Environmental Hearing Board

Adjudications and Opinions

1999

Volume III

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1999

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1999.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources (now the Department of Environmental Protection) by the Act of December 3, 1970, P.L. 834, No. 275, which amended the Administrative Code, the Act of April 9, 1929, P.L. 177. The Board was empowered "to hold hearings and issue adjudications...on orders, permits, licenses or decisions" of the Department. While 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 remains unchanged.

ADJUDICATIONS

OPINIONS

1999 DECISIONS

SOLID WASTE MANAGEMENT ACT

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEFFERSON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 98-071-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** August 27, 1999

OPINION AND ORDER ON PETITION TO INTERVENE

By George J. Miller, Administrative Law Judge

Synopsis:

A Petition to Intervene by a township sewer authority is denied where the petition is filed over a year after the Department issued the Order to both the petitioner and the Township. Granting such a petition by a recipient of a Department Order would permit the petitioner to circumvent the requirement that an appeal must be filed within 30 days of the Department action.

OPINION

This matter involves a March 23, 1998 Administrative Order (Order) issued by the Department of Environmental Protection (Department) to Jefferson Township and the Jefferson Township Sewer Authority. The Order required, among other things, the Township and the Sewer Authority to implement the Official Sewage Facilities Plan Update in accordance with the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20(a). The Jefferson Township Board of Supervisors appealed the Order in a timely manner on April 22, 1998 and

filed an amended notice of appeal on May 12, 1998.[1] Pending before the Board is the Department's motion to dismiss for lack of jurisdiction and in the alternative, motion to deny petition for supersedeas without a hearing. The Board granted the Appellant's request for an extension to file a response to the Department's motion pending obtaining new legal counsel. In the meantime, the Sewer Authority filed a Petition to Intervene. The Department filed a response opposing the Sewer Authority's intervention in this appeal.

The Board's Rules require that a petition to intervene contain sufficient factual averments and legal assertions establishing petitioner's reasons, basis, interests and specific issues upon which it seeks to intervene; otherwise, the Board will deny the petition. 25 Pa. Code §§ 1021.62(b) and (e). An intervening party must be "interested" in the sense that it has a "substantial, direct and immediate" interest in the matter. *Borough of Glendon and Glendon Energy Company v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth. 1992); *Darlington Township Board of Supervisors v. DEP*, 1997 EHB 934.

The Sewer Authority seeks intervention in this appeal solely on the grounds that the "matters set forth in the above-captioned appeal, and particularly in the settlement negotiations between the parties . . . relate directly to the purpose of the Sewer Authority, which is to implement and fund the Jefferson Township sewage facilities plans." (Petition, ¶ 2) The Department contends that the Sewer Authority's petition is an attempt to circumvent the time constraints of 25 Pa Code § 1021.52, which requires that appeals be filed within 30 days of the Department action.

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[1] On May 11, 1998, the Board consolidated this case with EHB Docket No. 98-070-MG, which involved the Jefferson Township Homeowners Association's challenge of the March 23, 1998 Order. On March 18, 1999, the Board issued an Order acknowledging the Association's withdrawal of its appeal and marking the appeal closed and discontinued.

Usually a petitioner may not use intervention as a means of circumventing the time constraints of 25 Pa. Code § 1021.52. *Darlington Township Board of Supervisors v. DEP*, 1997 EHB 934, 936; *New Morgan Landfill Co. Inc. v. DER*, 1992 EHB 1690, 1694. We have held that third parties, whose interest in the Department's action is sufficient to give them standing, may intervene after the time established for an appeal. *Conners v.* DEP, EHB Docket No. 99-138-L (Opinion issued August 20, 1999). However, this rule does not apply to parties who are subject to a Department order. Absent extraordinary circumstances, a recipient of a Department order may participate in the appeal only if it files an appeal within the 30 day time period required by 25 Pa. Code § 1021.52(a)(1). *Connors* at *slip. op.* 7; *Robinson Coal Company v. DER*, 1995 EHB 370.

The Sewer Authority's petition fails to state any extraordinary reason for intervening in the present appeal over a year after the issuance of the Department's Order. The Sewer Authority was aware of the Department's March 23, 1998 Order since the Order was issued to both Jefferson Township and the Sewer Authority. Jefferson Township initiated the above-captioned appeal while the Sewer Authority chose not to file an appeal. In such circumstances, the Board has declined to allow the non-appealing party to intervene in the original party's appeal. *Robinson Coal Company v. DER*, 1995 EHB 370. In addition, the Sewer Authority's particular interest is in the settlement negotiations between the Township and the Department. This subject is beyond the scope of this appeal. To allow the Sewer Authority to intervene at this late date would directly contradict the requirement that the recipient of a Department order must file an appeal within 30 days of the Department action.

Accordingly, we enter the following:

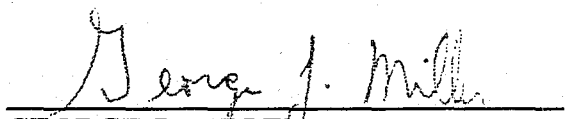
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFFERSON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 98-071-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of August, 1999, it is hereby ordered that the Jefferson Township Sewer Authority's Petition to Intervene is DENIED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: August 27, 1999

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RECREATION REALTY, INC.	:	
	:	
v.	:	**EHB Docket No. 99-002-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 27, 1999**

OPINION AND ORDER
ON RULE TO SHOW CAUSE

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

An appeal is dismissed as a sanction pursuant to 25 Pa. Code § 1021.125 for failing to respond to an Order and a Rule to Show Cause.

OPINION

The Department of Environmental Protection (the "Department") issued a compliance order to Recreation Realty, Inc. ("Recreation Realty") on December 11, 1998. Recreation Realty filed an appeal of the Order on January 11, 1999. When Recreation Realty did not respond to the Department's written discovery requests, the Department filed a motion to compel. The Board granted the motion by Order dated June 15, 1999. The Order directed Recreation Realty to respond to the Department's discovery requests by July 14, 1999. The Order also warned Recreation Realty that its failure to comply with the Order could result in the imposition of sanctions, including the dismissal of its appeal. When Recreation Realty continued

to fail to comply with the Board's Order, the Department filed a second motion to compel. Consequently, the Board issued a Rule to Show Cause on July 26, 1999, which directed Recreation Realty to show by August 16, 1999 why its appeal should not be dismissed as a sanction for ignoring the Board's June 15, 1999 Order. Recreation Realty has failed to respond to the Rule.

Section 1025.125 of the Board's Rules of Practice and Procedure, 25 Pa. Code §1021.125, grants this Board the authority to impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions include the dismissal of an appeal.

Here, Recreation Realty failed to respond to the Board's Order dated June 15, 1999 and then ignored the Board's Rule to Show Cause issued July 26, 1999. It is obvious that Recreation Realty has no serious intention of prosecuting its appeal. Its unwillingness to abide by the Board's authority and rules compels us to dismiss its appeal. *See Shaulis et al. v. Department of Environmental Protection*, 1998 EHB 503, 507.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RECREATION REALTY, INC.	:	
	:	
v.	:	**EHB Docket No. 99-002-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th of August, 1999, Recreation Realty, Inc.'s appeal is dismissed as a sanction pursuant to 25 Pa. Code § 1021.125 for failing to respond the Board's Order and Rule to Show Cause.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

EHB Docket No. 99-002-L

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **August 27, 1999**

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JH/bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PEN ARGYL BOROUGH	:	
	:	
v.	:	**EHB Docket No. 98-066-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRAND CENTRAL SANITARY LANDFILL, INC., Permittee	:	**Issued: August 30, 1999**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

In a neighboring municipality's appeal from the Department's issuance of a permit modification allowing for expansion of a landfill, the permittee's motion for summary judgment is denied for the most part. Most of the municipality's objections boil down to a concern that the expansion will violate the law and cause a public nuisance because of increased noise, odor, traffic, and the like. The issue is primarily a factual one, and it is genuinely disputed. Accordingly, summary judgment is inappropriate.

OPINION

Background

The Department of Environmental Protection (the "Department") issued a permit modification to Grand Central Sanitary Landfill, Inc. ("Grand Central") on March 17, 1998. The

modification allows Grand Central to laterally expand the surface area and increase its average daily volume of incoming waste at its landfill in Plainfield Township, Northampton County. A neighboring municipality, Pen Argyl Borough ("Pen Argyl"), filed this appeal from the issuance of the permit modification. Grand Central has moved for summary judgment on all of Pen Argyl's objections. For the reasons that follow, the motion is granted in part and denied in part.

Consistency with County Plan

Although Penn Argyl objected in its notice of appeal to the permit modification as being inconsistent with the host county's municipal waste management plan, it expressly abandoned the argument in its response to Grand Central's motion for summary judgment. (Brief in opposition, p.6.) Accordingly, Grand Central is granted summary judgment on this objection.

Failure to Seek an Injunction

Penn Argyl directs our attention to a consent order and agreement entered into by the Department and Grand Central dated March 18, 1998, the day after the permit modification was issued. Penn Argyl objects to the permit modification because the Department should have sought an injunction instead of entering into a consent order. We fail to see any connection between the Department's choice between an injunction and a consent order on the one hand, and the issuance of a permit modification on the other hand. If we assume the Department erred in choosing a consent order over an injunction to address past violations, it does not thereby follow that the permit modification was issued in error. The consent order and the permit modification are not mutually exclusive. An injunction was not a prerequisite to issuance of the permit modification. We are obviously straining, unsuccessfully, to make sense out of a nonsensical argument.

In any event, even if the Department's decision to enter into a consent order was infirm, Pen

Argyl's remedy would have been to appeal from that consent order. Finally, in the event of such a challenge, which it is now too late to mount, we suspect that the Department's choice among enforcement remedies would have been a matter committed to its prosecutorial discretion. For these reasons, Grand Central is entitled to summary judgment on Pen Argyl's objection.

Nuisance Concerns

In its notice of appeal and response to Grand Central's motion for summary judgment, Pen Argyl asserts that the landfill expansion will cause or contribute to a public nuisance from inadequately mitigated odors, noises, dust, truck traffic, and other causes. Section 1112(d)(2) of the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.1112(d)(2), is one of the operative statutes cited by Pen Argyl. That section provides that the Department may not approve a permit modification that allows for an increase in daily waste volume limitations unless the applicant demonstrates to the Department's satisfaction that the increased volumes will not cause or contribute to any public nuisance from odors, noises, dust, truck traffic, or other causes. Whether the Department erred in concluding that the landfill expansion will not create a public nuisance is very heavily dependent upon questions of fact that are genuinely disputed here. Pen Argyl and Grand Central have submitted detailed affidavits and cited discovery materials to support their respective, opposing positions. Although motions for summary judgment serve a useful purpose, we are resistant to allowing a trial by affidavit. Accordingly, this issue must proceed to an evidentiary hearing.

Resolution of the same or nearly identical disputed issues of fact will also determine who prevails on Pen Argyl's claims that the landfill expansion was authorized in violation of Article I, Section 27 of the Pennsylvania Constitution, that the landfill's mitigation plan is inadequate, that

Grand Central did not prepare an adequate harm and mitigation assessment as part of its application, and that the modification violates Executive Order No. 1996-5 and various statutes and regulations, including the Air Pollution Control Act, 35 P.S. § 4001.1 *et seq.* Although Pen Argyl has cited several legal authorities in support of its claims, there is no point to resolving the challenges raised by Grand Central to the use of those legal authorities at this juncture when we will be left with the need to decide unresolved, determinative issues of fact in any event.

The Need for the Expansion

25 Pa. Code § 271.127(f) requires an applicant for a permitted landfill expansion to explain the need for the expansion. Pen Argyl asserts that there is no such need. In its motion for summary judgment, Grand Central points out that its facility is a designated municipal waste facility in seven county plans. By citing 25 Pa. Code §271.127(h), Pen Argyl seems to respond that the fact that a facility is included in county plans does not necessarily mean that an expansion is needed. We will allow this factually dependent issue to proceed to a hearing.

Consultation with the Municipality

Pen Argyl cites Executive Order No. 1996-5 as "evidence" that the Department did not consult adequately with Borough officials before issuing the permit. It also relies upon an affidavit of a Borough councilwoman to support its claim that the limited consultation that did occur was neither effective nor timely. The question of adequate consultation may have limited relevance or utility now that the permit modification is subject to this Board's *de novo* review, but in any event, the question is primarily factual and we will consider it at the evidentiary hearing.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

PEN ARGYL BOROUGH	:	
	:	
v.	:	
	:	**EHB Docket No. 98-066-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRAND CENTRAL SANITARY LANDFILL, INC., Permittee	:	

ORDER

AND NOW, this 30th day of August , 1999, Grand Central Sanitary Landfill, Inc.'s motion for summary judgment is GRANTED IN PART AND DENIED IN PART, as follows:

1. Pen Argyl Borough has waived its objection that the permit modification at issue is inconsistent with the host county's municipal waste management plan, and the objection is, therefore, dismissed.

2. Pen Argyl Borough's objection that the Department should have sought an injunction against Grand Central Sanitary Landfill is dismissed.

3. Grand Central's motion for summary judgment is denied in all other respects.

4. The parties shall file a joint proposed case management order on or before September 17, 1999. The order shall include proposed hearing dates. The order shall describe the parties' respective positions to the extent they are unable to agree on any deadlines.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Honorable George J. Miller is recused from this matter.

DATED: August 30, 1999

See next page for a service list.

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

MURRAY and LAURINE WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 98-153-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CYPRUS EMERALD RESOURCES, Permittee	:	**Issued: August 31, 1999**

OPINION AND ORDER ON MOTION TO LIMIT ISSUES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board's Rules require Appellants to set forth in separate numbered paragraphs their specific objections to the action of the Department. Objections not set forth in the notice of appeal or any subsequent amendments allowed pursuant to 25 Pa. Code § 1021.53 can not be raised for the first time in the Appellants' pre-hearing memorandum. The Board grants a motion to limit issues filed by a coal mining company where the Appellant homeowners' notice of appeal neither raised generally or specifically, issues concerning the adequacy of the mine subsidence bond and water loss and water replacement. Since those objections were only raised for the first time in Appellants' pre-hearing memorandum the Board does not have jurisdiction to consider them. The motion is denied concerning the Department's 15-degree guideline as the issue was raised in the notice of appeal.

Simply by conducting discovery on an issue does not result in the issue being part of the appeal if it was not raised in the notice of appeal or any subsequent amendment. An Appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later. 25 Pa. Code § 1021.53(c).

