope.

The Board will not devote any more effort to tracking down H & H Coal Company in order to force H & H to prosecute its appeal, as such an effort has been, and will undoubtedly continue to be futile. Although the Department has the burden of proof in this appeal, we believe the sanction of dismissal is appropriate here, as H & H has ignored Board orders and correspondence and has

demonstrated, by its failure to provide the Board with a current address, that it has no intention of prosecuting its appeal.

ORDER

AND, NOW, this 10th day of February, 1989, it is ordered that the appeal of H & H Coal Company is dismissed 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: February 10, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

DUNKARD CREEK COAL, INC.	:	
	:	EHB Docket No. 88-015-W
v.	:	88-046-W
	:	88-047-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 10, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeals of civil penalty assessments under the Surface Mining Conservation and Reclamation Act and the Clean Streams Law will be dismissed when the appellant fails to prepay the assessments or post bonds as required. Neither inability to prepay nor the pendency of appeals of the underlying orders upon which the assessments are based is a defense to the failure to prepay the assessment or post bonds.

OPINION

This matter was initiated by the filing of three notices of appeal by Dunkard Creek Coal, Inc. (Dunkard) seeking review of three civil penalty assessments issued by the Department of Environmental Resources (Department) 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). The three unconsolidated appeals appear at EHB Docket Nos. 88-015-W, 88-046-W, and 88-047-W.

The notice of appeal docketed at EHB Docket No. 88-015-W, filed on January 20, 1988, seeks review of a December 18, 1987 civil penalty assessment issued as a result of Dunkard's alleged failure to comply with a May 28, 1987 order requiring the revegetation of its Althea No. 3 mine in West Wheatfield Township, Indiana County and with a June 8, 1987 compliance order for failure to comply with the May 28, 1987 order.[1] The notice of appeal at EHB Docket No. 88-046-W, filed on February 19, 1988, seeks review of a January 19, 1988 civil penalty assessment issued for Dunkard's alleged failure to comply with a September 11, 1988 order[2] requiring it to regrade and revegetate diversion ditches and to remove a sedimentation pond at the Althea No. 3 mine. The notice of appeal at Docket No. 88-047-W seeks review of January 19, 1988 civil penalty assessment for Dunkard's alleged failure to comply with a September 11, 1987 order[3] requiring the same measures at its Althea No. 2 mine.

On January 22, 1988 the Department filed a motion to dismiss the appeal at EHB Docket No. 88-015-W and on March 3, 1988 it moved to dismiss the appeals at EHB Docket Nos. 88-046-W and 88-047-W. The Department argues that this Board lacks jurisdiction to hear Dunkard's appeals due to Dunkard's

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[1] These compliance orders were separately appealed by Dunkard at Docket Nos. 87-233-W and 87-243-W, respectively.

[2] This compliance order was separately appealed by Dunkard at Docket No. 87-409-W.

[3] This compliance order was separately appealed by Dunkard at Docket No. 87-410-W.

failure to prepay the penalties into an escrow account or post a bond for the assessed amounts, as required by §18.4 of SMCRA, 52 P.S. §1396.22, and §605 (b) of the CSL, 35 P.S. §691.605 (b).

On February 22, 1988 Dunkard filed a response to the Department's January 22, 1988 motion and on March 28, 1988 it filed responses to the March 3, 1988 motions, arguing that it is unable to post bonds or forward the amounts of the penalties and that dismissal of these appeals would foreclose its ability to challenge other related actions taken by the Department. Dunkard further claims that if its appeals are dismissed, it will be deprived of its property without due process of law and will be deprived of its rights to appeal under both the U.S. and Pennsylvania Constitutions. Additionally, Dunkard argues that the prepayment provisions do not apply to situations where the underlying orders which are the basis of the civil penalty assessments are being appealed. A different interpretation, Dunkard claims, would give the Department the ability to have appeals of compliance orders dismissed without a hearing on the merits by simply assessing a large civil penalty which a would-be appellant could not afford to prepay.

The Department argues in its April 1, 1988 memorandum in support of its motions to dismiss at all three dockets that the prepayment provisions of SMCRA and the CSL are constitutional, citing Boyle Land and Fuel v. Com., Env. Hearing Bd., 82 Pa. Cmwlth 452, 475 A.2d 928 (1984), aff'd. 488 A.2d 1109, in which the Commonwealth Court held the prepayment requirement to be a reasonable condition on the right to appeal. The Department also maintains that the fact that Dunkard has appealed the underlying compliance orders does not affect the jurisdictional requirement to prepay the civil penalty assessments.

Dunkard's memorandum in opposition to these motions to dismiss contends that Boyle does not apply to the facts of these cases, since Boyle merely found the prepayment requirement to be constitutional on its face, but failed to discuss whether or not it could be unconstitutionally applied. Dunkard also argues that federal cases upholding the prepayment provision of the Federal Surface Mining Control and Reclamation Act, 30 USCA §1201 et seq., cited in Boyle, establish differences between the federal and state civil penalty assessment procedures sufficient to cast doubt on the constitutionality of the Pennsylvania procedure. And, finally, Dunkard cites Commonwealth v. Barsky & Sons, 476 Pa. 13, 381 A.2d 842 (1978) in which the Pennsylvania Supreme Court required only a nominal bond to be posted in an appeal of a tax assessment under the prepayment provision of 72 P.S. §1104(b), as grounds for urging the Board to adopt a similar interpretation of the prepayment provisions in SMCRA and the CSL.[4]

Section 18.4 of SMCRA states, in pertinent part:

> "When the department proposes to assess a civil penalty, the secretary shall inform the person or municipality within a period of time to be prescribed by rule and regulation of the proposed amount of said penalty. The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty. Failure to forward the money or the appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."
>
> (emphasis added)

Section 605(b) of the CSL contains similar language. The Board has held that the prepayment requirement is jurisdictional and that failure to comply with

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[4] 72 P.S. §1104 (b) has since been repealed.

it is grounds for dismissal. 3 L Coal Co. v. DER, EHB Docket No. 87-321-W (opinion and order issued January 19, 1988); William J. McIntire Coal v. DER, EHB Docket No. 87-433-W (opinion and order issued April 15, 1988).

Notwithstanding arguments Dunkard advances concerning the differences in assessment procedures under the federal and state statutes, the Commonwealth Court, in Boyle, supra., found them sufficiently similar to rely on federal case law upholding the constitutionality of the federal provision as support for ruling the state provisions constitutional. We are bound by the Commonwealth Court's determination.[5]

Even if the facts of these appeals differ from those in Boyle, in that Dunkard cannot afford to comply with the prepayment provisions and its appeals of the underlying compliance orders are still pending, the outcome is the same. This Board has ruled that financial inability to prepay will not waive this jurisdictional requirement. McGal Coal Co. v. DER, 1987 EHB 954, citing Anthracite Processing Inc. v. DER, 1986 EHB 1173. Additionally, the statutory provisions allow the Department to issue compliance orders prior to assessing civil penalties and do not set forth separate procedures for appealing assessments where the appeal of compliance order which gives rise to an assessment is also pending before the Board. Although this issue is one of

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[5] Boyle stated:
"....We are mindful that there are few significant differences between the review procedures of the SMCRA and CSL and the federal Surface Mining Control & Reclamation Act of 1977. Since federal courts have consistently upheld the constitutionality of Section 518(c), 30 USC §1268(c) which requires an escrow deposit of surety bond as a condition for an appeal, we believe that the bond requirement in section 18.4 of the SMCRA and section 605 of the CSL is likewise constitutional."
475 A.2d at 930-931. (footnotes omitted)

We must presume that the Commonwealth Court considered the "significant differences" that did exist in deciding the state assessment procedures to be constitutional in Boyle.

first impression, we do not find anything in the statutory language to suggest that the prepayment requirement can be waived or that the Board may alter the amount of prepayment if the underlying compliance orders on which a civil penalty is based are still pending before the Board. Furthermore, we have no authority to waive jurisdictional pre-requisites, even in situations where a perceived injustice or hardship would be remedied. Thomas Fitzsimmons v. DER, 1986 EHB 1190.

ORDER

AND NOW, this 10th day of February, 1989, it is ordered that the Department of Environmental Resources' motions to dismiss are granted and the appeals of Dunkard Creek Coal Company at EHB Docket Nos. 88-015-W, 88-046-W and 88-047-W are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: February 10, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

ROSWEL COAL COMPANY, INC. :
:
v. : EHB Docket No. 88-053-R
: EHB Docket No. 88-097-R
COMMONWEALTH OF PENNSYLVANIA, : EHB Docket No. 88-132-R
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: February 15, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeals of civil penalty assessments will be dismissed for lack of jurisdiction where the Appellant fails to prepay the assessments or post appeal bonds within the 30 day appeal period. The fact that an appellant is a debtor-in-possession does not relieve it from meeting the jurisdictional prerequisites.

O P I N I O N

These matters were initiated by the filing of notices of appeal by Roswel Coal Company (Roswel) from three separate Department of Environmental Resources (DER) civil penalty assessments. On February 25, 1988, Roswel filed an appeal from a $22,500 civil penalty for alleged failure to comply with a DER order pertaining to its O'Rourke Mine, located in Fairview Township, Butler County; this appeal was docketed at EHB Docket No. 88-053-R. On March 17, 1988, Roswel filed an appeal from a $5,288 civil penalty assessed for

Roswel's alleged violations of the law at its Knapp Run Mine located in South Buffalo Township, Armstrong County; the appeal was docketed at EHB Docket No. 88-097-R. Finally, on April 5, 1988, Roswel appealed a $22,500 civil penalty assessed for its alleged failure to obey a DER order and failure to reclaim pertaining to the Knapp Run Mine; this appeal was docketed at EHB Docket No. 88-132-R. In each of these appeals, Roswel did not prepay the civil penalty assessments or post appeal bonds.

DER has filed motions to dismiss the three Roswel appeals for lack of jurisdiction. DER argues that because Roswel did not prepay the civil penalty assessments or post appeal bonds, it failed to fulfill a jurisdictional prerequisite under both 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). DER notes Roswel's contention, made in its notices of appeal, that this requirement should be waived because it is a Chapter 11 debtor-in-possession in the United States Bankruptcy Court for the Western District of Pennsylvania. DER argues that this is immaterial, since financial inability is no defense to a failure to prepay. Further, DER claims that Roswel's present status is irrelevant, since the Board's role here is not to order a party to pay a civil penalty, but simply to determine whether DER abused its discretion in issuing the assessment. Finally, DER argues that the assessment of a civil penalty is not affected by the automatic stay provision of the Bankruptcy Code.

In its responses, Roswel explained its status as a debtor-in-possession and contended that because its assets were in the constructive possession of the Bankruptcy Court, any distribution of those assets required the approval of the Court. Roswel contends that since it is

very close to having an approved plan of reorganization, after which time it would be able to prepay the civil penalty assessment, the Board should wait until the plan's acceptance by Roswel's creditors to receive the civil penalty prepayment.[1]

The Board has repeatedly held that it has no jurisdiction over cases where an appellant has failed to perfect its appeal by prepaying the proposed penalty or forwarding an appeal bond within the 30 day appeal period. McGal Coal Company v. DER, 1987 EHB 954, citing Raymond Westrick v. DER, 1987 EHB 96 and Thomas Fitzsimmons v. DER, 1986 EHB 1190. Roswel's status as a debtor-in-possession does not shield it from the jurisdictional requirements of SMCRA or CSL. The assessment of a civil penalty is an action arising from the exercise of DER's governmental police powers and is the means to set the amount of damages due to violations of the law. The mere entry of a money judgment, if related to government's police or regulatory powers, is completely unaffected by the automatic stay provisions of a bankruptcy proceeding. Penn Terra Limited v. DER, et al., 733 F.2d 267 (3rd. Cir., 1984). As a a consequence, the Board has no jurisdiction over this matter and the appeal must be dismissed.

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[1] By Roswel's account, there are assets under the constructive possession of, and whose distribution would require the approval of, the Bankruptcy Court. Neither Roswel's notices of appeal nor its responses to DER's motions indicate whether such approval was requested and, if so, whether the request for funds to satisfy the prepayment requirement was denied.

O R D E R

AND NOW, this 15th day of February, 1989, it is ordered that the appeals of Roswel Coal Company, Inc. at Docket Nos. 88-053-R, 88-097-R and 88-132-R are dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 15, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

PENNBANK, et al.	:	
	:	
v.	:	EHB Docket No. 88-281-M
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 15, 1989

OPINION AND ORDER
SUR
MOTIONS FOR SUMMARY JUDGMENT

Synopsis

A secured creditor repossessing and removing production equipment from an oil well does not become an "owner" of the well and responsible for plugging it under the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 et seq. The fact that the secured creditor, after default, has the option to exercise pervasive control over the debtor's assets does not, in and of itself, place the secured creditor in control of the oil well. Such control can come about only when the secured creditor takes affirmative action with respect to the oil well; and, even then, the determination depends on the nature and extent of the action taken. Since the secured creditor did not take any action with respect to the oil wells in this case, the Department of Environmental Resources' (DER) plugging order under the Oil and Gas Act was an abuse of discretion. Similarly, since the secured creditor did not cause the wells to be abandoned and did not own or possess the wells or the land on which they are situated, it had no

responsibility to abate the public nuisance the abandoned wells represented. Summary judgment is entered in favor of the secured creditor.

OPINION

Procedural History

On July 18, 1988, Pennbank filed at docket number 88-281-M a Notice of Appeal from an Order of DER dated July 13, 1988, which directed Pennbank to cease removing equipment from four oil wells located in Harmony Township, Forest County, and to plug the wells in accordance with Section 210 of the Oil and Gas Act, 58 P.S. §601.210. With Pennbank's Notice of Appeal, Drake Well Oil & Gas Associates, Inc. (Drake) filed a Petition to Intervene, asking to be substituted for Pennbank by reason of an assignment of Pennbank's interests to Drake. Pennbank also filed a Petition for Supersedeas.

On July 19, 1988, DER issued another Order, virtually identical to that of July 13, 1988, but directed to both Pennbank and Drake. Pennbank and Drake filed a Notice of Appeal from the Order at docket number 88-298-M, together with a Petition for Supersedeas and a Motion for Consolidation of both appeals. A consolidated hearing on the Petitions for Supersedeas was scheduled for August 22-23, 1988, but was cancelled after the parties indicated their willingness to work out a means of preserving the status quo until the Board could reach a final decision on the merits.

An undated Stipulation, executed by all parties, was filed with the Board on September 7, 1988. Pennbank and Drake (collectively called Appellants) filed a consolidated Motion for Summary Judgment and a supporting brief on September 16, 1988. The Appeals were consolidated at docket number 88-281-M on September 28, 1988. On October 31, 1988, DER filed an Answer to Appellants' Motion and filed its own Cross Motion for Summary Judgment with supporting brief. A second Stipulation, executed by all parties and dated

October 27, 1988, was submitted on November 1, 1988. Appellants' Answer to DER's Cross Motion was filed on November 14, 1988.

Statement of Facts

From an examination of the Notices of Appeal, the Stipulations and the Motions, it appears that the following facts are undisputed. Compass Development, Inc. (Compass), a corporation engaged in the development of oil and gas fields in Pennsylvania, filed a Voluntary Petition for reorganization under Chapter 11 of the United States Bankruptcy Code on or about December 29, 1981, in the U.S. Bankruptcy Court for the District of New Jersey (case no. 81-07724(d)). Consolidated Energy Corporation (Consolidated), a Nevada corporation authorized to conduct business in Pennsylvania, was confirmed as the successor to Compass under a reorganization plan approved by the Bankruptcy Court on March 14, 1984. As the successor to Compass, Consolidated received various oil and gas assets of Compass.

On December 21, 1984, Compass and Consolidated entered into a Loan Agreement and a Mortgage, Security Agreement and Assignment of Production (Agreement) with Pennbank, a Pennsylvania-chartered bank and trust company. In exchange for Pennbank's commitment to lend them up to $1,050,000.00, Compass and Consolidated granted to Pennbank a mortgage and security interest in certain of their real and personal property and an assignment of royalties and production payments. Included among the listed collateral were leasehold rights, oil wells and production equipment applicable to the Shermac lease covering 233 acres in Harmony Township, Forest County. Pennbank also was granted the extensive rights upon default usually incorporated in agreements of this sort. These included the right to enter into possession and operate the collateral, the right to foreclose on the mortgage, the right to repossess the collateral under the security agreement, and the right to confess judgment

on the notes and issue execution thereon. Pennbank's interests were duly perfected by recording and filing.

On March 27, 1986, Consolidated filed a Voluntary Petition for reorganization under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the District of New Jersey (case no. 86-01854(c)). Consolidated defaulted on its obligations to Pennbank at or about the same time. Pennbank sought a lift of the automatic stay provisions of Section 362 of the Bankruptcy Code, 11 U.S.C. §362, in order to enable it to exercise its rights under the Agreement. The stay was lifted by an order of the Bankruptcy Court dated June 21, 1988, in accordance with a remand Order and Opinion of the U.S. District Court for the District of New Jersey, dated June 24, 1987.

Meanwhile, on May 31, 1988, Pennbank had assigned to Drake, a Pennsylvania business corporation, all of its rights under the Agreement, promising to protect said rights by appropriate action until the assignment was properly consummated. On June 6, 1988, Drake repossessed a portion of the collateral by removing the rods, tubing and production equipment from four of the oil wells on the Shermac lease and by removing an intermediate string of 4 1/2" casing and its associated packer from one of the same four wells. The collateral removed from the wells is necessary for production, extraction or injection. Appellants claim that the removal of these items from the four wells does not constitute a threat of pollution because the groundwater casings were left undisturbed. DER has not admitted this fact or stipulated to it; and, therefore, we make no finding with respect to it. We note, however, that in both Orders DER raises the possibility of groundwater pollution by the removal of the intermediate string of 4 1/2" casing and its associated packer. We note, in addition, that in paragraph 9 of the initial Stipulation, DER agreed to suspend temporarily the plugging requirement only

so long as no imminent threat existed to the environment or the public health. All of this suggests that DER is not convinced that there is no threat of pollution.

On July 11, 1988, Pennbank confessed judgment against Consolidated in the amount of $1,721,717.60 (as amended) in the Court of Common Pleas of Forest County. Drake, then substituted for Pennbank, ordered execution on the judgment and directed the Sheriff of Forest County to levy upon and sell certain oil leases, wells, production and storage equipment of Consolidated located in Forest County. This sale was scheduled to take place on October 28, 1988, but the Board has not been given any further information concerning it. The Sheriff's sale notice makes no reference to the Shermac lease and we assume that the four wells which are involved in the present case were not part of the sale.

Consolidated's bankruptcy proceeding was converted on August 5, 1988, from Chapter 11 (reorganization) to Chapter 7 (liquidation) with the appointment of a trustee. Up to that time, we presume, Consolidated continued to operate its business as a debtor in possession.

Based on the above facts, the parties have stipulated to the following issues:

1. "Whether Pennbank and/or Drake became an owner of the 4 Shermac wells when, acting under the rights in the Mortgage Security Agreement and Assignment of Production, it removed the equipment necessary to produce the wells."

2. "Whether the Department [DER] abused its discretion by issuing its order under the Administrative Code and the Oil and Gas Act."

Discussion

Section 210 of the Oil and Gas Act, 58 P.S. §601.210, provides, in part, as follows:

> (a) Upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the department [DER] in order to stop any vertical flow of fluids or gas within the well bore unless the department has granted inactive status for such well pursuant to section 204.
>
> * * * *
>
> (e) If a well is abandoned without plugging, the department shall have the right to enter upon the well site and plug the abandoned well and to sell such equipment, casing and pipe as may have been used in the production of the well in order to recover the costs of plugging. Said costs of plugging shall have priority over all liens on said equipment, casing and pipe, and said sale shall be free and clear of any such liens to the extent the costs of plugging exceed the sale price. If the equipment price obtained for casing and pipe salvaged at the abandoned well site is inadequate to pay for the cost of plugging the well, the owner or operator of the well shall be legally liable for the additional costs of plugging the well.

Many of the terms used in this Section are defined in Section 103, 58 P.S. §601.103. The following definitions are pertinent to our discussion.

> "Abandoned well." Any well that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months, or any well for which the equipment necessary for production, extraction or injection has been removed, or any well, considered dry, not equipped for production within 60 days after drilling, redrilling or deepening, except that it shall not include any well granted inactive status.
>
> * * * *
>
> "Owner." Any person who owns, manages, leases, controls or possesses any well or coal property; except that for purposes of sections 203 (a) (4) and (5) and 210, the term "owner" shall not include those owners or possessors of surface real property on which the abandoned well is located who did not participate or incur costs in the drilling or extraction operation of the abandoned well and had no right of control over the drilling or extraction operation of the abandoned well.

* * * *

"Well." A bore hole drilled or being drilled for the purpose of or to be used for producing, extracting or injecting any gas, petroleum or other liquid related to oil or gas production or storage, including brine disposal, but excluding bore holes drilled to produce potable water to be used as such....

"Well operator" or "operator." The person designated as the well operator or operator on the permit application or well registration. Where a permit or registration was not issued, the term shall mean any person who locates, drills, operates, plugs or reconditions any well with the purpose of production therefrom....

There are other pertinent provisions of the Oil and Gas Act. Section 204, 58 P.S. §601.204, authorizes DER to grant inactive status to a well that has some future utility. Section 215, 58 P.S. §601.215, provides for bonding to cover the cost, inter alia, of plugging a well. Section 502, 58 P.S. §601.502, declares a violation of the plugging requirement to constitute a public nuisance. Section 505, 58 P.S. §601.505, provides for fines and Section 506, 58 P.S. §601.506, provides for civil penalties to be assessed for violations of the Act. Section 601, 58 P.S. §601.601, allocates all fines, civil penalties and permit fees to the Well Plugging Restricted Revenue Account. These funds, together with the proceeds from bonds forfeited under Section 215, 58 P.S. §601.215, are dedicated to paying the cost of plugging abandoned wells.

These statutory provisions make it clear that, when the production equipment has been removed, a well becomes an "abandoned well." At that point, the "owner" or "operator" of the well either must plug it or apply for inactive status. If the well owner or operator fails to take appropriate action, DER may pursue one or more of a variety of enforcement powers. It may seize and sell the production equipment (if it has not already been removed), free and clear of all liens, and use the proceeds to plug the well. It may

forfeit the bond, institute a criminal action for fines, and assess civil penalties in order to generate funds for the Well Plugging Restricted Revenue Account. It may also take other action, such as revoking the permit (58 P.S. §601.503) or seeking an injunction (58 P.S. §601.504), although such endeavors would not automatically bring about the plugging of the well or the payment of the costs thereof. Finally, under Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, DER can take steps to abate the public nuisance represented by an unplugged well.

From its array of enforcement options, DER has elected to proceed against Appellants, arguing that they became the "owner" of the four wells on the Shermac lease because (1) they removed the production equipment and converted the wells into "abandoned wells", and (2) they exercised extensive control over all the collateral, including the wells and the production equipment. Appellants maintain, to the contrary, that the Oil and Gas Act does not ensnare repossessing creditors and that the legislature did not intend to alter the status of secured creditors established at common law and by statute.

The legal responsibility of a mortgagee or other secured party has evolved over the centuries but has remained fairly constant during the modern era. A mortgagee who goes into possession after default has a duty to keep the premises in good repair and to refrain from committing waste: Landau et al. v. Western Pennsylvania National Bank et al., 445 Pa. 217, 282 A.2d 335 (1971). He may be held liable for injuries sustained by a third person as a result of the defective condition of the premises: Zisman v. City of Duquesne, 143 Pa. Super. Ct. 263, 18 A.2d 95 (1941). He is not the owner, however, and assumes no responsibility to pay the taxes: Provident Trust Co. of Phila. v. Judicial B&L Assn., 112 Pa. Super. Ct. 352, 171 Atl. 287 (1934);

Peoples-Pittsburgh Trust Co. v. Henshaw et al., 141 Pa. Super Ct. 585, 15 A.2d 711 (1940), or to satisfy other obligations of the mortgagor: Myers-Macomber Engineers v. M.L.W. Construction Corporation, 271 Pa. Super. Ct. 484, 414 A.2d 357 (1979). He acts as a quasi-trustee, bearing the responsibility of managing the property prudently for the owner while protecting his own lien: Elliott v. Moffett, 365 Pa. 247, 74 A.2d 164 (1950); Central Pennsylvania Savings Association v. Carpenters of Pennsylvania, Inc., 502 Pa. 17, 463 A.2d 414 (1983). His duties are owed only to the mortgagor: Myers-Macomber Engineers, supra.

The duties of a secured party in possession of personal property collateral, whether before or after default, have been codified from common law into Section 9207 of the Uniform Commercial Code, Act of April 6, 1953, P.L. 3, as amended, 13 Pa. C.S.A. §9207. Basically, he is required to use reasonable care in the custody and preservation of the collateral. Again, it is clear that the secured party is not the "owner" of the collateral -- even when title has been retained for security purposes: Commonwealth v. Two Ford Trucks, 185 Pa. Super. Ct. 292, 137 A.2d 847 (1958).

In the context of a business climate financed primarily by secured loans and a social atmosphere influenced by demands for environmental protection, it was inevitable that a mortgagee's or secured party's responsibility to comply with environmental laws ultimately would have to be resolved. The earliest decision on this subject of which we are aware is Associates Commercial Corporation v. DER, 1979 EHB 158. There, DER sought to prevent a secured creditor from repossessing equipment needed to reclaim a surface mining site. The debtor had gone into bankruptcy, and DER believed that reclamation would not be accomplished if the equipment were removed. Moreover, a DER regulation made it unlawful to remove such equipment prior to

the completion of reclamation. The Board held that DER has no power to order a secured creditor to use equipment for reclamation unless the secured creditor had an antecedent duty to do so. After examining 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 Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, the Board concluded that the secured creditor had no duty to reclaim the site.

A similar result was reached in the Matter of Zacherl Coal Company, Inc., 9 Bankruptcy Reporter 952 (U.S. Dist. Ct., Western Dist. of Pa., 1981). In that case, DER attempted to bring about the reclamation of a surface mining site by seeking an affirmative order to reclaim, directed to the trustee of a bankrupt mining company, and an injunction preventing secured creditors from repossessing equipment necessary for the reclamation. The Court refused DER's request, holding that DER had an adequate remedy in the form of bond forfeiture.

These two decisions were relied on in Ford Motor Credit Company v. S. E. Barnhart & Sons, Inc., et al., 644 F.2d 377 (U.S. Ct. of Appeals, 3d Circuit, 1981). A secured creditor, trying to repossess surface mining equipment after the debtor's default, was ordered to leave the equipment in place until reclamation had been completed in accordance with DER's regulations, even if it had to do the work itself. The order was reversed on appeal, the Court holding that nothing in SMCRA refers to finance companies or expresses a legislative intent to impair the security interest of creditors under the Uniform Commercial Code. The Court also ruled:

> If the regulation's purpose is to force the finance company to arrange for reclamation as a type of ransom for the equipment, the scope of the rule is clearly beyond the intent of the legislature and the authority delegated to the agency.
> (644 F.2d 377 at 382)

Several cases have considered a mortgagee's or secured party's obligation under the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq. The first of these, In re T. P. Long Chemical, Inc., 45 Bankruptcy Reporter 278 (U.S. Bank. Ct., North. Dist. of Ohio, 1985), dealt with the clean-up costs of a hazardous substance released by vandals from drums on premises owned by a bankrupt corporation. BancOhio, which held a security interest in the drums, had repossessed and sold other collateral prior to the incident involving the hazardous substance. EPA sought to recover clean-up costs from BancOhio as an owner or operator, even though the bank had not repossessed the drums. The Bankruptcy Court held that, even if BancOhio had repossessed the drums, it would not be liable for the clean-up costs, since the CERCLA definition of "owner or operator" in 42 U.S.C. §9601 (20) (A) does not include a person who, without participating in the management of a facility, holds indicia of ownership primarily to protect a security interest.

In United States v. Mirabile, 15 Envir. Law Rep. 20,992 (U.S. Dist. Ct., Eastern Dist. of Pa., Sept. 4, 1985), a mortgagee who entered into possession of real property for a short period of time after default and prior to the transfer of the property to a third person was held not liable for clean-up costs under CERCLA. The possession was determined to be an indicia of ownership held by the mortgagee primarily to protect his security interest.

The holding in the Mirabile case contrasts with a holding in the Maryland District in United States v. Maryland Bank & Trust Company, 632 Fed.

Supp. 573 (U.S. Dist. Ct., Dist. of Md., 1986). There, a bank had foreclosed on a mortgage and had bought the real property in at the resulting sale. The bank still owned the property four years later when toxic materials were discovered on the site. The Court held that the bank was liable for the clean-up costs since, at the time the toxic material was discovered, the bank's ownership was not for the purpose of protecting a security interest.

The cases decided under SMCRA and CERCLA all demonstrate a reluctance to impose on secured creditors any duties or liabilities beyond those established at common law or codified in statutes such as the Uniform Commercial Code. This reluctance was articulated by the Bankruptcy Court in In re T. P. Long Chemical, Inc., supra., when, after noting that a secured creditor already assumes the risk that the value of the collateral will fail to cover the debt, the court said at page 288:

> This court will not add to this risk by making the creditor the insurer of all risks caused by its collateral.

Thus, the secured creditor's right to repossess the collateral will not be impaired by the environmental concerns of SMCRA; and the secured creditor's entry into interim possession of the collateral after default and before sale will not subject him to liability for CERCLA clean-up costs. However, if the secured creditor buys the collateral at the sale and obtains all of the indicia of ownership, he then becomes subject to all the responsibilities and liabilities of an owner. These holdings are entirely consistent with the traditional concepts of secured creditor liability and immunity, and do not represent a departure from established doctrine.

However, none of these cases was decided under the Oil and Gas Act, the statute involved in the present case. Our decision, of course, must rest

upon an analysis of the particular provisions of that Act. Nonetheless, we enter upon that analysis with an awareness that interpreting environmental laws to impact upon the interests of secured creditors is the exception rather than the rule. In order for us to conclude that Appellants are within the scope of the Oil and Gas Act, we must be convinced of a clear legislative intent to accomplish that end.

Since the parties have not raised the question, we assume that Appellants acted within their rights as secured creditors in repossessing the rods, tubing and surface casing from four of the wells and the 4 1/2" intermediate string of casing and associated packer on one of the four wells. It has been stipulated that the repossessed equipment was necessary for production, extraction or injection. Accordingly, we conclude that the removal of this equipment brought each of the four wells within the definition of "abandoned well." At that point, Section 210 (a) of the Oil and Gas Act, 58 P.S. §601.210 (a), required the "owner" or "operator" to do one of two things -- either plug the well or apply for inactive status.

DER apparently concedes that Appellants cannot be considered the "operator," but argues that they are the "owner" because they removed the production equipment and because they exercised control over Consolidated's assets. The definition of "owner" in Section 103 of the Oil and Gas Act, 58 P.S. §601.103, includes any person who "owns, manages, leases, controls or possesses any well or coal property." If the word "property" is construed to apply to "well" as well as to "coal" and is construed to include personalty as well as realty, then a person exercising control over production equipment would fall within the definition of "owner."

Such a construction, however, is improper for two reasons.

First, it violates the "last antecedent" rule of statutory construction.[1] Second, Section 210 (a) is limited in scope to the "owner or operator thereof" --that is, the "well," the bore hole--and does not encompass a person who is the "owner" of the production equipment. Thus, the fact that Appellants exercised control over the production equipment did not make them the "owner" of the wells. In order to impose on Appellants an obligation to plug each of the four wells, we must find that they owned, managed, leased, controlled or possessed the "well." Appellants' security interests under the Agreement clearly extended to the wells and endowed Appellants with the inchoate right to manage, control or possess them. In order for this right to crystallize, however, a default had to occur and Appellants had to take some affirmative steps to enter into possession and control of the wells.

There is no indication that this happened. Certainly, there was a default and Appellants repossessed the production equipment, but they did nothing else at these four well sites. The ownership of the wells and the power to manage, lease, control or possess them remained in Consolidated as the debtor in possession and then, subsequently, in the bankruptcy trustee. The repossession of the production equipment placed an obligation upon Consolidated and its trustee to plug the wells or apply for inactive status under Section 210 (a).

DER maintains that Appellants had such pervasive control over Consolidated's assets after the automatic stay was lifted that only a

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[1] Under the "last antecedent" rule of statutory construction, "property" would be construed as applying only to "coal" and not to "well." This rule is an aid in construction, to be used in the absence of other evidence of legislative intent: Equitable Gas Co. v. City of Pittsburgh, 507 Pa. 53, 488 A.2d 270 (1985).

semblance of ownership or control remained in Consolidated and its trustee. The following language is from page 9 of DER's brief:

> Once the property of the estate was no longer under the protection of the bankruptcy court, [Appellants'] position was like a cloud casting a shadow over the entire estate. [They] could act against any of the collateral property at any time, opting to operate, repossess, foreclose or sell any of the leases, equipment, accounts, et cetera. Alternatively, [Appellants] also had the right not to act against any collateral when such proceedings would not be economically sound. Further, [Appellants] had no obligation to disclose [their] intentions toward any particular piece of property; the only other purported owner, Consolidated and its bankruptcy trustee, would never know what collateral was to be seized next, whether [Appellants] had decided to forego action against an item of collateral, or whether [Appellants were] simply biding [their] time to begin proceedings at a more auspicious moment. Such uncertainty, coupled with the range of available remedies, certainly illustrate that [Appellants] had far more control over the property of the estate than Consolidated, a bankrupt debtor facing liquidation and no longer under the protection of the court.

The picture so graphically painted by DER eloquently portrays the uncertain position of a debtor in default under a secured transaction. The same picture of stark uncertainty can be painted of a judgment debtor pending the issuance of a Writ of Execution; yet, there is no suggestion that the judgment creditor controls the debtor's property to the point where he becomes the "owner" of all of it. Such a suggestion would run counter to cases such as Valente v. Northampton National Bank of Easton, 2 D&C 3d 623 (C.P. Lehigh Cty., 1976), which hold that a judgment creditor has no responsibility for the property levied on by the sheriff.

Aside from this, the true picture is not so bleak as DER suggests. It must be noted, first of all, that the lifting of the automatic stay did not remove the property of the estate from the protection of the Bankruptcy Court; it merely authorized Appellants to exercise their rights in the collateral.

Secondly, Consolidated was a debtor in possession pursuing efforts at reorganization under Chapter 11 of the Bankruptcy Code on June 6, 1988, when the production equipment was repossessed from four wells on the Shermac lease. Consolidated remained in possession in that capacity until August 5, 1988, when the proceeding was converted to Chapter 7 and a trustee was appointed. During this two-month period, Consolidated had the continuing right to manage its business and the freedom to put the four wells on the Shermac lease, or any one or more of them, back into operation by any means available.