OPINION

This appeal was filed by Murray and Laurine Williams (Appellants), challenging the Department of Environmental Protection's (Department's) approval of a revision to a deep coal mining permit held by RAG Emerald Resources Corporation (RAG Emerald), formerly known as Cyprus Emerald Resources Corporation. The revision authorizes RAG Emerald to add 1,954 acres to its permit boundary and to extend the boundary of its subsidence control plan. A hearing on this appeal is scheduled to begin September 21, 1999.

Appellants filed their pre-hearing memorandum on July 21, 1999. On August 6, 1999, RAG Emerald filed a motion to limit issues, asserting that the Appellants have raised issues of law and objections in their pre-hearing memorandum which were not set forth in their notice of appeal. The Department filed a letter stating it concurred with RAG Emerald's motion.

The issues which RAG Emerald asserts were not set forth in the notice of appeal but appear for the first time in the Appellants' pre-hearing memorandum are as follows:

1) The Department's 15-degree guideline is an inadequate means of preventing adverse impacts and adverse effects from subsidence.
2) The Department's staff failed to consider water loss or water supply replacement prior to permit issuance, citing *Stoystown Borough Water Authority v. Department of Environmental Protection*, 729 A.2d 170 (Pa. Cmwlth. 1999).

3) The Department's staff failed to require an adequate bond, citing *People United to Save Homes v. DEP*, EHB Docket No. 95-232-R (Adjudication issued July 2, 1999).

4) Issues relating to whether the Department made adequate findings prior to issuing the permit revision, citing an unreported decision of the Commonwealth Court, *Blose v. Department of Environmental Protection*, No. 287 C.D. 1999 (Pa. Cmwlth. filed May 14, 1999).[1]

In its motion, RAG Emerald asks the Board to preclude Appellants from advancing any legal or factual contentions relating to the allegedly new issues.

Pursuant to the Board's rules of practice and procedure, an appellant waives any objections not stated in the notice of appeal, or any amendment thereto, unless good cause is shown. 25 Pa. Code § 1021.51(e).

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under § 1021.53 (relating to amendments to appeal; *nunc pro tunc* appeals) shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

This appeal was filed in August 1998. On September 19, 1998, amendments to the Board's Rules became effective. One of the amendments substantially revised Rule 53. First, parties may now amend their appeals "as of right" within 20 days after filing. 25 Pa. Code § 1021.53(a). This is an important change in the Board's Rules which should provide counsel with far greater flexibility than past practice.

Second, and more relevant to our discussion here, after the 20 day period for amendment as of right, the Board, upon motion by the appellant, may grant leave for further amendment of the appeal provided that the requested amendment satisfies one of the following conditions:

> (1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.
>
> (2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.
>
> (3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will have no prejudice to other party or intervenor.
> 25 Pa Code § 1021.53(b)

An issue which was not raised in the notice of appeal may not be raised in the Appellant's prehearing memorandum. In addition, the Board's Rules clearly require that any motion to amend must be filed ***before*** the matter has been listed for hearing. Rule 53(c) reads as follows:

> An appellant *may not* request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later. 25 Pa. Code § 1021.53(c) (emphasis added)

Background

Appellants filed a response to the motion on August 16, 1999. As to the so-called *Blose* issues, relating to the adequacy of the Department's findings, Appellants now state that they do not intend to pursue these issues at hearing. Therefore, these issues are waived. With regard to

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1 The internal operating procedures of the Commonwealth Court prohibit counsel from citing in any brief or argument an unreported decision of the court. 210 Pa. Code § 67.55. Although the Board currently does not have such a rule, we believe counsel should not cite

the remaining issues, i.e. the Department's 15-degree guideline, water loss and replacement, and bonding, Appellants assert that these issues were adequately raised in the notice of appeal. In support of their position, Appellants cite *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991) and *Newtown Land Ltd. Partnership v. Department of Environmental Resources*, 660 A.2d 150 (Pa. Cmwlth. 1995).

Controlling Commonwealth Court Decisions

Our analysis of these issues begins with the seminal case of *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd on other grounds*, 555 A.2d 812 (Pa. 1989). This case concerned an appellant's petition to amend its appeal outside the 30-day appeal period. In that case, the Pennsylvania Game Commission (Game Commission) had appealed the Department's issuance of a solid waste permit. Subsequent to the 30-day appeal period, the Game Commission sought leave to amend its appeal to add new grounds for the appeal. The Board denied the motion, and the Game Commission appealed. In upholding the Board's denial of the motion, the Commonwealth Court held as follows:

> [I]t is clear that the Board need not grant the petition absent a showing of good cause. Thus, this is not a case like a civil suit, where leave to amend should be liberally granted absent an error of law or prejudice to the opposing party....Instead, the failure to file specific grounds for appeal within the thirty-day period is a defect going to jurisdiction, and the time period cannot be extended *nunc pro tunc* in the absence of a showing of fraud or a breakdown in the court's operation....

509 A.2d at 886 (citations omitted).

Pennsylvania Game Commission stands for the proposition that issues not stated in the notice of appeal are waived unless good cause is shown for amending the appeal.

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unreported Commonwealth cases in briefs or arguments before the Board.

In 1991, the Commonwealth Court decided *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991). In that case, Croner, Inc., a coal mining operator, and permittee, filed an appeal with the Board challenging restrictions which the Department had placed in its blasting permit. These restrictions were based on a Department regulation set forth at 25 Pa. Code § 87.127. The notice of appeal filed by the permittee was very extensive but focused on the narrow issue of the restrictions to blasting in its permit. The court's opinion noted as follows:

> Croner raised the following contentions in its appeal: (1) the limitations imposed on peak particle velocity and air over pressure are more stringent than those limitations imposed on blasting in operations other than coal mining and thus violates Croner's right to equal protection of the law; (2) the conditions arbitrarily preclude a landowner affected by coal mine blasting from waiving the peak particle velocity and air over pressure limitations while allowing a landowner to waive them if affected by non-coal operations and thus those conditions violated Croner's right to equal protection under the law; (3) the conditions deny Croner its right to equal protection of the law by arbitrarily precluding an affected landowner from waiving these limitations, whereas such waivers are allowed by other similarly situated individuals under 25 Pa. Code § 87.127(i) without a reasonable basis for distinction in the regulation; (4) the disparate treatment of blasting activities in coal mining operations versus non-coal mining operations is without any reasonable basis and deprives Croner of its constitutional right to equal protection under the law; and (5) the conditions imposed by the department are otherwise contrary to the law and in violation of Croner's rights.

589 A.2d at 1184.

The Board dismissed Croner's appeal mainly on the ground that the Board had no jurisdiction over a challenge to a state regulation regarding blasting because it was an indirect attack upon an almost identical federal surface mining regulation. The Board also made a determination that one of Croner's arguments had not been raised in its notice of appeal. Specifically, Croner argued that 25 Pa. Code § 87.127 violated Section 4.2(c) of the Surface

Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 – 1396.31, at § 1396.4b(c). Section 87.127 of the regulations sets forth very detailed restrictions on surface blasting. Section 4.2(c) of the statute sets forth setback limits for surface mining and allows a dwelling owner to waive the prohibition against surface mining activities within 300 feet of a dwelling.

Because Croner's notice of appeal made no specific reference to Section 4.2(c) of the statute, the Board, in a footnote, concluded that this issue was waived. On appeal, the Commonwealth Court reversed the Board and held that Croner could indeed challenge the constitutionality of the state regulation. The Court also found that the Board's analysis was flawed concerning Section 4.2(c) of the Surface Mining Conservation and Reclamation Act. Then President Judge Craig, writing for the Commonwealth Court, found that this issue had been sufficiently raised in the notice of appeal. The court held as follows:

> Croner's notice of appeal, filed with the board, did raise, in general terms, the issue of compliance with authority given by law, by stating that "[t]he action of the Commonwealth of Pennsylvania, Department of Environmental Resources, in conditioning Appellant's mine drainage permit to these conditions, is otherwise contrary to law and in violation of the rights of Appellant."

Croner, 589 A.2d at 1187.

A review of the objections set forth in Croner's notice of appeal, which are included in both the Commonwealth Court and Board opinions, leads to the inescapable conclusion that Croner raised this issue in the first three paragraphs of his notice of appeal with the exception of failing to specifically identify 52 P.S. § 1396.4(c). However, although Croner did not specifically identify the statute, as pointed out (perhaps too concisely) by the Commonwealth Court, there was no doubt what section of the law Croner was referring to in his notice of appeal. While *Croner* has been cited by Appellants (and others) as holding that a very general notice of

appeal allows an appellant to raise a broad spectrum of issues at a later date, we do not believe this is a correct interpretation of the law. Under the Appellants' argument, an appellant would be better served by filing a notice of appeal which simply states, "The Department's action was arbitrary and capricious and contrary to the statutes and regulations of this Commonwealth." An appellant who listed specific objections to the Department's action would be penalized in effect, by being "limited" to the objections stated in the notice of appeal. The Commonwealth Court did not intend such a result.

Appellants, however, contend that the court did intend such a result. They cite the court's decision in *Newtown Land Ltd. Partnership v. Department of Environmental Resources*, 660 A.2d 150 (Pa. Cmwlth. 1995), as holding that the *Croner* rationale applies only where there are general allegations. While we agree that *Newtown* held that *Croner* applies where an issue has been raised in general terms, we do not agree with the Appellants' interpretation of the Commonwealth Court decision in *Newtown*.

At issue in *Newtown* was whether certain issues were encompassed in the notice of appeal of the Department's approval of a revision to a sewage plan. The notice of appeal stated that "the revision did not address many of the specific requirements of 25 Pa. Code § 71.21 (relating to content of official plans for sewage systems.)" Subsequently, Appellants wished to raise the issue of whether the plan violated not only Section 71.21, but also Sections 71.62, 71.62(a) and 71.62(c). The Department filed a motion in limine with respect to the latter issues, which the Board granted. On appeal, the Commonwealth Court affirmed, holding "that the very specific challenges in the notice of appeal, described above, cannot legitimately be stretched to encompass the issues [the appellant] raised later. Nowhere in the notice of appeal is any mention made of Section 71.62...." *Id.* at 152.

Newtown stands for the proposition that if specific challenges are made to the Department's action in a notice of appeal, the appellant cannot subsequently seek to raise new issues which are clearly outside the scope of the challenges raised in the notice of appeal. However, neither *Croner* nor *Newtown* stand for the converse proposition asserted by the Williams, i.e. that an appellant may always raise new specific objections later if he has filed a general notice of appeal. It is important to remember that *Croner* held that an issue may be *raised* in general terms, not that a general statement in a notice of appeal may encompass every issue.

It should also be remembered that *Croner* involved a very narrow subject on appeal – certain restrictions contained in its blasting plan. Although *Croner* did not cite the specific statute, Croner *did* cite the specific regulation at issue and it was clear that it was referring to a specific section of the Surface Mining Act.

Guided by these Commonwealth Court opinions, we hold that there is nothing in the Appellant's notice of appeal which can be read as referring to either water loss and replacement or bonding, even in a very general sense. Appellants' notice of appeal deals with the issues of the impact of mining on a historic structure.

We also are guided by the recently enacted amendments to Rule 53, discussed earlier in our opinion. The Board, in enacting this Rule, sets forth a very specific manner in which appeals may be amended. At no time did Appellants adequately raise these two issues in their notice of appeal or move to amend their notice of appeal during the course of discovery to include these objections before the Board decided dispositive motions in the case or scheduled the case for hearing. 25 Pa. Code § 1021.53(c).

We now turn to the specific objections in the Appellants' pre-hearing memorandum to which RAG Emerald has objected.

Department's 15-degree Guideline

In their pre-hearing memorandum, Appellants claim that the Department's 15-degree guideline is an inadequate means of preventing adverse impacts from subsidence. This statement occurs in a discussion in which Appellants assert that the Department has misinterpreted and misapplied 25 Pa. Code §§ 86.37(a)(6) and 89.38(b). Section 86.37(a)(6) states that a mining permit may not be approved unless the application demonstrates that the proposed mining activities will not adversely affect any publicly owned places on the National Register of Historic Places. Section 89.38(b) states that the mining operation plan shall describe measures to accomplish prevention of adverse impacts (for areas unsuitable for mining) or minimization of adverse impacts (if valid existing rights exist). Appellants contend that the Department's interpretation of adverse impact as "irreparable damage" is too narrow.

However, Appellants assert that even if the Department's allegedly incorrect definition is used, it still failed to condition RAG Emerald's permit so as to protect Appellants' farm from adverse impact or adverse effects. It is the Appellants' contention that the 15-degree guideline is "an inadequate means of preventing adverse impacts and adverse affects because subsidence can occur outside that area but DEP failed to determine whether that could happen here." (Appellant Pre-Hearing Memo p. 14)

Although Appellants did not specifically mention the Department's 15-degree guideline with regard to subsidence effects in their notice of appeal, they did specifically raise the issue of whether the Department adequately considered the effects of subsidence on Appellant's property. Paragraph 25 of the notice of appeal states as follows:

> Under Regulations Sections 86.37 and 89.38 DEP has an affirmative duty of protection of historic properties and the historic structures thereon. Even if Cyprus only removes 50% of the coal beneath this farm as currently proposed in its Application, historic structures have been known to suffer subsidence damage when only 50% removal occurs. Moreover, DEP has either not considered or failed to give adequate consideration to the issue of how far from the farm's boundaries long-wall mining must end to continue to provide sufficient support to the historic structures located near the farm's boundaries, which could be damaged if long-wall mining occurs beneath the edge of adjacent tracts....

Paragraph 11 further states:

> DEP has never made a documented decision that no additional protective measures are necessary to prevent any adverse affect on the Thomas Kent, Jr. Farm.

Applying *Croner*, we find that Appellants are not precluded from asserting that the Department's 15-degree guideline with regard to subsidence effects is inadequate. Appellants' notice of appeal clearly sets forth their objection that the Department did not adequately consider the effects of subsidence on the Appellants' farm due to mining. The subject matter of the is described in the notice of appeal with sufficient specificity in that this issue is merely a technical description of the issue raised by the objection. Since the 15-degree guideline is relied upon by the Department in assessing the impact of subsidence, this is certainly within the scope of the Appellants' objection.[2]

Water Loss and Water Supply Replacement

In their pre-hearing memorandum, Appellants contend that the Department failed to consider potential water loss and water supply replacement prior to issuing the permit. Appellants argue that they raised this objection in their notice of appeal in a general fashion.

However, even under the most liberal reading of the objections stated in the Appellants' notice of appeal, we cannot find that Appellants raised the issue of water loss and water supply replacement. While the notice of appeal twice mentions the Department's duties under Article 1, Section 27 of the Pennsylvania Constitution, these references make no mention of water loss, but deal solely with protection of historic structures. In fact, each objection in the notice of appeal deals exclusively with protection of the Appellants' property as a historic structure, as required by 25 Pa. Code §§ 86.37(a)(6) (dealing with permit approval or denial) and 89.38 (dealing with archaeological and historical resources). Contrary to Appellants' assertion in their response that they filed a "general Notice of Appeal," their objections deal quite specifically with protection of their property as a historic structure according to the narrow criteria set forth in the regulations.

Appellants appear to rely on paragraph 15 of their notice of appeal as encompassing the issue of water loss and replacement. This paragraph states that RAG Emerald's operation plan fails to describe the measures to be used to accomplish the requirements of Section 89.38(b)(1) or alternatively Section 89.38(b)(2)." These sections read as follows:

> (b) For publicly owned parks or historic places listed in the National Register of Historic Places that may be adversely affected by the proposed underground mining activities, the [mining company's operation] plan shall describe the measures to be used to accomplish one of the following:
>
> (1) The prevention of adverse impacts and meet the requirements of Chapter 86, Subchapter D (relating to areas unsuitable for mining).
>
> (2) The minimization of adverse impacts if valid existing rights exist or joint agency approval is to be obtained under Chapter 86, Subchapter D.

---

[2] We will allow Appellants to raise this issue at the hearing because it was raised in its notice of appeal. However, we believe that the better practice would have been for Appellants to have sought leave to amend their appeal in conformance with Rule 53 to explain issue this issue in further detail.

However, even a very general reading of paragraph 15 gives no notice to the coal company and the Department that there is any issue concerning water loss or water supply replacement. As noted in our earlier discussion, the Commonwealth Court's holding in *Croner* allowed for a more liberal reading of objections in a notice of appeal, only to argue later that specific objections inserted for the first time in their pre-hearing memorandum filed after the close of discovery are now properly part of their appeal. Due process requires that parties be aware of the claims or defenses which are being raised against them. Here, Appellants' notice of appeal gives the opposing parties absolutely no indication that water loss or water supply replacement is an issue. Moreover, Rule 53 (b) and (c) sets forth the requirements that Appellants must follow to amend their appeal. Appellants completely ignored the provisions of Rule 53.

Appellants also contend that RAG Emerald and the Department had notice that they intended to raise the issue of water loss and water supply replacement because Appellants conducted discovery on these issues. Attached to their response are pages from Appellants' deposition of Jeffrey Sowers, who conducted the permit review of the Department. In his deposition, Mr. Sowers was asked whether he evaluated water loss issues in his review of the permit. Mr. Sowers answered that he was not responsible for reviewing water loss issues and that he did not review such issues under 25 Pa. Code § 89.38(b)(1).

Such "issues" should be set forth in the notice of appeal. 25 Pa. Code § 1021.51(e). Appellants make the novel argument that simply because they raise an issue in discovery it somehow becomes part of their appeal. They cite no authority for this proposition and our research reveals none. Appellants also argue that the have no duty to raise an issue in discovery

and it is up to the coal mining company and the Department to conduct discovery to obtain more information concerning the objections raised in Appellants' notice of appeal.

While it is certainly true that Appellants need not conduct discovery on any issues raised in their notice of appeal, it does not follow that Appellants can then raise issues in their pre-hearing memorandum that were not raised as objections in their notice of appeal. If they wish to include objections which they found out about in discovery, then they must file a motion pursuant to Rule 53(b) to amend their notice of appeal to include these objections. 25 Pa. Code § 1021.53(b). Likewise, if a party does not question an Appellant about the objections set forth in the notice of appeal it may suffer some legal harm in not being fully prepared to meet those objections. However, it should not be prejudiced and surprised when the objection is somehow transformed from a very general and innocuous statement to a specific objection dealing with, in this case, water supply loss and water replacement. Such objections are not mentioned in Appellants' twenty-seven detailed paragraphs listing their objections in their notice of appeal.

Moreover, simply asking questions on a particular topic during a deposition does not automatically make it an issue which is part of the appeal. As pointed out earlier, the Board's Rules provide for amending one's notice of appeal if the basis for an action is learned through discovery. 25 Pa. Code § 1021.53(b). Appellants did not seek leave to amend their notice of appeal to include the issue of water loss and water supply replacement. Nor is there any indication that this matter was learned through discovery. Moreover, contrary to Appellants' argument, the burden is not on the opposing parties to make an inquiry into whether a matter raised during discovery is now an "issue" in the appeal and somehow relates back to an objection set forth in the notice of appeal. Such a practice would encourage "trial by ambush" and

undermines the due process considerations and fundamental fairness concepts that our Rules seek to establish.

We further note that there is some indication Appellants are asserting that the water is part of the "historic structure" entitled to protection under 25 Pa. Code §§ 86.37(a)(6) and 89.38. I deposing Mr. Sowers, counsel for Appellants asked whether he considered water loss and replacement under Section 89.38(b)(1), dealing with adverse impacts on historic structures. Furthermore, the questioning of Mr. Sowers took place in the context of protection of historic structures. Nevertheless, even considering the issue in this light, we cannot find that the notice of appeal properly raised this issue. There is no mention of water - whether loss or replacement - in the notice of appeal. Questioning Mr. Sowers on the specific issue of whether he considered water loss or replacement in his permit review does not change this fact, since, as we have noted above, an issue may not be added to an appeal merely by questioning on it during discovery. If Appellants sought to include water loss and replacement in their appeal, they should have stated so in their notice of appeal or sought leave to amend their notice of appeal to include it.

Finally, in support of their argument as to water loss and water supply replacement, the Williams cite the Commonwealth Court's recent holding in *Stoystown Borough Water Authority v. Department of Environmental Protection*, 729 A.2d 170 (Pa. Cmwlth. 1999). In that case, the Commonwealth Court held that coal mining companies in their permit applications need to describe in detail how they would replace water supplies that might be adversely affected by coal mining activities. However, *Stoystown* did not change the law on the subject of the Department's duties with respect to permit approval. Therefore, this is an issue Appellants could have raised prior to the decision in *Stoystown*. Since this issue was not raised in their notice of appeal they cannot raise it for the first time in their pre-hearing memorandum.

We, therefore, grant RAG Emerald's motion with respect to the issue of water loss and water supply replacement.

Adequacy of Bond

In their pre-hearing memorandum, Appellants assert that the Department failed to require an adequate subsidence bond. Again, even the most liberal reading of the notice of appeal fails to disclose this objection.

In their response and supporting memorandum, Appellants contend that the bonding issue is raised in the notice of appeal. Interestingly, they cite no specific paragraphs in the notice of appeal, but refer only to general concepts.

As with the issue of water loss and water replacement, Mr. and Mrs. Williams assert that the bond issue was raised in discovery. In their response, they state "As to the inadequacy of the bond for potential repairs see the Permit Application submitted by [RAG Emerald] and the Permit issued by [the Department]." (Appellants' Response, p. 5) Again, as we noted earlier, an issue cannot be added to an appeal simply by virtue of the appellant raising it through discovery. Moreover, a simple reference to the permit and the permit application, rather expansive documents, provides no clue that the adequacy of the subsidence bond is at issue.

Appellants cite *People United to Save Homes v. DEP*, EHB Docket No. 95-232-R (Adjudication issued July 2, 1999). In this decision, the Board determined that the Department had acted arbitrarily in setting $10,000 as the amount of the subsidence bond. Although this decision was issued after the filing of Appellants' appeal, it did not change existing law, and Appellants do not allege otherwise. If Appellants believed that the amount of the mine subsidence bond set by the Department was inadequate, this certainly was an issue they could have and should have raised in their notice of appeal. They cannot raise it now.

Therefore, we grant RAG Emerald's motion that the adequacy of the mine subsidence bond was not raised by the Appellants in their notice of appeal and is therefore not part of their appeal. Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MURRAY and LAURINE WILLIAMS	:	
	:	
v.	:	**EHB Docket No. 98-153-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CYPRUS EMERALD RESOURCES, Permittee	:	

ORDER

AND NOW, this 31st day of August, 1999, after review of Permittee's Motion to Limit Issues (Motion) and the Responses filed by the Department and Appellant, it is ordered as follows:

1) The Motion is **granted** with respect to the adequacy of the mine subsidence bond and water loss and water supply replacement. These objections were not raised in the Appellant's notice of appeal either specifically or generally but were instead raised for the first time in Appellants' pre-hearing memorandum. Since those objections were not raised in the notice of appeal or by timely amendment the Board does not have jurisdiction to consider them now.

2) The Motion is **denied** with respect to the issue concerning the Department's 15-degree guideline. This issue was raised in the notice of appeal.

EHB Docket No. 98-153-R

ENVIRONMENTAL HEARINB BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD J. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 31, 1999

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

For Commonwealth, DEP:
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Southwestern Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN STULL	:	
	:	
v.	:	**EHB Docket No. 96-168-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 2, 1999

ADJUDICATION

By the Board

Synopsis:

An appeal challenging a $22,550 civil penalty assessed by the Department of Environmental Protection (Department) under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018-1003 (Solid Waste Management Act), is sustained and the penalty reduced to $7,500.

The Department abused its discretion by assessing civil penalties for violations of a compliance order based solely on an "automatic civil penalties" provision in the order, rather than considering the factors required under the Solid Waste Management Act and its own regulations. Therefore, the Board has substituted its discretion for that of the Department based upon an application of the relevant regulatory criteria.

INTRODUCTION

This matter was initiated with the August 22, 1996 filing of a notice of appeal by John Stull (Appellant) challenging a $22,550 civil penalty the Department assessed against him on July 23, 1996. The Department assessed the penalty under the Solid Waste Management Act for

failing to conform with a compliance order issued in relation to J&J Recycling (facility), a facility Appellant operates in Union Township, Adams County. In his notice of appeal, Appellant argued that the civil penalty assessment was an abuse of discretion and contrary to law for several reasons. Among other things, he argued that he did not need a permit for the activities he conducted, and that the Department should have assessed the penalty against J&J Recycling, not him.

A hearing on the merits was held on November 4, 1998. The Department filed its post-hearing memorandum on January 15, 1999, and Appellant filed his on February 9, 1999. The Department did not file a memorandum in reply. Any arguments not raised in post-hearing memoranda are deemed waived. *T.R.A.S.H. v. DER*, 1989 EHB 487.

The record consists of the notes of testimony and 14 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is an adult with a mailing address of P.O. Box 184, Littlestown, PA 17340. (Ex. B-1, p. 1, para. 2)[1]

2. Appellee is the Department, the agency with the authority to administer and enforce the Solid Waste Management Act, Section 1917-A of the Administrative Code, and the rules and regulations promulgated pursuant to each. (Ex. B-1, p. 1, para. 1.)

3. Appellant does business as J&J Recycling. (Ex. B-1, p. 1, para. 2.)

4. J&J Recycling's facility is located at 1160 Littlestown Road, Union Township, Adams County. (Ex. B-1, p. 1, para. 2.)

5. On July 21, 1995, a fire occurred at Appellant's facility. (N.T. 19; Ex. B-1, p. 2, para. 6.)

[1] Board exhibits are denoted "Ex. B-___", while those of the Department are marked "Ex. C-___." Appellant did not introduce any exhibits.

6. The Department issued Appellant a compliance order on November 1, 1995. (Ex. B-1, p. 2, para. 9; Ex. C-1.)

7. The compliance order asserted that Appellant stored solid waste—including defective beverage cans and bottles—at the facility for more than a year; that he crushed the cans and bottles, consolidated their liquid contents, and otherwise processed residual waste at the facility; that he permitted the transportation of solid waste contrary to the Department's regulations; that he disposed or allowed the disposal of beverages and other solid waste without a permit; and that he created a public nuisance. (Ex. C-1, p. 2.)

8. Among other things, the November 1, 1995 compliance order directed Appellant to:

   a. immediately cease processing "all containers" (Ex. C-1, p. 2, para. 1);

   b. apply for a residual waste processing permit within 90 days (Ex. C-1, p. 2, para. 4);

   c. remove and properly dispose of "all debris relating to the July 21, 1995 fire" within 30 days (Ex. C-1, p. 3, para. 3); and

   d. remove and properly dispose of "all visible surface contaminants" within 14 days (Ex. C-1, p. 3, para. 2).

9. The compliance order also informed Appellant that the Department would inspect the facility every 45 days or less to determine if there was "an overall outflow of waste" from the facility; that "[f]ailure to remove substantial quantities of waste" would subject Appellant to "further enforcement actions and penalties"; and that a "stipulated penalty of $25.00 per day per violation shall automatically accrue in the event [Appellant] fail[ed] to comply with this order." (Ex. C-1, p. 3, para. 5 and 6.)

10. Appellant did not appeal the compliance order. (N.T. 29; Ex. B-1, p. 4, para 25.)

11. On July 23, 1996, the Department assessed a civil penalty against Appellant. (Ex. C-17, p. 1.)

12. Much of the assessment details the facts behind violations the Department alleges occurred before November 1, 1995, when it issued the compliance order. (Ex. C-17.)

13. The assessment also summarizes the compliance order and states that inspections conducted at the facility after November 1, 1995, show that Appellant failed to comply with the order, in violation of 35 P.S. § 6018.610(9), because he did not:

a. apply for a residual waste processing permit within 90 days;

b. remove and properly dispose of all debris from the July 21, 1995 fire within 30 days.

c. remove all visible surface contaminants within 14 days; and,

d. remove substantial quantities of waste from the facility.

(Ex. C-17, p. 3, para. 11-12.)

14. The Department assessed Appellant a civil penalty of $22,550 referring to "the violations enumerated in the paragraphs above" in the compliance order. (Ex. C-17, p. 3.)

15. Melissa Gross is an environmental compliance specialist and has worked with the Department for five years. (N.T. 147.)

16. Gross calculated the penalty the Department assessed. (N.T. 150, 154.)

17. Gross based the penalty solely on Appellant's alleged violations of the compliance order, and calculated it by applying the "stipulated penalty" of $25/day per violation, mentioned in the compliance order. (N.T. 155-160, 184.)

18. Gross did not use the Department's guidelines for calculating waste management civil penalties when she derived the penalties in the assessment. (N.T. 152, 155, 184; Ex. C-18.)

19. When calculating the penalties the Department assessed, Gross did not consider the willfulness of the violations; the damage to water, land, or other natural resources of the Commonwealth; or costs that Appellant avoided by violating the order. (N.T. 184-186.)

20. The Department assessed Appellant a $4,225 civil penalty for Appellant's failure to submit an application for a residual waste permit--$25/day from January 31, 1996, to July 18, 1996. (Ex. B-1, para. 14 and 19; Ex. C-17, p. 3; Ex. C-18.)