It could have arranged a lease of production equipment, for example, protecting the lessor by giving the rental claim priority status under Section 364 of the Bankruptcy Code, 11 U.S.C. §364 -- a device commonly and necessarily employed by debtors in possession. It also could have moved production equipment from some of its other wells and installed it in the four wells on the Shermac lease. None of the other wells was affected at all by Appellants' collection activities until July 11, 1988, when execution was issued on the confessed judgment. This was over a month after Appellants had repossessed the production equipment from the four wells in issue. Even then Consolidated was not without options. The execution affected only 297 of the 564 wells covered by the Agreement. Unless the other 267 wells all had gone out of production and been stripped of equipment during the 3 1/2 years that passed between the execution of the Agreement and the lifting of the automatic stay (a circumstance unlikely to have occurred), there should have been production equipment available for installation in the four wells on the Shermac lease. If this was not done, it was the result of Consolidated's business decision not to do it.

Finally, DER's argument fails because it attempts to translate a secured creditor's legal options that arise after default into actual control

of the debtor's property. No control in the legal sense can be said to exist in such a situation until the secured creditor actually exercises one of the options available to it. Even then, the existence of control must depend on what actually is done with respect to the property. Appellants in the present case could have taken over possession and control of the Shermac lease and all of its wells, but, for whatever reason, chose not to do so. Accordingly, they did not control the wells so as to become the "owner" within the definition set forth in Section 103 of the Oil and Gas Act, 58 P.S. §601.103.

Since Appellants did not cause the wells to be abandoned, they also cannot be held responsible for abating the public nuisance the abandoned wells represented: Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886). Of equal importance, Appellants did not own or possess the wells or the land on which they were situated: National Wood Preservers, Inc. v. Commonwealth, Dept. of Environmental Resources, 489 Pa. 221, 414 A.2d 37 (1980), app. dism., 449 U.S. 803, 101 S. Ct. 47, 66 L. Ed. 2d 7 (1980).[2]

We note in closing that DER has a number of alternatives under the Oil and Gas Act for assuring that abandoned wells are plugged and that the costs thereof are fully recovered. While some of these alternatives depend upon the solvency of the well owner or operator, others do not. Most important of these is the bond required to be filed under Section 215, 58 P.S. §601.215, for the specific purpose, inter alia, of securing the plugging of

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[2] DER's Orders of July 13, 1988, and July 19, 1988, cited certain sections of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. The CSL was not included in the stipulated issues, however, and has not been alluded to in the briefs. As a result, our decision is not based upon the CSL. Nonetheless, we note in passing that, since Appellants did not own or possess the land on which the wells were located, they would not fall within the scope of Section 316 of the CSL, 35 P.S. §691.316. cf. Western Pennsylvania Water Company v. DER, docket number 84-351-G (Board Adjudication issued August 25, 1988).

the well. The existence of these alternatives, especially of the bonding requirement, reinforces our conclusion that the legislature did not intend that this obligation or cost fall upon a secured creditor acting in the manner that Appellants acted in this case.

Our decision should not be construed as freeing secured creditors from any responsibility at all for environmental concerns. If, for example, collateral is repossessed surrepticiously without notice to the debtor and, as a direct result of such secret action, environmental harm occurs, the secured creditor could very well be held liable to the debtor for the cost of corrective action. There may be other examples just as compelling. The facts of the present case do not reflect such utter disregard of the public interest, however.

We answer the stipulated questions as follows:

1. Pennbank and/or Drake did not become an owner of the four Shermac wells.

2. DER abused its discretion by issuing the orders to Pennbank and Drake under the Administrative Code and the Oil and Gas Act.

ORDER

AND NOW, this 15th day of February, 1989, it is ordered as follows:

1. The Motion for Summary Judgment, filed by Pennbank and Drake on September 16, 1988, is granted.

2. The Cross Motion for Summary Judgment, filed by the Department of Environmental Resources on October 31, 1988, is denied.

3. The appeals of Pennbank and Drake are sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: February 15, 1989

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M. DIANE SMITH
SECRETARY TO THE BOA

MARK AND ELAINE MENDELSON	:	
	:	
v.	:	EHB Docket No. 88-336-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 15, 1989
and McNEIL CONSUMER PRODUCTS CO.,	:	
Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEALS

Synopsis

When an appeal challenges the issuance of three permits, but is untimely with respect to one of the permits, the appeal will be dismissed with respect to that permit. It will not be dismissed with respect to one of the remaining permits, on the ground of irrelevancy, so long as discovery is taking place.

OPINION

On December 8, 1988, McNeil Consumer Products Company (Permittee) filed a Motion to Dismiss the appeal filed by Mark and Elaine Mendelson (Appellants) to the extent that it relates to NPDES Permit No. 0012696 and Air Quality Permit No. 46-313-17A. In support of its Motion, Permittee represented that the appeal from the NPDES Permit was filed untimely and that the Air Quality Permit is unrelated to the trash-to-steam incinerator which forms the basis of the appeal.

In their response to the Motion, filed January 3, 1989, Appellants acknowledged that the NPDES Permit and Air Quality Permit may be unrelated to the proposed incinerator and suggested that their appeal be dismissed with respect to these Permits, without prejudice, so that they could be reinstated if discovery discloses some connection to the incinerator project. Permittee objected to this procedure in a Reply filed January 20, 1989.

Appellants have admitted that the NPDES Permit was issued on June 21, 1985, and that notice of the issuance was published in the Pennsylvania Bulletin on July 13, 1985. As third parties, Appellants were required to file their appeal within 30 days following this publication date: Lower Allen Citizens Action Group, Inc. v. DER, ____ Pa. Cmwlth. ____, 538 A.2d 130 (1988), affd. on recons., ____ Pa. Cmwlth. ____, 546 A.2d 1330 (1988). Since they did not file their Notice of Appeal until August 29, 1988, more than three years later, the appeal is untimely with respect to the NPDES Permit.

Permittee's objection to the inclusion of the Air Quality Permit within the scope of the appeal cannot be so easily sustained. The objection is based on relevancy which, because of ongoing discovery, still has fluid boundaries. Consequently, it is premature to exclude consideration of this Permit. Viewing the Motion in the light most favorable to the Appellants, as we are required to do, we cannot grant the relief requested by Permittee.

ORDER

AND NOW, this 15th day of February, 1989, it is ordered as follows:

1. The Motion to Dismis Appeals, filed by McNeil Consumer Products Company on December 8, 1988, is granted in part and denied in part.

2. The appeal of Mark and Elaine Mendelson is dismissed to the extent that it seeks to challenge the issuance to McNeil Consumer Products Company of NPDES Permit No. 0012696.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

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WILLIAM A. ROTH, MEMBER

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DATED: February 15, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

DELTA EXCAVATING AND TRUCKING CO., INC. AND DELTA QUARRIES & DISPOSAL, INC.	:	
v.	:	**EHB Docket No. 86-614-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 1, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss the appeal of a Department letter finding a proposal to use a marsh to treat and dilute VOC discharges unacceptable is denied. The letter rises to the level of an "adjudication" or "action" and, therefore, is appealable.

OPINION

This matter was initiated by the October 31, 1986, filing of a notice of appeal by Delta Excavating and Trucking Co., Inc. and Delta Quarries and Disposal, Inc. (Delta) seeking review of an October 3, 1986, letter from the Department of Environmental Resources (Department) to John P. Niebauer, President of Delta, advising Delta that in order to comply with a consent order and agreement (CO&A) entered into between Delta and the Department on November 1, 1984, Delta must propose and implement a program providing for the collection and treatment of contaminated groundwater at Delta's Stotler site in Blair County.

The Department filed a motion to dismiss Delta's appeal as moot on September 20, 1988, arguing that the October 3, 1986, letter does not constitute an adjudication and is not an appealable action. Rather, the Department maintains that the letter is a request for additional information pursuant to the CO&A.

In its response, filed on October 11, 1988, Delta argues that the letter constitutes an unreasonable failure to approve the closure plan in violation of Paragraph 17 of the CO&A and, therefore, is an appealable action. Delta asserts that the October 3, 1986, letter is not merely a request for additional information, but an order directing Delta to implement another program, the parameters of which have been unilaterally set by the Department. Furthermore, Delta contends that the letter requires action which may be pre-empted by the U.S. Environmental Protection Agency (EPA), since the Stotler site is on the National Priorities List (NPL) under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* (Superfund) and is subject to an administrative order and agreement between EPA and Delta, to which the Department refused to become a signatory. Moreover, Delta claims that the CO&A expressly allows an appeal from Department actions which violate the CO&A. Finally, Delta argues that, as a matter of policy, the Board should hear this appeal, since the Department's letter left only three options: comply with the letter, risk possible sanctions, or appeal the letter.

A Department decision is appealable to the Board if it is an adjudication as defined in 2 Pa. C.S.A. §101 or an action under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S.

§510-21,[1] and 25 Pa.Code §21.2(a). In South Hanover Twp. Bd. of Supervisors v. DER, EHB Docket No. 88-166-M (Opinion and order issued November 4, 1988), we noted that the definition of an action is simple to state but hard to apply. Applying the definitions of action and adjudication to the fact situation at bar, we believe that the Department's letter was not simply a request for additional information, but, rather, a rejection of Delta's plan, and, as such, constituted an appealable action.

The October 3, 1986, letter stated, in part,

> The Bureaus of Water Quality Management (BWQM) and Waste Management (BWM) have completed review of the report prepared by Meiser and Earl Hydrogeologists, entitled "Delta Altoona Landfill, Old Stotler Site, Hydrogeologic Investigation, Antis and Logan Townships, Blair County." The Department has determined that the discharges of industrial waste emanating from the landfill and discharging to the groundwater and hence to the marsh constitute violations of Section 301 and 307 of the Clean Streams Law. The proposal embodied in the report to use the marsh to treat and dilute the VOC discharges is therefore unacceptable in fulfilling the requirements of Item 15B, Page 12 of the Consent Order and Agreement relating to this site.
>
> (emphasis added)

The letter goes on to say that

> In order to achieve compliance with Item 15B of the Consent Order and Agreement effective at this site, it will be necessary to propose and implement a collection and treatment program that provides for the collection and treatment of contaminated groundwater.

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[1] §1921-A of the Administrative Code was repealed by the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. ___, No. 94, 35 P.S. §7511 *et seq.* This appeal was filed prior to the effective date of the Environmental Hearing Board Act, but §4 of the Environmental Hearing Board Act would not change the result reached herein.

This language clearly indicates that the Department rejected Delta's proposal and is requiring a new program. This rises to the level of an action or adjudication which is reviewable by the Board.

Since we have determined that this action is appealable, we need not address other arguments made by Delta. We do note that the Board, on September 16, 1988, stayed this matter pending the issuance of an adjudication in Franklin Township Board of Supervisors v. DER, EHB Docket No. 84-403-M. However, this motion was filed after the issuance of that order and neither party raised the stay order as a bar to the Board's deciding this motion.

O R D E R

AND NOW, this 1st day of March, 1989, it is ordered that the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 1, 1989

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

WILLIAM FIORE, d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY	:	
v.	:	**EHB Docket Nos. 87-190-W**
	:	**87-191-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 1, 1989

OPINION AND ORDER

Synopsis

Appeals are dismissed for lack of prosecution where Appellant fails to file pre-hearing memoranda and to respond to a rule to show cause why his appeals should not be dismissed for lack of prosecution.

OPINION

These matters are the result of two related, but unconsolidated, appeals before the Board. The appeal docketed at No. 87-190-W was filed by William Fiore, d/b/a Municipal and Industrial Disposal Company (Fiore) on May 18, 1987, and sought review of the Department of Environmental Resources' (Department) April 13, 1987 denial of Fiore's solid waste permit application (No. 300679) for a site in Elizabeth Township, Allegheny County, commonly referred to as Site C. The appeal docketed at No. 87-191-W was also filed by Fiore on May 18, 1987, and sought review of the Department's April 13, 1987 denial of Fiore's solid waste permit application (No. 101319) for a site in Elizabeth Township, Allegheny County, commonly referred to as Site D.

The Board issued its standard Pre-Hearing Order No. 1 at both dockets, requiring Fiore to submit pre-hearing memoranda on or before August 4, 1987. When Fiore failed to file his pre-hearing memoranda by the required date, the Board advised him of his default in letters dated September 1, 1987. Fiore did not file his pre-hearing memoranda, but, instead, filed motions for continuance at both dockets. Fiore alleged that since the Department based its denials of the Site C and Site D permit applications on Fiore's convictions of violations 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 his adjudication of civil contempt by the Commonwealth Court, and, those matters were, at that time, on appeal to the Pennsylvania Supreme Court, the appeals before the Board should be continued pending the Supreme Court's disposition of Fiore's appeals.

The Department responded to Fiore's motions on November 23, 1987, opposing the grant of any continuances. The Department argued that its permit denials were based on other grounds and that, in any event, the Pennsylvania Supreme Court had already upheld Fiore'e adjudication of civil contempt. The Board denied Fiore's motions in a September 29, 1988 order and directed Fiore to file his pre-hearing memoranda on or before October 28, 1988.

Fiore failed to file his pre-hearing memoranda by the requested date and was advised in a December 7, 1988 default notice that unless his pre-hearing memoranda were filed by December 19, 1988, the Board could apply sanctions. Fiore failed to respond to the Board's December 7, 1988 default notice and was advised in a December 28, 1988 default notice that unless he filed his pre-hearing memoranda on or before January 9, 1989, sanctions would be applied by the Board.

When Fiore again failed to file his pre-hearing memoranda, the Board, on January 30, 1989, issued a rule to show cause why his appeals should not be dismissed for lack of prosecution. The rule was returnable, in writing, to the Board on February 20, 1989.[1] The Board was orally advised by Fiore's counsel on February 21, 1989, that Fiore would not be responding to the Board's rule.

Since it is apparent that Fiore has no intention of prosecuting these appeals, we will not expend any more resources on them. Accordingly, these appeals will be dismissed for lack of prosecution.

---

[1] Because February 20, 1989, was a legal holiday, the date of return was February 21, 1989.

O R D E R

AND NOW, this 1st day of March, 1989, it is ordered that the appeals of William Fiore, d/b/a Municipal and Industrial Disposal Company, are dismissed 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: March 1, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

ADAMS COUNTY SANITATION COMPANY and KENNETH NOEL	:	**EHB Docket No. 88-441-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 1, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss is granted when the action appealed from is not an "adjudication" or "action," but rather a notice of violation explaining the requirements of the Department's rules and regulations.

OPINION

This matter was initiated by the October 25, 1988, filing of a notice of appeal by Adams County Sanitation Company and Kenneth Noel (collectively, ACSC) seeking review of a September 23, 1988, letter from the Department of Environmental Resources (Department). The letter, which was captioned "Notice of Violation," requested the submission of a groundwater assessment plan previously requested from ACSC by the Department in a July 8, 1988, letter. The September 23, 1988, letter further stated that the failure to submit the plan within the time specified in 25 Pa.Code §273.286 constituted a violation of the rules and regulations of the Department and §610(4) 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). The letter then recommended submission of the plan within fifteen days.

On December 16, 1988, the Department filed a motion to dismiss ACSC's appeal, arguing that if ACSC maintains the September 23, 1988, letter is an adjudication or an appealable action, then the July 8, 1988, letter must also have been an adjudication or an appealable action, because the language of the two letters is virtually identical. Since the July 8, 1988, letter was not appealed by ACSC, it becomes a final action which cannot now be challenged by ACSC in this appeal. Alternatively, the Department argues that neither the July 8, 1988, letter nor the September 23, 1988, letter are adjudications or appealable actions, and, therefore, this Board lacks jurisdiction to hear ACSC's appeal.

On January 13, 1989, ACSC responded to the Department's motion, claiming that the two letters are not virtually identical and that, while the July 8, 1988, letter did not constitute a final action, the September 23, 1988, letter did. ACSC admits that the Board generally finds notices of violations not to be appealable, and, therefore, maintains that correspondence preceding a notice of violation cannot logically be appealable. However, in some cases, ACSC argues, the Board does find a notice of violation to be an "adjudication" or "action" in that the notice affects the personal or property rights of the appellant. Here, ACSC asserts that because the notice of violation will become part of the compliance history of Kenneth Noel, a principal in Adams County Sanitation Company, as well as Keystone Sanitation, a company with a permit application for a landfill site pending before the

Department, it may adversely affect Noel's personal or property rights. as he is required to disclose any notices of violation he has received from the Department in his capacity as a principal for ACSC.

Previous Board decisions have held that an appeal will lie only if the subject of that appeal is an "adjudication," as defined in §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, or an "action," as defined in 25 Pa.Code §21.2(a), Chester County Solid Waste Authority v. DER, EHB Docket Nos. 87-441-W, 88-112-W, and 88-205-W (Opinion and order issued December 2, 1988). There is no set formula used to determine whether a notice of violation constitutes an adjudication or an action. Each notice must be reviewed on a case-by-case basis and the consequences stemming from the notice which may adversely affect the rights of a person must be explored. We find that the Department's September 23, 1988, letter is neither an adjudication nor an action, and, is, therefore, not appealable.

The September 23, 1988, letter states, in pertinent part, that

> It is the responsibility of Adams Sanitation Company, Inc. to prepare and implement a Groundwater Assessment Plan for all landfilled areas on the property which ADSCO leases and on any property, whether or not leased by ADSCO, Inc., which is affected by the landfill. Therefore, we are again requesting the submission of the Groundwater Assessment Plan previously requested in our letter of July 8, 1988.
>
> The failure of ADSCO, Inc. to submit the assessment plan within the time frame specified in Chapter 273.286 constitutes a violation of the Rules and Regulations of the Department and consequently a violation of the Solid Waste Management Act, Section 610(4).
>
> It is recommended that the assessment plan be submitted within fifteen (15) days.

Thus, the September 23, 1988, letter is no more than notification of ACSC's obligations under the SWMA and the rules and regulations adopted thereunder. Sandy Creek Forest v. Com., Dept. of Env. Res., 95 Pa.Cmwlth 457, 505 A.2d 1091 (1986). It does not impose any obligations on ACSC and is not appealable. Robert H. Glessner, Jr. v. DER, EHB Docket NO. 82-198-R (Opinion and order issued September 8, 1988).

The argument presented by ACSC that the September 23, 1988, letter constitutes an appealable action because it must be reported on a compliance history form which is part of permit applications under the SWMA has been previously rejected by the Commonwealth Court in Fiore v. Com., Dept. of Environmental Resources, 98 Pa.Cmwlth 35, 510 A.2d 880 (1986). There, in reviewing Fiore's claim that a notice of violation was an adjudication because the Department considered it as part of his compliance history in reviewing a permit application, the Commonwealth Court held that it was the ultimate permit denial, not the notice of violation, which would affect Fiore's rights and that, as a result, the proper time to appeal would be after that denial. Also, the Commonwealth Court pointed out a permit applicant can demonstrate that the violations have been corrected, and, thus, the Department may ultimately grant his permit application. Kenneth Noel and Adams County Sanitation Company are in the same situation as that considered by the Commonwealth Court in Fiore, and we must, therefore, reject this argument and dismiss the appeal.

In light of our holding, we will not address the Department's other arguments relating to collateral estoppel.

O R D E R

AND NOW, this 1st day of March, 1989, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Adams County Sanitation Company and Kenneth Noel is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

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ROBERT D. MYERS, MEMBER

DATED: March 1, 1989

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M. DIANE SMI
SECRETARY TO THE E

R.E.M. COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 88-519-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 1, 1989**

OPINION IN SUPPORT OF ORDER DENYING PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is denied in a case in which the Department of Environmental Resources ordered the petitioner to treat certain off-site discharges which bore characteristics of acid mine drainage. The petitioner did not prove that it is likely to succeed on the merits of its appeal, because the evidence indicates that the petitioner's mine site is the source of the acid mine drainage which is affecting the discharges.

OPINION

This is an appeal by R.E.M. Coal Company, Inc. (REM) from an order of the Department of Environmental Resources (DER) dated December 13, 1988. In its order, DER concluded that REM's mining under Surface Mining Permit Numbers 33803040 and 33743044 in Union Township, Jefferson County, had caused certain off-site discharges which bore characteristics of acid mine drainage. To

remedy the problem, DER ordered REM to commence "interim treatment" of the discharges within ten (10) days of the order, and to submit within thirty (30) days a "discharge treatment plan."

REM filed this appeal and a petition for supersedeas on December 19, 1988. On December 28, 1988, REM and DER filed a "consent supersedeas" which stayed the requirements of DER's order pending completion of the supersedeas hearing. The supersedeas hearing was held on February 6 and 7, 1989. On February 9, 1989, REM deposed William L. Smith, a mine inspector employed by DER who was unable to attend the hearing (the transcript of the deposition was forwarded to the Board). On February 17, 1989, we issued an order denying the petition for supersedeas. This opinion supports the February 17, 1989 order.

In ruling upon a petition for supersedeas, the Board will consider the following factors:

1) irreparable injury to the petitioner,

2) the likelihood of the petitioner's prevailing on the merits, and

3) the likelihood of injury to the public.

25 Pa. Code §21.78(a). In addition, a supersedeas will not be issued in cases where a nuisance or significant pollution, or other hazard to public health, would exist or be threatened while the supersedeas is in effect. 25 Pa. Code §21.78(b). The petitioner bears the burden of demonstrating that the standards for granting a supersedeas have been met. Lower Providence Township v. DER, 1986 EHB 395.

REM contends in its petition that it is entitled to a supersedeas. With regard to the merits of its appeal, REM argues that it can only be ordered to treat these off-site discharges if there is a hydrologic connection between the discharges and its mine site, citing Hepburnia Coal Co. v. DER, 1986 EHB 563. REM contends that it is likely to succeed on the merits because

a study conducted by Todd Giddings and Associates, a consulting firm specializing in hydrogeologic investigations, concluded that REM's mining was not responsible for the discharges. REM also argues that it will be irreparably harmed if a supersedeas is not granted because the cost of treating the discharges will reduce REM's revenues and lead to layoffs of REM employees. Finally, REM argues that the public will not be harmed or threatened by a supersedeas because there were already polluting discharges in this area prior to REM's mining, and because the Little Mill Creek--which ultimately receives these discharges--is already affected by acid mine drainage.

DER's response to REM's petition asserts that the petition should be denied. DER argues that REM is not likely to succeed on the merits of its appeal because REM's mining is responsible for the poor water quality of the discharges. DER also contends that any economic loss suffered by REM does not provide a basis for superseding DER's order unless REM shows that DER abused its discretion. Finally, DER contends that the public will be harmed if a supersedeas is granted because REM's mining has added to the groundwater pollution in the area, and that this pollution could affect additional groundwater and streams.

After reviewing REM's petition and DER's response, and weighing the evidence, it is clear that the petition for supersedeas must be denied. REM did not prove that it is likely to succeed on the merits of its appeal because the weight of the evidence indicates that REM's mining is responsible for the poor quality of the discharges in question.[1]

---

[1] In addition to the factual issue concerning the source of the groundwater pollution, REM raised several legal arguments against DER's order. DER addressed these arguments in its response. We will not address REM's other arguments specifically except to say that we do not find them to be persuasive.

REM's mining here was on two tracts of land--the "Smail" and "Orcott" tracts (See Appellant's Exhibit 1). The discharges showing characteristics of acid mine drainage are off-site of REM's mining on these two tracts. There is no dispute between DER and REM that the groundwater in the area is degraded at certain points; the argument is over the source of this degradation.

DER's primary expert witness, Michael Smith, concluded that REM's mining on the Smail and Orcott tracts was responsible for the poor quality of the discharges here. (Transcript 393-394, 404-405, 414-415) His conclusion was based upon the following facts. First, piezometers installed in the spoil at REM's mining site revealed that the spoil was producing acid mine drainage. (T. 392-393) Second, the discharge points at issue here were a short distance from the mine site and were topographically and hydrologically downgradient of the mine site. (T. 373-376, 381-386). Third, the discharges at issue here showed significant deterioration after REM's mining, while water samples taken upstream of REM's mine site did not show this deterioration over the same period of time. (T. 373-376, 381-386).

REM's expert witness, Dr. Todd Giddings, concluded that REM's mining was not responsible for the poor quality of the discharges. (T. 123-124) He testified that the poor quality of these discharges was probably attributable to abandoned deep mines and abandoned oil and gas wells in the area. (T. 135-141, 167-168) He based these conclusions upon his review of the literature concerning the geological history of the area, data collected by his firm and DER, and his own observations based upon visits to the site. (T. 124)

In our view, the evidence that abandoned oil and gas wells were responsible for the quality of the discharges was weak. We agree with Dr. Giddings that abandoned wells can both cause pollution, and--as Michael Smith himself acknowledged--act as a conduit for the flow of polluted groundwater.

(T. 114, 221-222, 428-429) However, REM did not prove that the discharges involved here bore characteristics of groundwater affected by abandoned oil and gas wells. Holding a cigarette lighter above bubbles emanating from a seep strikes us as a crude method of testing for methane (a substance which may be associated with drilling wells); we agree with Michael Smith that conducting laboratory tests is the preferred approach.[2] (T. 436-438) Moreover, Mr. Smith conducted an extensive analysis comparing the chemical characteristics of the discharges to the characteristics associated with groundwater affected by oil and gas well drilling activities. (T. 417-428, Exhibit C-25) He also evaluated the location of the wells compared to the location of the discharges on the hydraulic gradient, and the timing of the well drilling activities compared to the time when the discharges began to deteriorate. (T. 429-433) He concluded that the discharges were not degraded by oil and gas well drilling activities. (T. 432-433) We agree with Mr. Smith's conclusion.

There are two additional reasons why we believe that REM's mining activities, rather than oil and gas well drilling activities, were responsible for the quality of the discharges. First, Dr. Giddings acknowledged that the spoil on the site of REM's mining was producing acid mine drainage, but he testified that he had not determined where groundwater from the spoil was going. (T. 214). We think that the most logical answer is that it moved

---

[2] Commonwealth Court has held that visual observations are not adequate to support a finding where recognized scientific tests are available. Bortz Coal Co. v. Commonwealth, Air Pollution Commission, 2 Pa Commw. 441, 279 A.2d 388, 398 (1971).

downgradient toward the discharge points.[3] Second, Dr. Giddings conceded that, as a general principle, a deterioration in the quality of groundwater in an area where surface mining had occurred might indicate that mining caused the deterioration. (T. 172-173) However, Dr. Giddings did not seem to apply this principle to the facts of this case. When asked on cross-examination about the difference between pre-mining samples of the discharges versus post-mining samples, he stated that he was unfamiliar with the data. (T. 187-188) In our view, this data was entitled to more weight than Dr. Giddings seemed to give it in reaching his conclusions.[4] We have more confidence in Michael Smith's conclusions because he gave this data the weight it deserves. (T. 373-376, 381-386, 414-415, Exhibit C-22)

Finally, we have read the transcript from the deposition of DER mine inspector William Smith, particularly with regard to abandoned deep mines in the area, discharges emanating from abandoned gas wells, and the alleged dumping[5] of gas well brine from trucks in the vicinity of the discharges.

---

[3] It is true that some of the downgradient sampling points showed no effect from acid mine drainage; however, this does not rule out the REM mine site as the source of the acid mine drainage which is causing degradation at the other sampling points. This statement is supported by Michael Smith's testimony that the untainted water found at certain sampling points can be explained by a fracture flow system in this area and a perched aquifer on the Upper Clarion coal seam. (T. 407-411, 456-458)

[4] Dr. Giddings gave additional reasons why he concluded that abandoned oil and gas wells and deep mines were the source of the acid mine drainage. In his testimony, Mr. Smith refuted each of these points. Though we will not discuss separately each of Dr. Giddings' arguments, and Mr. Smith's counter-arguments, we have considered them in evaluating the evidence as a whole.

[5] We use the word "alleged" because the testimony on the dumping of brine was vague, conclusory, and based largely upon hearsay. (T. 58) Even if admissible, this testimony is entitled to little weight.

(W. Smith Deposition 26-37, 56-57, 57-61) Suffice it to say that this testimony does not alter our conclusion that the quality of the discharges is attributable to REM's mining.

In summary, we have evaluated the evidence submitted at the supersedeas hearing and we conclude that REM did not prove that it is likely to succeed on the merits of its appeal because the weight of the evidence points to REM's mine site as the source of the acid mine drainage which is affecting the discharges in question. Since REM did not show that it is likely to succeed on the merits of its appeal, it is unnecessary for us to consider whether REM will suffer irreparable injury and whether the public is likely to be injured by a supersedeas. Ralph Bloom, Jr. v. DER, 1984 EHB 685, WABO Coal Co. v. DER, 1986 EHB 71.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: March 1, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

BOLOGNA MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-555-M**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 3, 1989

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT
OR IN THE ALTERNATIVE TO LIMIT ISSUES

Synopsis:

The doctrine of administrative finality does not prevent a coal operator, who took no appeal from an abatement order for which no civil penalty was ever assessed, from litigating the same issues in appeals from later compliance orders for which civil penalties were assessed. A coal operator is absolutely liable for acid mine drainage discharged from the permit site, even though it pre-existed the start of the operator's mining activities and regardless of whether or not the operator affected it or increased the pollution load. Partial summary judgment is entered on this issue, leaving the reasonableness of the civil penalty amounts as the only issue remaining to be litigated.

OPINION

These consolidated appeals all relate to a surface mining site in North Fayette Township, Allegheny County, operated by Bologna Mining Company

(Appellant) under permits issued by the Department of Environmental Resources (DER). In the first appeal, docketed at 86-555-M, Appellant challenged Compliance Order (C.O.) 86G494 issued by DER on August 27, 1986, which charged Appellant with permitting a discharge of acid mine drainage (AMD) in the vicinity of sedimentation pond no. 8 and directed Appellant to treat the discharge by October 6, 1986. In the second appeal, docketed at 87-124-M, Appellant contested C.O. 87G090 issued by DER on March 3, 1987, which charged Appellant with permitting the discharge of AMD to continue and directed Appellant to treat the discharge immediately. In the third appeal, docketed at 87-399-M, Appellant disputed a civil penalty of $945.00 assessed by DER on August 17, 1987, pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b). The civil penalty was assessed specifically for the violations related to C.O. 87G090.

DER filed a Motion for Partial Summary Judgment or in the Alternative to Limit Issues (Motion) on September 14, 1988. In its Motion, DER argued that Appellant's responsibility to treat the AMD discharge was fixed as a matter of law because (1) Appellant did not appeal Abatement Order 83G128, issued May 24, 1983, which directed Appellant to treat the AMD discharge; (2) Appellant commingled the AMD discharge with drainage from its own mining operations; and (3) Appellant is absolutely liable under section 315(a) of the CSL, 35 P.S. §691.315(a), for all AMD discharges from its mining site, regardless of whether Appellant created it or increased the pollutional load. DER requested an order confirming that the only issue to be litigated in these appeals is the appropriateness of the amount of penalty assessed by DER. Appellant opposed DER's Motion in an extensive brief filed on November 2,

1988, in which it claimed, inter alia, that there were serious disputes over material facts. DER filed a Reply Memorandum on November 25, 1988.

In the meantime, two additional appeals had been filed. In the one docketed at 88-424-M, Appellant attacked C.O. 88G256, issued August 17, 1988, and an Assessment of Civil Penalty in the amount of $287.00, issued September 28, 1988, pursuant to Section 18.4 of SMCRA, 52 P.S. §1396.22, and Section 605(b) of CSL, 35 P.S. §691.605(b). In the appeal docketed at 88-474-M, Appellant objected to C.O. 87G438, issued September 16, 1987, and an Assessment of Civil Penalty in the amount of $230.00, issued November 1, 1988, pursuant to Section 18.4 of SMCRA, 52 P.S. §1396.22, and Section 605(b) of CSL, 35 P.S. §691.605(b). On December 5, 1988, Appellant filed a Motion to Consolidate these two latest appeals with those already consolidated at 86-555-M, maintaining that they all relate to the same discharge of AMD. After DER indicated its concurrence with this motion and both parties assured the Board that consolidation would not require a delay in disposing of the pending Motion of DER, the appeals were consolidated by an Order issued December 21, 1988.

Summary judgment may be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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). The Board must read a motion for summary judgment in the light most favorable to the non-moving party: Robert C. Penoyer v. DER, 1987 EHB 131. DER's Motion is supported by depositions and answers to interrogatories. Appellant's response is supported by affidavits and reports.

It is undisputed that Appellant received mining permits and a mine drainage permit for this site during 1978 and 1979. The site had been mined

in the past -- extensively deep mined and partially surface mined by other operators -- but had not been reclaimed. Prior to Appellant's activities on the site, which began in 1979, a seep (Petraglia Seep) was observed within the boundaries of the permitted area. Both parties agree that the Petraglia Seep had all the characteristics of AMD when sampled by DER prior to Appellant's uncovering any coal; but Appellant claims that DER's handling of the field sample was not careful enough to enable the specific concentrations to be used for "background" purposes.

As part of its mining operations, Appellant constructed sedimentation pond no. 8. The discharge from the Petraglia Seep flowed into this pond where it mixed with surface water from other portions of the permitted area. On May 24, 1983, DER issued Abatement Order 83G128, charging Appellant with discharging AMD from sedimentation pond no. 8 and directing Appellant to treat the discharge. Appellant took no appeal from this Abatement Order. The reason, according to Appellant, grew out of the fact that the pond contained surface water other than the Petraglia Seep. Since Appellant recognized its legal responsibility with respect to this other surface water, it took no appeal.

Sometime subsequent to the receipt of Abatement Order 83G128, Appellant constructed a limestone barrier below the Petraglia Seep in an effort to neutralize the discharge before it reached sedimentation pond no. 8. Apparently, the construction of this barrier diverted a portion of the discharge toward the east. This caused an additional seep zone to emerge near sedimentation pond no. 8 but outside its drainage area. On August 27, 1986, DER issued C.O. 86G494, directing Appellant to channel the discharge from this new seep zone into sedimentation pond no. 8 and to treat it there.

It was at this point that Appellant filed its first appeal, claiming that the Petraglia Seep pre-existed Appellant's mining operations; that Appellant had not affected or worsened it; and that Appellant, therefore, had no obligation to treat it. The appeal was filed, according to Appellant, because sedimentation pond no. 8 was no longer receiving any surface water other than the Petraglia Seep. The subsequent C.O.'s all resulted from later inspections by DER -- December 17, 1986, January 14, 1987, September 16, 1987, and August 16, 1988 -- which revealed that AMD was still being discharged from sedimentation pond no. 8. Appellant has consistently disputed its responsibility for treating the discharge in all of the appeals arising out of these subsequent C.O.'s.

The date when Appellant ceased mining coal on the site has not been given to us, but we infer that it was prior to the issuance by DER of the 1983 Abatement Order. We also have not been provided with the date when reclamation was completed, but infer (from the inspection report attached to C.O. 86G494) that it was subsequent to August 27, 1986.

DER argues, initially, that Appellant was required to file an appeal from the 1983 Abatement Order if it wanted to keep alive its right to dispute responsibility for the Petraglia Seep. Not having filed such an appeal, Appellant is now foreclosed from raising that issue in the current appeals. DER's argument is based upon numerous decisions of the Board that have applied consistently the principle of administrative finality to this type of situation. All of those cases, however, predated the Commonwealth Court decision in Kent Coal Mining Company v. Commonwealth, Dept. of Environmental Resources, ____ PA. Cmwlth. ____, 550 A.2d 279 (1988), issued after DER filed its Motion. The Kent case established the right of a coal operator, in the course of contesting a civil penalty assessed under SMCRA, to challenge the

basis for the underlying C.O. even where no appeal had been filed from the C.O.