21. Appellant never applied for a residual waste processing permit. (N.T. 211; Ex. B-1, p. 3, para. 12.)

22. Tony Hassler was a solid waste inspector with the Department prior to December 1996. (N.T. 14-15.)

23. Hassler inspected the facility 20-30 times. (N.T. 17.)

24. Hassler did not know whether Appellant processed residual waste at the facility after the compliance order was issued. (Ex. B-1, para. 2.)

25. Hassler did not know whether Appellant stored residual waste at the site prior to shipping it to other sites for processing. (N.T. 90.)

26. After he received the compliance order, Appellant went to see a lawyer about submitting a permit application. (N.T. 212.)

27. After speaking to the lawyer, and discovering that it would cost $14,000 to submit an application, and that, even then, there was no guarantee of a permit, Appellant decided to stop processing and disposing of waste at the facility, rather than submitting a permit application. (N.T. 212.)

28. The Department assessed a $25 per day civil penalty for Appellant's failure to remove the fire debris from the facility from December 2, 1995 to July 18, 1996, amounting to $5,725. (Ex. B-1, para. 14 and 18; Ex. C-17.)

29. The fire at the facility scorched stored scrap metal; it damaged five bailers, five forklifts, and a tractor; and it consumed a tractor trailer and a building, in addition to cardboard and plastic materials stored in the building. (N.T. 46, 78-80, 208, 210.)

30. When the tractor trailer burned, a drum inside it burst, spilling mineral spirits or another salt-like compound onto the floor of the trailer and the ground below. (N.T. 51, 58-59.)

31. The debris from the fire consisted primarily of paper, cardboard, and plastic, with some glass. (N.T. 208.)

32. Hassler testified that Appellant removed "a little bit" of the ash from "one of the areas." (N.T. 80.)

33. When asked to quantify how much was "a little bit," Hassler testified that he could not say how much of the debris Appellant removed because the crushed drums, wooden pallets, and other objects strewn about the facility made it impossible for him to determine how much ash remained. (N.T. 80.)

34. Appellant testified that he removed "the majority" of the fire debris, but that a small amount remained "in the corners." (N.T. 222, 195.)

35. Appellant also testified that he removed "$30,000 worth" of the debris. (N.T. 195, 209.)

36. When he was asked to identify how much of the debris was removed in each instance, Appellant testified that:

a. he had $1,773.38 removed from the site on August 30, 1995, and $10,576.08 removed on November 29, 1995 (N.T. 197);

b. "[T]hey picked up the 9th or the 29th, which that [sic] was a small dumpster. That one had to be a little dumpster, $222." (N.T. 197); and

c. "[Another] was done the eighth of 30th of '95. That shows five loads they picked up then. They picked up on the eighth and 21st, they picked up two loads, eleventh of 29th." (N.T. 208.)

37. When asked one more time whether he had any other fire debris removed from the site, Appellant testified,

> I think I gave you all the dates on these here [referring to the unadmitted exhibits he was using to refresh his memory]—9/29, one load was removed; 11/15 there was a load removed. There were several loads removed then because that bill was $9,500—oh, that was the 10/31.

(N.T. 209.)

38. Appellant also testified at least twice that all of the fire debris that he removed from the site, he removed by October of 1995—before the compliance order was issued. (N.T. 195, 210.)

39. The scorched carcass of the tractor trailer remained at the facility through July 18, 1996, as did a pile of charred refuse next to it, and numerous carbonized wooden supports from the consumed structure. (Ex. C-3, C-4, C-6, C-7, C-13.)

40. The Department assessed Appellant a $6,125 civil penalty for Appellant's failure to remove all visible surface contaminants from the facility--$25 a day from November 16, 1995, to July 18, 1996. (Ex. B-1, para. 14 and 17; Ex. C-17 and C-18.)

41. Hassler testified that the phrase "visible surface contaminants" included the soil on which beverages and other materials were spilled, and on which the crushed materials were stored; but he also testified that the order did not direct Appellant to remove that soil, but only soil which had been contaminated by the salt-like compound, fire debris, or waste oil. (N.T. 67.)

42. Mary Margaret Golab is a solid waste supervisor with the Department. (N.T. 101.)

43. Golab has worked for the Department for 12 ½ years. (N.T 100.)

44. Golab testified that the phrase "visible surface contaminants" included a dumpster load of "materials" at the facility, one barrel of grease and tar, and all stained soil—regardless of the source of the contamination. (N.T. 136-137.)

45. Golab testified that the compliance order required Appellant to remove all the stained soil, not just some of it. (N.T. 137.)

46. Appellant testified that he did not think that any "visible surface contamination" existed at the facility. (N.T. 194.)

47. Appellant also testified that he thought the phrase "visible surface contamination" referred to glass and aluminum beverage containers that had to be emptied before they could be sold. (N.T. 194-195.)

48. Appellant failed to remove all of these containers from the facility. (N.T. 195.)

49. Hassler used the phrase "visible surface contaminants" in some of his conversations with Appellant before the compliance order was issued. (N.T. 96-97.)

50. Appellant never asked for clarification of the phrase "visible surface contaminants" – either in his conversations with Hassler or after the Department issued the compliance order. (N.T. 97.)

51. The Department assessed $6,475 of the civil penalty--$25 per day from November 2, 1995, to July 18, 1996—for Appellant's failure to remove substantial quantities of waste from the facility. (Ex. C-18.)

52. Even before the Department issued the compliance order, Department personnel walked through the site and "conducted almost an inventory" or the materials present—identifying which ones were waste, and had to be properly disposed of, and which were not. (N.T. 102.)

53. The Department's reference to "waste" at the facility referred to tires, broken lumber, plastic strapping, paper labels, and other materials for which there is no post-consumer market—not to plastic or metal drums, aluminum cans, or other potential commodities. (N.T. 86-88.)

54. The Department also considered fire debris and visible surface contaminants at the site to be "waste." (N.T. 85-86.)

55. Hassler had specified which materials at the site the Department considered "waste" in his inspection reports and in conversations he had with Appellant. (N.T. 87-89.)

56. Hassler testified that Appellant failed to make a sustained effort to remove "any percentage of waste" from the facility, and that there was not an overall outflow of waste between the time the Department issued the compliance order and assessed the penalty. (N.T. 54, 98.)

57. Appellant testified that he removed "a lot of stuff" from the facility. (N.T. 226.)

58. To the extent that Appellant's testimony can be construed as conflicting with Hassler's concerning the amount of waste removed from the facility, Hassler is more credible.

DISCUSSION

Under Section 1021.101(b)(1) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.101(b)(1), the Department bears the burden of proof with respect to civil penalty assessments. Before we turn to the parties' individual arguments, some context is necessary.

The July 23, 1996 civil penalty assessment, at issue in this appeal, was not the first action that the Department took with respect to Appellant and his facility. Among other things, on November 1, 1995, the Department issued a compliance order to Appellant. (Ex. B-1, para. 9; Ex. C-1.)

The compliance order alleged that Appellant had engaged in conduct at the facility that violated the Solid Waste Management Act, the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law), and the Department's

regulations. Specifically, the order asserted that Appellant stored solid waste—including defective beverage cans and bottles—at the facility for more than a year; that he crushed the cans and bottles, consolidated their liquid contents, and otherwise processed residual waste at the facility; that he permitted the transportation of solid waste contrary to the Department's regulations; that he disposed or allowed the disposal of beverages and other solid waste without a permit; and that he created a public nuisance. (Ex. C-1, p. 2.)

The compliance order directed Appellant to:

immediately cease processing "all containers" (Ex. C-1, p. 2, para. 1);

apply for a residual waste processing permit within 90 days (Ex. C-1, p. 2, para. 4);

remove and properly dispose of "all debris relating to the July 21, 1995 fire" within 30 days (Ex. C-1, p. 3, para. 3); and

remove and properly dispose of "all visible surface contaminants" within 14 days (Ex. C-1, p. 3, para. 2).

The compliance order also informed Appellant that the Department would inspect the facility at least once every 45 days to determine if there was an "overall outflow of waste" from the facility; that "[f]ailure to remove substantial quantities of waste" would subject Appellant to "further enforcement actions and penalties"; and that a "stipulated penalty of $25.00 per day per violation shall automatically accrue" if Appellant failed to comply with the order. (Ex. C-1, p. 3, para. 5 and 6.) Appellant did not appeal the order. (N.T. 29.)

On July 23, 1996, the Department assessed a civil penalty against Appellant. (Ex. C-17, p. 1.) Much of the assessment details the facts behind violations the Department alleges occurred *before* November 1, 1995, when it issued the compliance order.[2] However, the

[2] For instance, Paragraph 3 of the assessment lists alleged violations observed at the facility during inspections on June 14, 1993; August 19, 1993; September 24, 1993; December *(footnote continued next page)*

assessment also summarizes the compliance order, and states that inspections conducted at the facility *after* November 1, 1995, show that Appellant failed to comply with the order—in violation of 35 P.S. § 6018.610(9)—because he did not:

> apply for a residual waste processing permit within 90 days;
>
> remove and properly dispose of all fire debris within 30 days;
>
> remove all visible surface contaminants within 14 days; and,
>
> remove substantial quantities of waste from the facility.

(Ex. C-17, p. 3, para. 11-12.)

The Department assessed Appellant a civil penalty of $22,550, referring to "the violations enumerated in the paragraphs above." (Ex. C-17, p. 3.) Since the phrase "the paragraphs above" in the assessment could refer to the alleged violations occurring before the compliance order—in addition to the alleged violations of the compliance order itself—the reference to "the paragraphs above" suggests that the assessment is based on all of Appellant's alleged violations, rather than just those relating to his failure to conform to the compliance order. That is not the case, however. The Department compliance specialist who calculated the assessment, Melissa Gross, testified that she based Appellant's penalty solely on his alleged violations for failing to comply with the compliance order; and arrived at the penalty by applying the "stipulated penalty" mentioned in the compliance order: $25/day per violation.[3] (N.T. 155-160, 184.) She did not use the Department's guidelines for calculating waste management civil penalties when she

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13, 1993; and June 16, 1994. (Ex. C-17, p. 1, para. 3.) Paragraph 6 states that the same violations were present during inspections on January 26, 1995, and June 2, 1995. (Ex. C-17, p. 2, para. 6.)

[3] Although the compliance order refers to the penalty as "stipulated," there is no evidence in the record suggesting that Appellant ever stipulated or otherwise assented to the amount of the penalty, either in a consent order or elsewhere.

derived the penalties in the assessment. (N.T. 155, 184.) The civil penalty worksheet Gross used to calculate the penalty bears out her testimony. (N.T. 152; Ex. C-18.)

I. The Automatic Penalty

Appellant argues that the Department abused its discretion by deriving the penalties based solely on the language in the compliance order referring to an automatic $25/day penalty for each violation of the order. According to Appellant, the automatic $25/day per violation penalty fails to comport with the civil penalties provision at Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605, and 25 Pa. Code § 287.[4]

We agree that the Department abused its discretion by applying the automatic $25/day penalty per violation mentioned in the order. Section 605 of the Solid Waste Management Act, provides, in pertinent part:

> In addition to proceeding under any other remedy available at law or in equity for a violation..., the Department may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was willful or negligent. *In determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors...* The maximum civil penalty which may be assessed pursuant to this section is $25,000 per offense. Each violation for each separate day and each violation of any provision of ... any order of the department ... shall constitute a separate and distinct offense under this section.

(Emphasis added). Section 287.412 of the Department's regulations contains even more detailed requirements. It provides, in pertinent part:

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[4] Appellant actually referred to Section 271.412 of the Department's regulations, 25 Pa. Code § 271.412. It is clear from the context, however, that Appellant meant to refer to Section *287*.412 of the Department's regulations. (Section 287.412 governs the assessment of civil penalties involving *residual waste*, such as the assessment at issue here. Section 271.412 of the regulations applies to civil penalty assessment regarding *municipal* waste.)

(a) The Department *will* use the system described in this section and § 287.413 (relating to assessment of civil penalties; minimum penalties) to determine the amount of the penalty....

(b) Civil penalties *will* be assessed as follows:

(1) Up to the statutory maximum may be assessed based on one or more of the following factors:

(i) The willfulness of the violation

(ii) The cost that the operator avoided by incurring the violation.

(iii) The damage or injury to the land or waters of this Commonwealth or other natural resources or their uses.

(iv) The cost of restoration or costs of abatement, remedial and preventive measures taken to prevent or lessen the threat of damage or injury to property or waters of this Commonwealth or other natural resources, or their uses, or to prevent or reduce injury to a person.

(v) The hazards or potential hazards to the health or safety of the public.

(vi) The property damage.

(vii) Interference with a person's right to the enjoyment of life or property.

(viii) The costs expended by the Commonwealth as a result of the violation, including administrative costs, costs of inspection, and costs of collection, transportation and analysis of samples.

(ix) Other relevant factors.

(Emphasis added).

Since the Department set the $25/day penalty in the compliance order before Appellant violated the order, the Department necessarily failed to consider the factors enumerated in Section 605 of the Solid Waste Management Act and Section 287.412 of the regulations.[5] By

[5] The testimony of Melissa Gross, the Department environmental compliance specialist who calculated Appellant's civil penalty assessment, underscores this conclusion. She testified *(footnote continued next page)*

doing so, the Department erred. The language in Section 605 of the Act and Section 271.412 of the regulations is *mandatory*, not discretionary; the Department could not ignore the factors listed there. As we have often explained, administrative agencies have only those powers expressly conferred, or necessarily implied, by statute. *DER v. Butler County Mushroom Farm*, 454 A.2d 1 (Pa. 1982), and *Costanza v. DER*, 606 A.2d 645 (Pa. Cmwlth. 1992). By assessing the penalty without considering all the factors required under Section 605 of the Act, the Department acted outside the scope of its statutory authority. *See 202 Island Car Wash, L.P. v. DEP*, 1998 EHB 1325, 1334. The Department also erred by failing to consider the factors required under Section 287.412 of its regulations. As we have previously held, "An agency cannot, under the guise of interpretation, ignore the language of its regulation, for the agency as well as the regulated public is bound by the regulation." *People United to Save Homes v. DEP*, 1996 EHB 1411, 1421-22 (citing *Delaney v. State Horse Racing Commission*, 535 A.2d 719 (Pa. Cmwlth. 1988)).[6]

Having concluded that the Department abused its discretion in assessing the penalties based on the "automatic" penalty provision in the compliance order, we must determine what penalties are appropriate given the violations the Department proved. Where, as here, the Board

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that, when determining the amount of the penalty, she did not consider a number of factors the Department was required to consider under Section 605 of the Act and Section 287.412 of the regulations—among them, the willfulness of Appellant's violations; the damage to water, land, or other natural resources of the Commonwealth; and the costs that Appellant avoided by violating the order. (N.T. 184-186.)