In its Reply Memorandum, DER attempts to avoid the impact of the Kent decision by limiting its application to the specific C.O. on which the civil penalty is based. Where, as in the present appeals, the issue of administrative finality is based not on the specific C.O.'s underlying the civil penalties but on an unappealed Abatement Order that preceded all of them, DER maintains that the Kent decision has no relevance. We reject this argument as based upon a misreading of Kent. Our reading of the case convinces us that Appellant was not required to file an appeal from the 1983 Abatement Order because, until a civil penalty was assessed on the basis of it, Appellant did not know the full extent to which it was "aggrieved."[1] Since no civil penalty has ever been assessed on the basis of that Abatement Order, Appellant is not precluded from litigating factual and legal issues relevant to it. Those issues still being alive with respect to the 1983 Abatement Order, it follows that they can be litigated in the appeals before us.

There is widespread disagreement concerning what, if anything, Appellant did with respect to the Petraglia Seep during the mining and reclamation phases of its operations on the site. Appellant acknowledges commingling the discharge with other surface runoff in sedimentation pond no. 8 and acknowledges putting in the limestone barrier that diverted part of the discharge. Appellant insists, however, that these actions did not constitute an acceptance by Appellant of permanent responsibility to treat the AMD discharge from the Petraglia Seep. In support of this position, Appellant

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[1] See Commonwealth Court's reasoning on this point at 550 A.2d 279, pages 282-283.

cites certain regulations and policies of DER in effect at the time the permits were issued. 25 Pa. Code §77.92(26) provided as follows:

> The operator shall take the necessary steps to eliminate, if possible, any gravity drains from previous mining. Any drainage so encountered shall be treated to neutrality during the period of corrective action and during the life of the operation. The operator shall be responsible for any additional pollution load.

J. Anthony Ercole, Director of DER's Bureau of Surface Mine Reclamation (BSMR) from 1977 to 1983, stated by affidavit that the above-quoted regulation embodied DER's policy "of not holding surface coal mine operators responsible for mine discharges existing from prior mining, after the life of the operator's mining, whether the discharges were on or off the operator's permit area, unless the operator made the discharge worse either in quality or quantity as a result of his mining." 25 Pa. Code §77.92 (26) was repealed effective July 31, 1982, and no similar provision has appeared in the regulations since that time.[2]

Appellant asserts that it dealt with the Petraglia Seep only to carry out its responsibilities under 25 Pa. Code §77.92(26). In reliance on this regulation and DER's policy implementing it, Appellant believed that it would have no further responsibility for the seep after its own operations had been completed--provided, of course, that it did nothing to increase the pollution load. According to Appellant, the repeal of the regulation in July 1982,

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[2] Comprehensive regulations for remining areas with pollutional discharges were adopted June 28, 1985, and are published at 25 Pa. Code §87.201 et seq. However, they have no bearing on the present appeals.

after Appellant had finished mining coal[3], cannot legally be used to impose on Appellant greater responsibility than it agreed to assume when it accepted the permits.

DER responds to this argument by contending (1) that Appellant did, in fact, increase the pollution load, and (2) that Appellant became absolutely liable for the Petraglia Seep under §315(a) of the CSL when it commenced mining operations on the site, regardless of 25 Pa. Code §77.92(26) and regardless of whether it did anything at all to affect the seep or worsen the pollution load. The first point is encumbered by a factual dispute, but the second point has the support of decisional law.

The seminal case for our purposes is Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974) (Barnes & Tucker I) where the Supreme Court held that a coal operator could be forced to abate a discharge of AMD from a closed mine even though it had been operated under a permit that did not require the treatment of AMD. The court ruled, inter alia, that the purposes of the CSL are of such importance that no permit holder can obtain a prescriptive right to discharge AMD or to conduct its mining operations under any particular version of the regulations or regulatory policy. Amendatory legislation and modified regulations impacting on past conduct that cannot be changed nonetheless are valid exercises of the police power under the standards announced in Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). These principles were reaffirmed in Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977) (Barnes & Tucker II), App. dism.

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[3] In its brief, Appellant states that coal mining was completed in June 1982 and backfilling was completed in December 1982. Statements in briefs cannot be used as findings of fact and no evidence supporting these dates has been offered. Accordingly, we are not accepting these dates as having been proved; we are merely repeating Appellant's arguments based on them.

434 U.S. 807, 98 S.Ct. 38, 54 L.Ed. 2d 65 (1978), even though the coal operator proved that most of the AMD was coming from a mine owned by someone else.

A series of Board decisions, beginning with Hawk Contracting, Inc. and Adam Eidemiller, Inc. v. DER, 1981 EHB 150, continuing with John E. Kaites et al. v. DER, 1985 EHB 625, William J. McIntire Coal Company v. DER, 1986 EHB 712 and 1986 EHB 969, Old Home Manor, Inc. v. DER, 1986 EHB 1248, and a host of recent cases, Robert C. Penoyer v. DER, 1987 EHB 131, Benjamin Coal Company v. DER, 1987 EHB 402, McGal Coal Company, Inc. v. DER, 1987 EHB 771 and 1987 EHB 975, and C & K Coal Company v. DER, 1987 EHB 786 and 1987 EHB 796, have applied the Barnes & Tucker rationale to impose on coal operators the responsibility for treating or abating AMD discharges from their mine sites, regardless of fault. The McIntire case was affirmed by Commonwealth Court at ____Pa. Cmwlth. ____, 530 A.2d 140 (1987), without considering absolute liability. However, the subject was discussed in Commonwealth, Dept. of Environmental Resources v. PBS Coals, Inc., ____Pa. Cmwlth. ____, 534 A.2d 1130 (1987), where two coal operators were held liable without fault for polluting nearby water wells.

By its peremptory nature, absolute liability produces results that sometimes appear to be unfair; and, on the surface, such an unfairness appears to be the result in the present cases. However, the Barnes & Tucker decisions both predated Appellant's applications for permits to mine the site. They clearly forewarned all coal operators that the discharge of AMD was prohibited by the CSL and that any relaxation of this prohibition by regulation or regulatory policy could be revoked at any time with retrospective consequences.

The DER regulations in effect at the time Appellant received its permits prohibited the discharge of mine drainage "from any source" having a

pH less than 6.0 or greater than 9.0: 25 Pa. Code §77.92(16). The regulations that went into effect July 31, 1982, contained a similar provision: 25 Pa. Code §87.102(a)(5). While the exemption Appellant claims was present in 25 Pa. Code §77.92(26) was not carried over into the new regulations, Appellant had no vested right to a continuation of the exemption.[4] At any time, it could be ordered to bring the discharges on its mining site within the pH parameters of the regulations.

Finally, Appellant admits that its mine drainage permit contained Special Condition 15 which required it to treat to neutrality "all gravity discharges encountered from the previous deep mining operation" without limitation as to time. This Special Condition is significantly different from the language of 25 Pa. Code §77.92(26) and is binding upon Appellant (see the McIntire case, supra, 530 A.2d 140 at 143-144). Appellant's argument that it did not "encounter" the Petraglia Seep is rejected. While the word often implies a chance occurrence, its basic meaning is "to meet with," "to come into the presence of," either of which describes Appellant's experience.

The only issue remaining to be litigated in these appeals concerns the dollar amount of the civil penalties assessed by DER and whether they constitute an abuse of descretion.

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[4]Indeed, the regulation itself was of doubtful validity after the Barnes & Tucker decisions.

ORDER

AND NOW, this 3rd day of March 1989, it is ordered as follows:

1. DER's motion is granted.

2. Partial summary judgment is entered in favor of DER on the issue of Bologna Mining Company's legal responsibility to abate or treat the Petraglia Seep.

3. The only remaining issue in these appeals is whether DER abused its discretion in setting the amounts of the civil penalties it assessed.

4. A hearing will be scheduled on this issue.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: March 3, 1989

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M. DIANE SMITH
SECRETARY TO THE BOA

IN RE:	:	**EHB Docket No. 88-090-CP-W**
TEXAS EASTERN GAS PIPELINE	:	**(Master Docket)**
COMPANY LITIGATION	:	
	:	
This filing applies to:	:	**All dockets.**
	:	
	:	**Issued:** March 10, 1989

OPINION AND ORDER SUR THE DEPARTMENT OF ENVIRONMENTAL RESOURCES' MOTION FOR AMENDMENT OF ORDER TO CERTIFY CONTROLLING QUESTION OF LAW FOR INTERLOCUTORY APPEAL

Synopsis:

A motion to amend a Board order to certify a controlling question of law for interlocutory appeal under 42 Pa.C.S.A. § 702(b) is denied. Because the motion was filed more than ten days after service of the Board's order, it is untimely. 1 Pa.Code § 35.225(a). The motion also fails to meet the criteria of 42 Pa.C.S.A. § 702(b) in that there are no substantial grounds for a difference of opinion on the issue sought to be certified and interlocutory appeal of the issue will not materially advance the termination of the appeals.

OPINION

The procedural history of this matter is described in the Board's February 7, 1989, opinion and order on Texas Eastern's motion to compel. The issue presently before us involves the Board's granting in that opinion Texas Eastern's motion to compel production of the Department of Environmental Resources' (Department) Proposed Cancer Risk Management Policy and Groundwater

Management Proposal over the Department's objections that the two documents were protected by the "deliberative process" privilege. The Board rejected the Department's claim of privilege, relying upon its previous disposition of that issue in Kocher Coal Company v. DER, 1986 EHB 945.

In a motion filed with the Board on February 21, 1989, the Department requested the Board to, pursuant to 42 Pa.C.S.A § 702(b) and Pa.R.A.P. No. 1311, amend its February 7, 1989, opinion and order to include a statement that the Board's order involved a controlling question of law as to which there was substantial grounds for a difference of opinion and that an immediate appeal therefrom would materially advance the termination of the matter. More specifically, the Department requested that the Board certify this question for interlocutory appeal:

> Do the Courts of Pennsylvania recognize a deliberative process/draft documents privilege for executive/administrative agencies of the Commonwealth?

The Department characterizes this question as an "extremely important and controlling question which will continuously arise in this case." The Department asserts that Texas Eastern will "delve even further into the deliberative process of the Department, seeking drafts of important policy documents which are still under review" and such discovery "would be extremely disruptive to the give and take crucial to informed and intelligent policy formulation." It contends that unless the Board certifies the question, the Department will be irreparably harmed.

Texas Eastern responded to the Department's motion on March 3, 1989, asserting that the Department's motion was untimely under 1 Pa.Code § 35.225(a). Texas Eastern also opposed the motion on the grounds that the question sought to be certified by the Department did not meet the criteria set forth in 42

Pa.C.S.A. § 702(b). It argues that because the question relates to a narrow discovery matter and not to any of the ultimate issues in the case, it does not present a controlling question of law, disposition of which would materially advance the termination of these appeals. Furthermore, Texas Eastern contends that there are no substantial grounds for a difference of opinion in light of the Board's prior decision on the question in Kocher and that the Department's claim that it will be irreparably harmed by compliance with the Board's order to produce the documents is disingenuous in light of the Board's disposition of the issue in Kocher over two-and-one-half years ago.

For the reasons set forth below, we will deny the Department's request to certify the question.

The Board's rules of practice and procedure provide at 25 Pa.Code § 21.1(c) that:

> Except where inconsistent herewith, the general rules of administrative practice and procedure shall be applicable insofar as they relate to adjudicatory proceedings. Where the term 'agency' is used in the general rules, 'Board' is to be understood; where the term 'participant' is used in the general rules, 'party' is to be understood.

The General Rules of Administrative Practice and Procedure provide at 1 Pa.Code § 35.225(a) that:

> When the agency head has made an order which is not a final order, a participant may by motion request that the agency head find, and include the finding in the order by amendment, that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order under 42 Pa.C.S. § 702 (relating to interlocutory order) may materially advance the ultimate termination of the matter. The motion shall be filed within 10 days after service of the order, and shall be subject to § 35.179 (relating to

> objections to motions). Unless the agency head acts within 30 days after the filing of the motion, the motion shall be deemed denied.

This rule is applicable to proceedings before the Board, as the Board's rules contain no provisions which would supersede or supplement 1 Pa.Code § 35.225(a).

The Board's rules provide at 25 Pa.Code § 21.31(a) that "Orders, notices, and other documents originating with the Board shall be served upon the person or persons designated in the notice of appearance by mail or in person." The date of service is addressed in 25 Pa.Code § 21.33(a), which provides that "The date of service shall be the date the document served is deposited in the United States mail, or delivered in person."

In this case, the Board's opinion and order was served upon the parties by certified mail, return receipt requested. The receipts for certified mail (Nos. P 866 662 384 and P 866 662 385) accompanying the copies served upon the Department's counsel indicate that the postmark of the opinion was February 7, 1989; the Domestic Return Receipt ("green card") accompanying the opinion indicates that the opinion was delivered by the Postal Service to both Department counsel on February 9, 1989.

In order to determine when the motion for certification had to be filed, we must also look to 25 Pa.Code §21.11(a), which states:

> Appeals, briefs, notices, and other documents required or permitted to be filed under these rules shall be <u>received by the Board</u> within the time limits, if any, for such filing. The date of receipt by the Board and not the date of deposit in the mails is determinative.
>
> (emphasis added)

As a result, the Department's motion would have had to be filed with the Board by February 17, 1989. Since it was not filed until February 21, 1989, it was, as Texas Eastern argues, untimely under 1 Pa.Code § 35.225(a).

While ordinarily we would simply hold that we are without jurisdiction to entertain the Department's motion, we will explain our substantive reasoning in denying the Department's motion, as this is the first instance in which we have applied 1 Pa.Code §35.225(a) in disposing of a motion to certify.

The Department failed to provide the Board with any binding authority for recognizing the deliberative process privilege in opposing Texas Eastern's motion to compel. Similarly here, it has failed to provide us with any rationale why the Board's rejection of the deliberative process privilege is a controlling question of law as to which there are substantial grounds for a difference of opinion. Rather, as Member Gerjuoy stated in Kocher,

> According to DER, all the documents withheld fall under the deliberative process privilege, which according to DER "includes matters relating to forms of government information, disclosure of which would be injurious to the consultative functions of government." DER cites only two Pennsylvania cases in support of its argument, issued in 1815 and 1878. Kocher argues that the deliberative process privilege is inapplicable to the above-captioned matter.
>
> We totally agree with Kocher. Many privileges limiting evidence which may be elicited in Pennsylvania civil proceedings are statutory. 42 Pa.C.S.A. §§ 5921-5945.1. The "deliberative privilege" is not listed under the just cited statutes. DER has pointed to no reasonably recent on point Pennsylvania decisions which would provide judge-made authority for its assertion of a deliberative process privilege in civil actions such as the instant appeal.
>
> 1986 EHB at 951 (emphasis added).

The law in the Commonwealth on this question is neither conflicting or unsettled. Indeed, the substantial grounds for a difference of opinion here is a difference of opinion over public policy, not the law, an observation again made by Mr. Gerjuoy in Kocher:

> Returning now to DER's attempt to invoke deliberative process privilege (and wholly ignoring any implications of the Right to Know Act which we admittedly may be misreading), the real issue is whether--in the absence of statutory or case law supporting a deliberative process privilege--DER's public policy argument that disclosure of the documents would negatively affect its ability to freely deliberate on policy questions should override the public policy objective of the Pennsylvania discovery rules, which obviously seek to ensure that every litigant is able to present its best possible case to the finder of fact, even if preparation of its case depends on information in the possession of an opposing party. DER's argument is not frivolous, but--again in the absence of statutory or case law authority--we do not believe that DER's laudable desire for totally untrammeled policy deliberations should override the even more laudable principle that insofar as is reasonably possible the finder of fact in a judicial dispute should have the benefit of all relevant facts. Adherence to this principle is especially important when the party seeking disclosure is appealing a governmental action, as in some of the appeals which have been consolidated under the above-captioned docket number. Under our democratic system of government, of which we are justly proud, a governmental agency should be able to defend its discretionary actions on the merits, without reliance on its ability to withhold information on grounds other than well-established privilege. ...
>
> 1986 EHB at 952-953.

We do not believe that the vehicle of interlocutory appeal was ever intended

to resolve public policy disputes; the General Assembly is the proper forum for resolving such debates.

Certifying this question will not, in our opinion, materially advance the termination of this matter. Discovery in these matters has been on-going for a year, and this is the first instance in which this issue has been brought to the Board's attention. The question bears no relation to the ultimate issues on the merits; at best, certification of the question may have some effect on accelerating the completion of discovery. The Department's claims of irreparable harm are likewise without merit, in that it has presumably been responding to discovery requests for draft policies since the Kocher ruling two-and-one-half years ago and is still, to the best of the Board's knowledge, managing to discharge its duties in administering the numerous regulatory statutes for which it has responsibility.

ORDER

AND NOW, this 10th day of March, 1989, it is ordered that the Department of Environmental Resources' motion for amendment of the Board's February 7, 1989, order to certify a controlling question of law for interlocutory appeal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: March 10, 1989

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and
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Eastern Region
For Texas Eastern:
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M. DIANE SMITH
SECRETARY TO THE BOARD

RENA THOMPSON	:	
	:	
v.	:	**EHB Docket No. 88-399-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and NORTH PENN AND NORTH WALES WATER AUTHORITIES, Permittees	:	**Issued:** March 14, 1989

OPINION AND ORDER
DISMISSING APPEAL

Synopsis:

Sanctions in the form of dismissal of an appeal will be imposed when an Appellant repeatedly fails to comply with Board orders requiring the filing of a pre-hearing memorandum.

OPINION

This appeal was filed by Rena Thompson (Appellant) from the issuance by the Department of Environmental Resources (DER) on August 18, 1988, of Permit No. E09-340 to North Penn & North Wales Water Authorities (NP/NW) in connection with the Interim Forest Park Water Treatment Plant in Chalfont, Bucks County. Pre-Hearing Order No. 1 was issued by the Board on October 6, 1988, directing Appellant to file a pre-hearing memorandum by December 20, 1988.

The Board sent a notice to Appellant on December 27, 1988, advising her that a pre-hearing memorandum had not been filed as required and

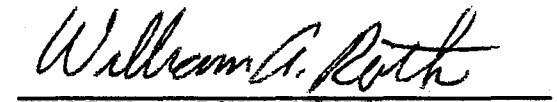
admonishing her that sanctions (including dismissal of the appeal) could be imposed if she failed to comply by January 6, 1989. A second default notice was sent to Appellant on January 26, 1989, advising that sanctions would be imposed if a pre-hearing memorandum was not filed by February 6, 1989. On February 6, 1989, Appellant requested an extension of time. The Board responded to this request by issuing an Order on February 14, 1989, directing Appellant to file her pre-hearing memorandum by February 24, 1989, "or be subject to sanctions."

No pre-hearing memorandum has been filed and no request for a further extension of time has been received. Accordingly, sanctions will be imposed pursuant to 25 Pa. Code §21.124.

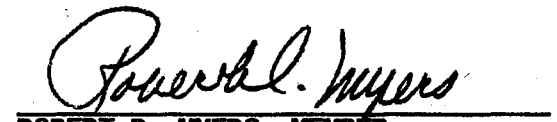
ORDER

AND NOW, this 14th day of March, 1989, it is ordered that the appeal of Rena Thompson is dismissed for failure to abide by Board orders.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER



ROBERT D. MYERS, MEMBER

Chairman Woelfling did not participate in the disposition of this appeal as a result of Appellant's allegations concerning the relationship of the permit at issue to the Point Pleasant diversion project. The Chairman has recused herself from all Board deliberations relating to the Point Pleasant Project.

DATED: March 14, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

RENA THOMPSON	:	
	:	
v.	:	**EHB Docket No. 88-405-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and NORTH PENN AND NORTH WALES WATER AUTHORITIES, Permittees	:	**Issued:** March 14, 1989

OPINION AND ORDER
DISMISSING APPEAL

Synopsis:

Sanctions in the form of dismissal of an appeal will be imposed when an Appellant repeatedly fails to comply with Board orders requiring the filing of a pre-hearing memorandum.

OPINION

This appeal was filed by Rena Thompson (Appellant) on October 3, 1988, from the issuance by the Department of Environmental Resources (DER) on August 18, 1988, of Permit No. 0988202 to North Penn/North Wales Water Authority (NP/NW) in connection with the Forest Park Interim Water Treatment Facility in Chalfont, Bucks County. Pre-Hearing Order No. 1 was issued by the Board on October 14, 1988, directing Appellant to file a pre-hearing memorandum by December 28, 1988.

The Board sent a notice to Appellant on January 10, 1989, advising her that a pre-hearing memorandum had not been filed as required and

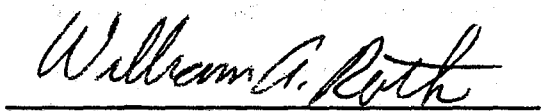
admonishing her that sanctions (including dismissal of the appeal) could be imposed if she failed to comply by January 20, 1989. On January 23, 1989, Appellant requested an extension of time. The Board responded to this request by issuing an Order on February 14, 1989, directing Appellant to file her pre-hearing memorandum by February 24, 1989, "or be subject to sanctions."

No pre-hearing memorandum has been filed and no request for a further extension of time has been received. Accordingly, sanctions will be imposed pursuant to 25 Pa. Code §21.124.

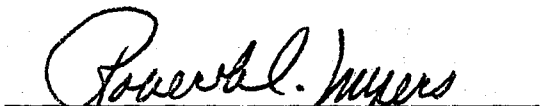
ORDER

AND NOW, this 14th day of March, 1989, it is ordered that the appeal of Rena Thompson is dismissed for failure to abide by Board orders.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER



ROBERT D. MYERS, MEMBER

Chairman Woelfling did not participate in the disposition of this appeal as a result of Appellant's allegations concerning the relationship of the permit at issue to the Point Pleasant diversion project. The Chairman has recused herself from all Board deliberations relating to the Point Pleasant project.

DATED: March 14, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

RENA THOMPSON	:	
	:	
v.	:	**EHB Docket No. 88-406-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and NORTH PENN AND NORTH WALES WATER AUTHORITIES, Permittees	:	**Issued:** March 14, 1989

OPINION AND ORDER
DISMISSING APPEAL

Synopsis:

Sanctions in the form of dismissal of an appeal will be imposed when an Appellant repeatedly fails to comply with Board orders requiring the filing of a pre-hearing memorandum.

OPINION

This appeal was filed by Rena Thompson (Appellant) on October 3, 1988, from the issuance by the Department of Environmental Resources (DER) on August 18, 1988, of Permit No. 0988508 to North Penn & North Wales Water Authorities (NP/NW) in connection with the Forest Park Water Treatment Plant in Chalfont, Bucks County. Pre-Hearing Order No. 1 was issued by the Board on October 14, 1988, directing Appellant to file a pre-hearing memorandum by December 28, 1988.

The Board sent a notice to Appellant on January 10, 1989, advising her that a pre-hearing memorandum had not been filed as required and

admonishing her that sanctions (including dismissal of the appeal) could be imposed if she failed to comply by January 20, 1989. On January 23, 1989, Appellant requested an extension of time. The Board responded to this request by issuing an Order on February 14, 1989, directing Appellant to file her pre-hearing memorandum by February 24, 1989, "or be subject to sanctions."

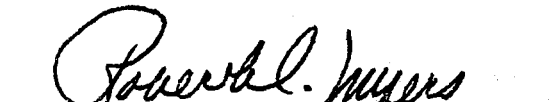
No pre-hearing memorandum has been filed and no request for a further extension of time has been received. Accordingly, sanctions will be imposed pursuant to 25 Pa. Code §21.124.

ORDER

AND NOW, this 14th day of March, 1989, it is ordered that the appeal of Rena Thompson is dismissed for failure to abide by Board orders.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER



ROBERT D. MYERS, MEMBER

Chairman Woelfling did not participate in the disposition of this appeal as a result of Appellant's allegations concerning the relationship of the permit at issue to the Point Pleasant diversion project. The Chairman has recused herself from all Board deliberations relating to the Point Pleasant project.

DATED: March 14, 1989

cc: **Bureau of Litigation**
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Eastern Region
For Appellant:
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For Permittee:
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M. DIANE SMITH
SECRETARY TO THE BOARD

THOMPSON & PHILLIPS CLAY COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 86-275-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 15, 1989

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT, MOTION TO LIMIT ISSUES, AND MOTION FOR SANCTIONS

Synopsis

The Department of Environmental Resources' motion for summary judgment in an appeal of its denial of a bond release request is denied. It is unclear whether the Department is entitled to judgment as a matter of law and there are disputes as to material fact which preclude the entry of summary judgment. However, the Department's motion to limit issues is granted; appellant is precluded from contesting its liability for acid mine drainage from its permitted mine site.

OPINION

This matter was initiated by the May 29, 1986, filing of a notice of appeal by Thompson & Phillips Clay Company, Inc. (T&P), seeking review of a May 6, 1986, letter from the Department of Environmental Resources (Department) denying the release of bonds posted pursuant to MDP No. 3269BSM6 on a mine site operated by T&P in Boggs and Decatur Townships, Clearfield

County. The Department refused to release T&P's bonds because of discharges of acid mine drainage (AMD) from the site and advised T&P that it would have to abate the discharges before its bonds could be released.

On June 12, 1986, T&P filed an amended notice of appeal claiming, *inter alia*, that it had not caused the AMD, it had complied with the applicable requirements for bond release, and it was entitled to the requested releases. T&P alleged that because it had not caused or allowed the AMD discharges and because the non-complying discharges pre-dated its mining, it was not required to treat the AMD discharges to meet the limitations in 25 Pa.Code §87.102.

On August 25, 1988, the Department filed a motion for summary judgment, or partial summary judgment, or in the alternative to limit issues. This motion, which is presently before us for disposition, alleges that it is undisputed that a pollutional discharge occurred which violated T&P's permit conditions, 25 Pa.Code §87.102, and applicable statutes, and that under §315(a) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL), T&P is responsible for treatment of that discharge to meet applicable requirements. The Department also contends that §315(b) of the CSL allows liability to continue under the bond until there is no further significant risk of a pollutional discharge from the mine. Because T&P's permit was issued, among other things, pursuant to the CSL, and there are no disputed issues of material fact, the Department contends it is entitled to summary judgment.

T&P responded to the Department's motion on September 15, 1988, reiterating the arguments regarding liability set forth in its amended notice of

appeal, but also contending that entry of summary judgment in the Department's favor would be inappropriate because of disputed material facts relating to the pollutional nature of the discharge.

We will deny the Department's motion for summary judgment and grant its motion to limit issues as to liability.

Under §315(a) of the CSL, T&P is responsible for any AMD discharge from its permit site, although the discharge may have existed before T&P began mining and although T&P may not have affected or worsened the discharge. The Board recently held, in Bologna Mining Co. v. DER, EHB Docket No. 86-555-M (Opinion and order issued March 3, 1989), that a mine operator was absolutely liable for AMD discharges from its permit site regardless of fault, citing, *inter alia*, Commonwealth v. Barnes & Tucker, 455 Pa. 392, 319 A.2d 871 (1974) (Barnes & Tucker I), and Commonwealth v. Barnes and Tucker, 472 Pa. 115, 371 A.2d 461 (1977) (Barnes and Tucker II), app. dism., 434 U.S. 807, and numerous Board decisions. For that reason, we will grant the Department's motion to limit issues.

But, while we believe that T&P is liable for any discharge at its permitted mine site, we cannot, on that basis alone, grant the Department's motion for summary judgment on the propriety of its denial of T&P's bond release request. Section 315(b) of the CSL provides, in pertinent part, that:

> The Department shall also establish the duration of the bond required for each operator and at the minimum liability under each bond shall continue until such time as the department determines that there is no further significant risk of a pollutional discharge.
>
> (emphasis added)

Thus, in order to grant summary judgment in the Department's favor, we must determine that there is no dispute as to the material fact that there is "further significant risk of a pollutional discharge." Here, we cannot say

that there is no dispute over this material fact (See T&P's response to Interrogatory No. 25) and, therefore, the granting of summary judgment is inappropriate.

Because there is ambiguity over what mineral (coal vs. non-coal) is being mined by T&P, and, therefore, what statutes, other than the CSL, and what regulations govern its operations, we cannot determine whether the discharges at issue are considered pollutional under the applicable law. In its motion for summary judgment, the Department asserts T&P is in the business of mining clay, and T&P admits it had engaged in clay mining at the site in question. While both parties assert T&P has mined clay, both cite regulations promulgated under 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). Because the mineral mined appears to have been non-coal, we do not have a sufficient basis to conclude that the SMCRA and the regulations adopted thereunder, rather than 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.*, are the applicable law.

The Department also filed a motion for sanctions on September 2, 1988, to which T&P has not responded. The Board deferred its disposition of the motion for sanctions pending the disposition of the Department's motion for summary judgment. A portion of the relief requested by the Department's motion for sanctions has been rendered moot by our ruling on its motion for summary judgment. We will grant the motion as it relates to the remainder of the Department's motion as set forth in Paragraph 3 of our order below.

O R D E R

AND NOW, this 15th day of March, 1989, it is ordered that:

1) The Department's motions for summary judgment and partial summary judgment are denied;

2) The Department's motion to limit issues is granted, and T&P is precluded from contesting its liability for the discharges at its permitted mine site;

3) The Department's motion for enlargement of time and for imposition of sanctions, to which T&P did not respond, is denied as moot in light of this opinion as it relates to the deposition of Charles Krey and Interrogatory No. 35. It is granted as it relates to Interrogatories No. 16, 17, 25(b), 26(b), and 32, and T&P is precluded from introducing any evidence on the subjects of these interrogatories other than that already set forth in its responses; and

4) The Department shall file its pre-hearing memorandum on or before March 30, 1989.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 15, 1989

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M. DIANE SMITH
SECRETARY TO THE BOA

UPPER ALLEGHENY JOINT SANITARY AUTHORITY	:	
	:	
v.	:	**EHB Docket No.** 88-084-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 15, 1989

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment will be treated as a motion for judgment on the pleadings. The motion will be granted and an appeal of the Department of Environmental Resources' return of an unprocessed Act 339 application will be dismissed when that application is filed, postmarked or received after the statutory deadline. The Department does not abuse its discretion when it refuses to process an Act 339 application which is untimely submitted.

OPINION

This matter was initiated by the March 14, 1988, filing of a notice of appeal by the Upper Allegheny Sanitary Authority (Authority) seeking review of a letter dated February 16, 1988, from the Department of Environmental Resources (Department) returning, unprocessed, the Authority's application for a sewage treatment plant operating subsidy submitted pursuant to the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. §§701-703, commonly referred to as Act 339. The Department returned the Authority's application because

the Authority failed to comply with 25 Pa. Code §103.23 which requires applications to be filed, received or postmarked on or before January 31 of the year following that for which the applicant is seeking a subsidy.

On July 11, 1988, the Department filed a motion for summary judgment, arguing that since the application was postmarked February 2, 1988, and the Department received the application on February 8, 1988, it did not commit an abuse of discretion in returning the application because the language of 25 Pa. Code §105.23 is to be strictly construed.

The Authority responded to the Department's motion on July 25, 1988, claiming that the use of the words "filed", "received", and "postmarked" in 25 Pa. Code §103.23 and the use of two application submission dates, January 31 and February 1 on the application, statute and regulation leave an applicant unsure of the filing requirements.[1] Furthermore, the Authority argues that since January 31, 1988, fell on a Sunday, the filing deadline was extended to the next business day, Monday, February 1, 1988, and that the application in question was properly filed on February 1, 1988. Additionally, the Authority contends the Department's motion for summary judgment is premature and the Board cannot rule on it, since the Department has not responded to its discovery requests. The Authority then advances an extensive chronology of events to support its claims that material facts remain in dispute.[2] The Authority states that on February 1, 1988, an employee of the Authority changed the date on the postage meter used to stamp the Act 339 application,

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[1] As explained later, it does not matter whether the official deadline is January 31 or February 1 because January 31, 1988 fell on a Sunday, thus extending any deadline to February 1, 1988.

[2] The Authority maintains it is improper for the Department to aver facts not of record in this motion since the Board may only consider those facts of record when ruling on summary judgment. We have considered those facts pleaded by the Authority as true for the purposes of ruling on this motion.

from February 1 to February 2, in anticipation of the next business day. Although the envelope was stamped February 2, 1988, the Authority claims it was actually mailed after business hours on February 1, 1988. The Authority asserts that, but for the February 2, 1988 mark, the Department would have processed the application. Since the date was incorrect, the Authority argues the Department should still consider the application timely.[3] Moreover, the Authority believes that other Act 339 applications received after February 1, 1988, were processed by the Department and that the Department did not begin to process many of the applications until considerably after February 8, 1988.

Although this is a motion for summary judgment, we have treated it as a motion for judgment on the pleadings since it may be disposed of upon an examination of the Authority's notice of appeal. See Beardell v. Western Wayne School Dist., 91 Pa. Cmwlth. 348, 496 A.2d 1373 (1985). Like a motion for summary judgment, a motion for judgment on the pleadings may be granted when no material facts are in dispute and a hearing is pointless because the law is clear on the issue. Id. In ruling on a motion for judgment on the pleadings, this Board will look at all facts pleaded by the non-moving party

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[3] The Authority cited St. Christopher's Hospital v. D.P.W., 78 Pa. Cmwlth. 113, 466 A.2d 1134 (1983), for the proposition that the question of whether an application has been timely made cannot be decided summarily.

as true. Id. No material facts are directly controverted,[4] although the Authority does seek discovery to ascertain additional facts. Since we find no material facts in dispute, we believe the Department is entitled to judgment as a matter of law. Outstanding discovery requests by the Authority will not bar judgment in this case, since a motion for judgment on the pleadings may be filed after the pleadings are closed.[5] In any event, we do not believe further discovery will uncover any additional material facts, because the only issue is whether the Authority's Act 339 application was timely filed and that issue may be readily resolved by an examination of the Authority's notice of appeal.

Section 3 of Act 339 authorizes the Department to make payments to municipalities for the operation of sewage treatment plants.

> "In accordance with rules and regulations which the Department is hereby authorized to promulgate, and shall be based upon reports filed with the Secretary of Health prior to the thirty-first day of January, one thousand nine hundred and fifty-four, and annually thereafter, by the municipalities, municipality authorities or school districts

---

[4] The Authority specifically mentions paragraphs 11 and 14 of the Department's motion. Paragraph 11 contains argument, not fact. The Department claims the Authority has not cited extraordinary circumstances. Additionally it says it is common knowledge that most post offices close at 5:00 p.m. and that it was within Authority's control to ensure the application was posted or picked up on the same day as it was deposited in the mail. The Authority alleges that the application left its control after it was placed in the mailbox, but does not say it had no control to ensure the application was mailed with enough time to allow the post office to process it. Since the Authority admits to placing the application in the mail after the post office closed for the day and after the last scheduled pickup for the day, we do not find a controversy over a material fact. Paragraph 14 alleges the Department denied other Act 339 applications which were untimely filed. Since we are not concerned with what the Department could have done, but rather with whether it abused its discretion in doing what it did, this fact is also not material.