[6] Even if the Department were not required to consider these other factors by statute or its own regulations, the automatic civil penalty would still be problematic. In *202 Island Car Wash v. DEP*, 1998 EHB 1325, we confronted an automatic civil penalty assessed under the Storage Tank Act, 35 P.S. §§ 6021.101-6021.2104. In striking that assessment, we noted that "to calculate a reasonable penalty for a particular violation, the Department must consider the facts surrounding the violation itself, not just the facts underlying [the] order which gives rise to a violation." 1998 EHB at 1335. We also noted that "[t]he assessment of a penalty in advance of a violation is necessarily made without adequate information concerning the nature and effect of the specific violation." *Id.*

finds that the Department has abused its discretion, the Board may substitute its discretion and modify the amount. *Phillips v. DER*, 1994 EHB 1266, 1271 (*quoting Booher v. DER*, 1991 EHB 987, 1005, *aff'd*, 612 A.2d 1098 (Pa. Cmwlth. 1992.)) Given the age of this matter, its relative magnitude, and the fact that we have developed a full record, we see no point in remanding this matter for further consideration by the Department. We view this as an appropriate case for substituting our discretion for that of the Department and putting an end to this matter.

II. The Civil Penalties To Be Assessed

In its civil penalty assessment, the Department asserts that Appellant violated Section 610(9) of the Solid Waste Management Act, 35 P.S. § 6018.610(9), because he did not abide by requirements in the November 1, 1995 compliance order that he:

> apply for a residual waste processing permit within 90 days;
>
> remove and properly dispose of all fire debris within 30 days;
>
> remove all visible surface contaminants within 14 days; and
>
> remove substantial quantities of waste from the facility.

(Ex. C-17, p. 3, para. 11-12.) Section 610(9) of the Act provides that it is unlawful to violate the provisions of Department orders.

A. *Failure to apply for a residual waste processing permit within 90 days of the compliance order.*

In its November 1, 1995 compliance order, the Department directed Appellant to apply for a residual waste processing permit within 90 days. (Ex. C-1, p. 3, para. 4.) In its assessment, the Department assessed Appellant a civil penalty for failing to comply with this aspect of the order from January 31, 1996, to July 18, 1996. (Ex. C-17, pp. 2-3,; Ex. C-18.) Appellant concedes that he never applied for the permit. (N.T. 211; Ex. B-1, para. 12.) But he insists that he is not liable for violating this provision because there was a fire at the facility even before the

order was issued. The implication seems to be that, after the fire, Appellant conducted no activities on the site that would require a permit.

We disagree. Since Appellant admits that he did not apply for a permit, the Department proved that he violated the compliance order from January 31, 1996, (the date by which the compliance order required him to have a permit) to July 18, 1996 (the date the Department assessed the civil penalty). Appellant's duty under the compliance order was unambiguous: he had to apply for a residual waste processing permit within 90 days. His failure to do so or seek to be excused from doing so justifies the assessment of a civil penalty.

The Department assessed Appellant a penalty of $25/day—or $4,225 total—for the 169 days he failed to abide by the provision of the compliance order requiring him to apply for a permit. (Ex. C-17, p. 3; Ex. C-18.) However, this penalty is unreasonably high given the "technical" nature of the violations the Department proved.

Under Section 287.101(a) of the Department's residual waste management regulations, 25 Pa. Code § 287.101(a), "a person may not own or operate a residual waste disposal or processing facility unless the person or municipality has first applied for and obtained a permit for the activity from the Department under this article." Section 287.1 of the Department's regulations, 25 Pa. Code § 287.1, defines a "residual waste disposal or processing facility" as "[a] facility for disposing or processing of municipal waste."

Appellant has stipulated that he is the operator of the facility at issue here. (Ex. B-1, para. 2.) But the Department failed to show that the facility engaged in the processing or disposal of residual waste after Appellant was required to submit the permit application. Tony Hassler, the Department solid waste inspector who conducted most of the investigations at the facility, testified that he did not know whether Appellant processed residual waste there after the compliance order was issued. (N.T. 90-92.) He also testified that it was unclear whether

Appellant stored residual waste at the facility prior to shipping it to other sites for processing. (N.T. 90.) None of the other witnesses testified that Appellant processed or disposed of residual waste at the site after the Department issued the compliance order.

Regarding the willfulness of the violation, which is one of the eight factors at 25 Pa. Code § 287.412(b)(1)(1)(i)-(viii) which must be considered when assessing the penalty, after Appellant received the compliance order, Appellant went to see a lawyer about submitting a permit application. (N.T. 212.) But when Appellant discovered that it would cost $14,000 to submit an application, and that, even then, there was no guarantee that the Department would issue him the permit, he decided to stop waste processing and disposal at the facility, rather than submitting an application. (N.T. 212.) On the one hand, Appellant knew of the application requirement yet deliberately chose to ignore it. On the other hand, we stop short of characterizing the actions as "willful" because Appellant might have been under the impression that a permit was not necessary in light of his decision to stop processing new waste at the site.

As for "other relevant factors," under Section 287.412(b)(1)(ix) of the regulations, we will consider two: the deterrent effect of the penalty and the fact that Appellant mitigated the violation by ceasing the activities for which the permit was required. These factors dictate that the penalty we assess must be substantial enough to deter other potential violators from flaunting the Department's orders—even for a day—yet still reflect the essentially "technical" nature of Appellant's violation. The maximum penalty under the Act is $25,000/day per violation. 35 P.S. § 6018.605. Under the particular circumstances of this violation, we deem a total penalty of $1,500 to be appropriate.

B. *The Other Violations*

The Department assessed separate penalties for Appellant's failure to remove fire debris, visible surface contaminants, and substantial quantities of waste. Although we are not called

upon to decide whether these three lapses may be treated as separate violations because this is not an appeal from the underlying compliance order, we are called upon to decide whether, in the exercise of our discretion, we believe it is appropriate to assess three separate penalties for these three types of conduct. We do not.

We conclude that, for purposes of assessing a penalty, the conduct described as failure to remove all "visible surface contaminants" subsumes the other two failures. In the Department's view, as well as our own in the unique circumstances of this case, "surface contaminants" included fire debris. (F.F. 41.) "Failure to remove substantial quantities of waste" may also be viewed as a subset of failure to remove all visible surface contaminants. To the extent there is less than a perfect overlap, we are nevertheless convinced that a civil penalty for the failure to remove all visible surface contaminants is encompassing enough to incorporate the other two types of conduct.

There is no question that the Appellant failed to remove all visible surface contaminants at the facility. Photographs of the facility introduced at the hearing show that, whatever debris Appellant removed, a significant amount remained at the facility. The scorched carcass of the tractor trailer remained, as did a pile of charred refuse next to it. (Ex. C-4, C-6.) In addition, numerous carbonized wooden supports from the consumed structure stood about the property. (Ex. C-3, C-4, C-6, C-7, C-13.) Furthermore, since Appellant twice testified that, all the fire debris he removed from the facility, he removed by October of 1995, we assume that he removed no debris after the Department issued the compliance order, on November 1, 1995. In other words, Appellant failed to remove any fire debris from the property in response to the Department's order.

Appellant himself conceded that he failed to remove all "visible surface contaminants." He testified that he thought the phrase referred to glass and aluminum beverage containers that

had liquid remaining in them. Yet he admitted that he left some of those containers on his property. While Appellant testified that he removed "a lot of stuff" from the facility, it is unclear whether the "stuff" was "waste" or whether the amount Appellant removed was substantial compared to the amount of waste remaining at the facility. (N.T. 226.) To the extent that his testimony can be construed as conflicting with Hassler's, we find Hassler's testimony more credible. As of the date of the hearing, there was simply no question that substantial visible surface contaminants remained on the site.

Having concluded that Appellant failed to remove all visible surface contaminants, we are left to determine what civil penalty is appropriate. The Department assessed $6,125 for the violation.

Section 287.412(b)(1)(i)-(viii) of the Department's regulations, 25 Pa. Code § 287.412 (b)(1)(i)-(viii), lists the eight factors quoted above that must be considered when assessing civil penalties under the residual waste management regulations. The evidence of record concerning the willfulness factor includes testimony indicating that Appellant was familiar with the requirement that he remove all visible surface contaminants; that he knew the phrase referred to glass and aluminum containers that had liquid remaining in them; and that, nevertheless, he left some of those containers at the facility. Appellant also acknowledged that he left some fire debris in place. Therefore, the Department has shown that Appellant's violation was knowing—not merely reckless or negligent—with respect to his failure to remove visible surface contaminants.

Regarding the other regulatory criteria, our review of the evidence leaves no question that Appellant left behind substantial quantities of waste. Although Appellant paid to have some waste hauled away, he obviously should have paid more to have all of it hauled away. Despite

the Department's efforts to work with Appellant over the course of more than a year involving upwards of 30 site visits, Appellant failed to finish the job.

On the other hand, there is no record evidence of any lasting material damage or injury to land or waters, or of significant hazards to the health or safety of the public. Although the Department obviously incurred costs in pursuing enforcement, it did not offer any evidence on the amount of those costs. The Department did not indicate that substantial future costs are likely. The waste materials in question are, relatively speaking, not particularly hazardous or toxic.

After a careful consideration of all of the record evidence and all of the regulatory criteria, we conclude, based upon the exercise of our independent discretion, that Appellant should pay a civil penalty of $6,000 for his failure to remove all visible surface contaminants. As previously noted, we will not assess additional amounts for the substantially similar failure to remove fire debris and substantial quantities of waste.

Appellant argues that we cannot assess any penalty for his failure to remove all visible surface contaminants because the term is simply too vague, ambiguous, and imprecise. Although Appellant's argument itself is hardly a model of clarity, he very clearly states that his challenge does not relate to the violation itself. (Brief, p. 13, n. 4.) In other words, he does not assert that the violation itself was described too imprecisely. Instead, he is only challenging the use of the phrase in assessing a civil penalty for his conduct. We reject Appellant's argument for several reasons.

First, in point of fact, the precise language used by the Department simply has not in any way interfered with our ability to review the relevant facts in light of the applicable regulatory criteria to formulate what we believe to be an appropriate civil penalty.

Secondly, Appellant is essentially invoking the "void-for-vagueness" doctrine:

> The void-for-vagueness doctrine is embodied in the Due Process Clause of the Fifth and Fourteenth Amendments, and it is a general principle of statutory construction that a statute must be definite to be valid. A statute is void for vagueness when its prohibition is so vague as to leave an individual without knowledge of the nature of the activity that is prohibited. To pass constitutional muster, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.

16B Am. Jur. 2d. *Constitutional Law*, § 920. Although courts frequently apply the doctrine to regulations and ordinances in addition to statutes, Appellant points to no authority, nor are we aware of any ourselves, that the doctrine has any place in the calculation of an appropriate civil penalty.

However, even assuming the vagueness doctrine had some applicability, the doctrine would not apply given the facts of this matter. Regulations satisfy due process so long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair notice of what the regulations require. *Freeman United Coal Mining Company v. Federal Mine Safety and Health Review Commission*, 108 F.3d 358 (D.C. Cir. 1997). Furthermore, courts subject economic regulation and regulations involving only civil penalties to less scrutiny under the vagueness doctrine than criminal laws and laws affecting constitutionally protected rights (like the right to free speech). *Keeffe v. Library of Congress*, 588 F.Supp. 778 (D.D.C.), *aff'd in part and rev'd in part*, 777 F.2d 1573 (D.C. Cir. 1984). In addition, courts are less likely to find regulation impermissibly vague where an administrative avenue exists by which affected persons can resolve any ambiguity as to the meaning of the regulation. *See, e.g., United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 580 (U.S. 1973).

Significantly, the civil penalty being assessed against Appellant addresses economic factors, and it does not involve allegations of criminal activity. The terms of the Department's order cannot be read in a vacuum. They must be understood in the context of the Solid Waste Management Act., the Department's municipal waste management regulations, and the discussions between the Department and Appellant that preceded the issuance of the order. Appellant never argues that the terms of the Act or its regulations are unconstitutionally vague. And there were detailed discussions between Appellant and the Department concerning what the Department wanted removed from the site even before the order was issued. Mary Margaret Golab, a solid waste supervisor with the Department, testified that on January 26, 1995—before the compliance order was issued—she and other Department representatives met with Appellant and Victor Neubaum (Appellant's attorney at the time) and walked through the site, "conduct[ing] almost an inventory" of the materials present, identifying which materials were waste and had to be removed and disposed of accordingly. (N.T. 102, 140.) Similarly, Tony Hassler, a solid waste inspector with the Department, testified that, by his twelfth visit to the facility, Appellant understood what the Department wanted him to do. (N.T. 18-19.) Hassler also testified that he had used the phrase "visible surface contaminants" in some of his conversations with Appellant before the order was issued and Appellant never asked him to clarify the term. (N.T. 97.)

Appellant's own testimony makes it seem more likely that his alleged violations resulted from his indifference to compliance with the law, rather than from any vagueness inherent in the precise terms used by the Department. For instance, although he argues that the terms were impermissibly vague to the extent that it required him to remove "visible surface contaminants," Appellant testified at hearing that he thought the phrase referred to glass and aluminum beverage containers which had to be emptied before they could be sold. (N.T. 194-195.) And Appellant

conceded that he failed to comply with the order with respect to some of the beverage containers. (N.T. 195.) Similarly, although Appellant argues that the terms were impermissibly vague because he was required to remove all "fire debris," he testified that he thought that the phrase referred to things which were burned. (N.T. 223.) And Appellant conceded that he allowed material that was burned to remain at his facility after the deadline in the order. (N.T. 223; Ex. C-3.)

Appellant's final contention is that the Department abused its discretion by not assessing a civil penalty against him sooner. He argues in his post-hearing memorandum, "[T]he Department calculated the civil penalties by taking the number of days that [Appellant] had allegedly violated the four requirements in the Compliance Order and multiplied those amount [sic] of days by $25.00." (Appellant's post-hearing memorandum, p. 17.) He contends that the Department abused its discretion because "if the Department had not lost an employee, [Appellant's] civil penalty assessment may have been lower because it [the assessment] would have been completed more quickly." (*Id.*, p. 18.)

The essence of Appellant's argument is that, for civil penalty assessments concerning continuing violations, the Department may not consider any portion of the violation that occurs after the Department first had the opportunity to assess a penalty. This argument is meritless, however. No support exists for the propositions that the Department has a duty to assess civil penalties at its first opportunity to do so or that alleged violators have a right to have the penalties imposed on them at that time.[7] Indeed, Appellant's memorandum appears to be a tacit admission on this point: it fails to cite any authority for either principle.

---

[7] Appellant's argument that he had a "right" to have the Department take enforcement action against him sooner, rather than later, bears a certain similarity to the argument that a criminal defendant has a right to be indicted when the government could first do so. The *(footnote continued next page)*

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof in appeals of civil penalty assessments. 25 Pa. Code § 1021.101(b)(1).

3. The Department does not have a duty to assess civil penalties at its first opportunity to do so, rather than allowing an individual to continue to violate the law and then assessing him penalties for violations over the longer period.

4. The Department erred by calculating Appellant's civil penalty based solely on the automatic $25/day per violation penalty mentioned in the compliance order, rather than considering the factors set forth at 35 P.S. 6018.605 and 25 Pa. Code § 287.412.

5. Where a compliance order required that Appellant submit an application for a residual waste processing permit, and Appellant failed to submit the application, Appellant can be liable for violating the compliance order whether or not he ceased all residual waste processing and disposal activities at the facility, but the civil penalty assessed by the Department will be reduced to reflect the technical nature of the violation.

Supreme Court rejected the latter concept in *Hoffa v. U.S.*, 385 U.S. 293 (1966). There, Hoffa, a criminal defendant, maintained that he had a right to have the government arrest him for jury tampering once it had sufficient evidence to do so, and that incriminating statements he made after that time but before his actual arrest were inadmissible. (According to Hoffa, since the government could not question him *after he was arrested* without observing his Sixth Amendment right to counsel, the government had to observe his right to counsel *from the time it could have first arrested him.* The Supreme Court rejected Hoffa's argument in short order, explaining that nothing in any of its cases "even remotely suggests this novel and paradoxical constitutional doctrine...." 385 U.S. at 310.

Courts are understandably reluctant to accord much weight to arguments, like Appellant's and Hoffa's, that take the form of "Stop me before I violate the law again...." A person content to fashion the noose and place it around his neck can hardly blame the government for giving him enough rope to hang himself.

6. Where, as here, the Board concludes that the Department has abused its discretion in assessing a civil penalty, the Board may substitute its discretion and modify the result.

7. The void-for-vagueness doctrine does not interfere with the Board's ability to assess a civil penalty under the facts of this case.

8. Under the circumstances of this case, it is inappropriate to assess separate civil penalties for Appellant's failure to remove fire debris, visible surface contaminants, and substantial quantities of waste from the site.

9. Having reviewed the evidence, in the exercise of our independent discretion we assess Appellant a civil penalty of $7,500:

a. $1,500 for Appellant's failure to submit an application for a residual waste processing permit; and

b. $6,000 for Appellant's failure to remove all visible surface contaminants in a timely manner.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN STULL	:	
	:	
v.	:	**EHB Docket No. 96-168-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of September, 1999, it is ordered that the $22,550 civil penalty assessed by the Department is reduced to $7,500:

a. $1,500 for Appellant's failure to submit an application for a residual waste processing permit; and

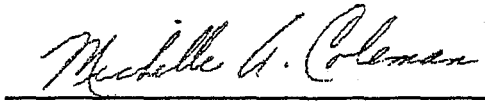
b. $6,000 for Appellant's failure to remove all visible surface contaminants in a timely manner.

ENVIRONMENTAL HEARING BOARD

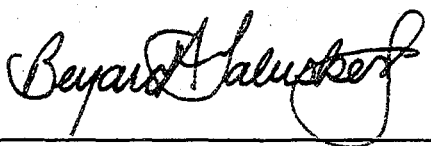
GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No.96-168-C



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 2, 1999

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SECRETARY TO THE BOARD

ROBERT K. GOETZ, JR. d/b/a GOETZ DEMOLITION	:	**EHB Docket No. 97-226-C**
	:	**(Consolidated with 97-147-C,**
v.	:	**97-224-C, 97-225-C, 98-115-C**
	:	**and 98-158-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 3, 1999

OPINION AND ORDER ON MOTION FOR ORAL ARGUMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis

A motion for oral argument is denied where the motion concerns an alleged agreement about the use of evidence introduced at hearing, the transcript of the hearing contains the parties' characterization of the agreement, and the parties could have objected to the characterization of the agreement, or raised other oral arguments concerning the agreement, at that time.

OPINION

This matter was initiated with the October 21, 1997, filing of a notice of appeal by Robert K. Goetz, Jr., (Appellant) challenging a noncoal inspection report the Department of Environmental Protection (Department) issued on September 9, 1997. The report alleged Appellant violated the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Surface Mining Act), on property he owns in Franklin Township, Adams County.

On December 16, 1997, pursuant to a Department motion, we consolidated Appellant's appeal of the noncoal inspection report with three other appeals he had pending before the Board. On May 3, 1999, pursuant to a second Department motion, we consolidated two other appeals Appellant had pending before the Board. All of the appeals were consolidated at the instant docket number, EHB Docket No. 97-226-C.[1]

Administrative Law Judge Michelle A. Coleman presided over a hearing on the merits on May 18, 19, and 28, 1999. Appellants filed a motion for compulsory nonsuit and an accompanying memorandum of law on July 6, 1999. On July 26, 1999, the Department filed a memorandum in response to the motion for compulsory nonsuit. On August 4, 1999, Appellant filed a reply to the Department's response.

Appellant also filed a motion for oral argument on August 4, 1999. In that motion, Appellant argues that the Department's response to its motion for nonsuit improperly referred to certain excerpts from Appellant's deposition. According to Appellant, these references were improper because "the [Department] agreed that if the Appellant testified [it] would not use his deposition transcript except in accordance with Pennsylvania Rule of Civil Procedure 4020(a)(1) which allows the use of depositions for the purpose of contradicting or impeaching the testimony of the deponent as a witness." (Motion, p. 3, para. 6.) According to Appellant, his "case can be seriously jeopardized if oral argument is not granted to address this blatant violation of the agreement between the parties." The Department failed to file a response to Appellant's motion.

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[1] One of the appeals—the appeal of a September 19, 1997, civil penalty assessment—has since been dismissed. *See, Goetz v. DEP,* EHB Docket No. 97-226-C (opinion issued February 12, 1999).

We will not grant Appellant's motion for oral argument. Appellant's reply to the motion for nonsuit spells out his objections to the Department's references to his deposition, and requests that the Board strike those references. There, Appellant insists that, by relying on the deposition, the Department violated an agreement it had made with Appellant, and Appellant cites a portion of the transcript that he argues contains the agreement. (Appellant's Reply, p. 6.) Therefore, whether Appellant is entitled to prevail on its motion to strike turns on the contents of the transcript: If the transcript shows that the Department agreed to limit the use of the deposition excerpts, as Appellant argues, then Appellant will likely prevail on his request that we strike the Department's references to those excerpts. On the other hand, if the transcript does not show that the Department made such an agreement, Appellant will not likely prevail on his request to have the references to the deposition excerpts stricken. Since the outcome depends solely on the contents of the transcript, and counsel from both parties were present during the characterization of the agreement, and could have raised any appropriate arguments orally at that time, we see little reason for reopening the issue for oral argument at this stage in the proceedings. Nor do we believe that Appellant's interests will be compromised in any way if we rule on the issue based on the parties' written filings, rather than oral argument.

Accordingly, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR.	:	
d/b/a GOETZ DEMOLITION	:	**EHB Docket No. 97-226-C**
	:	**(Consolidated with 97-147-C,**
v.	:	**97-224-C, 97-225-C, 98-115-C**
	:	**and 98-158-C.)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 3rd day of September, 1999, it is ordered that Appellant's motion for oral argument is **denied.**

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 3, 1999

c: **DEP, Bureau of Litigation:**
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Harrisburg, PA
For the Commonwealth, DEP:
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Southcentral Regional Counsel
For the Appellant:
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267 East Market Street
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 98-166-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	**Issued: September 10, 1999**

OPINION AND ORDER ON MOTION IN LIMINE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department's Motion in Limine is granted to the extent that the Appellant may not raise any issues which the Board already determined were barred by collateral estoppel, administrative finality or relevancy when the Board granted partial summary judgment to the Department. The Department's motion is denied to the extent that the Appellant may present his expert witnesses and exhibits provided they are relevant to the other issues in the current appeal. The Board reserves its ruling on relevancy until the hearing on the merits.

OPINION

This matter involves the appeal of George M. Lucchino from the Department of Environmental Protection's (Department) approval of bond releases for two surface mines operated by Robinson Coal Company (Robinson) in Washington County, Pennsylvania. The Department

approved Stage II and III bond release for the McWreath I site and Stage III bond release for the McWreath II site.

The Board previously issued an Opinion and Order granting partial summary judgment to the Department. *Lucchino v. DEP*, EHB Docket No. 98-166-R (Opinion issued May 10, 1999)(*Lucchino II*). With regard to McWreath I, the Board determined that Mr. Lucchino was barred by administrative finality from raising Objection 3(k)(area that Robinson reclaimed is filled with numerous depressions) and Objection 3(m)(seep near driveway) was outside the scope of the appeal. With respect to McWreath II, the Board held that Mr. Lucchino was collaterally estopped from raising Objections 3(i)(Robinson trespassed on Mr. Lucchino's property), 3(j)(Robinson mined off permitted and bonded area), 3(k)(area reclaimed is too rough to mow), 3(l)(area reclaimed contains numerous depressions, 3(n)(Seep near driveway) and 3(o)(wash out near Ann Pershina's property) since these issues have been litigated and adjudicated in an earlier appeal. *See Lucchino v. DEP*, 1998 EHB 473, *aff'd.*, *Lucchino v. Department of Environmental Protection*, No. 1730 C.D. 1998 (Pa. Cmwlth. filed December 4, 1998). Furthermore, the Board noted that where it is unclear on the face of the notice of appeal whether certain issues are outside the scope of the appeal, Mr. Lucchino will be required to specify in detail the basis for his objections.

A hearing on the merits is scheduled to commence on September 28, 1999. Mr. Lucchino filed his pre-hearing memorandum on July 30, 1999. Currently before the Board is the Department's Motion in Limine which contends that Mr. Lucchino's pre-hearing memorandum is deficient. The Department seeks to: limit the issues which Mr. Lucchino may present; exclude Mr. Lucchino's proposed exhibits; exclude Mr. Lucchino's expert witnesses; and limit Mr. Lucchino's presentation at the hearing to Objections 3(a)-3(h) for his appeal of the bond release for the McWreath I mine and

Objections 3(a)-3(h) for his appeal of the bond release for the McWreath II mine. The Board issued an Order requesting Mr. Lucchino to amend his deficient pre-hearing memorandum in accordance with the Board's Rule at 25 Pa. Code § 1021.82. The pre-hearing memorandum did not identify the expert witnesses' qualifications and lacked a sufficient summary of the experts' testimony. Additionally, it was unclear which exhibits Mr. Lucchino was referring to. In response to the Board's Order, Mr. Lucchino supplemented his pre-hearing memorandum and he filed a response to the Department's motion.

Facts in Dispute

Mr. Lucchino contends in his notice of appeal that 37 regulations, six permit conditions, two permit modules and one statutory provision have been violated by the Stage III bond release at the McWreath II site. With regard to the Stage II and III bond releases at the McWreath I site, he contends that 36 regulations have been violated, in addition to the same six permit conditions, two modules and one statutory provision. In Pre-Hearing Order No. 2 issued on May 10, 1999, the Board stated that the "Appellant shall set forth in detail specifically how he claims a statute or regulation has been violated rather than just listing the statue or regulation without any explanation." (Pre-Hearing Order No. 2, ¶ 3B) In deciding the Department's motion for summary judgment, the Board noted that "without knowing Mr. Lucchino's basis for believing these provisions have been violated by Robinson and the Department in the present action, we cannot summarily dismiss his objections at this time." *Lucchino II, slip op.* at 6-7.

In its motion in limine, the Department asserts that although Mr. Lucchino's pre-hearing memorandum identifies seven factual issues which he contends are in dispute, he fails to provide a detailed explanation regarding his claim that the regulations, statutory provisions, permit conditions

and permit modules listed by him were violated when the Department released the bonds for the McWreath I and McWreath II mines. We agree.

The Board is reluctant to find that contentions of law or fact set forth in the notice of appeal are waived if not also set forth in the pre-hearing memorandum, unless this would be prejudicial to the opposing party. *Levdansky v. DEP*, 1998 EHB 571; *Jay Township v. DER*, 1994 EHB 1724; *Koretsky v. DER*, 1994 EHB 905. Our Order of August 12, 1999 gave Mr. Lucchino ample opportunity to amend his pre-hearing memorandum to specifically explain how each regulation cited in his notice of appeal was violated and ignored by the Department and Robinson. Mr. Lucchino never set forth the required information. At this late point in the proceedings, the Department would be unduly prejudiced if we required the Department to prepare its case based only on the laundry list of regulations cited in Mr. Lucchino's notice of appeal. Therefore, the Department should prepare its case based on those regulations specifically cited in Mr. Lucchino's pre-hearing memorandum, namely 25 Pa. Code §§ 86.174 and 87.159. We hold that Mr. Lucchino has waived his contentions as to the other regulations by reason of his failure to meet the requirements of the Board's Order which gave him sufficient opportunity to state the basis for his contentions in his pre-hearing memorandum.

The Department next argues that several issues mentioned in Mr. Lucchino's pre-hearing memorandum were litigated in prior appeals. We agree with the Department that the Board dismissed most of the issues in either the earlier appeal involving Mr. Lucchino or our Opinion partially granting the Department's motion for summary judgment. *See Lucchino v. DEP*, 1998 EHB 473, *aff'd., Lucchino v. Department of Environmental Protection*, No. 1730 C.D. 1998 (Pa. Cmwlth. filed December 4, 1998); *Lucchino II*. The doctrine of collateral estoppel prevents a

question of law or issue of fact which has been litigated and adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit. *Meridian Oil and Gas Enterprises, Inc. v. Penn Central Corp.*, 614 A.2d 246, 250 (Pa. Super. 1992). The doctrine is designed to prevent relitigation of issues which have been decided and have substantially remained static, both factually and legally. *Booher v. DER*, 1992 EHB 1638, 1645.