[5] Although a notice of appeal is not a pleading, we will treat it as such here. Furthermore, even if we treat this as a motion for summary judgment, outstanding discovery requests will not bar the entry of summary judgment. A motion for summary judgment may be filed "after the pleadings are closed, but within such time as not to delay trial..." Pa. R.C.P. No. 1035(a).

> municipalities, municipality authorities or school districts entitled to receive such payments, setting forth the amounts expended for the aquisition and construction of sewage treatment plants from the effective date of the Act, approved the twenty second day of June, one thousand nine hundred thirty-seven (Pamphlet Laws 1987)[1], up to and including the thirty-first day of December of the preceding year."
>
> (footnote omitted)

The regulations implementing the operating subsidy program at 25 Pa. Code §103.23(a) provide that

> The required application and supporting documentation shall be filed with the Department prior to January 31, 1954 and prior to February 1 annually thereafter. No application received by the Department or postmarked later than January 31 will be accepted for processing by the Department.
>
> (emphasis added)

In those situations where the January 31 deadline falls on a Sunday, the Board has held that the deadline is extended until the next business day, citing 1 Pa. C.S.A. §1908. Tunkhannock Borough Municipal Authority v. DER, EHB Docket No. 88-083-W (Opinion and order issued July 29, 1988).

The Board has previously ruled that the Department does not commit an abuse of discretion in refusing to accept Act 339 applications which are not timely filed. Sanitary Authority of the City of Duquesne v. DER, 1984 EHB 635. The Board noted in Duquesne that whether or not the Department could have accepted a late application was not at issue; rather, the issue on review was whether the Department abused its discretion in refusing to review Duquesne's untimely application. The Board held that the Department did not abuse its discretion and that it was not bound by Borough of Norristown v. Commonwealth, 85 Dauph. 65 (1966), and the Dauphin County Court of Common Pleas' reliance in that decision on East Lake Road and Payne Avenue, 309 Pa. 327, 163 A. 683 (1932). Likewise, we are not here influenced by the Authority's arguments based on Norristown, supra, and East Lake, supra.

Since January 31, 1988, fell on a Sunday, the Authority's Act 339 application had to be received by the Department on or before Monday, February 1, 1988, or postmarked on or before Monday, February 1, 1988.[6] Looking at the facts in the light most favorable to the Authority, Robert C. Pennoyer v. DER, 1987 EHB 131, and accepting the Authority's representation of these facts, the application was placed in the mail on February 1, 1988, at approximately 5:15 p.m., not February 2, 1988 as stamped on the envelope. Since there is no dispute that the Department did not receive the Authority's Act 339 application until after February 1, 1988, we must determine whether the Authority's application satisfied the postmark requirement or whether the postmark bearing the date February 2, 1988 precludes the Authority's argument that the application was timely. We must also determine whether or not depositing the application in the mail after business hours of the Authority, the Department and the Tarentum Post Office on February 1, 1988, constitutes timely filing.

The Authority claims that when an envelope already has been stamped by a postage meter and bears the same date as that on which the post office processes the envelope, the post office does not stamp the envelope with an official postmark. This corresponds with the Domestic Mail Manual, Vol. 29, Section 144.532 (December 18, 1988)(DMM), of which we take official notice pursuant to 25 Pa. Code 21.109, which directs post office employees, "Do not postmark metered mail, except as required in 144.534 and Postal Operations Manual (POM) 423.35." Section 144.534 of the DMM directs post office officials to

"Examine mail while it is being routed for distribution to

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[6] See infra for a discussion of the importance of "filed," "received," and "postmarked" in 25 Pa. Code §103.23(a).

> determine that it is properly prepared. This examination may be made by a selective check of the pieces as they are distributed. Metered mail bearing the wrong date of mailing (See 144.47) will be run through a cancelling machine or otherwise postmarked to show the proper date..."

Section 144.47 states

> "Dates shown in the meter postmark of any type or kind of mail must be the actual date of deposit, except when the mail piece is deposited after the last scheduled collection of the day. When deposit is made after the last scheduled collection of the day, mailers are encouraged but not required to use the date of the next scheduled collection." (emphasis added)

Section 144.47 further states that "When a .00 postage meter impression is used to correct the date of metered mail, the date in that impression shall be considered to be the actual date of deposit."

Even though the Tarentum Post Office's treatment of the Authority's application is consistent with the DMM, we do not see how it helps the Authority. First, even if the the Tarentum Post Office did, on February 2, 1988, notice the envelope bearing the February 2 postmark, it would not have stamped another postmark. Second, even if the Tarentum Post Office did not notice the postmark when processing the mail (since only selective pieces are checked), the Authority admits that the envelope was placed in the mailbox

outside the Tarentum Post Office after the last scheduled pickup.[7] Therefore, the envelope could not have been processed until, at the earliest, February 2, 1988. Had the Authority's employee not changed the date on the meter to February 2, the post office could have stamped February 2, 1988, on the envelope, or could have left the February 1, 1988, meter stamp in place in accordance with §144.47 of the DMM. But, if the postage meter had not been used to affix postage, the envelope would have been processed and postmarked no earlier than February 2, 1988. Third, the Authority could have affixed another postage mark reading .00 and bearing the correct date in order to resolve any disputes over the correct date of mailing. The Tarentum Post Office then could have left that postmark or postmarked the application the day it processed the application.

Because we have taken as true the Authority's allegation that the envelope was placed in the mail box after the close of business on February 1,

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[7] See Authority's notice of appeal, paragraphs 11 and 14, admitting the "meter indicia (postage meter stamp) was actually affixed to the envelope on Monday, February 1, 1988, at approximately 5:15 p.m." and that "the last pickup of mail deposited in the aforementioned post office box designated for "out-of-town" mail is at 5:10 p.m. on weekdays, all mail deposited after said time not being removed from said depository box until said Tarentum Post Office opens for business the following morning." The Authority's brief in opposition to the motion for the summary judgment elaborates on this: "the indicia was actually affixed on February 1, 1988 at approximately 5:15 p.m." and that

> "mail deposited in this receptacle and destined for out-of-town delivery is removed from the receptacle outside the Tarentum Post Office for the last time each weekday at approximately 5:00 p.m. This mail is then picked up by truck at about 5:15 p.m. and delivered to the main post office in Pittsburgh. Any mail deposited in the outside receptacle after 5:00 p.m. is not removed therefrom until 5:00 a.m. the following morning and following its removal, does not leave the "Tarentum Post Office until noon on that day." (emphasis added)

1988, we are not concerned with the date of mailing, but rather with the date of the postmark. In any event, we do not see how the envelope could have been processed by the Tarentum Post Office prior to February 2, 1988.[8]

The Authority has argued that the use of the terms "filed," in §3 of Act 339 and "filed", "received," and "postmarked" in §3 of Act 339, 25 Pa. Code §103.23(a), and the application form is misleading and confusing. As for the Authority's argument that the differing words and dates leave an applicant in confusion, we find it meritless. The Authority failed to comply with even the most liberal reading of the language in not having the application postmarked by February 1, 1988. We also do not believe there is any confusion. The regulation requires the Act 339 application to "be filed with the Department." The very next sentence supplies the meaning of "filed." For an application to be considered timely filed, it must either be received by the Department by January 31, or postmarked by January 31 (in this case, by February 1, 1988, since January 31 was a Sunday).

Because the Department did not receive the application until February 8, 1988, and since the application, postmarked February 2, 1988, could not have been postmarked by the post office any earlier than February 2, 1988, even if it was marked February 1 by the postage meter, we must hold that the Department did not abuse its discretion in refusing to process the Authority's Act 339 application.

The Authority cites several cases to support its argument that extraordinary circumstances exist which should result in this application

---

[8] We do not believe a hearing on this matter is necessary. In determining the earliest date the post office could have postmarked the envelope we have considered as true facts set forth by the Authority in its notice of appeal.

being treated as timely filed. We cannot agree. The cases cited by the Authority deal with extending the appeal period, not extending the application deadline for a subsidy. Furthermore, the cases deal with a breakdown of the judicial or administrative process. Even if we extend this argument to the post office, we fail to see how there was a breakdown of the post office's operations. In this case, the action of the Authority's employee resulted in the February 2, 1988 postmark. As discussed earlier, a .00 postmark could have been used to change the date and was not. This case is more analogous to situations where the negligent actions of a party result in the untimely filing of a notice of appeal and the party is precluded from filing a petition for allowance of an appeal nunc pro tunc. Thomas Fitzsimmons v. DER, 1986 EHB 1190, citing Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976) and W. W. Grainger, Inc. v. W. C. Ruth & Son, 192 Pa. Super. 446, 449, 161 A.2d 644, 646 (1960).

ORDER

AND NOW, this 15th day of March, 1989, it is ordered that the Department's motion for summary judgment is granted and the Upper Allegheny Joint Sanitary Authority'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: March 15, 1989

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For the Commonwealth, DER:
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Western Region
For Appellant:
James L. Nardelli, Esq.
New Kensington, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

SWISTOCK ASSOCIATES COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 88-240-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 15, 1989

OPINION AND ORDER
SUR
MOTION IN LIMINE

Synopsis

A Motion in Limine, seeking to prevent an appellant from raising the issue of estoppel, will not be granted or denied when the appellant's Response to the Motion states that the issue will not be raised. Evidence of prior inconsistent actions and determinations by the Department of Environmental Resources (DER) in connection with a post-mining flooding problem is relevant in a proceeding to determine whether the appellant is the responsible party.

OPINION

On February 9, 1989, DER filed a Motion in Limine, seeking to have the issue of estoppel removed from this appeal. Swistock Associates Coal Corporation (Swistock) filed a Response to DER's Motion on March 1, 1989, claiming that estoppel was not one of the issues it intended to litigate.

The appeal was filed from Complaince Order (C.O.) 88H046, issued on

June 3, 1988,[1] directing Swistock to eliminate the flooding of the Ardell Jacobson property. Apparently, the periodic flooding of the property had begun in 1983 sometime after Swistock had commenced extensive backfilling on its surface coal mining site in Lawrence Township, Clearfield County. In 1986, DER personnel had concluded that Swistock was not responsible for the flooding. This conclusion was reaffirmed in 1987 and 1988, and Stage II bond release was approved under 25 Pa. Code §86.172. After further review in 1988, DER personnel concluded that Swistock was responsible for the flooding.

In its Notices of Appeal, Swistock asserted that DER is "estopped from alleging the violations" set forth in the C.O.'s, but this legal contention was not repeated in the pre-hearing memorandum. Swistock's Response to DER's Motion removes any doubt on the subject.

Swistock argues, however, that the history of previous DER actions and determinations is nonetheless relevant to a proper disposition of this case. We agree. The central question is whether Swistock is responsible for the flooding. The fact that presumably competent DER personnel answered that question in the negative over a two-year period is certainly relevant, because it tends to cast doubt on the finality of DER's most recent conclusions.

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[1] C.O. 88H046 was amended by C.O. 88H046A, issued June 30, 1988. Swistock's appeal from C.O. 88H046A, docketed at 88-273-M, was consolidated into the appeal docketed at 88-240-M, by Board Order dated November 3, 1988.

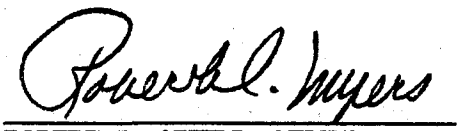
ORDER

AND NOW, this 15th day of March 1989, it is ordered as follows:

1. DER's Motion in Limine is neither granted nor denied, since Swistock's response thereto makes the subject of the Motion moot.

2. Evidence of previous actions and determinations by DER in connection with the flooding of the Ardell Jacobson property is relevant to these consolidated appeals.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: March 15, 1989

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Central Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOARD

PENNBANK, et al.	:	
	:	
v.	:	**EHB Docket No. 88-281-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 15, 1989

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION OR CLARIFICATION

OPINION

On February 15, 1989, the Board issued an Opinion and Order sur Motion for Summary Judgment in this appeal. On March 7, 1989, the Department of Environmental Resources (DER) filed a Petition for Reconsideration or Clarification pursuant to 25 Pa. Code §21.122. Two of the points set forth in the Petition focus on certain comments made in the Opinion; but, since the decision did not rest on these comments, they form no basis for reconsideration. DER's third point relates to a supposed internal inconsistency in the Opinion. We have reviewed the decision with this in mind and fail to find any substance to DER's assertion.

ORDER

AND NOW, this 15th day of March, 1989, it is ordered that the Petition for Reconsideration or Clarification, filed by the Department of Environmental Resources on March 7, 1989, 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: March 15, 1989

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**EHB Docket No. 85-252-M-CP**
v.	:	
CANADA-PA, LTD.	:	**Issued:** March 21, 1989

ADJUDICATION

By Maxine Woelfling, Chairman

Synopsis

The Board issues an adjudication determining the amount of civil penalties where the issue of liability has already been established in a partial default adjudication. In assessing a penalty of $50,470, the Board placed emphasis on the wilfulness of the defendant's conduct, harm to the environment, the costs of remediation, and the deterrent effect.

INTRODUCTION

This matter was initiated by the Department of Environmental Resources' (Department) June 19, 1985, filing of a complaint for civil penalties pursuant to 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 Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA). The complaint alleged that Canada-Pa, Ltd. (Canada-Pa) violated rules and regulations promulgated under the CSL and the DSEA, a 1983 encroachment

permit, and the terms and conditions of an April 15, 1983, consent order and agreement (CO&A). This Board entered a partial default adjudication which established Canada-Pa's liability for the violations alleged in the complaint in DER v. Canada-Pa, Ltd; 1987 EHB 177.

On August 26, 1987, this Board held a hearing to determine the amount of penalties to be assessed. Canada-Pa was informed, via certified mail, return receipt requested, of that hearing. However, Canada-Pa was neither represented by counsel nor in attendance at the hearing.

FINDINGS OF FACT

1-20. The findings of fact in DER v. Canada-Pa, Ltd, 1987 EHB 177, are hereby incorporated as Findings of Fact Nos. 1-20.

21. A hearing for the purpose of determining the amount of civil penalties to be assessed against Canada-Pa was held on August 26, 1987.

22. Canada-Pa was notified of the original hearing date of August 21, 1987, by certified mail, return receipt requested. The Board received the return receipt, signed by Robert Boyce, on June 24, 1987.

23. Canada-Pa was notified of the amended hearing date of August 26, 1987, by certified mail, return receipt requested. The Board received the return receipt, signed by Robert Boyce, on August 17, 1987.

24. Robert Boyce owns the Daugherty Hollow site (N.T. 28) and is the president of Canada-Pa. (N.T. 21)

25. Canada-Pa was neither represented by counsel nor present at the August 26, 1987, hearing.

26. Canada-Pa was formally notified of violations observed during a December 15, 1982, inspection of the site by a December 28, 1982, notice of violation. (Ex. 7)

27. On April 21, 1983, an inspection of the site indicated that Canada-Pa had conducted earthmoving activity not addressed in the erosion and sedimentation plan required pursuant to the CO&A and in violation of 25 Pa.Code §102.1 *et seq.* (Ex. 12)

28. Robert Boyce was made aware of these violations, as evidenced by his signature on the April 21, 1983, Earth Disturbance Inspection Report. (N.T. 50-51; Ex. 12)

29. Canada-Pa's erosion and sedimentation plan had not been fully implemented on May 10, 1983, when an inspection of the site was conducted by Thomas Bittner. (Ex. 13)

30. Robert Boyce was again made aware of the violation as evidenced by his signature on the May 10, 1983, Earth Disturbance Inspection Report. (Ex. 13)

31. Canada-Pa's logging activity impacted negatively on the unnamed tributary draining from Daugherty Hollow Run and Seven Mile Run. (N.T. 80)

32. Before Canada-Pa's activities, Seven Mile Run contained a good or excellent population of brook and brown trout. (N.T. 82)

33. There was no significant difference in fish density immediately after the violations, and no fish mortality was noted in the field. (Ex. 16)

34. Canada-Pa's violations had a chronic (long-term), rather than acute (short-term), effect on the trout population. (Ex. 16)

35. Stream substrate analysis indicated that there was an adverse effect on benthic macroinvertebrates. (Ex. 16)

36. Benthic macroinvertebrates are a food source for trout. (N.T. 96)

37. Sediment entering a stream can cause an immediate impact on fish. Some trout will migrate to find hiding cover. (N.T. 96)

38. Sediment on the substrate affects organisms, like fish, that use the substrate for reproduction. (N.T. 91)

39. If fish are unable to migrate, sediment may cause injury or death to the fish population. (N.T. 96)

40. Sediment accumulates on the stream bottom and is eventually re-distributed, migrating downstream. (N.T. 99)

41. Areas existed on the Daugherty Hollow site where the affected stream had left its banks and was flowing out into a skid trail. (N.T. 61)

42. The stream is now fairly well stabilized in that vegetation is coming back on its own. (N.T. 100)

43. All drainage within the Young Woman's Creek basin is classified as High Quality under 25 Pa.Code §93.9. (Conclusion of Law No. 5, 1987 EHB 177)

44. A spring area which formerly drained into Daugherty Run now carries silt and sediment. (N.T. 38)

45. On August 21, 1987, the spring through which the logs had been skidded was now flowing and an erosion dam was completely filled with debris. (N.T. 72-73)

46. Jack dams would provide better sedimentation control than the fabric filter fences installed by Canada-Pa. (N.T. 100)

47. The cost of replacing a fabric filter fence with a jack dam is approximately $3000; seven filter fabric fences exist on the site. (N.T. 100)

48. Additional costs for seeding and mulching would be approximately $4000. (N.T. 100-101)

49. Canada-Pa's logging activities are known to loggers in that area. (N.T. 65)

50. Photographs taken of the site are used in training sessions for loggers to demonstrate an improper way of conducting operations; some loggers who view these photographs recognize that they are pictures of the Daugherty Hollow site. (N.T. 64-65)

DISCUSSION

Our default adjudication at 1987 EHB 177 established violations of the 1983 CO&A, §§401, 402, and 611 of the CSL, and 25 Pa.Code §102.4 from Canada-Pa's unlawful earthmoving activities and failure to maintain a full and complete erosion and sediment control plan. Additionally, that adjudication established violations of the CO&A, §§307, 316, 401, 402, 503, and 611 of the CSL, and 25 Pa.Code §§102.4, 102.11, 102.12, 102.22, and 102.24 for Canada-Pa's failure to implement and maintain adequate control measures and failure to stabilize the Daugherty Hollow site. Furthermore, the Board found that Canada-Pa's discharge of pollutants and industrial waste violated the CO&A, §§307, 401, 402, 503, and 611 of the CSL, and 25 Pa.Code §102.12(g). In the remainder of our discussion, we will refer to these violations collectively as violations of the CSL.

In addition to the violations of the CSL and regulations promulgated thereunder, the default adjudication also established violations of §§6 and 18 of the DSEA and 25 Pa.Code §§105.11 and 105.44, resulting from Canada-Pa's construction, maintenance, and utilization of unpermitted stream obstructions and encroachments and the unlawful changing of the course, current, and cross-section of waters of the Commonwealth, and a violation of the April 5, 1983 encroachment permit issued pursuant to, *inter alia*, the DSEA and CSL. In the remainder of our discussion, we will refer to these violations collectively as violations of the DSEA.

Having determined the existence of these violations, we now turn to the calculation of the civil penalties to be assessed for those violations.

We are guided in our assessment by §605 of the CSL and §21 of the DSEA. Under §605 of the CSL we may assess a maximum penalty of $10,000 per day per violation of the CSL. That section also directs us to consider the wilfulness of the violation, the damage or injury to the waters or the use of the waters of the Commonwealth, the costs of restoration, and other relevant factors. DER v. Lucky Strike Coal Co. and Louis Beltrami, 1987 EHB 234; DER v. Lawrence Coal Co., EHB Docket No. 81-021-CP-M (Adjudication issued July 5, 1988).

The DSEA has similar provisions. Section 21 of the DSEA authorizes us to assess a maximum civil penalty of $10,000 per violation, plus $500 for each day of continued violation. In calculating the amount of the penalty, we are to consider the wilfulness of the violation, the damage or injury to the stream regimen and downstream areas of the Commonwealth, the cost of restoration, the cost to the Commonwealth of enforcing the DSEA against the violator, and other relevant factors.

Both the CSL and DSEA state that wilfulness is one factor which must be considered when determining the amount of civil penalties to assess. However, under both of these statutes, civil penalties may be assessed regardless of wilfulness. The Board has recognized the existence of different degrees of wilfulness. At one end of the spectrum is the deliberate, intentional violation of the law and at the other end of the spectrum is a negligent violation of the law. This Board has held that,

> An intentional or deliberate violation of law constitutes the highest degree of wilfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Reckless-

> ness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

Southwest Equipment Rental, Inc. v. DER, 1986 EHB 465, citing Refiners Transport and Terminal Corp. v. DER, 1986 EHB 400 (assessments 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.*).

We believe that Canada-Pa's violations were intentional. Canada-Pa acknowledged its violations of various sections of the CSL and regulations promulgated thereunder in the CO&A, and then failed to comply with it. See DER v. Lawrence Coal Co., *supra*. The exhibits introduced at the hearing indicate that Robert Boyce, President of Canada-Pa, was personally made aware of violations found at the Daugherty Hollow site on at least April 21, 1983, and May 10, 1983, as shown by his signature on these inspection reports, and the violations continued after these dates. Moreover, neither Canada-Pa nor its counsel participated in or even attended the hearing. Such disrespect for this Board indicates Canada-Pa's disrespect for the law and weighs heavily in our determination that these were wilful violations of the CSL. We believe $5000 is an appropriate amount to factor into the total civil penalty assessed for the wilfulness of Canada-Pa's conduct in violating the CSL. We also hold Canada-Pa's violations of the DSEA to be wilful as shown by its activities which caused obstruction and encroachment of Daugherty Run in violation of the DSEA and will factor $2000 into the DSEA penalty for wilfulness.

Section 605 of the CSL and §21 of the DSEA direct us to consider harm to the environment when assessing civil penalties. In considering the testi-

mony of witnesses, photographs taken at numerous inspections, and other evidence introduced, we conclude that there was moderate damage to the environment. We do not mean to trivialize the nature of the harm to this water basin; however, evidence does show that erosion and sedimentation control devices, in the form of fabric filter fences, were installed, and although some of these barriers were clogged and ineffective, some seem to have been working well to control siltation. Additionally, testimony indicates the area is trying to recover; for example, the skid road has somewhat returned to native vegetation (N.T. 73) and the stream is fairly well stabilized in terms of vegetation coming back on its own (N.T. 101). We do feel that the moderate nature of the injury was established by testimony that areas exist where the stream had left its banks and had rerouted into a skid trail (N.T. 61), at least one sediment barrier was clogged and ineffective (N.T. 63), the spring where logs were skidded through was not flowing (N.T. 72), and an erosion dam was filled with debris (N.T. 73). Furthermore, testimony from a fisheries biologist with the Pennsylvania Fish Commission established that the sedimentation entering the stream adversely affected the native population of trout by reducing the hiding cover required by the trout, by affecting the substrate used by trout for reproduction, and by forcing the trout to migrate, if possible, downstream. As a result of our findings, we believe that a penalty of $5000 is appropriately attributed to the damage to the environment caused by violations of the CSL and a $500 penalty is attributed to the environmental damage caused by the violations of the DSEA.

This Board must also consider the cost of restoration in determining the amount of civil penalty. The Department presented credible evidence from a fisheries biologist who suggested that the stream would better recover if the fabric filter fences installed by Canada-Pa were replaced by jack dams.

The cost of replacing each fabric filter fence would be approximately $3000 and associated costs of seeding and mulching for the entire area would total approximately $4000. Canada-Pa did not rebut this testimony. Therefore, we will factor $25,000 into our assessment of civil penalties as the cost of restoration.

Although the Department requested penalties for its costs in enforcing the law against Canada-Pa and for the economic savings accrued by Canada-Pa from its unlawful operations, it failed to present testimony which would have enabled us to consider these factors in our assessment of penalties.

Section 605 of the CSL and §21 of the DSEA also direct us to consider "other relevant factors" when assessing civil penalties. Deterrence is properly considered as one of these factors. Lawrence, *supra*. (discussing factors to be considered under §605 of the CSL). Canada-Pa's conduct in this matter indicates that it had little intention to comply with the law and that the signing of the CO&A was nothing more than an effort to get the regulatory agencies off its back and conduct business as usual. Canada-Pa has flaunted the CO&A and shown utter disregard for the law. We must send a signal to both Canada-Pa and the logging industry that their operations are not above the law and that violations will not be tolerated. Testimony presented at the hearing established that loggers in the area were familiar with the Daugherty Hollow site and this civil penalties complaint. We feel that $5000 is properly added to the total assessment of civil penalties to ensure Canada-Pa's future compliance with the law and the compliance of all loggers in the area who are familiar with this situation.

As for continuing violations of the CO&A, the Department requests that we assess a $50 per day penalty for the continuing violation of the CO&A for a

total of 1747 days. This request is based on the penalty for continuing violations prescribed in Paragraph 6 of the CO&A; the number of days appears to be the number of days from the execution of the CO&A to the filing of the Department's post-hearing brief. We find this proposal excessive. While the Department presented unrebutted testimony about the continuing nature of the violations (N.T. 32), we will assess a penalty of $5 per day for continuing violations of the CSL from the date of the CO&A to the date of the filing of the Department's complaint. A penalty of $3985 is, therefore, assessed for the continuing violations of the CSL for 797 days (from April 15, 1983, to June 19, 1985). As for the violations of the DSEA, we will assess a like penalty of $5 per day, for $3985.

A total civil penalty of $43,985 is assessed against Canada-Pa for its violations of the CSL. This sum includes $5000 attributable to the wilfulness of Canada-Pa's violations; $5000 attributable to the harm to the environment caused by those violations; $25,000 for the cost of replacing existing fabric filter fences with jack dams and reseeding; $5000 as deterrence to Canada-Pa and others engaged in similar activities; and $3985 for continuing violations of the CSL.

A total civil penalty of $6485 is assessed against Canada-Pa for its violations of the DSEA. This sum consists of $2000 for the wilfulness of the violations, $500 for the harm to the environment, and $3985 for Canada-Pa's continuing violations of the DSEA.

CONCLUSIONS OF LAW

1-25. The conclusions of law made at 1987 EHB 177 are hereby incorporated as Conclusions of Law Nos. 1-25.

26. This Board has jurisdiction over the parties and subject matter of this complaint for civil penalties.

27. This Board has the authority to assess civil penalties under §605 of the CSL and §21 of the DSEA.

28. The violations established at 1987 EHB 177 were intentional violations of law; a penalty of $5000 under the CSL and $2000 under the DSEA is appropriate.

29. The violations established at 1987 EHB 177 caused moderate damage to the waters of the Commonwealth. A penalty of $5000 under the CSL and $500 under the DSEA is appropriate.

30. The cost of replacing existing fabric filter fences with jack dams, plus incidental costs, is approximately $25,000.

31. A penalty of $5000 to deter Canada-Pa from violating the law and to deter other loggers in the area from violating the law is appropriate.

32. Canada-Pa violated the CSL on a continuing basis for 797 days. A penalty of $5 per day is appropriate for this continuing violation.

33. Canada-Pa violated the DSEA on a continuing basis for 797 days. A penalty of $5 per day is appropriate for this continuing violation.

O R D E R

AND NOW, this 21st day of March, 1989, it is ordered that civil penalties are assessed against Canada-Pa, Ltd. in the total amount of $50,470. Of this penalty, $43,985 is assessed for violations of the CSL; this amount is due and payable immediately into the Clean Water Fund. The remaining $6,485 is assessed for violations of the DSEA; this amount is due and payable immediately into the Dams and Encroachments Fund. The Prothonotary of Clinton County is ordered to enter the full amount of the civil penalty as a lien against any property of Canada-Pa, Ltd., together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: March 21, 1989

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M. DIANE SM
SECRETARY TO THE

GIORGIO FOODS, INC.	:	
	:	
v.	:	**EHB Docket No. 76-042-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 24, 1989

OPINION AND ORDER
SUR PARTIES' STIPULATION

Synopsis

An appeal is dismissed as moot where the parties stipulate that the only issue is the extent of the Department's authority to inspect Appellant's premises pursuant to the Clean Streams Law and the issue was never raised by the appellant in its notice of appeal or pre-hearing memorandum. The Board is not authorized to render advisory opinions.

OPINION

This action was initiated by the March 29, 1976, filing of a notice of appeal by Giorgio Foods, Inc. (Giorgio) seeking the Board's review of a March 2, 1976, order from the Department of Environmental Resources (Department) finding that Giorgio stored and discharged industrial waste and sewage in violation of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law), and the rules and regulations adopted thereunder, at its mushroom processing operation in Maidencreek Township, Berks County. The order directed Giorgio to, *inter*

alia, submit an engineering report, design wastewater collection and treatment facilities, submit a permit application, cease all discharges of industrial waste and sewage until a permit was obtained, and submit a plan for the elimination of impoundments, compost processing, and storage sites. Giorgio contended in its notice of appeal that its operations were not subject to regulation under the Clean Streams Law, that the Department's order was unreasonable and not supported by substantial evidence, and that the Department failed to consider the economic effect of its order on Giorgio.

As can be readily ascertained by the docket number, this matter has a lengthy history which we will only highlight here. On August 11, 1976, Giorgio filed its pre-hearing memorandum. The Department filed a status report on December 6, 1976, claiming that a settlement was pending. When no settlement was reached, the Board scheduled a hearing for April 7, 1977. After a March 31, 1977, request for a continuance, the Board canceled the April 7 hearing and rescheduled it on June 20 and 21, 1977. In response to Giorgio's May 26, 1977, request, the Board canceled the June 20 and 21, 1977, hearing.

For almost three years after the cancellation of the June, 1977, hearing, there was little activity at the docket. On February 22, 1980, the Department informed the Board that it would submit a proposed consent order. On February 23, 1981, the Department filed a motion for discovery, and, on April 23, 1981, it sent a letter concerning the proposed consent order and agreement to Giorgio.

On October 26, 1983, the Board notified the parties that the case was inactive and requested a report on its status. Giorgio advised the Board on October 31, 1983, that it would not withdraw its appeal. In response to this, the Board scheduled an October 2, 1984, pre-hearing conference. As a result

of the pre-hearing conference, the Board issued an order scheduling a hearing on May 1, 2, and 3, 1985, permitting the Department to inspect Giorgio's premises, and allowing the parties to engage in discovery until April 1, 1985.

Thereafter, the parties engaged in settlement negotiations and, as a result of a March 6, 1985, status report by the parties, the Board, by order dated March 19, 1985, canceled the May, 1985, hearings and generally continued the appeal. When it appeared that no progress was being made in resolving the appeal, the Board, on June 10, 1986, issued a rule to show cause, requiring the Department to inform the Board whether the 1976 order from the Department which was the subject of this appeal was still viable. The Department advised the Board that it was still viable and the parties again requested that the matter be continued to allow the parties to conduct settlement discussions.

After a May 20, 1988, letter from the Department informing the Board that negotiations were at a standstill and requesting guidance on inspection rights, the Board ordered that on or before October 1, 1988, the parties were to bring this matter to termination by submitting:

> 1) A properly executed settlement for the Board's approval pursuant to 25 Pa.Code §21.121;
>
> 2) A request by Giorgio Foods to withdraw its appeal;
>
> 3) A request by either party to schedule the matter for a hearing on the merits, in which case a hearing will be scheduled within a month;
>
> 4) A motion by the Department to dismiss the appeal as moot; or
>
> 5) A stipulation by the parties that the only remaining issue in the appeal is the nature and extent of the Department's authority to inspect Giorgio Food's premises and that the Board may decide the

appeal based on that stipulation and memoranda of law to be filed simultaneously with the stipulation.

The parties chose the fifth alternative in the Board's order, and, on September 27, 1988, filed a stipulation stating that all of the issues specifically raised in the Department's March 2, 1976, order have been settled and that the only issue in contention is the extent of the Department's right to inspect Giorgio's premises.

In its September 27, 1988, memorandum of law accompanying the stipulation, Giorgio expressed its unease about the fact that none of the five options available in the September 9, 1988 order dispose of the initial March 2, 1976, order that is the subject of the appeal. We disagree with Giorgio's characterization of the options. In any event, Giorgio had the option to request a hearing on the merits. Instead, it chose to stipulate that the only remaining issue was the extent of the Department's inspection rights.

Unfortunately, that issue is not ripe for adjudication.[1] The Department's order does not cite Giorgio for failing to allow Department personnel to inspect its premises. Nor did Giorgio raise the issue of warrantless search in its notice of appeal or its pre-hearing memorandum.[2] Giorgio does not allege that the Department is using any evidence seized during an unlawful inspection. Instead, it claims that any inspection of its premises by the Department would be in violation of its Fourth Amendment rights against an unreasonable and warrantless search (see Giorgio's petition

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[1] In order for this issue to be ripe for adjudication, Giorgio will have to wait until the Department inspects its premises and uses information gathered during that inspection in a proceeding against Giorgio. At that time, Giorgio may properly challenge the Department's authority to conduct warrantless searches.

[2] We also note that Pre-Hearing Order No. 1, issued April 29, 1976, states: "B. A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum."

to the Commonwealth Court filed April 13, 1981, seeking permission to appeal the Board's March 11, 1981 interlocutory order). Rather than being related to the appeal pending before the Board, the issue seems to stem from a request for discovery granted by the March 11, 1981, order of the Board and from the Department's conditions for entering into a settlement agreement to terminate the litigation.

Since the issue does not directly relate to the 1976 order, or the appeal therefrom, any ruling on that issue would be premature and would amount, in essence, to an advisory opinion on the extent of the Department's inspection powers.[3] More directly put, the parties wish the Board to render a declaratory judgment, a form of relief which this Board has held that it is not authorized to grant. Varos v. DER, 1985 EHB 892.

In light of the stipulation, all other issues in the case are moot. This Board will dismiss an appeal as moot if, during its pendency, an event occurs which deprives the Board of its ability to render relief. A. P. Weaver and Sons v. DER, EHB Docket No. 88-027-R (Opinion and order issued October 31, 1988), and Paradise Watch Dogs v. DER, EHB Docket No. 88-247-W (Opinion and order issued November 23, 1988). Since the stipulation covers all but one issue and we are, at this time, without jurisdiction to decide that issue, we must dismiss Giorgio's appeal as moot.

In concluding, this is a case in which the passage of thirteen years has undoubtedly obscured the issues originally in contention. For that matter, the parties may well have forgotten what the issues ever were. What is evident is that Giorgio has taken the measures necessary to comply with the

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[3] We are aware that this issue was one of the choices given to the parties in the Board's September 9, 1988, order; but, since this is a question of jurisdiction, it is properly raised at any time during the proceeding. Thomas Fitzsimmons v. DER, 1986 EHB 1190.

Department's order and that this appeal should long ago have been dismissed as moot.

O R D E R

AND NOW, this 24th day of March, 1989, it is ordered that the appeal of Giorgio Foods, Inc. is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING, CHAIRMAN

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WILLIAM A. ROTH, MEMBER

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: March 24, 1989

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M. DIANE SMI
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LANCASTER PRESS, INC.	:	
	:	
v.	:	**EHB Docket No. 88-410-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 24, 1989

OPINION AND ORDER
SUR
PETITION FOR ALLOWANCE OF APPEAL
NUNC PRO TUNC AND MOTION TO DISMISS

Synopsis

A petition for allowance of an appeal nunc pro tunc is denied and a motion to dismiss the appeal is granted where Appellant's only justification for untimely filing is an alleged failure by Federal Express to deliver its appeal to the Board.

OPINION

This matter was initiated with the October 6, 1988, filing of a notice of appeal (and petition for supersedeas) by Lancaster Press, Inc. (Lancaster) seeking review of three letters dated August 28, 1988, from the Department of Environmental Resources (Department) denying Lancaster's applications for plan approval for three of its printing presses under the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. (APCA). Lancaster acknowledges it received the letters and signed the certified mail receipts accompanying them on August 30, 1988.

On October 18, 1988, the Department filed a motion to dismiss Lancaster's appeal for lack of jurisdiction, arguing that, pursuant to 25 Pa. Code §21.52(a) and §6.1(e) of the APCA, the Board lacks jurisdiction to consider appeals from Department actions not filed within thirty days of the receipt of written notice.

Lancaster responded to the Department's motion and filed a request to file its appeal nunc pro tunc on November 4, 1988, alleging that it prepared its filing and mailed it in a Federal Express envelope on September 20, 1988, and that the sequence of events leading from this mailing to an October 6, 1988, docketing in Harrisburg cannot be discovered. In support of its request, Lancaster cited the case of Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), wherein the Pennsylvania Supreme Court allowed the filing of an appeal nunc pro tunc where the appeal had been filed four days late due to the illness of counsel's secretary. Lancaster included an affidavit from the secretary who prepared the mailing stating she could find no logical explanation for the dates that appear in the Department's briefs and the Board's docket, as she had prepared an envelope transmitting the appeal for pick-up by Federal Express on September 28, 1988. No receipts showing the actual date of mailing were included.

The Department filed a reply to Lancaster's nunc pro tunc request on November 16, 1988, averring that Lancaster's request did not meet the traditional standard of "fraud or breakdown" of the court system. Fitzsimmons v. DER, 1986 EHB 1190. The Department also attempted to distinguish the Bass case, arguing that an appeal nunc pro tunc will be allowed under Bass only when ultimely filing is caused by the activities of a third party entirely out of appellant's control and there is no causal connection between appellant's actions and the untimely filing.

The Board's rules of practice and procedure at 25 Pa. Code §21.52 state:

> (a) Except as specifically provided in §21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b).

See also Rostosky v. Commonwealth, Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). The Board will allow an appeal nunc pro tunc where fraud or breakdown of the Board's procedures were the cause of the untimely filing of the appeal. Daniel E. Blevins v. DER, EHB Docket No. 88-018-W (Opinion and order dated November 7, 1988).

Lancaster, while not specifically arguing that there has been a breakdown in Board procedures, relies heavily upon the Bass holding and analogizes the failure in mailing in this instance to the failure in mailing described in Bass. The Bass holding attempted to fit the then - new grounds for an appeal nunc pro tunc within the framework of a breakdown in the operation of the court by viewing attorneys as officers of the court and treating their non-negligent failure to timely file appeals as a breakdown in court operations.

Since Bass, the Pennsylvania intermediate appellate courts have held that the application of the holding in Bass should be limited to cases involving non-negligent happenstance where unique and compelling facts are presented. In Re Interest of C.K. 369 Pa. Super. 445, 535 A.2d 634 (1987), and Guat Gnoh Ho v. Unemployment Compensation Board of Review, 106 Pa. Cmwlth 154, 525 A.2d 874 (1987).

Rather than being analogous to Bass, we believe the situation presented herein is similar to that in Getz v. Comm., Pennsylvania Game Comm., 83 Pa. Cmwlth. 59, 475 A.2d 1369 (1984), wherein the Commonwealth Court held that speculation regarding the operations of the Postal Service was not sufficient to satisfy the requisite burden for allowance of an appeal nunc pro tunc. Relying on Getz, we denied a petition to appeal nunc pro tunc in Shirley E. Gorham v. DER, 1987 EHB 767, where the only justification for untimely filing was an alleged failure by the Postal Service to deliver the appeal to the Board.

In the affidavit accompanying Lancaster's reply, the secretary to Lancaster's attorney stated that she "believed" she prepared a Federal Express envelope to be mailed to the Board on September 28, 1988. Lancaster produced no return receipts, postmarked envelopes or other evidence establishing that the appeal was ever sent to the Board. The secretary admits she may have inadvertently placed the appeal materials in a first class mail envelope, but concludes that such an envelope would have arrived on October 3, 1988. Lancaster acknowledges October 3, 1988 is still past the thirty day appeal period, which ended on Thursday, September 29, 1988. The only justification offered by Lancaster is speculation that Federal Express, the Postal Service,

or even the Board itself[1] was responsible for the untimely filing.

Without any evidence supporting this claim, Lancaster has failed to establish unique and compelling circumstances justifying allowance of its appeal nunc pro tunc, and, accordingly, we must dismiss this appeal.

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[1] Ms. Cornell's affidavit states:

> My check of Federal Express records shows that the Environmental Hearing Board received a mailing from this office on September 29, 1988, although this mailing may have been from another attorney at our firm in a matter unrelated to Lancaster Press' appeal. To date, I have not been able to locate any documents from Federal Express or any other record to conclusively prove that our delivery of the appeals documents was either picked up or made.
>
> (emphasis added)

The Federal Express delivery referred to in Ms. Cornell's affidavit may well have been the notice of appeal in Central Delaware County Authority v. DER, EHB Docket No. 88-391-R, which was filed with the Board by Federal Express delivery on September 29, 1989, and wherein the appellant was represented by another member of the firm which is representing Lancaster.

ORDER

AND NOW, this 24th day of March, 1989, it is ordered that Lancaster Press, Inc.'s request for allowance of an appeal nunc pro tunc is denied and the Department of Environmental Resources' motion to dismiss 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: March 24, 1989

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

JOHN FLATI and LOUIS GAGLIARDI	:	
	:	
v.	:	EHB Docket No. 84-164-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 28, 1989

ADJUDICATION

By Robert D. Myers, Member

Syllabus

The Department of Environmental Resources (DER) did not abuse its discretion in denying an application for a permit under the Dam Safety and Encroachments Act to construct a 540-foot long culvert in the channel of an unnamed tributary to the Schuylkill River in Philadelphia County. The applicants (1) failed to provide adequate data to enable DER to consider the effects of the proposed project on the regimen of the stream, as required by 25 Pa. Code §105.14(b)(4); (2) failed to demonstrate that the proposed project was the only alternative to meeting the purposes stated by the applicants, to enable DER to consider the effects of the proposed project on the ecology of the stream in accordance with 25 Pa. Code §105.14(b)(4); (3) failed to prove that the proposed project complied with laws administered by the Pennsylvania Fish Commission, as required by 25 Pa. Code §105.21(a)(2); and (4) failed to submit an acceptable erosion and sedimentation control plan, as required by 25 Pa. Code §105.13(e). DER abused its discretion by denying the permit for

failure to provide data on environmental impact and mitigating possibilities, provided for in 25 Pa. Code §§105.15(B)(1) and (2), when DER never requested an environmental assessment or made a determination that the proposed project would have a significant impact on the environment. The appeal is dismissed.

Procedural History

On May 29, 1984, John J. Flati, Louis J. Gagliardi and Elisa D. Gagliardi (Appellants) filed an appeal from the April 27, 1984, decision of DER, denying Appellants' Application for a permit to construct a culvert on an unnamed tributary of the Schuylkill River along Shawmont Avenue in Philadelphia County. Hearings on the appeal were held in Norristown on August 9, 10 and 11, 1988, before Board Member Robert D. Myers. Post-hearing briefs were filed by Appellants on October 26, 1988, and by DER on January 3, 1989. The appeal is now ready for adjudication. The record consists of the pleadings, a hearing transcript of 482 pages and 33 exhibits.

Findings of Fact

1. Appellants are the owners of real estate situated at 220 Shawmont Avenue, Philadelphia, Philadelphia County, Pennsylvania (Property). (N.T. 7-8)

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. (Act), and the rules and regulations adopted pursuant to the Act.

3. The Property is located along the northern side of Shawmont Avenue, which runs generally in an east-west direction at that point. (Appellants' Exhibits Nos. 1, 2 and 3)

4. Appellants' frontage on Shawmont Avenue is not continuous. It is interrupted by the Joseph Walker property (Walker Property) which fronts on

Shawmont Avenue for 200 feet and extends to the north for a distance of 100 feet. (N.T. 8, 16; Appellants' Exhibits Nos. 1, 2 and 3)

5. Shawmont Avenue is on an 8% descending grade toward the west at the point where it passes the Property. (N.T. 34; Appellants' Exhibit No. 1)

6. An unnamed tributary to the Schuylkill River (Stream) emanates from springs on land north of Shawmont Avenue and flows in a westerly direction toward the Schuylkill River. (N.T. 11; Appellants' Exhibit No. 1)

7. The Stream flows through the Property and the Walker Property parallel to, and about 75 feet north of, Shawmont Avenue in a channel that (based on the contour lines) appears to be about 25 feet below the level of Shawmont Avenue on the east and about 3 feet below the level of Shawmont Avenue on the west. (Appellants' Exhibits Nos. 1, 2 and 3)

8. Two dwellings (one a Victorian house estimated to be over 100 years old) and a barn exist on the Property, situated 150 feet to 170 feet north of Shawmont Avenue on a terrace 20 feet to 25 feet above the level of the Stream. These dwellings are accessed from Shawmont Avenue by means of a right-of-way (shown on Appellants' Exhibit No. 2 as varying in width from 19 to 25 feet) across land of Great Bear Water Company immediately west of the Property. (N.T. 18, 20-25, 41-43; Appellants' Exhibits Nos. 1, 2 and 3)

9. The Stream flows through the Great Bear Water Company land and adjoining land to the west in a 72" x 44" underground concrete culvert about 320 feet long. There is no evidence to show precisely when or by whom this culvert was constructed. (N.T. 17; Appellants' Exhibits Nos. 1, 2, 3, 7, 8 and 10)

10. Under date of May 18, 1981, Appellants filed with DER an Application for Dam or Water Obstruction Permit with respect to a conduit "in

a storm water drainage ditch" on the Property for the purpose of "removing a hazardous steep grade adjacent to existing dwelling and have a usable front yard for the growing of trees, shrubbery and plantings." The purpose was enlarged in January 1982 to include the providing of vehicular access to the existing dwellings on the Property and was enlarged again in December 1983 to include the providing of water and sewer connections from said dwellings to lines in Shawmont Avenue. (Appellants' Exhibit No. 6; DER's Exhibit No. 2; Stipulated Exhibit No. 2)

11. The plans that Appellants submitted to DER in connection with the Application, as revised on several occasions subsequent to May 18, 1981:

(a) Showed a 72" x 44" corrugated metal culvert proposed to be constructed in the Stream channel from a point of connection with the existing culvert on the land of Great Bear Water Company to an inlet 540 feet upstream, about 75 feet west of the Walker Property (Appellants' Exhibits Nos. 2 and 3);

(b) Indicated that the proposed culvert would be constructed at a 3.38% descending grade toward the west (Appellants' Exhibits Nos. 2, 3 and 8);

(c) Indicated that about 10 feet of fill would be placed in the Stream channel, completely surrounding and covering the proposed culvert (N.T. 305; Appellants' Exhibits Nos. 2, 3 and 7);

(d) Showed a concrete box proposed to be constructed at the outlet end of the existing culvert for the purpose of velocity control (Appellants' Exhibits Nos. 2, 3, 8 and 11);

(e) Showed the proposed construction of hay bale berms, filtration dikes and tire cleaning areas as erosion and sedimentation (E&S) control devices to be used during construction (Appellants' Exhibit No. 2).

12. Despite repeated requests from DER, Appellants:

(a) Failed to identify accurately the limits of the watershed and to calculate the amount of runoff from a 100-year storm (N.T. 121-125, 277, 279-280; Appellants' Exhibits Nos. 6, 7, 8, 9, 10, 11 and 12; DER's Exhibit No. 6);

(b) Failed to provide the hydraulic and hydrologic calculations necessary to determine whether the proposed culvert would cause water to back up on the Walker Property (N.T. 229-230, 283-293, 312-316; DER's Exhibits Nos. 1, 3, 4, 5, 7, 8 and 9);

(c) Failed to provide the calculations necessary to determine whether the proposed velocity control structure at the outlet of the existing culvert was of adequate size and suitable location to reduce the super-critical flow in the culvert to sub-critical rate without causing erosion (N.T. 225-228, 232, 234-235, 378-384; DER's Exhibits Nos. 1, 4 and 9);

(d) Failed to provide a practical plan for maintenance of the proposed culvert (N.T. 237, 273, 299-302, 306-309).

13. The Stream:

(a) Is a spring-fed, perennial, order one stream with no tributaries in its upper reaches (N.T. 199, 321);

(b) Is surrounded by soils that are porous, nutrient-poor and easily eroded (N.T. 200-201, 322);

(c) Provides a home for organisms such as insect larvae, caddis flies, waterpennies, some of the more mobile creatures such as crayfish, the Scott index organisms, and darters. It is not a fishing stream in the sense of having sport fish (N.T. 325-326, 341-342);

(d) Is bordered by banks that support wetlands vegetation, contribute to food chain production and provide sites for habitat, nesting, spawning and rearing of aquatic and land species (N.T. 214-216, 330-331, 465-469).

14. Construction of the proposed culvert:

(a) Would cut off sunlight to about 2,000 square feet of Stream surface area, thereby eliminating its capacity to produce food (N.T. 203-206, 322-323);

(b) Would increase the velocity of the Stream, producing a scouring effect on the Stream bed and greater environmental stress upon organisms present in the Stream (N.T. 323-325);

(c) Would destroy the wetlands bordering the Stream, destroy the food chain production capacity of the Stream banks, and eliminate the habitat, nesting, spawning and rearing sites along the Stream banks (N.T. 213-214, 330-331, 465-469);

(d) Would reduce life forms in the Stream to the point where the Stream would be nearly dead (N.T. 203-204);

(e) Would convert a natural stream into a storm water pipe (N.T. 176).

15. Construction of the proposed culvert is not necessary from an engineering standpoint in order to provide vehicular access or water and sewer connections for the existing dwellings on the Property (N.T. 130-131, 235-237, 272-274, 338-339, 388-391).

16. Appellants did not propose a "habitat tradeoff" as part of their Application, but presented evidence on that subject through Dr. Frederick B. Higgins, Jr. of Temple University. The "habitat tradeoff," as described by Dr. Higgins, would mitigate the loss of Stream productivity in the proposed culvert by a development program designed to increase productivity in the 400 feet of the Stream that would remain open above the proposed culvert. This development program would consist of a series of low dams which would increase water surface area (N.T. 176-179, 206).

17. The "habitat tradeoff" program described by Dr. Higgins:

(a) Would not provide the same pool and ripple environment that presently exists in the Stream and which is essential for the support of certain kinds of aquatic life (N.T. 206-208);

(b) Would not compensate for the loss of the Stream banks (N.T. 214-216);

(c) Would be vulnerable to the depredations of deer living in the immediate vicinity (N.T. 327-329);

(d) Is based upon a new concept that has not been proven to be successful (N.T. 211, 327-329, 464-465).

18. DER approved Appellants' E & S plan on June 24, 1982, subject to two conditions which Appellants satisfied on a later version of the plan. DER reassessed the proposed project in June 1983 and imposed additional E & S requirements that Appellants did not satisfy (N.T. 384-388, 398-399; Appellants' Exhibits Nos. 2, 4, 5, 9, 13, 15 and 16; DER's Exhibit No. 11; Stipulated Exhibits Nos. 1 and 3).

19. Because Appellants' Application characterized the Stream as a "storm water drainage ditch," the Pennsylvania Fish Commission initially expressed no opposition to the project. Upon learning of the true nature of the Stream, the Commission urged DER to deny the Application (Stipulated Exhibit No. 1).

20. DER denied the Application on April 27, 1984.

DISCUSSION

DER denied Appellants' Application because it failed to satisfy the requirements of the Act and the rules and regulations adopted pursuant to the Act and published at 25 Pa. Code, Chapter 105. The denial letter, after making general reference to the Act and regulations, reads as follows:

Our review of the plan filed with your application indicates that the construction of the culvert would be in violation of Chapter 105, Section 105.21(a), Subsection (2) which requires "the proposed project or action complies with the standards and criteria of this title and with all other laws administered by the Department, the Pennsylvania Fish Commission and any river basin commission created by interstate compact". Your application does not meet the criteria of the Pennsylvania Fish Commission nor sections of this act. The following criteria has not been satisfied by your application and documentation.

1. An erosion and sedimentation control plan has not been submitted and approved as required by Chapter 105, §105.13(e).

2. The effect of the proposed project on regimen and ecology of the water course or other body of water, water quality, stream flow, fish and wildlife, aquatic habitat, instream and downstream uses, and other significant environmental factors have not been significantly addressed to indicate that there will not be any serious environmental harm to the area as required by Chapter 105, §105.14(4).[1]

3. The proposed project has not been justified as to the need to be located on or in close proximity to the water nor has the application addressed the effect of alternative locations, designs, and constructions which might be available to minimize the adverse impact of the project upon the environment and to protect the public natural resources of the Commonwealth as required by §105.15(b)(1) and (2).

The language of 25 Pa. Code §105.21(a)(2) is a paraphrase of Section 9(a) of the Act, 32 P.S. §693.9(a). Appellants have the burden of proving that they fulfilled this prerequisite to permit issuance. Focusing solely on the laws administered by the Pennsylvania Fish Commission, it is apparent that Appellants failed to carry their burden. The only evidence presented establishes that the Fish Commission recommended approval of the project on July 10, 1981, under the mistaken belief that it involved only a storm water drainage ditch as set forth in Appellants' Application. After learning that the project involved a perennial stream, the Fish Commission reversed its recommendation on April 28, 1983, because of the elimination of aquatic life

[1] The section reference is an obvious typographical error and should be §105.14(b)(4).

and the interference with the passage of fish. This action was confirmed in a June 1, 1983, memorandum from the Fish Commission to DER, citing the Stream's potential even though it "supports only limited fish life at present." (Stipulated Exhibit No. 1). The Commission's objections were communicated to Appellants later in 1983 and Appellants advised DER in December that they were dealing directly with the Fish Commission in an effort to satisfy their objections (Stipulated Exhibit No. 2). Apparently, they were unsuccessful.

Appellants claim that the Fish Commission did not have substantial evidence to support its position and, therefore, acted arbitrarily in changing its recommendation. Appellants cite no evidence or legal authority to buttress this claim and we have found none. The Fish Commission is given specific legislative authority to administer the Fish and Boat Code, Act of October 16, 1980, P.L. 996, as amended, 30 Pa. C.S.A. §§101 et seq., and to provide for the protection, preservation and management of fish and fish habitat, 30 Pa. C.S.A. §§2101 and 2102(a). The definitions in 30 Pa. C.S.A. §102 make it clear that crayfish, insect larvae, darters, amphibians and all other aquatic organisms fall within the scope of the term "fish." Since these life forms all are present in the portion of the Stream Appellants want to enclose, it is obvious that the Fish Commission had the power to recommend denial of the Application if it was convinced that the project would adversely affect these life forms and their habitat. The abundant evidence of such adverse effects nullifies Appellants' claim of arbitrary action on the part of the Fish Commission. If the Fish Commission did not act arbitrarily in recommending against the project, DER did not act arbitrarily in following that recommendation.

In reviewing the Application, DER was required by 25 Pa. Code §105.14(b)(4) to consider the effect of the proposed project on regimen and

ecology of the Stream, water quality, Stream flow, fish and wildlife, aquatic habitat, instream and downstream uses and other significant environmental factors. The regimen, or normal behavior, of the Stream undoubtedly was going to be affected by the project. DER was concerned about the possibility of water backing upstream from the culvert inlet during a 100-year storm and about the water velocity that would be generated by the culvert. The former concern was related directly to the possibility of flooding onto the Walker Property; the latter concern was related directly to erosion at the downstream outlet of the 860 feet of culvert.[2] Despite repeated requests from DER, Appellants never provided the definitive calculations necessary to enable DER to satisfy these concerns. Appellants' expert witness, Dr. Higgins, agreed that these calculations had not been done (N.T. 224-230). Appellants' failure to supply this data amply justified DER's denial of the permit.

There is no evidence to show that DER was concerned about the impact of the project on the ecology, aquatic habitat, fish and wildlife until the Fish Commission reversed its recommendation in 1983. While DER did not request any specific information from Appellants on these subjects, it did advise them on November 23, 1983, that they must demonstrate that the project (as proposed) was the only alternative to meeting the stated purposes. This is an obvious reference to 25 Pa. Code §105.14(b)(7) which requires such an assessment. There is no evidence that Appellants attempted to satisfy this requirement and the evidence produced at the hearing did not fill the gap. It showed that water and sewer pipes could be installed under the Stream channel without any culverting or filling, and that the existing right-of-way is

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[2] Appellants' 540 feet of culvert was going to connect directly to the 320 feet of existing culvert.

adequate to accommodate emergency vehicles.[3] Furthermore, Appellants made no attempt to explain why a 540-foot long culvert is necessary to accomplish what a 50-foot wide street ordinarily provides.

DER's reference to 25 Pa. Code §§105.15(b)(1) and (2) is puzzling. This portion of the regulations authorizes DER to request additional information on environmental impact and possible mitigating circumstances after it receives an environmental assessment on the proposed project. Subsection (a) requires an applicant to submit an environmental assessment when the proposed construction falls within one of several categories. The only category that might be relevant to Appellants' application is (a)(4), "a stream enclosure . . . which the Department [DER] determines may have a significant impact on the environment." There is no evidence in the record to establish that DER made such a determination and communicated it to Appellants. Stipulated Exhibit No. 1 certainly does not do so. In the absence of evidence to establish the regulatory prerequisite to demanding an environmental assessment, DER cannot rely on 25 Pa. Code §105.15 in denying the application.

Appellants' attempt during the hearing to introduce evidence of "habitat tradeoff" undoubtedly was prompted by DER's reference to 25 Pa. Code §§105.15(b)(1) and (2). DER objected to the evidence because it was not submitted while the Application was pending. Since DER raised the subjects of environmental assessment and mitigation only at the time of permit denial, it is not surprising that Appellants did not address the subjects sooner. The evidence was admitted but fell far short of justifying the project.

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[3] The fact that one of the dwellings has existed on the Property for more than 100 years without an immediate access to Shawmont Avenue also tends to undermine Appellants' contention that such access is a public safety necessity.

Appellants argue that DER was required to perform a balancing exercise under 25 Pa. Code §105.16 to determine whether the public benefits from the proposed project would outweigh the environmental harm. Such a balancing is only required after DER makes a determination that significant environmental harm will occur. As already noted, DER made no such determination. It simply informed Appellants of the Fish Commission's objections and raised a question about alternative solutions to the problems sought to be alleviated by the proposed project (Stipulated Exhibit No. 1). In the absence of a triggering determination, DER had no duty to enter upon a balancing exercise. In any event, the weakness of Appellants' evidence at the hearing on the subject of public benefit and their utter failure to justify the extensive nature of the proposed project is strong indication that they could not have survived a balancing test.

The only remaining reason cited by DER for denying the Application is the absence of an approved E & S plan required by 25 Pa. Code §105.13(e). This subject received more attention during the hearing than its importance deserved. This is not to suggest that E & S controls are irrelevant or unimportant. The contrary, of course, is true. The statement is intended to suggest that the lack of an approved E & S plan was a minor reason for denying the Application--one that could have been remedied easily if the Application had been acceptable otherwise.

Appellants submitted an E & S plan and received approval on June 24, 1982, subject to the addition of two items. These two items were added to the plan in a later revision. DER reassessed the E & S controls in 1983 and insisted on further revisions to the plan. Although Appellants attempted to meet the new requirements, their revised plans were rejected.

DER attempted to lay on Appellants the blame for causing the 1983 reassessment. Appellants' reference to the Stream as a storm water drainage ditch in their Application was misleading, according to DER, prompting the conditional approval of June 24, 1982. The reassessment became necessary after DER learned the true nature of the Stream in 1983. But DER's own witness testified that DER, including the Bureau of Soil and Water Conservation which had the responsibility for reviewing the E & S plan, was aware of the nature of the Stream soon after the Application was filed in 1981 (N.T. 400-404).

The reasons that prompted the reassessment are immaterial, in any event. Until a permit is actually issued, DER has the power to order further revisions to plans even though they have been approved previously. Requiring such revisions may be the result of a number of factors--changed regulations, new policies, current thinking, previous mistakes by DER personnel, a growing realization that the existing plan is not adequate, or a variety of other reasons. An E & S plan does not become finally approved until it is part of an actually issued permit.

DER's amended demands for the E & S plan, like other actions, can be challenged as amounting to an abuse of discretion; but Appellants have not done so. They presented no evidence whatsoever to show that DER's insistence on greater E & S controls was unreasonable. They relied, instead, on the argument that the E & S plan had been approved previously. As noted above, that argument has no merit. Since Appellants have not shown that DER acted unreasonably, it is obvious that DER was justified in citing the lack of an approved E & S plan as a reason for denying the permit.

CONCLUSIONS OF LAW[4]

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

2. To sustain the appeal, Appellants have the burden of proving that DER's denial of the permit was arbitrary or capricious or an abuse of discretion.

3. Appellants failed to prove that DER acted arbitrarily or capriciously or abused its discretion by denying the permit on the basis of:

(a) the failure of the proposed project to comply with laws administered by the Pennsylvania Fish Commission, as required by Section 9(a) of the Act, 32 P.S. §693.9(a) and 25 Pa. Code §105.21(a)(2);

(b) the failure of Appellants to provide calculations necessary for DER to consider the effect of the proposed project on the regimen of the Stream--specifically, the possibility of upstream flooding and the possibility of downstream erosion--as required by 25 Pa. Code §105.14(b)(4);

(c) the failure of Appellants to demonstrate that the proposed project was the only alternative to meeting Appellants' stated purposes, as required by 25 Pa. Code §105.14(b)(7), in order to enable DER to consider the effect of the proposed project on the ecology of the Stream, as required by 25 Pa. Code § 105.14(b)(4);

(d) the failure of Appellants to submit an acceptable E & S plan, as required by 25 Pa. Code §105.13(e).

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[4] DER called an official of the Pennsylvania Fish Commission to testify on the aquatic biology of the Stream and the impact the proposed project would have. Appellants objected on the grounds of inadequate notice and a ruling was deferred until final Adjudication. While Appellants' objections lack merit, the Board has reached its decision on this appeal and the following legal conclusions without considering the evidence presented through this witness.

4. DER abused its discretion by denying the permit on the basis of Appellants' failure to comply with 25 Pa. Code §§105.15(b)(1) and (2).

ORDER

AND NOW, this 28th day of March, 1989, the appeal of John J. Flati, Louis J. Gagliardi and Elisa D. Gagliardi 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: March 28, 1989

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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:** March 28, 1989

OPINION AND ORDER SUR
MOTION TO DISMISS FOR LACK OF JURISDICTION

Synopsis

A motion to dismiss for lack of jurisdiction is granted because the appellant failed to file its appeal within thirty (30) days after receiving notice of the action appealed from. 25 Pa. Code §21.52(a)

OPINION

This case involves an appeal by Bison Coal Company (Bison) from a letter of the Department of Environmental Resources (DER) dated April 7, 1988. In the letter, DER suspended Bison's surface mine operator's license for failure to replace certain surface mining bonds which had become invalid due to the demise of Fortune Assurance Company.

The instant Opinion and Order addresses a motion to dismiss for lack of jurisdiction filed by DER on November 18, 1988. In this motion, DER asserts that this appeal must be dismissed because it was not filed within thirty (30) days after Bison received DER's order, as required by the Board's regulations. See 25 Pa. Code §21.52(a). Specifically, DER states that

Bison's appeal was filed on July 5, 1988, while the appeal itself states that Bison received DER's letter on April 28, 1988.

On November 21, 1988, the Board sent a letter to Bison informing it that an answer to DER's motion must be filed by December 8, 1988, Bison did not file an answer by the required date. Subsequently, the Board sent letters dated January 10 and January 31, 1989 to Bison setting new dates for filing an answer and cautioning Bison that failure to file a timely answer would lead the Board to apply sanctions. Bison did not file an answer by the dates set out in these letters. On February 17, 1989, we issued a rule to show cause why the appeal should not be dismissed due to Bison's failure to file an answer to DER's motion. Bison did not respond to this rule by February 27, 1989, the date set out in the rule.

Our review of the Board's records confirms the averments in DER's motion. Bison's appeal was filed on July 5, 1988, while the appeal itself (paragraph 2(a)) acknowledges that Bison received DER's letter on April 28, 1988.[1] Since Bison did not file its appeal within thirty (30) days after receiving DER's letter, we lack jurisdiction to entertain the appeal. 25 Pa. Code §21.52(a), Rostosky v. Commonwealth, DER, 26 Pa. Commw. Ct. 478, 364 A.2d 761 (1976).

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[1] Since the Board's records document these dates, it is not necessary for us to determine whether we should deem admitted the factual averments in DER's motion as a sanction for Bison's failure to answer the motion.

ORDER

AND NOW, this 28th day of March, 1989, it is ordered that the motion to dismiss for lack of jurisdiction filed by the Department of Environmental Resources is granted, and the appeal of Bison Coal Company at EHB Docket Number 88-263-F 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: March 28, 1989

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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For Appellant:
Peter L. Miele
BISON COAL COMPANY
Clearfield, PA

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M. DIANE SMITH
SECRETARY TO THE BO

R & H SURFACE MINING	:	
	:	
v.	:	EHB Docket No. 87-424-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 29, 1989

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

In an appeal of a compliance order, a motion for summary judgment is granted where there is no dispute that the appellant failed to revegetate backfilled areas and failed to control the discharge from sediment ponds. Failure of the appellant to respond or object to a request for admissions renders the subject matter of those admissions admittted.

OPINION

This matter was initiated by the October 1, 1987 filing by R & H Surface Mining (R&H) of an appeal from a September 15, 1987 Department of Environmental Resources (DER) compliance order (CO) which alleged that R&H was in violation of the Surface Mining and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA), the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL), and various DER regulations promulgated thereunder at R&H's strip mine site located in Burrell Township, Armstrong County. Specifically,

DER alleged that R&H discharged pollutional water, failed to properly revegetate backfilled areas and failed to control the discharge from a sediment pond with an energy dissipator.[1]

On February 8, 1989, DER filed a motion for summary judgment, alleging that, in violation of SMCRA, the CSL and the rules and regulations adopted thereunder, R&H failed to control sediment ponds 1 and 2 by an energy dissipator and failed to revegetate backfilled areas of the R&H #1 Strip during the first normal period for favorable planting after backfilling and grading. Further, DER alleges that R & H failed to respond to its request for admissions, rendering admitted all material contained therein.

Although it received notice from the Board of the pendency of DER's motion, R&H failed to file a response.

The Board has the authority to grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. Robert C. Penoyer v. DER, 1987 EHB 131.

25 Pa.Code §87.148(a) of DER's rules and regulations requires that:

> (a) Disturbed areas shall be seeded and planted when weather and planting conditions permit, but such seeding and planting of disturbed areas shall be performed no later than the first normal period for favorable planting after backfilling and grading. The normal periods for favorable planting are:
>
> (1) Early spring until May 30, and August 10 until September 15 for permanent herbaceous species.
>
> (2) Early spring until May 20 for woody species.

DER's request for admission, paragraph 7 reads:

---

[1] As a result of an October 21, 1987 inspection, DER dropped its contention that R&H was allowing a pollutional discharge from its site.

> 7. Will R&H admit that it failed to revegetate backfilled areas of the R&H #1 Strip during the first normal period for favorable planting after backfilling and grading?

R&H failed to respond or object to this request for admissions and, therefore, it is deemed admitted. Pa. R.C.P. 4014(b); John Miller v.DER, EHB Docket No. 87-065-R (Opinion and order issued June 27, 1988). As a result, a violation of 25 Pa.Code §87.148(a) has been established.

25 Pa.Code §87.109 of DER's rules and regulations requires that:

> Discharge from dams, ponds, embankments, impoundments, and diversions shall be controlled by energy dissipators, riprap channels, and other devices when necessary to reduce erosion, to prevent deepening or enlargement of stream channels, and to minimize disturbance of the hydrologic balance. Discharge structures shall be designed according to standard engineering design procedures.

DER's request for admissions, paragraph 9 reads:

> 9. Will R&H admit that it failed to control the discharge from sediment ponds 1 and 2 by an energy dissipator?

Again, R&H failed to respond or object to this request for admissions. Accordingly, it is deemed admitted. Pa.R.C.P. 4014(b); John Miller, supra. As a result, a violation of 25 Pa.Code §87.109 has been established.

Because there are no disputes as to R&H's violations of the regulations adopted pursuant to SMCRA and the CSL, and DER is authorized by 52 P.S. §1396.4c to issue such orders as are necessary to enforce the provisions of SMCRA and by §610 of the CSL to issue such orders as are necessary to enforce the provisions of the CSL, DER is entitled to judgment as a matter of law and its motion will be granted.

O R D E R

AND NOW, this 29th day of March, 1989, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted and the appeal of R & H Surface Mining 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: March 29, 1989

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M. DIANE SMITH
SECRETARY TO THE BOAR

CITY OF HARRISBURG	:	
	:	
v.	:	EHB Docket No. 88-120-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 29, 1989
and PENNSYLVANIA FISH COMMISSION,	:	
Intervenor	:	

OPINION AND ORDER SUR
REQUEST FOR RECONSIDERATION OF
OPINION AND ORDER LIMITING THE ISSUES

Synopsis

A request for reconsideration filed by the Department of Environmental Resources of an order limiting the issues is denied. DER's request did not establish that our decision limiting the issues was based upon a legal ground not considered by the parties. In addition, DER has not persuaded us that we erred in ruling that the term "discharge" does not include "discharges of dredged or fill material" or "discharges of pollution."

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. 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.