In his pre-hearing memorandum, Mr. Lucchino asserts that the "seep on the McWreath II Surface Mining Permit was not present during mining," (Facts in Dispute, ¶ 2) and a "second seep appeared within eighty feet of the area, which [Robinson] was mining" (Facts in Dispute, ¶ 4). The only seep referred to by Mr. Lucchino in his notice of appeal is the "seep near driveway." (Notice of Appeal for McWreath I, ¶ 3(m); Notice of Appeal for McWreath II, ¶ 3(n)) Although Mr. Lucchino admits this in his Response (Mr. Lucchino's Response to Department's Motion in Limine, ¶ 15), Mr. Lucchino goes on to state that:

> There are two separate seeps in existence near Lucchino's driveway. . . . In the current appeal, Lucchino is arguing that the first seep does not meet Stage III bond Release criteria and therefore is not in compliance with 87.159. . . . Lucchino's argument regarding the second seep duplicates his original argument involving the first seep in that the seep also violations [sic] 87.159 and therefore, [Robinson] is not in compliance with the criteria necessary to meet Stage III Bond Release.

(Mr. Lucchino's Response to Department's Motion in Limine, ¶ 17)

Issues relating to the first seep were litigated in prior appeals and the Board ruled in its Opinion granting partial summary judgment that this issue is barred by collateral estoppel. *Lucchino II, slip op.* at 4-5. Regarding the second seep that Mr. Lucchino raised for the first time in his pre-hearing memorandum, the Board has held that any issue not raised in a notice of appeal or an amended notice of appeal is waived. 25 Pa. Code §§ 1021.51(e) and 1021.53; *Pennsylvania Game*

Commission v. Department of Environmental Protection, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd.*, 555 A.2d 812 (Pa. 1989). Mr. Lucchino is therefore barred from litigating issues relating to seeps.

Mr. Lucchino also asserts that "[Robinson] has not satisfactorily repaired the washout near the Ann Pershina property line." (Fact in Dispute, ¶ 7) In our recent Opinion, the Board explicitly noted that "Mr. Lucchino raised each of these in his earlier appeal and testified at great length regarding these matters at the hearing." *Lucchino II, slip op.* at 4-5. We reiterate that as such, Mr. Lucchino is collaterally estopped from relitigating these issues in the current appeal.

Additionally, Mr. Lucchino asserts that the "trees, which were destroyed when [Robinson] mined off of the permit and bonded area have not been replaced" (Facts in Dispute, ¶ 3) and "[Robinson] . . . dumped Lucchino's trees and trees from adjoining mining areas on the Lucchino property" (Facts in Dispute, ¶ 5). These issues were adjudicated in Mr. Lucchino's earlier appeals. *See Lucchino v. DEP*, 1998 EHB 473, *aff'd., Lucchino v. Department of Environmental Protection*, No. 1730 C.D. 1998 (Pa. Cmwlth. filed December 4, 1998). The doctrine of collateral estoppel bars Mr. Lucchino from attempting to resurrect these issues at the hearing on the merits.

Legal Issues in Dispute

Mr. Lucchino asserts that Robinson has not complied with 25 Pa. Code § 87.159 because his property is not "as smooth as a table" subsequent to regrading. (Legal Issues in Dispute, ¶ 5) With respect to the McWreath II permit, the issue of whether the land must be regraded to be "as smooth as a table" was already litigated. Because the Board held that Mr. Lucchino's land did not need to be regraded so that it is "as smooth as a table," this issue is barred by collateral estoppel. *See Lucchino v. DEP*, 1998 EHB 473, *aff'd., Lucchino v. Department of Environmental Protection*, No. 1730 C.D. 1998 (Pa. Cmwlth. filed December 4, 1998). With respect to the McWreath I permit, the

Board already held that regrading to approximate original contour is a Stage I bond release issue and since Mr. Lucchino did not appeal the Stage I bond release for the McWreath I permit, this issue is barred by administrative finality. *Lucchino II, slip op.* at 7.

Expert Witnesses

The Department contends that Mr. Lucchino's pre-hearing memorandum is deficient because he fails to provide the qualifications of his proposed expert witnesses and to provide a summary of their testimony as the basis for their conclusion. The Board issued an Order on August 12, 1999 requiring Mr. Lucchino to list the qualifications of his two expert witnesses along with a summary of their testimony and the basis for their conclusions in accordance with Pre-Hearing Order No. 2 and the Board's Rule at 25 Pa. Code § 1021.82. Mr. Lucchino supplemented his pre-hearing memorandum and provided his experts' qualifications and a summary of their testimony.

Mr. Lucchino is permitted to present the testimony of Mr. John Scott and Mr. Robert Goodall provided that their testimony is limited to the issues relevant to the current appeal of the McWreath I Stages II and III bond releases and McWreath II Stage III bond release.

Exhibits

In his pre-hearing memorandum, Mr. Lucchino proposes to submit excerpts from four verbatim transcripts from the *Lucchino v. DEP*, 1998 EHB 473, hearing previously held before the Board and an inspection report. The Department argues that the issues seemingly addressed by these excerpts, namely Mr. Lucchino's allegations that the site was not properly regraded and a seep exists on his property, are barred by collateral estoppel and are not relevant. In the Board's Opinion on the Department's motion for summary judgment, we held that Mr. Lucchino is barred by relevancy and the doctrine of administrative finality from raising any issues relating to Stage I release, which

included Mr. Lucchino's assertion that the area reclaimed by Robinson is filled with numerous depressions (Objection 3(k)). *Lucchino II, slip op.* at 7-8. The Board determined that Mr. Lucchino's assertion that the area reclaimed by Robinson is too rough to mow (Objection 3(j)) could relate to Stage II bond release, but without further information, we could not grant the Department's request to dismiss that objection. *Id.* at 8. Mr. Lucchino's pre-hearing memorandum does not explain why Mr. Lucchino is proposing to use certain evidence at the hearing, nor is he required to do so by the Board's Rules. We therefore reserve ruling on whether Mr. Lucchino's exhibits are relevant to the current appeal until the hearing on the merits.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 98-166-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 10th day of September, 1999, the Department's Motion in Limine is granted in part and denied in part. It is hereby ordered:

1) Mr. Lucchino's presentation at the hearing is limited to Objections 3(a)-3(h) and 3(j) for his appeal of the bond release for the McWreath I mine and to Objections 3(a)-3(h) for his appeal of the bond release for the McWreath II mine.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 10, 1999

c:

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

RAYMOND MALAK	:	
d/b/a NOXEN SAND & GRAVEL	:	
	:	
v.	:	**EHB Docket No. 99-074-L,**
	:	**99-075-L, 99-076-L, 99-077-L,**
COMMONWEALTH OF PENNSYLVANIA,	:	**99-078-L, and 99-079-L**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	**Issued: September 14, 1999**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Department's motion to dismiss a series of appeals is granted because the Environmental Hearing Board lacks jurisdiction. The inspection reports in question do not constitute final actions of the Department and, therefore, are not appealable to the Board.

OPINION

The Department of Environmental Protection (the "Department") prepared a series of inspection reports between October 30, 1998 and February 3, 1999 regarding a noncoal surface mine allegedly operated by Raymond Malak, d/b/a Noxen Sand & Gravel ("Malak"). Malak filed an appeal from each of the inspection reports. The Department has filed a motion to dismiss the six appeals because the inspection reports are not appealable actions. Malak did not file a response to the Department's motion.

Jurisdiction of this Board is limited to the review of "actions." *Eagle Enterprises, Inc. v. DEP*, 1996 EHB 1048, 1049-1050; *Borough of Ford City v. DER*, 1991 EHB 169, 171-172; *see also* 25 Pa. Code §1021.2 (defining action). This Board has specifically held that inspection reports issued by the Department do not normally constitute final, appealable actions. *Hapchuk, Inc. v. DER*, 1992 EHB 1134, 1136; *Bell Coal Company v. DER*, 1986 EHB 828, 829-830. Although the appealability of a Departmental communication is dictated by the substance and language of the communication, not its title, *Eagle Enterprises*, 1996 EHB at 1050, our review of the inspection reports at issue reveals that they are advisory, not imperative. They impose no obligation upon Malak in and of themselves. Accordingly, there is nothing in these particular inspection reports to distinguish them from the other cases where we have held that such reports are not appealable actions. Thus, this Board lacks jurisdiction to review Malak's appeals.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAYMOND MALAK	:	
d/b/a NOXEN SAND & GRAVEL	:	
	:	
v.	:	**EHB Docket No. 99-074-L,**
	:	**99-075-L, 99-076-L, 99-077-L,**
COMMONWEALTH OF PENNSYLVANIA,	:	**99-078-L, and 99-079-L**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

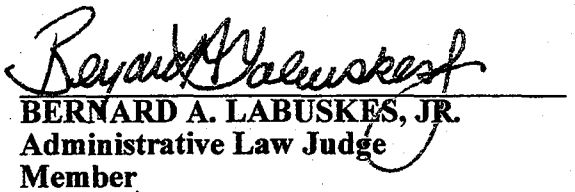
AND NOW, this 14th of September, 1999, the Department's motion to dismiss is GRANTED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **September 14, 1999**

c: **For the Commonwealth, DEP:**
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Southcentral Regional Counsel

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JH/bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 21, 1999

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION
AND MOTION TO STRIKE

By Michelle A. Coleman, Administrative Law Judge

Synopsis

A petition for reconsideration is denied. The Board will not reconsider a decision denying a motion to shift the burden of proceeding and burden of proof where the petitioner fails to meet the criteria for reconsideration of a final order, and fails to show that special circumstances are present that warrant the Board taking the extraordinary step of reconsidering an interlocutory order.

OPINION

This matter was initiated with the August 8, 1997, filing of a notice of appeal by Conrail, Inc. and its wholly-owned subsidiary, Consolidated Rail Corporation (collectively, Appellants). They challenged a July 9, 1997, Department administrative order (order) issued to them under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-

691.1001 (Clean Streams Law), and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003. (Solid Waste Management Act). The order alleged that Appellants were responsible for the unlawful release of solvents, oil, diesel fuel, and other contaminants at the Hollidaysburg Car Shop and Reclamation Plant (site), in Frankstown Township, Blair County. The order also directed Appellants to stop depositing solid waste at the site; to take a range of specific measures to prevent the contamination from migrating off-site; to submit a remedial investigation report and closure plan; to remove and properly dispose of the contamination at the site; and, to replace any unsafe drinking water resulting from the contamination at the site.

The Board has issued three previous opinions in this appeal, all on May 3, 1999: an opinion and order granting a motion to sustain objections to a subpoena, filed by Appellants; an opinion and order granting a motion to compel, filed by the Department; and, an opinion and order denying a motion to place the burden of proceeding and burden of proof on Appellants, filed by the Department.

On May 13, 1999, the Department filed a petition for reconsideration of our opinion denying its motion to shift the burdens of proceeding and proof to Appellants.[1] On May 28, 1999, Appellants filed a response and motion to strike portions of the Department's petition. Appellants also filed a memorandum of law supporting their position. On June 4, 1999, the Department filed a response to the motion to strike and a memorandum of law opposing the

---

[1] The Department failed to submit an accompanying memorandum of law, though it was required to do so under section 1021.74(d) of the Board's rules, 25 Pa. Code § 1021.74(d).

motion.

In our May 3, 1999, opinion and order denying the Department's motion to shift the burdens of proof and proceeding, we refused to shift the burdens because the Department failed to submit evidence showing that Appellants owned the site or that their officers or employees participated in the alleged violations. In its petition for reconsideration, the Department argues that we erred by denying its motion to shift the burdens because 25 Pa. Code § 1021.101(d)—the provision of the Board rules that the Department argued shifted the burdens—did not require that the Department show that Appellants owned the site, or that Appellants' officers or employees participated in the violations. The Department contends that our decision was based on an issue not raised by the parties. In its petition, it urges us to reconsider its motion to shift the burdens, and argues that, if we do so, we should either (1) not require evidence that Appellants owned the site or that their officers or employees participated in the violations, or (2) consider additional evidence on those issues, which the Department submitted in support of its petition for reconsideration.

Appellants disagree. In their response and motion to strike, they argue that the Department has not met the criteria for reconsideration of an interlocutory order, that the Board's opinion was based on grounds raised by the parties, and that the Board properly denied Appellants' motion to shift the burdens. Appellants also argued that we should strike the evidence the Department submitted in support of its petition for reconsideration because it would be inappropriate to shift the burdens based on evidence that the Department did not submit as part of its original motion to shift those burdens. In its response to Appellants' motion to strike, the Department argues that the documents submitted in support of its petition for reconsideration

are appropriate and that the Board should rely on them if it reconsiders its motion to shift the burdens.

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, governs reconsideration of interlocutory orders. It states that the Board will grant reconsideration only where the petition demonstrates that "extraordinary circumstances" exist. 25 Pa. Code § 1021.123(a). To show that "extraordinary circumstances" exist, petitioners must show that they meet the criteria for reconsideration of a final order, listed at 25 Pa. Code § 1021.124, and, in addition, that special circumstances exist that warrant the Board taking the extraordinary step of revising an interlocutory order. *Miller v. DEP,* 1997 EHB 335, 339. Section 1021.124 of the Board's rules provides that "[r]econsideration is within the sound discretion of the Board and will be granted only for compelling and persuasive reasons," 25 Pa. Code § 1021.124(a), and that those reasons may include:

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

25 Pa. Code § 1021.124(a) (1)-(2).

The Department is not entitled to reconsideration of our decision denying its motion to shift the burdens. Our previous opinion and order were based on an issue that the parties had raised, and, in any event, the Department failed to show that exceptional circumstances are present that would warrant our reconsidering an interlocutory order.

In its petition, the Department argues that it meets the criteria for reconsideration under

25 Pa. Code § 1021.124(a) because "[t]he Board's Order ... relies upon a legal ground which ha[d] not been proposed by either party. Specifically, the Board held that the Department had not met its burden of proof that [Appellants are], or should be, in possession of facts related to the environmental damage." (Petition for reconsideration, p. 3, para. 10.) In their response and motion to strike, Appellants argue that they did raise the issue.

Appellants are correct; they did raise the issue. In their memorandum opposing the Department's motion to shift the burdens, Appellants write, "The Department has not offered a single shred of evidence to meet the second element of 25 Pa. Code [§] 1021.101(a) and (d)—that Conrail is in possession of, or should be in possession of, specialized facts relating to any environmental damage at the Site." (Memorandum in opposition to motion to shift burdens, p. 21.) Later in the same memorandum, Appellants add, "[T]he Department's bald assertion that Conrail is in possession of, or should be in possession of, facts relating to any environmental damage at the Site is no more than wishful thinking." (Memorandum in opposition to motion to shift burdens, p. 22.)

The Board's denial of the Department's motion flows directly from Appellants' argument. Although the Board has subsequently rescinded section 1021.101(d) of its rules, 25 Pa. Code § 1021.101(d), that subsection created an exception to the general rule that the Department bears the burden of proof in appeals of orders. Section 1021.101(d) provided:

> When the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established that:
>
> > (1) Some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie case is made that a statute or regulation is

being violated.