This Opinion and Order addresses DER's request for reconsideration of our "Opinion and Order sur Motion to Limit Issues" dated October 6, 1988.[1] In our opinion and order, we granted the City's motion in part, and denied it in part. Specifically, we ruled that the "discharges" which DER is authorized to review under section 401 are limited to point-source and non-point source discharges of pollutants; the term "discharge" does not include "discharges of dredged or fill material" or "discharges of pollution." The practical effect of this ruling was to bar evidence on certain issues which DER wished to raise at the hearing--the inundation of wetlands, the effect of the project on fish migration, and the effect on aquatic resources resulting from physical changes in the river.[2]

In its request for reconsideration, DER disagrees with our conclusion that "discharge" as used in section 401 does not include "discharges of dredged or fill material" or "discharges of pollution." DER argues that our conclusion was based upon a non-existent reservation of powers to the U. S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA), and that reconsideration is warranted because the parties did not address this "reservation of powers" issue in their briefs. DER contends that we have misunderstood the dual state and federal jurisdiction contemplated by the Clean Water Act. See Section 510 of the Clean Water Act, 33 U.S.C. §1370.

---

[1] On October 6, 1988, we also issued a separate opinion and order ruling upon three petitions to intervene in this proceeding. A request for reconsideration of that opinion and order was filed by the Pennsylvania Environmental Defense Foundation, et al; a separate opinion and order addressing that request is being issued on this same date.

[2] As our October 6, 1988 opinion made clear, we did not completely agree with the scope of the issues as set forth by the City, either. Specifically, we disagreed with the City that the term "discharge" in Section 401 referred to the water flowing through the dam. Instead, we ruled that DER may review any point source or non-point source discharge of pollutants caused by the project, whether those discharges originated upstream or downstream of the dam itself.

DER further argues that the distinction we have drawn between the impacts of pollutants and physical impacts of raised water levels will make this case very difficult to litigate. Finally, DER argues that our ruling had the practical effect of granting partial summary judgment to the City, and that a grant of partial summary judgment is inappropriate because this is a case of first impression, citing Emerald Mines Corp. v. DER, 1986 EHB 605, 607.

The City filed a brief responding to DER's request for reconsideration. The City argues that our ruling was not based upon a "reservation of powers" to the Corps and EPA; instead, our ruling turned upon the definition of "discharge" in Section 401. The City, while not endorsing our opinion in every respect, supports the conclusion that DER is not authorized to review "discharges of dredged or fill material" or "discharges of pollution." The City also contends that this is not a case of first impression; therefore, a grant of partial summary judgment was not barred by Emerald Mines.

The Board's regulations provide that reconsideration will only be granted for "compelling and persuasive reasons." 25 Pa. Code §21.122(a). Normally, this standard is met only when the decision rests upon a legal ground not considered by the parties, or when new facts which would justify a different result have come to light and these facts could not, with due diligence, have been presented at the original hearing. 25 Pa. Code §21.122(a)(1) and (2).

Applying these standards to this case, DER's request for reconsideration must be denied. There is no allegation of new evidence here (our decision dealt solely with legal issues), and the decision did not rest upon a ground which the parties did not consider in their briefs. Furthermore, DER's arguments do not persuade us that we erred in our October 6, 1988 opinion and order.

We disagree with DER that our opinion rested upon a reservation of powers to the Corps and EPA which the parties did not consider in their briefs. As the City pointed out in its response, our opinion rested upon the definition of "discharge" as used in Section 401. This issue was briefed exhaustively. It is true that we explained that "discharges of dredged or fill material" and what DER refers to as "discharges of pollution" would be considered by the Corps and EPA pursuant to Section 404 of the Clean Water Act, 33 U.S.C. §1344.[3] However, our reason for addressing the jurisdiction of the Corps and EPA was solely to consider how the different parts of the Act fit together. Statutory construction is a holistic endeavor. American Mining Congress v. EPA, 824 F.2d 1177, 1187 (D.C.Cir. 1987). We believe it was appropriate to determine the practical effect of interpreting whether "discharge" includes "discharges of dredged or fill material" and "discharges of pollution."[4]

Moreover, we continue to believe that our interpretation of "discharge" was appropriate. First, "discharge" as used in Section 401 does not include a "discharge of dredged or fill material." Discharges of dredged or fill material are subject to a permitting process administered by the Corps and EPA under Section 404 of the Clean Water Act, 33 U.S.C. §1344. Since this permit is a "Federal license or permit" under Section 401, the City must

---

[3] Section 404 grants the Corps and EPA authority to issue permits for the "discharge of dredged or fill material." The City will be required to apply for such a permit for this project, but it has not yet done so. (see Note 5 below)

[4] As we explained in our October 6, 1988 opinion, the definition of "discharge" in the Act is open-ended--it states that the term "includes a discharge of a pollutant, and a discharge of pollutants" 33 U.S.C. §1362(16). The term "discharge of a pollutant" (or pollutants) is limited to discharges originating from a "point source." 33 U.S.C. §1362(12). The insertion of the word "includes" in the definition of "discharge" implies that the term can have other meanings in addition to the one specifically stated. See National Wildlife Federation v. Gorsuch, 693 F.2d 156, 172 (D.C. Cir. 1982).

obtain certification from DER before the Corps and EPA can issue this permit. If we were to construe "discharge" in Section 401 to include discharges of "dredged or fill material," we would be authorizing DER to engage in the same review which the Corps and EPA would conduct pursuant to Section 404. This duplication of functions makes little sense. In addition, we believe the regulations implementing the Section 404 permit process clarify the different purposes of the reviews authorized by Section 404 and Section 401. 40 CFR §320.2 provides:

> §320.2 Authorities to issue permits
>
> * * *
>
> (f) Section 404 of the Clean Water Act (33 U.S.C. 1344) (hereinafter referred to as Section 404) authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into the waters of the United States at specified disposal sites.

(emphasis supplied). 40 CFR §320.3 provides:

> §320.3 Related laws.
>
> (a) Section 401 of the Clean Water Act (33 U.S.C. 1341) requires any applicant for a Federal license or permit to conduct any activity that may result in a discharge of a pollutant into waters of the United States to obtain a certification from the State in which the discharge originates or would originate, that the discharge will comply with the applicable effluent limitations and water quality standards.

(emphasis supplied). In our view, a comparison of these regulations clarifies that while the purpose of the Section 404 permit process is to review "discharges of dredged or fill material," the purpose of the Section 401

certification process is to review "discharges of pollutants."[5]

We also stand by our previous conclusion that the term "discharge" in Section 401 does not include "discharges of pollution." The term "discharge of pollution" is not found anywhere in the Act. While we recognize that the definition of "discharge" can "include" other meanings in addition to the stated meaning of a discharge of pollutants (from a point source), DER has not persuaded us that "discharge of pollution" should be included in the definition. DER's motivation for arguing in favor of discharges of pollution is that it would give DER authority to review the physical and biological effects of raised water levels in the river resulting from the impoundment behind the dam. This is because "pollution" is defined to mean the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. §1362(19) (emphasis added) We find it difficult to conceptualize how physical and biological alterations are "discharged." More importantly, however, the physical and biological effects of the project will be reviewed at some point by the Corps and EPA pursuant to the Section 404 permit process. See 33 U.S.C. §1344, 40 CFR Part 230.[6] Thus, reading "discharges of pollution" into the meaning of "discharge" is not necessary to effectuate the purposes of the Act.

---

[5] The City has not yet applied for a dredge or fill permit from the Corps and EPA; the instant dispute over certification arises from the City's application for a license from the Federal Energy Regulatory Commission. It does not appear to us that our review of this project's effects on water quality would be broader in scope even if the City had applied for both federal licenses and was seeking certification for both licenses simultaneously.

[6] DER may be correct that it will be difficult to litigate this case in light of the distinction between the effects of pollutants and the physical and biological effects of the dam. We believe this is an unavoidable consequence of this federal law. Congress could have simply given states jurisdiction to review all the environmental effects of federally licensed projects, but it did not do so.

Finally, we disagree with DER that our limiting of the issues is contrary to Emerald Mines Corp. v. DER, 1986 EHB 605, 607. First, our order limited the issues for the upcoming hearing; it did not grant partial summary judgment. If the Board disagrees with the author's opinion on the scope of the issues, it can, if necessary, remand the case for an additional hearing. Second, DER is placing an overbroad interpretation on Emerald Mines. We can glean no intent from that opinion to establish a wooden rule that summary judgment will never be granted in cases of first impression. In denying DER's motion for summary judgment in Emerald Mines, the Board was concerned that DER had not consistently interpreted the statute at issue, and that there were issues of fact relating to safety consequences which affected whether the Board should accord deference to DER's interpretation of that statute. 1986 EHB 605, 610. In the present case, we do not believe a hearing will illuminate the legal issues raised by the motion to limit issues.

In summary, DER's request for reconsideration has not persuaded us that our prior ruling rested upon a legal ground not considered by the parties; nor has DER persuaded us that we erred in holding that "discharge" does not include "discharges of dredged or fill material" or "discharges of pollution." Therefore, DER's request will be denied.

ORDER

AND NOW, this 29th day of March, 1989, it is ordered that the Request for Reconsideration filed by the Department of Environmental Resources is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: March 29, 1989

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CITY OF HARRISBURG	:	
	:	
v.	:	EHB Docket No. 88-120-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 29, 1989
and PENNSYLVANIA FISH COMMISSION,	:	
Intervenor	:	

OPINION AND ORDER SUR
REQUEST FOR RECONSIDERATION OF
ORDER DENYING PETITION TO INTERVENE, and
REQUEST FOR CERTIFICATION FOR INTERLOCUTORY APPEAL

Synopsis

A request for reconsideration of a decision denying intervention is denied. Intervention is not warranted where the petitioners' interests will be adequately represented by the parties in the proceeding. A request for certification for interlocutory appeal is denied because the request was not filed within ten (10) days of receipt of our order. 1 Pa. Code §35.225(a). In addition, the question (regarding federal antidegradation policy) should be addressed to the Environmental Protection Agency and to federal courts, not to Commonwealth Court. Finally, the question may not control the outcome of this case. See, 42 Pa. C.S. §702(b).

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. 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.

This Opinion addresses a request for reconsideration and a request for certification for interlocutory appeal filed 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. In general terms, both requests take issue with our "Opinion and Order Sur Petitions to Intervene" issued on October 6, 1988. These two requests will be discussed individually.

I. The Environmental Groups' Request for Reconsideration

The request for reconsideration filed by the environmental groups is directed at our opinion and order of October 6, 1988, denying their petition to intervene.[1] We denied intervention to the environmental groups because many of the issues which they planned to raise related to the physical alteration of the river, which we held--in a separate opinion and order also issued on October 6, 1988--to be beyond the scope of this proceeding. In addition, we stated that the interests of the groups in preventing environmental harm due to discharges of pollutants would be adequately represented by DER and the Pennsylvania Fish Commission.

In their request for reconsideration, the environmental groups contend that we erred in denying intervention. They argue that the broad

---

[1] In the same opinion, we granted the petition to intervene of the Pennsylvania Fish Commission, and denied the petition to intervene of Voith Hydro, Inc. (the manufacturer of the turbines which the City plans to use in the dam).

impact of the project warrants intervention, and that the "selective wording" of the opinion denying intervention indicates a belief that the groups are simply "canoeists and birdwatchers wanting to keep things the way they are" (request for reconsideration, p. 2). The environmental groups also argue that their interests will not be represented adequately by DER and the Fish Commission for two reasons. First, DER and the Fish Commission are subject to legal limitations and political pressures, and they could settle this case on terms which would compromise the environmental values of the groups. Second, the groups differ with DER over the interpretation of the "antidegradation requirement" in the regulations of the Environmental Protection Agency (EPA). See 40 CFR §131.12.[2] Finally, the environmental groups argue that both federal precedents and the Clean Water Act itself mandate that they be granted intervention in this case.

The City filed a response opposing the environmental groups' request for reconsideration. The City argues that the provision of the Clean Water Act which supports broad public participation applies only to the rulemaking proceeding in which the state considers revisions to its water quality standards program, not to adjudicatory proceedings such as the present case. Moreover, the City points out that at the time it filed its response, DER was engaged in its triennial review of its water quality program, and the public had been invited to submit comments. See 18 Pa Bulletin 1997, et seq (April 23, 1988). The City contends that this rulemaking proceeding was the proper forum to raise arguments that DER's regulations violated EPA's antidegradation

---

[2] In a nutshell, the environmental groups argue that EPA's regulation is designed to prevent degradation of all waters, while DER's regulation only applies to certain bodies of water designated as "high quality" and exceptional value" 25 Pa. Code §95.1(b), (c). This dispute will be discussed in more detail later in this opinion.

regulation. If DER did not adopt the environmental groups' position, then the next step would be to urge EPA to reject the state's proposal, and then--if necessary--to appeal to federal courts. Thus, the City contends, the environmental groups' argument with DER over the application of the antidegradation regulation is not ripe for decision in this proceeding, and does not provide a basis for intervention. Finally, the City contends that, putting aside the argument concerning antidegradation, the interests of the environmental groups regarding water quality are adequately represented by DER and the Fish Commission.

The Board's regulations provide that reconsideration will only be granted for "compelling and persuasive reasons." 25 Pa. Code §21.122(a). Normally, this standard is met only when the decision rests upon a legal ground not considered by the parties, or when new facts which would justify a different result have come to light and these facts could not, with due diligence, have been presented at the original hearing. 25 Pa. Code §21.122(a)(1) and (2).

Applying these standards to this case, the environmental groups' request for reconsideration must be denied. The groups have not shown that our decision rests on a ground not previously considered by the parties, nor have they convinced us that we erred in denying their petition to intervene.

We do not question the depth of the groups' concerns about the impact this proposed hydroelectric dam could have on the environment. We certainly do not view the sincere interests of the environmental groups as trivial. However, neither the importance of the project nor the profundity of the environmental groups' concerns controls our decision whether to grant

intervention.[3] For the reasons which follow, we continue to believe that the environmental groups' interests will be adequately represented by DER and the Fish Commission.

We disagree with the environmental groups that their dispute with DER over the interpretation of EPA's antidegradation regulation warrants intervention. As we will explain in the section of this opinion addressing the request for certification of interlocutory appeal, the dispute over antidegradation should be addressed to EPA and the federal courts, not to this Board or to the courts of this Commonwealth.

We also disagree with the environmental groups that DER and the Fish Commission cannot adequately represent the groups' interests in maintaining chemical water quality. If DER and the Fish Commission, due to either legal limitations or political presure, decide to settle this case on terms which are repugnant to the environmental groups, then the groups may file objections to the settlement when it is published in the Pennsylvania Bulletin. See 25 Pa. Code §21.120(a). Moreover, if the case is not settled, we have no reason to believe that DER and the Fish Commission will not litigate this case energetically and effectively.

Finally, we disagree with the environmental groups that the Clean Water Act and federal precedents require that their petition to intervene be granted. Section 101(e) of the Clean Water Act, 33 U.S.C. §1251(e), provides for encouragement of public participation in various types of proceedings

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[3] As we stated in our opinion of October 6, 1988, intervention is discretionary with the Board. Keystone Sanitation Co., Inc. v. DER, 1987 EHB 22. Generally, the Board will grant intervention when the petitioner establishes a direct, substantial, and immediate interest in the outcome of the litigation, provided this interest is not adequately represented by the parties to the controversy. Keystone, Save Our Lehigh Valley Environment v. DER, 1987 EHB 117. A prospective intervenor has the burden of showing that it meets the standards for granting intervention. Sunny Farms Ltd. v. DER, 1982 EHB 442.

under the Act. In our view, this very general language does not supersede the standards for granting intervention in cases before the Board. The Board's standards provide for granting intervention when this will aid the Board in reaching an informed decision, but not when it will lead to a needless proliferation of parties, issues and witnesses. If we were to adopt a per se rule of granting intervention by the "public," it would be difficult to deny intervention to any person, group, or corporation seeking it, regardless of the nature of the interest alleged or whether that interest would be adequately represented by other parties.

In addition, we do not believe that the federal precedents cited by the environmental groups compel us to grant intervention to the groups. While it is true that much of the substantive law in this case involves the Federal Clean Water Act, we are not persuaded that state procedural requirements are displaced by federal law in this type of case.[4]

In summary, the environmental groups' request for reconsideration will be denied.

II. The Environmental Groups' Request For Certification For Interlocutory Appeal.

The environmental groups have also filed a request for certification for interlocutory appeal. This filing requests the Board to certify to Commonwealth Court "that the question of legality of the DER compliance with the Federal Antidegradation Requirements is a controlling question of law as to which there is a substantial ground for difference of opinion and that an

---

[4] This is not to suggest that intervention would be granted even if we applied federal law on this question.

immediate appeal will materially advance the ultimate termination of the litigation." (Request for Certification, pp. 1-2). Both the City and DER filed responses opposing the request for certification.

EPA's antidegradation regulation provides:

> **§131.12 Antidegradation policy.**
>
> (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:
>
> (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
>
> (2) Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

40 CFR §131.12. The environmental groups interpret the language in subsection (a)(2) as requiring protection of all waters from degradation, regardless of how pristine the waters are or whether the quality exceeds levels necessary to protect existing uses.

Pennsylvania's water quality program provides varying levels of protection to waters depending upon the uses for which the waters are designated. See 25 Pa. Code §§93.2, 93.3, 93.7, 93.9. The highest level of protection ("special protection") is accorded to waters designated as "high quality" or "exceptional value"; the regulations provide for maintaining these

waters at their existing quality.[5] See 25 Pa. Code §95.1(b)(c). For waters which do not fall within this special protection category, the water quality standards are designed to protect the designated uses of the waters. 25 Pa. Code §§93.2(a), 93.7, 93.9.

The environmental groups argue that EPA's regulations are designed to prevent degradation of all waters, while DER's regulations are only designed to protect against the degradation of waters designated as "high quality" and "exceptional value." Thus, in the view of the environmental groups, DER's regulations fail to comply with EPA's regulations. The significance of this difference of opinion as applied to this case is that the environmental groups would apply the antidegradation provisions to the Susquehanna River, while DER would not because the river is designated as "warm water fishery," not as "high quality" or "exceptional value." See 25 Pa. Code §93.9.

The environmental groups' request for certification for interlocutory appeal will be denied. Although this point was not raised in the responses filed by the City and DER, the request for certification was untimely in that it was not filed within ten (10) days of our interlocutory order as required by 1 Pa. Code §35.225(a).[6] See In Re: Texas Eastern Gas Pipeline Company Litigation, EHB Docket No. 88-090-CP-W (Opinion and Order issued March 10, 1989).

---

[5] Waters designated as "high quality" may be degraded (though not to the point where existing uses would be precluded or the numerical criteria in 25 Pa. Code §93.9 would be violated) where the discharge of pollutants is necessary to accommodate "economic or social development which is of significant public value" 25 Pa. Code §95.1(b)(1). There is no similar provision for degradation of "exceptional value" waters.

[6] The Board's records indicate that all of the environmental groups received our opinion and order on either October 7 or October 11, 1988. The request for certification was filed on October 26, 1988, more than ten (10) days after the groups received our order.

Normally, we would simply hold that we lack jurisdiction to consider the environmental groups' request for certification. However, in light of the fact that Texas Eastern is a recent precedent, and that it was the first case in which the Board applied 1 Pa. Code §35.225(a), we will also explain our substantive reasons for denying the request.

First, we agree with the City that the question of whether DER's water quality regulations comply with EPA's requirements is a question which ought to be addressed to EPA and the federal courts. EPA's regulations provide for review of state water quality programs by the Regional Administrator of EPA. 40 CFR §§131.20, 131.21. It makes no sense for the environmental groups to ask Commonwealth Court to determine whether DER's regulations comply with EPA's requirements when the environmental groups could ask EPA itself. There is precedent for challenging a state's water quality standards before EPA and the federal courts. See Environmental Defense Fund v. Costle, 657 F.2d 275 (D.C.Cir. 1981).

Second, certification will be denied because this issue may not be a "controlling question of law" as required by Section 702(b) of the Judicial Code, 42 Pa C.S. §702(b). It is possible that DER's denial of certification will be upheld due to evidence of discharges of pollutants which violate DER's water quality standards. 25 Pa. Code Ch. 93. In this event, the issue concerning interpretation of EPA's antidegradation provision would be moot. Since it is not clear that the question concerning antidegradation is controlling, certification of this question to Commonwealth Court is as likely to delay this litigation as it is to expedite it.

In summary, we will deny the environmental groups' request for certification of interlocutory appeal.

ORDER

AND NOW, this 29th day of March, 1989, it is ordered that:

1) The request for reconsideration 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.

2) The request for certification for interlocutory appeal filed by the groups listed in paragraph one (1) is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: March 29, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
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Pittsburgh, PA
For Intervenor:
Dennis T. Guise, Esq.
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M. DIANE SMI
SECRETARY TO THE E

AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	EHB Docket No. 89-045-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 4, 1989

OPINION AND ORDER SUR
COMPLAINT TO JOIN ADDITIONAL DEFENDANTS

Synopsis

Appellant's complaint to join additional defendants is dismissed. The Board does not have the authority to compel joinder.

OPINION

This matter was initiated on February 27, 1989, with the filing of a notice of appeal by Al Hamilton Contracting Company (Hamilton) challenging the issuance of a groundwater study order by the Department of Environmental Resources (Department). The order required Hamilton to conduct a study of ground and surface water emanating from its mine sites in Covington Township, Clearfield County.

Along with its notice of appeal, Hamilton filed a petition for supersedeas and a complaint to join additional defendants. The complaint to join additional defendants seeks to join Moshannon Falls Mining Company (Moshannon), Homer Maney, Robert Bailey, and R. S. Carlin, Inc. (Carlin), who have conducted mining operations within the Grimes Run Watershed which makes up a large portion of the groundwater study area which is the subject of the Depart-

ment's order. Hamilton contends the Department cannot properly evaluate contributions to groundwater pollution without considering every possible mining source.

On March 8, 1989, the Department filed a reply to Hamilton's complaint, requesting that the Board dismiss the complaint since Hamilton cited no authority for its proposed joinder and the Board's Rules of Practice and Procedure do not provide for such joinder.

On March 22, 1989, Carlin filed its reply to Hamilton's complaint, again requesting the Board to dismiss the complaint on the grounds that the Board's rules have no provision for joinder. Moshannon responded to Hamilton's complaint on March 30, 1989, also contending that there was no authority for the Board to compel joinder. Homer Maney, in a March 27, 1989, letter, requested that the Board dismiss Hamilton's complaint as it pertains to him.

On March 24, 1989, Hamilton filed a motion to strike the Department's reply to the complaint to join additional defendants, arguing that the Pennsylvania Rules of Civil Procedure (Pa.R.C.P.) do provide for joinder in this case, and under the Board's rules, various pleadings described in the Pa.R.C.P. are permitted. Further, Hamilton avers that the Department has no standing to challenge Hamilton's complaint, since the Department would benefit by being able to seek relief against all defendants and the Pa.R.C.P. mandate that all except the defendant and additional defendants are barred from filing pleadings on the issue of additional defendants. We find it unnecessary to address this last contention, since the Department's arguments are raised in the responses submitted by Carlin and Moshannon, and we can rule on these issues based on the information submitted outside of the Department's reply.

Although Hamilton's initial complaint cited no authority or procedural rule, the motion to strike cited Pa.R.C.P. Nos. 2251 and 2252 as governing

joinder of additional defendants. Rule 2251, entitled "definitions," reads as follows:

> As used in this chapter
>
> action means any civil action or proceeding at law or in equity brought in or appealed to any court of record which is subject to these rules.

Rule 2252(a) provides:

> In any action the defendant or any additional defendant may, as the joining party, join as an additional defendant any person whether or not a party to the action who may be alone liable or liable over to him on the cause of action declared upon by the plaintiff or jointly or severally liable thereon with him, or who may be liable to the joining party on any cause of action which he may have against the joined party arising out of the transaction or occurrence or series of transactions or occurrences upon which the plaintiff's cause of action is based.

Hamilton cites Rule 21.64(a) of the Board's Rules of Practice and Procedure, 25 Pa.Code §21.1 *et seq.*, as permitting the various pleadings described in the Pa.R.C.P. and concludes that because the complaint to join additional defendants is a pleading described in the Pa.R.C.P. and, therefore, recognized by 25 Pa.Code §21.64(a), the Board has the power to compel joinder.

The Pa.R.C.P. are not generally applicable to proceedings before the Environmental Hearing Board. The Board is bound by the General Rules of Administrative Practice and Procedure, 1 Pa.Code §31.1 *et seq.*, and its own Rules of Practice and Procedure, 25 Pa.Code §21.1 *et seq.* Neither the Board's Rules of Practice and Procedure nor the General Rules of Administrative Practice and Procedure provide explicitly for joinder. Furthermore, nothing in the Board's grant of jurisdiction permits it to adjudicate the rights of

parties vis a` vis each other.[1] The Board is not a tribunal of general jurisdiction; the Board's jurisdiction is limited to appeals of actions taken by the Department. Berwind Natural Resources v. DER, 1985 EHB 356. We have no authority to inject ourselves into the regulatory process by reviewing what the Department might have or should have done in a particular situation.

As for Hamilton's argument that 25 Pa.Code §21.64 empowers the Board to join additional parties, we examined a similar argument in New Hanover Township v. DER, EHB Docket No. 88-119-W (Opinion issued September 22, 1988). In that case appellant filed a praecipe for involuntary substitution/joinder of a prospective purchaser of the permittee's landfill. The Board considered 25 Pa.Code §21.64(a), which provides:

> Except as provided otherwise in these rules of procedure, the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this Board, and such pleadings shall have the functions defined in the Pennsylvania Rules of Civil Procedure.

The Board rejected the notion that 25 Pa.Code §21.64(a) should be read as authorizing joinder, stating that, "A pleading is not a proceeding, and it does not follow that because the Board's rules recognize pleadings under Pa.R.C.P. that they incorporate all other provisions of the Pa.R.C.P." We must reach the same conclusion here.

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[1] We note that Senate Bill 527, Printer's Number 913, the Environmental Hearing Board Enabling Act, included a provision specifically authorizing the Board to join additional parties in appeals from orders and civil penalty assessments. Although substantial portions of Senate Bill 527, as passed by the Senate, were incorporated by the Senate into House Bill 1432, the bill which was eventually passed as the Environmental Hearing Board Act, the joinder provision was deleted.

O R D E R

AND NOW, this 4th day of April, 1989, it is ordered that Al Hamilton Contracting Company's complaint to join additional defendants is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 4, 1989

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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TUCKER ARENSBERG, P.C.
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For Homer Maney:
Homer Maney
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For Robert Bailey Estate:
c/o County National Bank
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For R. S. Carlin, Inc.
R. S. Carlin, Inc.
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Snow Shoe, PA 16874

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M. DIANE SMITH
SECRETARY TO THE BOARD

MARK BASALYGA, t/a TAMARACK TOPSOIL COMPANY	:	
v.	:	EHB Docket No. 88-165-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 5, 1989

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT, OR,
IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Synopsis

A motion filed by the Department of Environmental Resources (DER) for summary judgment, or, in the alternative, partial summary judgment is denied. The language which DER cited in an earlier letter did not constitute an "action" of DER; therefore, it could not have been appealed. Since the appellant could not have appealed from the language in the earlier letter, he cannot be precluded from raising certain issues in the instant proceeding on the basis that he failed to appeal.

OPINION

This case involves an appeal by Mark Basalyga, trading as Tamarack Topsoil Company (Basalyga), from an order of the Department of Environmental Resources (DER) dated March 21, 1988. In this order, DER found that Basalyga was extracting peat from a wetland without a permit to authorize this activity, in violation of the Dam Safety and Encroachments Act (DSEA), Act of

November 26, 1978, P.L. 1375, No. 325, as amended, 32 P.S. §693.1 et seq. DER ordered Basalyga to cease extracting peat from the alleged wetland and to restore the site.[1]

This opinion and order addresses DER's motion for summary judgment or, in the alternative, partial summary judgment, filed on March 8, 1989. In this motion, DER alleges that Basalyga is precluded by the doctrine of "administrative finality" from raising the issues of whether this site constitutes a wetland, and whether Basalyga should restore the site. DER explains that Basalyga previously applied for a permit to conduct these activities, but that the application was denied by DER in a letter dated March 4, 1986, due to Basalyga's failure to submit information which DER requested.[2] In addition to denying the application, DER went on to state in the March 4, 1986 letter that any extraction of peat from the site "will be in violation of" the DSEA, and concluded "You are hereby advised that you should immediately cease all peat extraction activity on Carpenter Swamp." DER alleges that Basalyga did not file an appeal from this letter; therefore, he is precluded from contesting in this proceeding whether the site constitutes a wetland, and whether the restoration measures are warranted.

DER's motion assumes that the language cited above constituted an adjudication or action which affected Basalyga's "personal or property rights, immunities, duties, liabilities, or obligations." 25 Pa. Code §21.2(a), Delta Excavating and Trucking Co., Inc. v. DER, 1987 EHB 319, 323. If the language did not constitute such an action, it was not appealable. Delta Excavating

---

[1] The site involved here is "Carpenter Swamp," an alleged wetland along an unnamed tributary of the South Branch Tunkhannock Creek in Scott Township, Lackawanna County, Pennsylvania.

[2] The March 4, 1986 letter was attached as Exhibit A to DER's motion.

and Trucking Co., Inc., Fiore v. Commonwelth, DER, 98 Pa. Commw. 35, 510 A.2d 880 (1986). Although the March 4, 1986 letter clearly constituted an "action" to the extent that it denied Basalyga's application for a permit, the language that extracting peat will constitute a violation of the DSEA, and advising Basalyga to cease extracting peat, was not a part of that action. The language cited above merely provided a warning on how DER would view Basalyga's future activities; the language "advised" Basalyga to cease activities at the site, but did not "order" him to do so. The language did not impose any new duties or obligations upon Basalyga. See Delta Excavating and Trucking Co., Inc., 1987 EHB 319, 322. Nor did the language affirmatively direct remedial action or payment of a penalty. See Chester County Solid Waste Authority v. DER, 1986 EHB 1169, 1170-1171. In short, the language DER cites in the March 4, 1986 letter did not have any specific, concrete effect on Basalyga's rights, and his failure to file an appeal from that letter does not preclude him from contesting in this proceeding whether the site is a wetland, and whether the restoration measures are warranted.[3]

Based upon the above reasoning, DER's motion for summary judgment or, in the alternative, partial summary judgment will be denied.

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[3] A comparison of the order which has been appealed here with the language cited by DER in its March 4, 1986 letter highlights the differences between a document which is an appealable "action" and one which is not. In the March 21, 1988 order, DER "ordered" that all peat extraction activities "shall cease," and also "ordered" Basalyga to file a restoration plan. (order, p. 2) The March 4, 1986 letter, however, provides that extraction of peat "will" constitute a violation of DSEA, and "advised" Basalyga that he "should" cease peat extraction activities. The former is a command; the latter is a mere warning.

ORDER

AND NOW, this 5th day of April, 1989, it is ordered that the motion of the Department of Environmental Resources for summary judgment or, in the alternative, partial summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: April 5, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Central Region
For Appellant:
Mark Basalyga
Tamarack Topsoil Company

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M. DIANE SMITH
SECRETARY TO THE BOARD

ST CHILLISQUAQUE TOWNSHIP :
:
v. : EHB Docket No. 87-150-W
:
MONWEALTH OF PENNSYLVANIA :
'ARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 7, 1989

OPINION AND ORDER
SUR
MOTION TO DISMISS

opsis

Because the Board must view a motion in the light most favorable to non-moving party, a motion to dismiss is denied where the Department ter at issue is susceptible to different interpretations and the motion does allege sufficient facts for the Board to conclude whether the letter stitutes an adjudication.

OPINION

This matter was initiated by the April 20, 1987, filing of a notice ippeal by West Chillisquaque Township (Township), seeking review of a March 1987, letter from the Department of Environmental Resources (Department) sing the Township of the applicability of 25 Pa. Code §71.32, which was ulgated pursuant to the Pennsylvania Sewage Facilities Act, the Act of ary 24, 1966, P.L. 1535 (1965), as amended, 35 P.S. §§750.1 et seq. (the ge Facilities Act), and operates to limit the issuance of on-lot sewage its where timely implementation of a sewage facilities plan has not

occurred. The Department's letter also directed the Township's sewage enforcement officer not to issue permits until further notice.[1] The Department's letter was prompted by the Township's alleged failure to promptly update its official plan.

The Township appealed the letter, claiming the Department's action was arbitrary, capricious, and without legal foundation because the completion date for the plan update was conditioned on negotiations with the Borough of Milton which were ongoing and because the Department imposed restrictions on a larger area than addressed by the plan update.

The motion currently before the Board is the Department's September 15, 1988, motion to dismiss, which argues that the Department's letter is not an appealable action, as it merely advises the Township of the applicability of certain provisions of the Sewage Facilities Act.

The Township responded to the Department's motion on October 12, 1988, claiming that the letter precluded it from issuing on-lot sewage permits in a larger portion of the Township than was experiencing sewage problems, and that the letter subjected the Township to penalties if the Township did not comply with it.

In order for an appeal to lie, the subject of that appeal must constitute an "adjudication" as defined in §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, or an

---

[1] Under current regulations, 25 Pa. Code §71.32, the authority cited in the March 25, 1987, letter, is reserved. In its August 8, 1988 motion to consolidate this matter, with Borough of Milton v. DER, EHB Docket No. 88-160-F, the Department claims to have sent a letter dated April 25, 1987, to correct the citation in the letter of March 25, 1987. The Township admits this in its Answer to the motion to consolidate, filed August 26, 1988. The April 25, 1987, letter allegedly states that the Department's action was taken pursuant to 35 P.S. §750.7. The Board was not provided with a copy of this letter.

"action" as defined in 25 Pa. Code §21.1(a).[2] Adams County Sanitation Company and Kenneth Noel v. DER, EHB Docket No. 88-441-W (Opinion issued March 1, 1989), and Chester County Solid Waste Authority v. DER, EHB Docket Nos. 87-441-W, 88-112-W and 88-205-W (Opinion issued December 2, 1988). In another instance involving the imposition of limitations on on-lot sewage permit issuance pursuant to §7(b)(4) of the Sewage Facilities Act, York Township v. DER, 1986 EHB 515, the Board held

> "Once a municipality is in the position of having been ordered to revise its plan, the permit limitations take effect automatically by operation of law. 25 Pa. Code §71.32(a). See Gilpin Township & Frank Ravotti v. DER, 1980 EHB 91. The letter of October 23, 1985 merely advised Appellant of the applicability of 25 Pa. Code §71.32(a) to particular areas of the township. Appellant has not yet complied with DER's order to revise its official sewage facilities plan, and therefore it is within the discretion of DER to advise appellant of the 25 Pa. Code §71.32(a) permit limitations, Gilpin, supra."

While the reasoning employed by the Board in York Township is applicable here, we cannot reach the same result as we did in York Township.

The Department's March 25, 1987 letter to the Township reads in its entirety:

> On July 30, 1985, the Department approved a plan of study to update the Township's Official Sewage Facilities Plan for certain identified areas of the Township. Your consultant, Mr. John Bakowicz, projected a study completion date of October 1, 1985 conditioned upon negotiation with Milton Borough.
>
> Nearly 18 months have passed without submission of the required study. There has been a litany of correspondence and promises for completion. The Department is aware of the obstacle Milton Borough represents and has received very preliminary notice of a new municipal update

---

[2] §1921-A of the Administrative Code was repealed by the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. _____, No. 94, 35 P.S. §7511 et seq. This appeal was filed prior to the effective date of the Environmental Hearing Board Act, but §4 of that Act would not change the result reached herein.

proposed to involve the Borough, the Township and Turbot Township.

Frankly, the Department is skeptical over the necessity and propriety for the type of multi-municipal plan discussed and feels that West Chillsquaque Township should have long ago concluded the approved study with or without a commitment from Milton Borough. Please recall the possibility of resolving the Township's sewage problems without Milton Borough was recognized in 1984. The Department had agreed to authorize an expanded study which would identify alternatives to conveyance to Milton Borough. However, without timely efforts by the Township and your consultant on this plan of study, absolutely no progress can occur.

Chapter 71, Section 71.32 of the Department's Rules and Regulations provide for limitations on permit issuance in areas where timely implementation of municipal sewage facilities plans have not occurred. You are hereby notified that permit limitations are not in effect in all areas shown on the attached topographic map photocopy. By copy of this letter, I am notifying your certified sewage enforcement officer not to issue permits in the identified area until further notice from this Department. Your building permit officer should be similarly cautioned against building permit issuance for structures where wastewater will be generated. Be further aware that Department review and response on all subdivision proposals in this area will be impacted by the status of your Official Sewage Facilities Plan.

The permit limitations imposed will remain in effect until the Department approves a municipal planning effort which establishes a definitive time frame for the resolution of all existing sewage facilities needs in the identified areas of the Township. Be further advised that new sewage disposal concerns which have recently arisen involving several mobile home parks in the Montandon area and the problems with Milton Center East, a commercial complex, will be aqccessed in detail by the Department and may require additional Township involvement through the sewage facilities planning process.

The Department will also begin internal evaluation of the need for a new Department Order to mandate Township actions on these problems. If you have any questions or require clarification, please call.

At best, this letter is ambiguous. It is susceptible to two possible interpretations: that the Department has now determined that the Township has failed to timely implement its official plan and that permit limitations are

now imposed (see Paragraphs 1-5), or, that the Township was at some time in the past ordered to revise/implement its official plan, that it failed to timely do so, and that, as a result, permit limitations are now in effect (see Paragraph 6). The latter clearly is analogous to the situation considered by the Board in York Township, while the former is not. In any event, the Department has not provided us with sufficient information to make this determination. To further complicate matters, it is impossible to ascertain from the Department's letter and motion to dismiss whether those areas where permit limitations are being imposed are the same areas where problems are allegedly occurring. Because we must view this motion in the light most favorable to the Township, Robert C. Penoyer v. DER, 1987 EHB 131, we have no choice but to deny it.

ORDER

AND NOW, this 7th day of April, 1989, it is ordered that the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

DATED: April 7, 1989

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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For Appellant:
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Milton, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

HEELING-PITTSBURGH STEEL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 85-161-M**
	:	
OMMONWEALTH OF PENNSYLVANIA	:	
EPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 12, 1989

OPINION AND ORDER
SUR
DISMISSING APPEAL AS MOOT

ynopsis

An appeal challenging the limitations of a NPDES permit will be ismissed as moot when the Appellant no longer has any ownership interest in ıe facilities and the new owners have had the opportunity to pursue their own itigation on the limitations of the permit.

OPINION

Wheeling-Pittsburgh Steel Corporation (Appellant) initiated this ›peal on April 29, 1985, for the purpose of litigating certain conditions of 'DES Permit No. 0001554 issued to Appellant by the Department of ıvironmental Resources on March 28, 1985, and pertaining to Appellant's ıcilities in Monessen, Westmoreland County. Hearings were scheduled to begin ı October 6, 1986, but were cancelled (at the request of the parties) after ›pellant's bankruptcy and the shutdown of the Monessen plant rendered many of ıe issues moot, raising the possibility of settling the others.

Appellant eventually sold part of the Monessen plant to Monessen, c. (a subsidiary of Sharon Steel Corporation) and the balance to Bethlehem

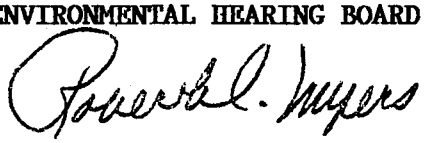
Steel Corporation. The parties advised the Board of this development in a March 13, 1989, status report which suggested that the appeal is moot. On March 17, 1989, the Board issued a Rule to Show Cause, directing the parties to demonstrate by April 7, 1989, why the appeal should not be dismissed as moot. No response to the Rule has been filed.

Since Appellant no longer has any interest in the Monessen facilities and since its purchasers have had the opportunity to pursue their own litigation on the limitations of the NPDES Permit, it is clear that this appeal is moot and should be dismissed.

O R D E R

AND NOW, this day of April, 1989, the appeal of Wheeling-Pittsburgh Steel Corporation is dismissed as moot.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS, MEMBER

DATED: April 12, 1989

cc: **Bureau of Litigation**
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For Appellant:
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Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

ELMER R. BAUMGARDNER, BAUMGARDNER OIL CO., ECONO FUEL, INC., and WASTE-OIL PICKUP AND PROCESSING	:	
v.	:	EHB Docket No. 88-343-F
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 13, 1989

OPINION AND ORDER SUR
MOTION FOR REARGUMENT and
PETITION FOR SUPERSEDEAS

Synopsis

An appellant's motion for reargument and petition for supersedeas are denied. When an appellant files more than one petition for supersedeas in a proceeding, the later petition or petitions will only be granted when exceptional circumstances are present. Normally, this will require that the petition be supported by evidence which could not, with due diligence, have been offered at the hearing on the previous petition. Finally, the new evidence cited in the instant petition does not present exceptional circumstances which would warrant granting the petition.

OPINION

The background of this appeal has been stated in detail in two Opinions and Orders dated September 16, 1988 and January 10, 1989, and will be summarized here. On September 16, 1988, following a hearing, we issued an order granting Baumgardner's petition for supersedeas; the effect of this order was to reopen Baumgardner's used oil recycling facility in Fayetteville, Franklin County, Pennsylvania. However, on January 10, 1989, following another hearing, we issued an order granting DER's petition for reconsideration and revoking the supersedeas due to new evidence concerning the nature of the waste Baumgardner had buried at the site. Baumgardner then filed, on January 13, 1989, a "petition for supersedeas and stay, motion for rehearing and reconsideration." The petition and motion were denied by an Opinion and Order dated February 2, 1989 for the primary reason that the evidence cited in the petition and motion could have been introduced at the earlier hearings.[1] Baumgardner then filed a motion for reargument En Banc of the February 2 order. On February 10, 1989, the Board denied this motion to the extent that it sought reconsideration En Banc, and referred the motion to the undersigned for review.

This Opinion and Order addresses a petition for supersedeas filed by Baumgardner on March 2, 1989.[2] DER filed an answer to this petition on March 8, 1989. Baumgardner responded to DER's answer on March 22, 1989.

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[1] On January 13, 1989, due to the unavailability of the undersigned, Chairman Woelfling had entered an order staying the shutdown of the facility based upon the allegations in the petition and motion. This stay remained in effect until the February 2, 1989 order.

[2] We will also dispose of Baumgardner's motion for reargument referred to above.

In its most recent petition, Baumgardner argued that the Fayetteville facility should be reopened pending a decision on the merits because an environmental study conducted for Baumgardner by Buchart Horn, Inc. concluded that no environmental harm resulted from the burial of the waste material. In addition, Baumgardner contended that the decision not to introduce certain evidence at the prior hearing was attributable to Baumgardner's former counsel, not to Mr. Baumgardner himself. Finally, Baumgardner argued that it is irrelevant whether any evidence could have been presented before since Baumgardner has now filed a new petition for supersedeas.[3]

In its answer, DER argued that since the written report of Buchart Horn, Inc. had not yet been produced at the time that Baumgardner filed its petition (Baumgardner later produced the report when it responded to DER's answer), it could not evaluate Baumgardner's contention that there was no environmental harm. In addition, DER contended that Baumgardner cannot raise the actions of its former counsel as a defense.

To put this matter in perspective, this is the third petition for supersedeas which has been filed in this proceeding. We have issued four Opinions and Orders (counting the instant one) ruling on these petitions and a related request for reconsideration by DER.[4] Baumgardner argued in its most

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[3] This last argument was also raised in Baumgardner's motion for reargument which we have referred to above.

[4] In addition to the arguments cited above, Baumgardner also argued in its petition that we erred in granting DER's motion for reconsideration because Board precedent indicates that reconsideration will not be granted from rulings on supersedeas petitions, citing Chemical Waste Management, Inc. v. DER, 1982 EHB 482. However, the holding in Chemical Waste has been limited by the later decision in Old Home Manor, Inc. and W. C. Leasure V. DER, 1983 EHB 463, where the Board held that reconsideration of rulings on supersedeas petitions (and other interlocutory rulings) would be granted where "exceptional circumstances" are present. We will follow the latter precedent. See also, Magnum Minerals, Inc. v. DER, 1983 EHB 589.

recent petition that it has the right to file more than one petition for supersedeas in a proceeding, and that the issue to be decided in ruling upon any of these petitions is whether the facts in existence when the petition is filed warrant a supersedeas. As we understand Baumgardner's argument, it is irrelevant whether the facts relied upon in a later petition for supersedeas were available at the time an earlier petition for supersedeas was decided.

When a party files more than one petition for supersedeas in a case, that party must show that the later petition or petitions are supported by exceptional circumstances. Among other things, this standard will normally require that a later petition be supported by evidence which could not, with due diligence, have been offered to the Board during the hearing on the previous petition. If the Board did not treat the later petition in this manner, the parties would not be required to put all of the relevant facts before the Board when the first petition for supersedeas is filed, thereby encouraging the filing of multiple petitions for supersedeas. This, in turn, would undermine the integrity of the Board's procedures and impair its ability to fairly and efficiently manage its caseload. Of course, if the evidence cited in the later petition was not available at the time of the hearing on the first petition, then the Board will consider the evidence in ruling upon the later petition.

While Baumgardner does cite certain "new" (not previously available) evidence in its most recent petition, this evidence does not present exceptional circumstances. First, we are not persuaded by the allegation that Baumgardner's former counsel, contrary to Elmer Baumgardner's wishes, decided not to introduce evidence regarding tests conducted on the buried material. Even if we accept this as true, it explains the failure to present the evidence, but it does not excuse it. Baumgardner has not cited any authority

for the proposition that it is not bound by its former counsel's actions at the hearings.

Second, the Buchart Horn, Inc. study does not present exceptional circumstances which warrant reversal of our January 10, 1989 order. It is necessary at this point to review one of the legal issues presented by the merits of this case. We concluded in our September 16, 1988 Opinion and Order that DER was likely to prevail on the issue of whether used oil was a "solid waste." The question which we have been focusing on since then is whether DER abused its discretion by closing the facility based upon the fact that Baumgardner does not have a permit to process solid waste. In our September 16, 1988 Opinion and Order we concluded that the lack of a permit did not--by itself--justify the immediate closure of the facility. Since that time, however, DER has presented new evidence to show that Baumgardner buried waste material on site without a permit from DER and without testing that waste for the full scope of constituents which could cause it to be classified as hazardous.[5]

The new evidence now advanced by Baumgardner would show, at most, that the burial of the waste did not cause groundwater pollution in the area.

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[5] In our January 10, 1989 opinion, we concluded, based upon the record as it stood at that time, that the buried material constituted a hazardous waste. In its petition and motion filed on January 13, 1989, Baumgardner attached an affidavit from one of its experts stating that the concentrations of organic constituents in the waste material were not sufficiently high to render the material a hazardous waste. In our February 2, 1989 opinion, we stated that we would not consider this evidence since it should have been presented at the previous hearing. Whether or not the buried material constitutes a hazardous waste (we believe DER and Baumgardner are still debating this issue), it is clear to us that the material was at least a solid waste, and that its burial was therefore improper. Baumgardner has admitted that the material should have been tested for organic constituents and should not have been buried. (Motion for Reargument, para. 11).

While this might mitigate our concern over environmental harm to some extent, it does not alter the fact that Baumgardner disposed of the waste improperly in the first place. Given the current state of the record developed by the parties, and looking to the merits of the case, the Board is not likely to find that DER abused its discretion by closing Baumgardner's unlicensed solid waste processing facility where Baumgardner has illegally dumped waste on the site. Therefore, the new evidence cited by Baumgardner does not present exceptional circumstances and does not warrant granting Baumgardner's petition.

In summary, when a party files more than one petition for supersedeas in a proceeding, the later petition or petitions will only be granted where exceptional circumstances are present. Since the instant petition fails to meet this standard, it must be denied.

ORDER

AND NOW, this13th day of April, 1989, it is ordered that:

1) The motion for reargument filed by Elmer R. Baumgardner, et al, on February 6, 1989 is denied.

2) The petition for supersedeas filed by Elmer R. Baumgardner, et al, on March 2, 1989 is denied.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Hearing Examiner

DATED: April **13, 1989**

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

WESTFIELD BOROUGH AUTHORITY	:	
	:	
v.	:	EHB Docket No. 88-045-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 17, 1989

ADJUDICATION

By Robert D. Myers

Synopsis

A facility constructed by a municipality authority for the treatment primarily of industrial waste and which was completed and placed in operation as of December 31, 1986, is eligible for funding under Act 339. A treatment facility which is certified to be substantially complete, which begins receiving flows of industrial waste and which begins treating such wastes on or before December 31 is deemed to be completed and placed in operation for Act 339 purposes. The term "sewage treatment plants" has a generic meaning in Act 339, unrelated to the specific types of pollutants being treated.

Procedural History

On February 19, 1988, Westfield Borough Authority (Appellant) filed a Notice of Appeal from a January 21, 1988, letter from the Department of Environmental Resources (DER), denying Appellant's application for a subsidy under the provisions of the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. §701 et seq. (Act 339), for the year ended December 31, 1986. A hearing

was convened on July 26, 1988, but was suspended when DER raised an issue not previously disclosed. The parties were given an opportunity to engage in discovery relating to this new issue, and the hearing was rescheduled to convene on September 27, 1988.

DER's Motion for a Continuance, filed on September 23, 1988, was denied and the hearing convened as scheduled on September 27, 1988. Appellant filed a Motion in Limine on that date, seeking to prohibit DER from litigating the new issue raised for the first time on July 26, 1988. Action on the Motion was deferred and the hearing proceeded, lasting into September 28, 1988. DER filed its Answer to the Motion in Limine on November 18, 1988. Post-hearing briefs were filed on November 14, 1988, by Appellant, and on December 22, 1988, by DER. Appellant's reply brief was filed on January 5, 1989.

The record consists of the pleadings, a hearing transcript of 286 pages and 15 exhibits.

Findings of Fact

1. Appellant is a Pennsylvania municipality authority organized and existing under the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §301 et seq. (Authorities Act), with its principal office at 429 Main Stret, Westfield, Tioga County, Pennsylvania (Notice of Appeal; Appellant's Exhibits Nos. 7, 10 and 11).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of Act 339, the provisions of the Act of June 22, 1937, P.L. 1987, 35 P.S. §691.1 et seq. (CSL) and the rules and regulations adopted pursuant to said statutes.

3. On December 10, 1985, DER entered into a Consent Order and Agreement (CO&A) with Westfield Tanning Company (WTC), a corporation organized

and existing under Pennsylvania laws and engaged in the tanning business at a plant in Westfield, Tioga County, Pennsylvania. Pursuant to provisions of the CO&A, the effluent limitations of NPDES Industrial Permit No. 0008800, previously issued to WTC, were temporarily suspended until December 31, 1986, when WTC was required to have better treatment facilities in operation (N.T. 54-60, 121, 136; Appellant's Exhibits Nos. 7, 9 & 10; DER's Exhibits Nos. B and C).

4. In anticipation of the requirements of the CO&A, WTC had entered into an Agreement for Engineering Services, Advanced Industrial Waste Treatment Facilities (Engineering Agreement), dated June 21, 1985, with Tracy Engineers, Inc. (Tracy), pursuant to which Tracy was to design treatment facilities (Facilities) for WTC's industrial waste (N.T. 16, 49-51; Appellant's Exhibit No. 10; DER's Exhibit No. A).

5. In December 1985, Appellant executed a Sewer Service Agreement (dated as of August 1, 1985) with WTC. This Agreement provided, inter alia, that Appellant would take over the Facilities project, would construct the Facilities for the use of occupants of an industrial park, and would permit WTC to discharge its industrial wastes into the Facilities. The Agreement provided, in addition, that WTC would operate the Facilities until such time as another industrial customer hooked onto the system (N.T. 16-17; Appellant's Exhibit No. 11).

6. On December 10, 1985, DER issued to WTC Water Quality Management Permit No. 5985201, authorizing construction of the Facilities pursuant to an application prepared by Tracy and filed on behalf of WTC on October 3, 1985 (N.T. 51-54; DER's Exhibit No. C).

7. Appellant--

(a) acquired title to the 86-acre industrial park premises by deed dated February 26, 1986 (Appellant's Exhibit No. 11);

(b) secured financing for the Facilities project, on or about March 15, 1986, by issuing to a local bank notes guaranteed by the Borough of Westfield (Appellant's Exhibit No. 11);

(c) accepted an assignment of WTC's rights under the Engineering Agreement on March 20, 1986 (Appellant's Exhibits Nos. 10 & 11);

(d) entered into construction contracts for the Facilities project on April 24, 1986, with Spera Construction Company and John Mills Electric, Inc., pursuant to public bidding procedures (Appellant's Exhibit No. 11); and

(e) applied for and received approval for a U. S. Economic Development Administration (E.D.A.) grant subsidy of $500,000 (N.T. 88-89, 261-264; Appellant's Exhibit No. 7).

8. Appellant reimbursed WTC for costs and expenses incurred by WTC in connection with the Facilities project (Appellant's Exhibit No. 7).

9. Apparently, the Water Quality Management Permit was transferred by WTC to Appellant with DER's approval. DER denied a request for a similar transfer of the NPDES Permit, fearing it would lose its enforcement power against WTC (N.T. 51-57, 87-89).

10. Appellant proceeded with construction of the Facilities, and WTC proceeded with the installation of pre-treatment facilities so that its industrial waste would be compatible with the biological treatment process being incorporated into the Facilities (N.T. 40-42).

11. On December 30, 1986--

(a) an irreversible change in piping at WTC diverted the flow of its industrial waste to the Facilities (N.T. 40-41, 43; Appellant's Exhibit No. 6);

(b) the Facilities were inspected by Stanley J. Chilson, on behalf of Tracy; by Francis A. Sever, on behalf of DER; and by Gerald F. McKernan, on behalf of DER (N.T. 17, 120, 135-136);

(c) Mr. Chilson issued a certificate attesting to the substantial completion of the Facilities as of that date, attached to which was a "punch list" of uncompleted items (N.T. 17-19; Appellant's Exhibit No. 4);

(d) Mr. Sever reported that major components of the Facilities were built but that the Facilities were not completely finished; that, upon certification by OSHA of the chlorination system, the Facilities will be considered built in accordance with the Water Quality Management Permit (N.T. 121-122, 123-124, 131; Appellant's Exhibit No. 5);

(e) Mr. Sever noted, inter alia, that one Sequential Batch Reactor (SBR) tank was structurally capable of receiving waste water but was not capable of treating it because the aeration equipment was not entirely fitted; that two other SBR tanks could not contain waste water because of the absence of bulkheads or manways; that none of the SBR tanks had air diffusers or decant piping; that the sludge system was not complete; and that the chlorination system was not operable (N.T. 128-131; DER's Exhibit No. D);

(f) Mr. McKernan reported that the Facilities began receiving flows of waste water from WTC on that date, but that major construction still needed to be done before the plant would be 100% operational (N.T. 140-141; Appellant's Exhibit No. 6);

(g) the condition of the Facilities was such that WTC was deemed to be in compliance with the requirements of the CO&A (N.T. 163);

(h) the Facilities were operating mechanically, but very little treatment was taking place because the biomass, which is an essential element in the treatment process, requires months to develop (N.T. 45-47, 70-73, 104-112, 265-266);

(i) the work remaining to be done on the aeration equipment consisted of anchoring pipe supports in two of the SBR tanks. The equipment was already installed in all of the SBR tanks (N.T. 130, 256-257); and

(j) the bulkheads or manways only needed to be bolted onto the SBR tanks, a task requiring no more than one-half hour's time (N.T. 259-261).

12. Since the flow of waste water from WTC amounted to more than 200,000 gallons per day and the capacity of the SBR tanks is 380,000 gallons, it would take about 1 1/2 days to fill one of the SBR tanks (N.T. 257; Appellant's Exhibits Nos. 6 & 8).

13. The flow of waste water from WTC's plant cannot be shut down on short notice. The nature of WTC's tanning operation is such that it continues to produce waste water for about a week after production is halted (N.T. 257).

14. Because of the limitations set forth in findings of fact 12 and 13, it is apparent that the SBR tank which began receiving flows of waste water on the morning of December 30, 1986, would have filled up on December 31, 1986, at which point the flows would have been directed into one of the other SBR tanks. As a result, the contractor had to have more than one SBR tank operable (including aeration equipment, bulkheads and manways) before leaving the project site on December 31, 1986 (N.T. 256-258, 264).

15. Although 10% of the work remained to be done as of December 31, 1986 (N.T. 65), the uncompleted items did not prevent the Facilities from operating for the following reasons:

(a) the use of the chlorination system, which was added to the project at DER's request and which was intended to be activated manually if the pH produced by the treatment process was not high enough to disinfect the waste water, has not been necessary since the Facilities went into operation (N.T. 21-23, 101-102);

(b) since each SBR tank is capable of operating with only one decant mechanism to draw off clean water after solids have settled out, the fact that some of the back-up decant mechanisms had not been installed had no operational effect (N.T. 21, 30-31);

(c) the piping that previously conveyed sludge from WTC's plant to the lagoon was intended to be reused to convey effluent from the Facilities to the lagoon. This piping change could not be started until after the flow of waste water was diverted to the Facilities on December 30, 1986, and did not have to be finished until all of the SBR tanks had been filled, a matter of four or five days (N.T. 258-259);

(d) the centrifuge used to dewater sludge was not needed until the biomass had developed to the maximum extent, a matter of months (N.T. 255-256);

(e) the tank at the sludge pad, intended to be used as a seasonal storage facility, was not needed until sludge removal became necessary after biomass development, a matter of months, and even then, only if sludge could not be spread on crop land at the time (N.T. 31-32):

(f) structural items pertaining to building and site did not prevent equipment from being operated (N.T. 17-18, 23); and

(g) equipment items required for maintenance and safety did not prevent equipment from being operated (N.T. 19-23.

16. Because the biomass had not developed sufficiently, the effluent from the Facilities was conveyed to a lagoon (previously owned and used by WTC) and stored there. In June, 1987, when the effluent was able to meet the effluent limits of the NPDES Permit, it was discharged directly into a receiving stream. The non-compliant effluent in the lagoon was discharged into the stream upon WTC's payment of a $46,000 penalty to DER (N.T. 46-47, 83-87, 100-104; Appellant's Exhibit No. 9).

17. Mr. McKernan reported that the Facilities became 100% operational sometime between DER's inspections of January 27, 1987, and March 9, 1987 (N.T. 141-145; Appellant's Exhibit No. 8).

18. On or about January 27, 1987, Appellant filed with DER an Application for a sewage treatment operations grant under Act 339 for the year ended December 31, 1986 (N.T. 47; Appellant's Exhibit No. 7).

19. Appellant's Act 339 Application, which reported only those costs actually paid as of December 31, 1986, included only about 58% of the total construction costs. This figure was based essentially on payments made as of November 30, 1986, since Appellant's board of directors did not meet and approve any payments in December. In addition, Appellant's E.D.A. grant money was delayed, causing Appellant to experience cash flow problems around the end of the year 1986. By January 31, 1987, about 93% of the total construction costs had been paid, essentially leaving only the retainage to be paid after that date (N.T. 33-36, 48-49, 73-79, 219-220, 261-262; Appellant's Exhibits Nos. 3 & 7).

20. The material submitted with Appellant's Act 339 Application reflected the involvement of WTC and the goal of industrial development, but

did not precisely indicate the character of the waste water being treated (N.T. 223-224; Appellant's Exhibit No. 7).

21. DER's processing of Act 339 Applications involves an administrative review and a technical review (N.T. 173-175, 195-196).

22. During the administrative review of Appellant's Act 339 Application, when a question arose as to whether the Facilities were publicly owned, a request for more documentation was forwarded to Appellant on May 4, 1987 (N.T. 175-176).

23. Additional documentation was received from Tracy, but it did not fully satisfy DER. As a result, DER denied the Application on January 21, 1988, on the basis that the Facilities were not publicly owned (N.T. 176-177, 198-200; Appellant's Exhibit No. 1).

24. Appellant submitted additional documentation on ownership of the Facilities on February 15, 1988 (N.T. 177, 200-201; Appellant's Exhibit No. 11).

25. Satisfied of Appellant's ownership of the Facilities, DER submitted the Act 339 Application to technical review (N.T. 177-178, 201).

26. After reviewing Mr. McKernan's inspection report and Mr. Sever's inspection report and notes, after reviewing the percentage of construction costs actually paid, and after talking with Tracy, DER's technical staff concluded that the Facilities were not in operation on December 31, 1986 (N.T. 218-221, 224-226, 236).

27. On March 16, 1988, DER sent a letter to Appellant acknowledging Appellant's ownership of the Facilities but denying the Act 339 Application because they were not in operation on December 31, 1986 (N.T. 185, 221; Appellant's Exhibit No. 2).

28. On September 26, 1988, DER sent another letter to Appellant denying its Act 339 Application on the basis that it was an industrial waste treatment facility (N.T. 186-188).

29. Mr. Sever's inspection report, which was reviewed by DER's technical staff prior to the March 16, 1988, letter, indicated that the Facilities were used to treat industrial waste (N.T. 231; Appellant's Exhibit No. 5).

30. The Facilities treat primarily industrial waste and some human wastes from several restrooms in WTC's plant (N.T. 267-268).

31. To the knowledge of DER's Anthony Maisano, who has served as chief of the section that processes Act 339 Applications since 1979 and who reviewed the files for years prior to 1979, DER has never approved an Act 339 grant for a facility that treats solely industrial waste. He has no knowledge of whether grants have been approved for facilities that treat both industrial waste and human waste. He has never processed an Application where a portion of the costs was excluded because the facility treated industrial waste (N.T. 170, 180-181, 189-191, 202-203).

32. DER's Parimal Parikh, the engineer who performed the technical review of Appellant's Act 339 Application and who has been performing similar work for nearly seven years, had never previously seen an Application for facilities that treat solely industrial waste. He is aware of grants having been approved for facilities treating both industrial waste and human waste, but in all those instances, the facilities held permits for "sewage treatment facilities" rather than for "industrial waste treatment facilities" as is the case with Appellant. He has never been aware of any partial disallowance of costs related to the treatment of industrial waste (N.T. 209-210, 213, 239-242).

33. If treatment facilities are in operation and receiving flows of waste water as of the end of the year, DER's determination of grant eligibility under Act 339 does not depend upon whether the facilities are treating the waste water to the point where the discharges satisfy effluent limitations (N.T. 238-239).

DISCUSSION

Appellant, asserting the affirmative of the issue in its appeal from DER's action, bears the burden of proof, 25 Pa. Code §21.101(a), which it must carry by a preponderance of the evidence.

Section 1 of Act 339 (35 P.S. §701) provides for annual payments by the Commonwealth

> "toward the cost of operating, maintaining, repairing, replacing and other expenses relating to sewage treatment plants . . . equal to two percentum (2%) of the costs for the acquisition and construction of such sewage treatment plants by municipalities, municipality authorities and school districts to control stream pollution, expended by such municipalities, municipality authorities and school districts from the effective date of the [CSL], up to and including the thirty-first day of December of the year preceding the year in which such payment is made. . . ."

The regulations adopted by DER make it clear that applications must be filed by January 31 and must be limited to "works which have been completed and facilities placed in operation" on or before the previous December 31 (25 Pa. Code §§103.22, 103.23 and 103.25). However, neither Act 339 nor the regulations adopted under it define sewage treatment plants on the basis of the type of waste water being treated. Appellant's Act 339 Application for 1986 was filed on time and pertained to facilities owned by a municipality authority.

Completed and Placed in Operation

DER claims that the facilities were not completed and placed in operation by December 31, 1986, and are, therefore, ineligible for a grant. While there was abundant evidence on this subject, it consisted almost entirely of conditions as of December 30, 1986. No direct evidence was produced to establish what the conditions were on December 31--the critical date as far as Act 339 funding is concerned.

If, as Appellant claims, the Facilities went into operation on December 30 but work was still being done on December 31, it seems obvious that witnesses--workmen, inspectors, plant operators--should have been available to establish precisely what transpired on December 31. The failure to produce such evidence makes a resolution of this issue immensely more difficult than it should be. The Board is forced to consider the December 30 evidence and to make assumptions about December 31, where appropriate. While Appellant's failure to produce direct evidence is not necessarily fatal to its claim, it raises obvious questions about what that evidence would have shown.

Act 339 and the regulations are silent on what is meant by "completed and placed in operation." Apparently, the issue has never been litigated; neither Appellant nor DER has referred us to a prior decision and our own independent research has not brought one to light. Since this is such a pivotal issue, one would expect it to have been litigated frequently during the 35-year history of a funding statute. The absence of prior litigation suggests that DER generally has taken a practical--rather than a legalistic--approach in making its determinations.

There is no dispute about the fact that Appellant's Facilities began receiving flows of waste water from WTC's plant during the morning of December

30, 1986, after an irreversible change in piping had been accomplished. The presumption is that these flows continued into December 31 and thereafter without significant interruption. In order to receive these flows, piping had to be in place and at least one SBR tank had to be capable of holding liquids. A pump also may have been needed, but the evidence does not specifically mention it.

Appellant insists that a second SBR tank had to be capable of holding liquids before midnight on December 31, because the flows from WTC's plant would have filled the first SBR tank by that time. This is one example of an instance where the Board is required to deal with presumption when direct evidence should have been available and should have been presented. If, as Mr. Chilson testified, the flows from WTC's plant were approximately 200,000 gallons per day, then the first SBR tank might have reached its capacity before midnight on December 31. Fortunately, there is other evidence to substantiate that it did. Mr. McKernan's December 30 inspection report (Appellant's Exhibit No. 6) stated that WTC's production went up to 1000 hides per day as of December 16. Thomas M. Schmick's inspection report of April 29, 1987 (part of Appellant's Exhibit No. 8) stated that WTC's production of 956 hides per day produced between 230,000 and 240,000 gallons of waste water per day. Based on these figures, Mr. Chilson's estimate of 200,000 gallons per day was low. The actual figure would have been closer to 250,000 gallons. In any event, it is clear that a second SBR tank, capable of holding liquids, had to be in place before the end of the year.

DER contends that receiving flows of waste water is not enough. To be "completed and placed in operation," a treatment plant must be functioning for the purpose for which it was designed. In other words, it must be providing treatment. Appellant's Facilities were designed to aerate the waste

water, settle out the solids and provide biological decomposition. The necessary biomass took nearly six months to develop to the point where the effluent met the requirements of the discharge permit. While acknowledging that this was a progressive development, DER maintains that any biomass present as of the end of 1986 would have been so miniscule that no biological treatment would have occurred.

One of the difficulties with DER's position is that it conflicts with its normal procedures in awarding Act 339 grants. Under those procedures, DER totally ignores the effectiveness of the treatment process and the quality of the effluent, if the plant is in operation. Another difficulty with DER's position is that it ignores the fact that aeration and settlement also are part of the treatment process. The aeration equipment was in all of the tanks on December 30 but, in two of the tanks, needed anchors on the pipe supports. We decline to presume that these anchors were in place by December 31, but since the aeration equipment was totally in place in the tank receiving flows, some treatment was taking place there as of the end of the year. Finally, Mr. McKernan testified that a treatment plant can be 100% operational and still not meet effluent limits (N.T. 162).

DER points to other systems that were not completed and in operation on December 31. This was true of the chlorination system, part of the decant system, the effluent piping, the sludge dewatering system, plus one or two others of a more minor nature. While all of these are important to the proper functioning of the Facilities, the fact remains that they were not required to be in operation as of December 31 in order for the plant to go on line.

DER's determination that Appellant's Facilities were not "completed and placed in operation" by December 31, 1986, reflects an internal inconsis-

tency within the department itself. Mr. Sever testified, with respect to his December 30, 1986, inspection report, that--

> "It's a certification. It's a certification as far as we are concerned to meet our permit certification requirement, it was good enough."
> (N.T. 131)

Mr. McKernan was asked about his inspection of December 30, 1986:

> "In your judgment was the condition of the plant as of December 30, 1986, such that it was deemed that Westfield Tanning was in compliance with the consent order?"

and answered:

> "Yes. They were receiving flows and were no longer discharging to the other treatment unit. It had to be on line by that date." (N.T. 163)

If the Facilities were complete to the point that DER could certify on December 30, 1986, that they were built in accordance with the permit and if they were functioning on that date to the extent that DER could relieve WTC of its obligations under the CO&A, it is inexplicable how DER can claim that the Facilities were not "completed and placed in operation" as of December 31, 1986.

While it does not reflect an internal inconsistency, DER's position also conflicts with the professional judgment of Tracy. In public works contracts, such as those involved here, a Certificate of Substantial Completion has considerable legal significance. Under the Act of November 26, 1978, P.L. 1309, 73 P.S. §1621 et seq., the issuance of such a Certificate (1) entitles the contractor to receive final payment within 45 days of all contract amounts, except for certain retainages to cover uncompleted items and possible liabilities (73 P.S. §1627); (2) entitles the contractor to interest on delayed final payments (73 P.S. §1628); and (3) determines the starting date for warranties of material and workmanship contained in the performance

bond (73 P.S. §1627). "Substantial Completion" is defined in that Act as follows:

> "Construction that is sufficiently completed in accordance with the contract documents and certified by the architect or engineer of the contracting body, as modified by change orders agreed to by the parties, so that the project can be used, occupied or operated for its intended use. In no event shall a project be certified as substantially complete until at least 90% of the work on the project is complete." (73 P.S. §1621)

Tracy's Certificate of Substantial Completion constitutes a representation that, based on Tracy's professional judgment, as of December 30, 1986, the Facilities were at least 90% complete, had been built in accordance with the contract documents and could be used, occupied or operated for their intended use. Obviously, such a Certificate cannot be issued capriciously--especially where public moneys, including an E.D.A. grant, are involved.

The fact that only 58% of the contract price had been paid at the time the Certificate was issued raises a question about the extent of completion but is not controlling. Substantial completion, as defined above, depends on the amount of work completed, not on the amount of money paid to the contractor. Besides, Mr. Chilson adequately explained why payments to the contractor were delayed after November 30, 1986. Whatever may have justified this delay, Tracy's Certificate automatically entitled the contractor to receive final payment within 45 days and to receive interest on any additional delays. It is unlikely that a professional engineer on a public works project would have subjected the public body to this risk unless the extent of completion justified it.

In our view, the definition of "Substantial Completion" contained in the Act of November 26, 1978, P.L. 1309, 73 P.S. §1621 et seq., is an

appropriate measure for determining eligibility under Act 339. If the facilities are at least 90% complete, are built in accordance with the contract documents, are capable of being used, occupied or operated for their intended use, and, in addition, are actually being so used as of the end of the year, they should be deemed "completed and placed in operation" for Act 339 purposes. We urge DER to adopt this measure. While we do not insist that DER accept a Certificate of Substantial Completion from a professional engineer without question, we do suggest that the issuance of such a Certificate should be accorded great weight.

After considering all of the evidence and the arguments of the parties, we conclude that the Facilities were completed and placed in operation for Act 339 purposes as of December 31, 1986.

Sewage Treatment Plants

DER's belated reason for denying an Act 339 grant with respect to Appellant's Facilities is that, in DER's view, those Facilities do not constitute a "sewage treatment plant" as required by Act 339 and the regulations beginning at 25 Pa. Code §103.21. Appellant, in its Motion in Limine, sought to prevent DER from litigating this issue, since it had not been raised in DER's pre-hearing memorandum or in any other document prior to the convening of the initially-scheduled hearing on July 26, 1988. Paragraph 5 of the Board's standard Pre-Hearing Order No. 1 states that "a party may be deemed to have abandoned all contentions of law or fact not set forth in the pre-hearing memorandum." Relying on this statement, we could exclude any consideration of this issue belatedly raised by DER. However, the issue would most certainly be raised again by DER when Appellant files its Act 339

Application for the year 1987. In the interests of judicial economy, therefore, we will dispose of the issue now--especially since the parties have had ample opportunity to litigate it and brief it.

Since the term "sewage treatment plant" is not defined in Act 339, DER relies on the CSL to support its argument that Appellant's Facilities do not constitute a "sewage treatment plant" as referred to in Act 339.[1] There is a definite connection between the two statutes. The title to Act 339 states that it provides for payments to municipalities which have acquired or constructed "sewage treatment plants" in accordance with the CSL. The preamble recites, inter alia, that the Commonwealth, under the CSL, has required municipalities to construct "sewage treatment plants" to abate pollution and enhance the public health; that "sewage treatment plants" constructed in accordance with the CSL benefit all citizens of the Commonwealth; and that the responsibility for paying the costs of construction and acquisition of "sewage treatment plants" should be borne, in part, by the Commonwealth. The beginning date for calculating expenditures under Sections 1 and 3 of Act 339, 35 P.S. §701 & §703, is the effective date of the CSL. "Construction" is defined in Section 2, 35 P.S. §702, to mandate that it conform to the CSL.

Aside from mentioning the beginning date for calculating expenditures, the regulations adopted pursuant to Act 339 make only one reference to the CSL. 25 Pa. Code §103.25 (b) reads as follows:

> "The act clearly indicates an intent on the part of the Legislature to have the Commonwealth share in the costs

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[1] Unlike the situation considered in Northampton Bucks County Municipal Authority v. Commonwealth, Department of Environmental Resources, Supreme Court of PA., No. 101 E.D. Appeal Docket 1988, opinion and order issued March 6, 1989, there is no interpretive regulation to be accorded a presumption of validity and reasonableness.

> of the Clean Streams Program. Accordingly, the act shall be interpreted to permit payments to municipalities, public school districts, and municipality authorities based on construction which has furthered the Clean Streams Program as long as the construction has been approved by the Department as being in accordance with the Clean Streams Law (35 P.S. §§691.1-691.1001)."

Because of the interconnection between the two statutes, DER maintains that the term "sewage treatment plants" as used in Act 339 must be construed consistent with the CSL. Unfortunately, the term is not defined in the CSL; and, to our knowledge, is used only once in that entire statute (35 P.S. §691.211, pertaining to revenue bonds). Nor is the term defined in the regulations adopted pursuant to the CSL. "Sewage" is defined in the CSL, however, as "any substance that contains any of the waste products or excrementitious or other discharge from the bodies of human beings or animals" (35 P.S. §691.1). "Industrial Waste" is defined in the same section to mean "any liquid, gaseous, radioactive, solid or other substance, not sewage, resulting from any manufacturing or industry, or from any establishment, as herein defined, and mine drainage, refuse, silt, coal mine solids, rock, debris, dirt and clay from coal mines, coal collieries, breakers or other coal processing operations." Article II of the CSL (35 P.S. §691.201 et seq.) deals with sewage pollution and Article III (35 P.S. §691.301 et seq.) deals with industrial waste pollution.

Relying on this dichotomy and the clear statutory distinctions between sewage and industrial waste, DER maintains that the "sewage treatment plants" that municipalities have been required to construct under the CSL and for which grants are made available under Act 339 must, of necessity, be plants for the treatment and disposal of "sewage" as opposed to "industrial waste." At first blush, the argument appears to be very compelling. A closer look at the statutes, however, discloses that the distinction is not quite so

clear. For example, municipalities are not only required to cease discharging untreated sewage, they are also directed to cease discharging untreated industrial waste. Section 302 of the original version of the CSL (35 P.S. §691.302, repealed in 1970) required all persons then discharging industrial waste into waters of the Commonwealth or "into any municipal sewer system" to cease doing so. Section 307(a) of the CSL in the form in which it has existed since 1970 (35 P.S. §691.307(a)), prohibits persons or municipalities from discharging industrial waste into the waters of the Commonwealth without a permit. It goes on to provide:

> "For the purposes of this section, a discharge of industrial wastes into the waters of the Commonwealth shall include a discharge of industrial wastes by a person or municipality into a sewer system or other facility owned, operated or maintained by another person or municipality and which then flows into the waters of the Commonwealth."

Obviously, the legislature contemplated (1) that municipalities would be discharging industrial waste for which permits would have to be issued and treatment facilities constructed; and (2) that persons or municipalities would be discharging industrial waste into municipally-owned sewer systems. This expectation is mirrored in the regulations. 25 Pa. Code §91.33 exempts from permit requirements the discharge of "sewage or industrial wastes into a sewer, sewer system, or treatment plant" which has previously been permitted. 25 Pa. Code §92.531(c) requires the permittee of a publicly-owned treatment works to identify and report statistics on industrial users served by the works. "Industrial user" is defined in 25 Pa. Code §94.1 to mean an establishment that discharges "industrial wastes" into a publicly-owned treatment works. 25 Pa. Code §94.12(a)(5) requires municipalities to file annual reports containing extensive data on "industrial wastes" discharged into its "sewer system." 25 Pa. Code §94.15 requires municipalities to

develop and implement pretreatment programs under 25 Pa. Code §§94.61-94.63 for industrial users. The entire Chapter 97 of the regulations (25 Pa. Code §97.1 et seq.) deals with industrial wastes discharged directly into waters of the Commonwealth or indirectly by means of a publicly-owned treatment works, defined in §97.2 as a facility used to treat "municipal sewage or industrial wastes." 25 Pa. Code §§97.91-97.95 sets forth pretreatment requirements for industrial users of publicly-owned treatment works.

It is apparent that the CSL and the regulations maintain a clear distinction between "sewage" and "industrial wastes" as far as polluting substances are concerned; but the distinction is blurred where treatment facilities are discussed. If we were to apply the terms of the CSL literally, a system that transports any quantity of industrial wastes would not be a sewer system and a plant that treats any quantity of industrial waste would not be a sewage treatment plant. Consequently, Act 339 funding would not be available to municipalities that treat both household[2] wastes and industrial wastes.

Nothing in Act 339 hints at such a result. While the term "sewage treatment plants" is employed frequently, there is nothing to suggest that the legislature intended it to apply only to plants treating discharges coming within the narrow definition of "sewage" in the CSL. Municipalities are nowhere advised that they could lose their eligibility for Act 339 funding if they allow industrial wastes to enter their systems. Indeed, DER has not

---

[2] The term is used deliberately. The definition of "sewage" contained in the CSL and which was adopted verbatim from the Act of April 22, 1905, P.L. 260, known as the Pure Water Act, is limited to human and animal waste. It does not include the considerable quantities of fruit and vegetable matter introduced into modern sewer systems by household garbage disposal units, and does not include the enormous flows of surface water handled by the combined sewer systems in many municipalities. A literal reading of the term "sewage" would probably disqualify a significant number of present day sewage treatment plants.

administered the Act 339 program along such superficial lines. It has drawn no distinction between facilities treating just "sewage" and those treating a mixture of "sewage" and "industrial wastes." It has made no apportionment of facilities' cost on the basis of the relative flows of "sewage" and "industrial wastes." For DER to have drawn such a distinction and to have made such an apportionment undoubtedly would have had a dampening effect on DER's and EPA's policies of avoiding a proliferation of treatment facilities by promoting comprehensive regional treatment facilities handling the combined flows of municipalities and industries located in the same stream basin (See 25 Pa. Code §§91.15, 91.31 & 91.32 and the following sections of the Federal Water Pollution Control Act, 33 U.S.C.A. §§1252(c)(2)(B), 1255(a)(2), 1284(a)(5, 1288(b)(2)(A), 1298(a) and 1342 (b)(9).

In our judgment, the term "sewage treatment plants" as used in Act 339 must be given a generic meaning devoid of any distinction based on specific definitions of pollutants contained in the CSL. Construing the term in this manner corresponds with similar usage in the Sewer Rental Act, Act of July 18, 1935, P.L. 499, as amended, 53 P.S. §2231 et seq. and the Municipal Codes--Act of June 23, 1931, P.L. 932, as amended, 53 P.S. §38201 et seq. (Third Class Cities); Act of February 1, 1966, P.L. (1965) 1656, as amended, 53 P.S. §47001 et seq. (Boroughs); Act of June 24, 1931, P.L. 1206, as amended, 53 P.S. §57401 et seq. (First Class Townships); and Act of May 1, 1933, P.L. 103, as amended, 53 P.S. §66501 et seq. (Second Class Townships).[3] Interpreting Act 339 in this manner clearly advances the legislative goals

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[3] If a generic meaning were not given to "sewage," "sewers," and "treatment plants" in these statutes, municipalities would have no legislative authority to construct facilities to handle industrial wastes, in any amount, or to charge industrial customers for the use of such facilities--a result that would frustrate the goals of the CSL and cast a cloud over the legality of numerous municipal treatment plants.

of both Act 339 and the CSL--Clean Streams, and state aid to municipalities working toward that end--and satisfies the general eligibility statement of §103.25(b) of the regulations, quoted above.[4]

The fact that Appellant's Facilities treat industrial wastes primarily and human wastes only to a very limited degree is irrelevant to our decision. Since we find no basis in Act 339 for differentiating treatment plants on the basis of what substances they treat, it is immaterial whether a particular plant treats industrial wastes exclusively, not at all, or in some degree in between.

In its brief, DER expresses concern that, if Act 339 funding is approved in this case, the doors would be thrown open for a "huge unanticipated class of waste facilities . . . merely through the charade of transferring ownership of the treatment plant to the local municipality . . . . The Department cannot condone this type of indirect State aid to private industry." This is an odd statement to come from the administrative department charged with the management of Act 339, which clearly provides funding based on costs of "acquisition" as well as construction. If the language quoted from the brief accurately portrays DER's mindset, it conflicts seriously with the intent of the Legislature expressed in Act 339 and expressed in a series of other statutes authorizing the use of public moneys in projects designed to retain existing industries and attract new industries--Pennsylvania Industrial Development Authority Act, Act of May 17, 1956, P.L. (1955) 1609, as amended, 73 P.S. §301 et seq.; Industrial and Commercial

---

[4] The broad scope of meanings which can be attached to many of the terms used in connection with municipal sewer systems is also demonstrated by the decision in Medicus v. Upper Merion Township, 82 Pa. Cmwlth. 562, 475 A.2d 918 (1984).

Development Authority Law, Act of August 23, 1968, P.L. 251, as amended, 73 P.S. §371 et seq.; Business Infrastructure Development Act, Act of July 2, 1984, P.L. 520, as amended, 73 P.S. §393.1 et seq.; to name just three.

Furthermore, DER's position is simplistic in that it blithely assumes that a municipality (or municipality authority) and an industry would regard the prospect of an Act 339 grant as the determining factor in reaching a decision on whether to enter into an arrangement such as the one here between the Authority and WTC. Such a decision obviously involves consideration of a variety of complex legal and financial issues unrelated to Act 339.

Significantly, DER has not claimed that the actions of Appellant in constructing the Facilities in order to retain WTC and attract new industry was, in any manner, unlawful. Accordingly, it had the obligation of judging Appellant's Act 339 Application on its merits, uninfluenced by any animosity toward WTC or industrial establishments generally. Since we are convinced that Appellant has established its eligibility for an Act 339 grant with respect to the Facilities, it is for the Legislature to determine whether to restrict such grants in the future.

CONCLUSIONS OF LAW

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

2. Appellant bears the burden of proof.

3. The Facilities were completed and placed in operation for Act 339 purposes as of December 31, 1986.

4. The term "sewage treatment plants" as used in Act 339 has a generic meaning devoid of any distinction based on specific definitions of pollutants contained in the CSL.

5. Appellant has established its eligibility for an Act 339 grant with respect to the Facilities for the year ended December 31, 1986.

ORDER

AND NOW, this 17th day of April, 1989, it is ordered as follows:

1. The Motion in Limine, filed by Westfield Borough Authority on September 27, 1988, is denied.

2. The appeal of Westfield Borough Authority is sustained and the decision of the Department of Environmental Resources denying said Authority's Application for Act 339 funding for the year ended December 31, 1986, is reversed and remanded to the Department of Environmental Resources for action consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

Robert D. Myers
ROBERT D. MYERS, MEMBER

DATED: April 17, 1989

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

C.N. & W., INCORPORATED	:	
	:	
v.	:	EHB Docket No. 88-167-M
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 17, 1989

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A Motion for Summary Judgment will be granted when there is no dispute as to any material fact and when the moving party is entitled to judgment as a matter of law. When a coal operator has admitted to violations of the reclamation provisions of statutes, regulations, compliance orders and its mining permit in substantial respects, it cannot overcome the forfeiture of its bonds and the suspension of its mining permit by assertions that only a minimal amount of reclamation work remains to be done.

OPINION

The appeal docketed at 88-167-M was filed by C.N. & W., Incorporated (Appellant), on April 26, 1988, contesting the March 31, 1988, action of the Department of Environmental Resources (DER) forfeiting three (3) bonds posted by Appellant in connection with a surface mining site in Unity Township,

Westmoreland County. The appeal docketed at 88-223-F was filed by Appellant on June 2, 1988, challenging DER's May 16, 1988, suspension of Surface Mining Permit (SMP) 65830201 issued to Appellant for the same surface mining site.

On December 1, 1988, DER filed a Motion for Summary Judgment at Docket number 88-167-M. Appellant filed its Response to this Motion on January 6, 1989; DER filed a Reply on January 17, 1989; and Appellant filed a Supplemental Brief and Opposition on January 20, 1989. On March 28, 1989, both appeals were consolidated at docket number 88-167-M.

DER's Motion for Summary Judgment is supported by the affidavit of John Matviya and exhibits. Essentially, it is based upon a series of 37 Requests for Admission which DER served on Appellant on or about June 7, 1988, pursuant to Pa. R.C.P. 4014, and which Appellant failed to answer. As a result, the matters contained in the Requests are deemed admitted by Appellant.

When these admissions are combined with other undisputed facts, it is clear that SMP 65830201 was issued to Appellant on September 13, 1984, authorizing coal refuse processing at the Latrobe Pile on the Unity Township site. Authorizations to Mine were issued on September 13, 1984 (13.2 acres), September 5, 1986 (2.9 acres) and June 22, 1987 (1.5 acres). Appellant posted a $13,200 surety bond (guaranteed by International Fidelity Insurance Company) with respect to the first Authorization to Mine, and collateral bonds supported by cashier's checks in the amounts of $5,400 and $3,000, respectively, with respect to the two subsequent Authorizations.

Compliance Order (C.O.) 87G368A, issued by DER on September 15, 1987, cited Appellant for failure to comply with the approved reclamation plan and failure to backfill within 60 days of coal removal, and directed Appellant to correct these violations by October 6, 1987. Appellant took no appeal to this

Board from C.O. 87G368A. DER issued C.O. 87G541 on October 29, 1987, citing Appellant for failure to comply with C.O. 87G368A and ordering Appellant to cease operations. Appellant took no appeal to this Board from C.O. 87G541.

On November 2, 1987, DER advised Appellant that it intended to suspend its permit and/or license, if the violations are not abated in a timely manner, and would issue a civil penalty assessment. On March 31, 1988, DER forfeited Appellant's three bonds and on May 16, 1988, DER suspended SMP 65830201. As already noted, Appellant filed appeals from these two actions.

Appellant conducted its surface mining operations on, and affected, all three Authorization areas. As of June 1988, these three Authorization areas had not been rough backfilled, finally graded, covered with topsoil or revegetated. The findings contained in C.O. 87G368A and C.O. 87G541 apply to all three Authorization areas.

DER argues that there is no dispute as to any material facts and that DER is entitled to judgment as a matter of law. Appellant's response is based upon affidavits of Paul H. Mutschler, asserting that only a few minor items remain to be done (requiring no more than one day's work when weather permits) and that the remaining work has been obstructed by the property owner. Appellant argues that the violations cited by DER are de minimis and do not warrant the harsh penalty of bond forfeiture.[1]

The de minimis issue, first raised by Appellant in its Notice of Appeal docketed at 88-167-M, is based upon this Board's decisions in King Coal Company v. DER, 1985 EHB 104 and, on reconsideration, 1985 EHB 604, holding that a sanction as severe as bond forfeiture must be justified by more than

---

[1] While Appellant's argument does not specifically mention the permit suspension (the consolidation occurred after the legal memoranda had been filed), we will treat it as being included.

de minimis violations. DER's assertion that the Board abandoned this concept in the recent decision of James E. Martin and American Insurance Company v. DER (Board docket number 85-120-R), adjudication issued December 20, 1988, is incorrect. The Board acknowledged the de minimis argument in that case but held that Martin failed to present evidence to substantiate it.

Appellant's argument in the present case is bolstered by the affidavits of Paul H. Mutschler which, if believed, would lead to the conclusion that very little work remains to be done. The problem with these affidavits lies in the fact that they are dated January 5, 1989, and January 13, 1989, respectively, and speak of conditions existing on those dates. The only reference to the past is contained in paragraph 4 of the earlier affidavit where it is averred that Appellant "has been performing reclamation work at its permit site for the past several months." This strongly suggests that the reclamation work did not begin until the Autumn of 1988, about twelve months after DER issued the C.O.'s and about six months after DER forfeited the bonds. Mr. Mutchler's averments of present conditions, even if wholly correct, do not prove that the uncompleted reclamation work was de minimis on any of the earlier dates when DER acted.

DER's Requests for Admission, on the other hand, deal specifically with conditions that existed on or before June 7, 1988. Those facts, deemed admitted by Appellant's failure to respond to them, show the following conditions on all three Authorization areas (totalling 17.6 acres): (1) no rough backfilling, (2) no final grading; (3) no coverage with topsoil, and (4) no revegetation. These violations cannot be considered de minimis.

Moreover, as noted in the first King Coal Company decision, 1985 EHB 104, DER is not required to wait forever before resorting to bond

forfeiture--even when the violations are insubstantial. DER cited Appellant for reclamation violations in mid-September 1987 and again in late October 1987, demanding prompt corrective action. Appellant neither obeyed these orders nor challenged them by appeals to this Board. Six months later, DER forfeited the bonds; and, six weeks after that, suspended the surface mining permit. Since Appellant did not begin the work for yet another three or four months, it is obvious that all of DER's actions were necessary to bring Appellant into compliance. The fact that only a minimal amount of work may now remain to be done is not an adequate basis on which to conclude that DER abused its discretion a year ago.

Appellant has admitted (passively, by failing to respond to DER's Requests for Admission, and actively, by the averments of its affidavits) violations 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.; the regulations adopted pursuant to said statutes; the conditions of SMP 65830201; and the requirements of C.O. 87G368A and C.O. 87G541. Accordingly, DER was legally authorized, by the provisions of SMCRA and the CSL and the terms of the bonds, to forfeit the bonds and suspend the permit. No material facts are in dispute and DER is entitled to judgment as a matter of law.

ORDER

AND NOW, this 17th day of April, 1989, it is ordered as follows:

1. The Motion for Summary Judgment filed by the Department of Environmental Resources is granted.

2. The appeals of C.N. & W., Incorporated, are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: April 17, 1989

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

EDWARD ELERSIC, et al.	:	
	:	
v.	:	EHB Docket No. 87-502-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and REITZ COAL COMPANY, Permittee	:	Issued: April 21, 1989

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Appellant's motion for summary judgment is denied where the appellant has provided the Board with no authority for its assertion and the language of the permits does not support the conclusion that a coal mining activity permit and a coal refuse disposal permit, each incorporating conditions referring to the provisions of an Air Pollution Control Act plan approval, have become void where the plan approval expired after the issuance of the mining activity and coal refuse disposal permits.

OPINION

This matter was initiated by the December 10, 1987, filing by Edward Elersic and other citizens (collectively, Elersic) of a notice of appeal challenging the November 10, 1987, issuance by the Department of Environmental Resources (DER) of Coal Mine Activity Permit No. 56831602 and Coal Refuse Disposal Permit No. 56813710 (permits) to Reitz Coal Company (Reitz). Elersic

alleged that Reitz's coal preparation plant, located in Central City, Somerset County, was releasing pollutants into the Commonwealth's air and water and that DER's issuance of the permits was a breach of its fiduciary duty under Article I, Section 27 of the Pennsylvania Constitution.

On March 7, 1988, Elersic filed a motion for summary judgment, contending that it was entitled to judgment as a matter of law because the permits contained a special condition requiring Reitz to comply with the provisions of a plan approval issued to Reitz by DER pursuant to the the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq., on or about December 31, 1985. Because the plan approval expired on December 31, 1987, Elersic contends that the permits are void because there cannot be compliance with the 1985 plan approval. Reitz failed to respond to the motion, although informed by the Board of its pendency.

DER responded to Elersic's motion on March 18, 1988, contending that the expiration of the plan approval does not void DER's issuance of the permits and, therefore, Elersic is not entitled to summary judgment.[1]

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Robert C. Penoyer v. DER, 1987 EHB 131. However, it is not for the Board in its consideration of a motion for summary judgment to decide issues of fact, but rather to decide if

---

[1] DER attacks the relief requested by Elersic and suggests that if the Board concludes that the permits were void by operation of law on December 31, 1987, when the plan approval expired, there is nothing for the Board to review and Elersic's appeal should be dismissed as moot. We decline to be drawn into this metaphysical swamp until it is framed in a motion to dismiss for mootness.

there exist issues of fact. See Bolinger v. Palmer for Area Communities Endeavors, Inc., 241 Pa.Super. 341, 361 A.2d 676 (1976).

The special conditions at issue provide, respectively, that:

> Accordingly, this permit requires, as a condition thereof, compliance with the following:
>
> a) All provisions of the Bureau of Air Quality Control Plan Approval No. 56-305-026A, as issued January 31, 1985, and any subsequent revisions, approvals or operating permits issued pursuant to said plan approval.
>
> The preparation plant shall not be reactivated until the requirements of Paragraph A through I of this Plan Approval have been satisfactorily completed ...
>
> (Coal Mining Activity Permit No. 56831602)

and

> Accordingly, this permit requires, as a condition thereof, compliance with the following:
>
> a) All provisions of the Bureau of Air Quality Control Plan Approval No. 56-305-026-A, as issued January 31, 1985, and any subsequent revisions, approvals, or operating permits issued pursuant to said plan approval; ...
>
> (Coal Refuse Disposal Permit No. 56813710)

While Elersic has provided us with no legal authority to reach the conclusion he urges upon us and it is not our responsibility to fashion any such argument to support Elersic's motion, we do not believe that the language of the conditions in the permits supports the argument that they have become void by operation of law. Accordingly, we will deny the motion.

ORDER

AND NOW this 21st day of April, 1989 it is ordered that Edward Elersic's motion for summary judgment is denied. Reitz Coal Company and the Department are ordered to file their pre-hearing memoranda on or before May 12, 1989.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 21, 1989

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M. DIANE SMITH
SECRETARY TO THE BOARD

GEORGE W. HATCHARD :
:
v. : EHB Docket No. 88-057-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 21, 1989

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is denied when it is unclear whether a party is entitled to judgment as a matter of law.

OPINION

This matter was initiated by the March 2, 1988, filing of a notice of appeal by George W. Hatchard (Hatchard) seeking review of a January 28, 1988, letter from the Department of Environmental Resources (Department) denying Hatchard an after-the-fact permit to fill approximately 5400 square feet of wetlands located on his property in the Borough of Mount Pocono, Monroe County. The Department's stated reasons for denying the permit were:

> "1. The project will result in significant environmental damage by affecting the regimen and ecology of the watercourse, water quality, fish and wildlife, aquatic habitat and other significant environmental factors as set forth in 25 Pa. Code, Section 105.14(b)(4).
>
> 2. The application has not demonstrated that the proposed fill is a water-dependent activity, nor does it document the need for the project versus the loss of aquatic habitat, since upland area on the same tract is available, as set forth in 25 Pa. Code, Section 105.14(b)(7)."

The Department filed a motion for summary judgment on October 11, 1988, arguing that the U.S. Army Corps of Engineers (Army Corps) had previously denied an after-the-fact permit to fill the wetlands and ordered Hatchard to restore the site to its pre-fill conditions, that the Army Corps' order was not appealed and, therefore, is a final order, and that any permit to fill wetlands which is granted by the Department would contravene that order.

On October 26, 1988, Hatchard responded to the Department's motion, arguing that summary judgment is inappropriate because of the existence of disputed factual issues. Hatchard admitted that the Army Corps' order was not appealed because the order stated there was no appeal procedure to contest the Army Corps' action and indicated its willingness to reconsider its permit denial if Hatchard could obtain the appropriate permit from the Pennsylvania authorities. Hatchard also claimed that because the Department's letter never stated that the Department was barred from issuing the permit by the Army Corps' denial, the Department cannot now rely on that as a basis for the denial of the permit.

Summary judgment will be granted where there are no genuine disputes over material facts and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035, Summerhill Borough v. DER, 34 Pa. Cmwlth 574, 383 A. 2d 1320 (1978). When ruling on a motion for summary judgment, this Board will look at the facts in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

Although there may be disputes over whether the permit will affect Red Run, whether other area is available for a parking lot and whether other

alternatives are practicable, if the Department properly denied the permit as a result of the previous Army Corps' denial and order, then summary judgment could be granted, since the other issues would be irrelevant.

The Department asserts that §17 of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.17 (DSEA), and 25 Pa. Code §105.24 mandate it to deny a permit in circumstances where the Army Corps has denied a permit. Section 17 of the DSEA requires the Department to

> "cooperate and coordinate with the U.S. Army Corps of Engineers and other appropriate federal and interstate agencies for the purpose of assuring efficient regulation, permitting and inspection of dams, water obstructions and encroachments,"

while 25 Pa. Code §105.14 requires the Department to

> "establish a system to coordinate the application for, and issuance of, permits under this Chapter with permit processes conducted once other statutes and regulation administered by the Department and with permit processes administered by other federal and state agencies."

In reviewing permit applications, 25 Pa. Code §105.14(a) requires the Department to consider "Compliance by the proposed project with all applicable laws administered by the Department, the Fish Commission, and any river basin commission created by interstate compact." Our reading of these sections of the DSEA and the regulations does not lead us to conclude that they, per se, compel the Department to deny a permit if the Army Corps denies a permit, and the Department has failed to provide us with any other authority for its position. Because the Department has not demonstrated that it is entitled to judgment as a matter of law, we must deny its motion.

O R D E R

AND NOW, this 21st day of April, 1989, it is ordered that the Department's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 21, 1989

cc: **Bureau of Litigation**
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WALLENPAUPACK LAKE ESTATES PROPERTY OWNERS	:	
v.	:	**EHB Docket No.** 88-494-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 21, 1989

OPINION AND ORDER
SUR
PETITION TO INTERVENE

Synopsis

A petition to intervene will be denied where the prospective intervenor fails to demonstrate that its interests will not be adequately represented by the Department of Environmental Resources and where the evidence it seeks to present is either duplicative or irrelevant.

OPINION

This matter was initiated by the December 2, 1988, filing of a notice of appeal by the Wallenpaupack Lake Estates Property Owner's Association (Association) seeking review of a November 2, 1988, Department of Environmental Resources (Department) letter, disapproving a revision to the Paupack Township official plan for the Wallenpaupack Lake Estates (WLE) development. The Department's action was taken 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. (Sewage Facilities Act). The Department disapproved the plan revision, which proposed to eliminate sewer

service by the WLE sewage treatment plant in Sections 6 and 7 of WLE, because it did not address the sewage needs of the lots in Sections 6 and 7 and, therefore, was inconsistent with comprehensive water quality management in the watershed.

In its notice of appeal, the Association claimed that the Department's disapproval was premature in that the sewage needs of Sections 6 and 7 were unknown and, therefore, a comprehensive water quality management program could not be developed. Additionally, the Association claimed that the Department's denial was arbitrary and capricious in that it left the Association in the position of acting like a public utility, since Sections 6 and 7 are still to be served by the Association's sewage treatment plant. Furthermore, the Association argued that the Department's disapproval constituted a taking of property without due process of law.

On February 17, 1989, Cost Control Marketing and Management, Inc. (CCM) filed a petition to intervene arguing that, as owner of over 400 residential lots in Sections 6 and 7, it was able to provide evidence about the extent of development in Sections 6 and 7 and its immediate intentions and ability to sell lots, as well as other evidence to support the Department's determination that the exclusion was not in the best interest of the township's citizens and was contrary to the Commonwealth's concern for the resolution of sewage problems on a regional basis. CCM claimed that its interests were inadequately represented by the current parties because it was better able to present such evidence.

In order to better understand the context in which this motion was filed, we will briefly discuss the events leading up to the Association's appeal.

The Association owns and administers the common areas and facilities in the WLE subdivision. The developer of WLE mortgaged some lots in Sections 6 and 7 to Finance America Credit Corporation, now Chrysler Trust, in order to complete the sewer system in Sections 6 and 7. The developer defaulted, and Chrysler Trust foreclosed. CCM received these lots by quitclaim deed from Chrysler Trust, which had entered into a June 11, 1983, settlement agreement with the Association identifing areas in which it would be infeasible to complete sewer and water systems and agreeing that Section 6 and part of Section 7 would be removed from WLE. As assignee from Chrysler Trust, CCM was a party to this settlement agreement. The Association claimed that CCM did not sign a release and termination of the WLE restrictive covenants and would be named in a suit to quiet title to have Section 6 and part of Section 7 removed from the restrictive covenants. The Association would then remove Section 6 and part of Section 7 from the WLE development. (See notice of appeal).

The Association filed an answer to CCM's petition to intervene on March 6, 1989, urging the Board to deny the petition because of CCM's failure to deny, admit or otherwise answer each material allegation in the notice of appeal, as required by 25 Pa. Code §21.61 and 1 Pa. Code §35.29. In addition, the Association argued that because CCM is subject to the settlement agreement, its statement that it owns 400 lots in Sections 6 and 7 of WLE was misleading; that Sections 6 and 7 were not included in the sewer system or the WLE development and, therefore, without an inclusion, there could not have been an exclusion; that CCM was nothing more than a real estate speculator; that resolution of sewage problems on a regional basis is not a requirement of law; that CCM could not provide any additional relevant information because a site visit or videotape would show the Board the state of development in

Sections 6 and 7; and that CCM's intentions with regard to the lots in Sections 6 and 7 were not relevant. The Association also contended that this controversy should not be settled by the Board because it is essentially a contract dispute over the settlement agreement.

CCM filed a reply to the Association's answer on March 21, 1988, claiming that it had a substantial, direct, and immediate interest in the outcome of this proceeding because, if the Association was successful, CCM would have to construct its own sewage treatment facility, which would be inconsistent with the Commonwealth's preference for dealing with sewage problems on a regional basis. Additionally, CCM maintains it can best provide evidence concerning, inter alia, portions of Sections 6 and 7 which are affected, the settlement agreement, the extent of development in Sections 6 and 7, the need for a regional sewage disposal facility, CCM's status as a developer, the infra-structure of sewer systems in Sections 6 and 7 and plans to develop the infrastructure, and CCM's actions with regard to compliance with the Interstate Land Sales Full Disclosure Act. CCM also stated that its interest as a developer is far more substantial than others and that the Department was not adequately representing that interest.

In ruling on a petition to intervene, the Board will consider 1) the nature of the petitioner's interest; 2) the adequacy of representation of that interest by other parties to the proceeding; 3) the nature of the issue before the Board; 4) the ability of the petitioner to present relevant evidence; and 5) the effect of intervention on the administration of the statute under which the proceeding is brought. City of Harrisburg v. DER, 1988 EHB 946.

We note, at the outset of this discussion, that §4(e) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. _____, No.

94, 35 P.S. §7514(e), states that "any interested party may intervene in any matter pending before the board." We will make our determination on this petition applying the precedents developed under 25 Pa. Code §21.61, as we do not interpret §4(e) as mandating automatic intervention. A prospective intervenor must still demonstrate its interest in a particular matter before the Board.

It is the burden of the prospective intervenor to convince the Board that it should grant intervention. 25 Pa. Code §21.62(e) and Franklin Township v. DER, 1985 EHB 853. CCM claims to be an interested party to this proceeding and that it is not adequately represented before the Board by the Department. Even, if we were prepared to hold that CCM is an interested party, we believe that it failed to meet its burden of demonstrating that its interest is not adequately represented by the Department and that it will present relevant evidence to the Board.

While we recognize that CCM has some sort of property interest in the lots in Sections 6 and 7 of the WLE development, CCM has not demonstrated why the Department cannot protect that interest in its defense of its disapproval of the plan revision. Presumably, the Department evaluated the current and projected development in Sections 6 and 7, as well as the nature of the sewer system in the area, in reaching its decision to disapprove the plan revision which would delete Sections 6 and 7 because the plan revision would not address the needs of those sections. Indeed, the Department is required by §5 of the Sewage Facilities Act and 25 Pa. Code §71.14 to evaluate these issues in reviewing official plans or plan revisions.

What emerges from the petition to intervene, the Association's response, and CCM's reply is that the Association, WLE, and CCM have been

involved in a property and financial dispute which was triggered by WLE's attempts to finance the construction of sewers in Sections 6 and 7 of the development and that CCM now wishes to carry that dispute into this forum. This dispute is not relevant to our consideration of the Department's decision and, moreover, we have no jurisdiction over it. Therefore, we are denying CCM's petition to intervene.

O R D E R

AND NOW, this 21st day of April, 1989, it is ordered that the petition to intervene of Cost Control Marketing and Management, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 21, 1989

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