> (2) The party alleged to be responsible for the environmental damage is in possession of the facts relating to the environmental damage or should be in possession of them.

We concluded that the Department failed to show that Appellants met the criteria in section 1021.101(d)(2), writing, "We agree with Appellants that the Department has failed to sustain its burden of proof on the element of possession of facts." *Conrail, Inc. v. DEP,* EHB Docket No. 97-166-C (opinion issued May 3, 1999) (*slip op.* p. 7). In our analysis, we explained that, for the Commonwealth to show that Appellants possessed—or should have possessed—facts relating to the environmental damage, the Department had to support its motion with some evidence that Appellants either owned the site or that their officers or employees participated in the alleged violations. *Id.*, pp. 7-8.

Significantly, in its motion to shift the burdens, all that the Department did in trying to satisfy section 1021.101(d)(2) was to aver that Appellants are "alleged to be responsible for the environmental damage and [are] in possession of the facts relating to the environmental damage or should be in possession of such facts." (Motion to shift the burdens, p. 2, para. 7.) The Department failed to support the motion with any evidence showing that Appellants owned the property, that their officers or employees participated in the violations, or that Appellants otherwise knew or should have known the facts relating to the environmental damage. Indeed, the Department's motion never even alleged why Appellants were in a position where they knew or should have known the facts surrounding the damage. Instead, the Department assumed that it could make that showing merely by *stating* that Appellants were *alleged to be liable* for the environmental damage. That falls far short of establishing that Appellants were, or should have

been, in possession of the facts surrounding the damage.

Furthermore, even assuming that the Department had established that we based our decision on an issue not raised by the parties—or that the Department otherwise showed that it met the criteria for reconsideration of final orders at 25 Pa. Code § 1021.124—we would not reconsider that decision because there are no "exceptional circumstances" present which would warrant our taking the extraordinary step of revisiting an interlocutory order. The Commonwealth filed its motion to shift the burdens, pursuant to 25 Pa. Code § 1021.101(d), one day before we rescinded that provision from our rules. In the notice accompanying the proposed rulemaking detailing the amendments to section 1021.101, we explained,

> The proposed rule ... deletes the ... language which imposed the burden of proof on the appellant when the Department issues an abatement order. The Board believes the Department, not the appellant, should have the burden of proof in these cases in view of the Department's ability to obtain the evidence through discovery.

28 Pa. Bull. 809.

Given the Department's ability to obtain evidence through discovery, any harm to the Department's interests that might arise from our denying its motion to shift the burdens is minimal and falls short of the "exceptional circumstances" required for reconsideration of an interlocutory order.

Accordingly, we enter the following order:[2]

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[2] Because our decision does not rely on any of the evidence that the Department submitted in support of its petition for reconsideration, we need not rule on Appellants' motion to strike that evidence and the Department's references to that evidence in its motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-166-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of September, 1999, it is ordered that the Department's petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 21, 1999

See following page for service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEFFERY A. SEDER	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER, Permittees	:	**Issued: September 21, 1999**

OPINION AND ORDER
ON
MOTION TO SUBSTITUTE PARTIES and MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies motions to dismiss a successor in interest who was substituted as a party appellant in a third party appeal of a permit issued for the operation of a dam and minor power project.

OPINION

Before the Board is the motion of Jeffrey A. Seder to be substituted for Caroline and Gregory Bentley as the appellant in this appeal of a Limited Power Permit. Also before the Board are motions to dismiss the appeal filed by the Department of Environmental Protection and by the permittees, Donald and Joan Silknitter.

The facts surrounding this matter may be briefly summarized as follows.[1] Gregory and Caroline Bentley own a parcel of property which abuts property owned by the Permittees. They filed an appeal as third-party appellants seeking revocation of a Limited Power Permit issued by the Department which authorized the operation of a small dam and hydroelectric generating plant. The Board decided dispositive motions in June, 1999, and scheduled the matter for hearing in October, 1999.

On June 10, 1999, the Bentleys entered into an agreement of sale with Jeffrey A. Seder to sell the parcel of land involved in their appeal. The sale became final and title was transferred on July 23, 1999. On August 9, 1999, Mr. Seder filed a motion to be substituted as the appellant in the appeal of the permit as the new owner of land involved in this appeal. The presiding judge, George J. Miller, held a conference call on the motion on August 19, 1999. With the agreement of the parties, the substitution of Mr. Seder as the appellant in the place of Gregory and Caroline Bentley was granted, subject to the filing of appropriate dispositive motions after the deposition of Mr. Seder, should it become evident that he had no rights to proceed with the appeal. Both the Department and the Silknitters have filed motions challenging Mr. Seder's right to proceed with this appeal. We will deal with the Silknitters' motion first.

The Silknitters' make only two arguments. First, they argue that Mr. Seder can not proceed with this appeal because he waited more than 30 days after he obtained an equitable interest in the property by the execution of the agreement of sale, before filing his motion for substitution. Apparently the sole basis for this argument is the 30-day

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[1] A more detailed factual rendition may be found at earlier Board opinions disposing of a motion for summary judgement, *Bentley v. DEP*, EHB Docket No. 98-058-MG (Opinion issued June 28, 1999), and motion to amend the appeal. *Bentley v. DEP*, EHB Docket No. 98-058-MG (Opinion issued February 12, 1999).

appeal period during which a person must appeal an action of the Department. We are not persuaded by this argument.

Although the Board does not currently have a specific procedural rule on the substitution of parties, we have historically been guided by the Rules of Civil Procedure and practice before the civil courts. *See, e.g., Farmer v. DER*, 1993 EHB 1842; *Tri-County Industries, Inc. v. DER*, 1992 EHB 1139. Rather than imposing a 30-day requirement, the rule has been that the right of a successor in interest to be substituted as an appellant must be exercised in a "timely" fashion. *See Anderson v. DER*, 1986 EHB 632 (*citing Huffman v. Stiger*, 1 Pitts. Rep. 185); *but see Johnson v. 2140 Bar Corp.* 26 D&C3d 235 (Philadelphia 1982)(there is no time limit with respect to the voluntary substitution of a plaintiff). Accordingly, there is no evidence that Mr. Seder was dilatory in seeking substitution in this matter before the Board. Further, because he is limited to the issues raised by the Bentleys in their notice of appeal, we do not believe that we are deprived of jurisdiction over this appeal.

The second argument raised by the Silknitters is that Mr. Seder has been aware of the dispute surrounding the permit since the late 1980s, and although he had other property which adjoined the millrace, he did not object to the issuance of the permit. These facts, alone, are not an impediment to the substitution of Mr. Seder as an appellant in this matter. To the extent the permit affects other properties owned by Mr. Seder, he may be foreclosed from objecting to the permit based on harm that might result to those properties because he did not file his own appeal. As the substituted appellant he "steps into the shoes" of the Bentleys and may pursue only those objections raised by them, based on the parcel of property which they owned when they filed their notice of appeal. Therefore Mr. Seder's awareness of the litigation and ownership of other parcels of

property is not relevant to the propriety of his substitution as the successor in interest to the Bentleys.

The Department has raised some additional arguments in opposition to the substitution of Mr. Seder for the Bentleys. First, it argues that the Board does not have the authority to substitute parties. However, the Board in the past has made similar substitutions where the new appellant is a successor in interest to the original appellant.[2]

The Department next argues that Mr. Seder does not have standing to pursue this appeal. The Department takes the position that he has the burden to demonstrate standing at this point in the proceedings. This is not the law. We have many times held that for the purposes of dispositive motions it is not the obligation of the non-moving party to show that it has standing. *See, e.g., City of Scranton v. DEP*, 1997 EHB 985. It is the obligation of the party seeking dismissal on this basis to show that appellant lacks standing. *Id.* Since the Department has not proven that Mr. Seder does not have standing, we will deny its motion. We caution, however, that Mr. Seder must prove at the hearing on the merits that he has standing, as the owner of the parcel of land formerly owned by the Bentleys, to pursue this appeal.

The Department next argues that the substitution of Mr. Seder should not be permitted because he "has failed to demonstrate that he will pursue any issue over which the Board has jurisdiction." The crux of this argument seems to be the Department's concern that Mr. Seder will attempt to raise issues that were not raised by the Bentleys. We agree with the Department that Mr. Seder is restricted to the claims made and

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[2] The order of the Board issued following that conference states in the first paragraph that "in consideration of the motion of Jeffery A. Seder for substitution as the party appellant in this appeal as the successor of [the Bentleys] and *in accordance with the agreement of the parties*, the motion is hereby granted without prejudice to the filing of appropriate dispositive motions . . . ." (Emphasis added.) Accordingly, the Board understood that no one intended to challenge its authority to substitute parties.

properly preserved by the Bentleys. He may not, at this late date, add additional objections. He is bound by the Bentleys failure to timely raise issues under the Limited Power Act[3] and by their withdrawal of certain environmental and engineering issues.[4] We would further note that he may be bound by any representations Mr. Muto may have made to the Department if it is found that at the time he was acting as the duly authorized agent of the Bentleys.[5]

Finally, the Department argues that the interests of the Bentleys in this appeal can not be assigned to Mr. Seder, citing the Board's decision in *Anderson v. DER*, 1986 EHB 632. That decision does not support the Department's position that the assignment is a nullity. In *Anderson*, the successor in interest moved the Board to reconsider the dismissal of the appeal because they were unaware that it had been dismissed. They argued that the appellant had executed an assignment of her interest and that she failed to inform them that the appeal had been dismissed. The Board merely noted that it believed it was without authority to construe the effect of the assignment, not that such assignments could not be made. The Board further held that the successors were not entitled to reconsideration of the Board's order dismissing the appeal because they had failed to file a timely notice of substitution, and that the right to substitution could not be exercised after the cause of action was extinguished. Although the Board at that time had concerns about its power to allow the substitution of a successor in interest as an appellant, the decision does not support the proposition that we can not now do so. *See Tri-County Industries v. DER*, 1992 EHB 1139, 1149 (noting the routine practice of the Board of substituting parties who are successors in interest).

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[3] *Bentley v. DEP*, EHB Docket No. 98-058-MG (Opinion issued February 12, 1999).
[4] Order issued March 1, 1999.
[5] *Bentley v. DEP*, EHB Docket No. 98-058-MG (Opinion issued June 28, 1999), slip op. at 8.

The Department also argues that the transfer of appeal rights is precluded because it is essentially a personal, non-pecuniary right which can not be transferred, citing the decision of the Supreme Court in *Hedlund Manufacturing Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988). However, that case only noted that personal injury claims could not be assigned as opposed to claims grounded in breach of contract or professional negligence. In contrast to a personal injury action where the identity of the person injured is central to the cause of action, the standing of the appellants in this matter appears to be grounded in their ownership of adjoining property and that the operation of the Silknitters dam will harm their property and/or infringe upon their rights as landowners. It does not appear that any of the objections to the permit are based solely upon the particular identity of the individuals who own the property. If we were to find that this appeal were analogous to a personal injury action, the Bentleys may be entitled to pursue the litigation in their own right, regardless of their ownership of land.

We do not believe that allowing successors in interest to be substituted as appellants undermines the principle of administrative finality. The primary purpose of the doctrine is not so much to prevent affected persons from appealing actions of the Department, but to provide a margin of certainty to orders of the Department by providing that they will eventually become unassailable. That is, at some point actions of the Department must be considered final, so that the action which is permitted is allowed to move forward unchallenged. *See Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977)(to allow an indefinite time for an aggrieved person to appeal would "postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law.") In this case, the Department's permit has already been challenged in a timely manner. Neither the Department nor the permittee, the Silknitters,

were under any impression that the project could move forward unchallenged. The substitution of Mr. Seder for the Bentleys as an appellant does not "destroy the procedural certainty intended by the General Assembly . . . ." (Department Memorandum at 5). In this case, there was no "certainty" to the challenged permit of the Department because it was already under appeal.[6]

Accordingly, we reaffirm Mr. Seder's substitution, and deny the motions to dismiss of the Department and the Silknitters:

[6] The Department has also filed a motion to dismiss the Bentleys for lack of standing and mootness. Because the time for the filing of dispositive motions concerning the Bentleys has passed and because of our disposition of the motions in this opinion, we will not address this motion of the Department. The Department is of course free to raise the question of standing in its pre-hearing memorandum, and we will hear evidence on that matter at the hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFFERY A. SEDER	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER	:	

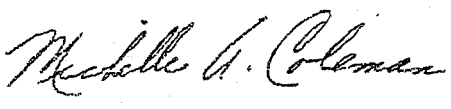
ORDER

AND NOW, this 21st day of September, 1999, the motions to dismiss of the Department of Environmental Protection and of the permittees, Donald and Joan Silknitter, in the above-captioned matter are hereby **DENIED**. The Board reaffirms its order of August 19, 1999, granting the substitution as the party appellant in this appeal of Jeffrey A. Seder for Gregory and Caroline Bentley.

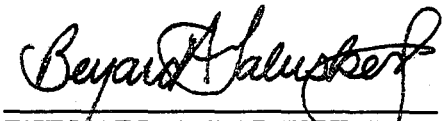
ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 21, 1999

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HEIDELBERG TOWNSHIP	:	
	:	
v.	:	**Docket No. 98-174-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, HEIDELBERG CITIZENS ALERT (HTCA) and ALLEN R. MAURER, Intervenors	:	**Issued: September 24, 1999**

OPINION AND ORDER ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT/MOTION TO LIMIT ISSUES

By George J. Miller, Administrative Law Judge

Synopsis:

A motion for summary judgment against the Intervenors seeking their dismissal from this proceeding will be denied where the Intervenors' evidence presents disputed issues of material fact with respect to the interest of the Intervenors in the proceeding. The motion to limit issues to prevent the Intervenors from introducing any argument or evidence outside the issues raised in the notice of appeal is also denied at least to the extent of issues relating to the feasibility of other land disposal alternatives and EPA's and the Department's anti-degradation policy. The Board will consider at the scheduled pre-hearing conference whether the broader issues of social and economic consequences and effect on property values within the Township are a proper part of the hearing on the merits. The Intervenors' motion to strike the Township's motion and appendix containing documents which otherwise appear to be a part of the record on the ground that the authenticity of those documents is not supported by an affidavit will be denied.

Background

This appeal is from the Department's August 7, 1998 disapproval of Heidelberg Township's (Township's) sewage facilities plan under the provisions of the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20a. The plan submission was disapproved because the alternative selected to provide public sewer service to Schafferstown and the surrounding area would result in discharge to a stream, classified as High Quality under 25 Pa. Code Chapter 93, without adequately justifying selection. The Department's letter stated that the Township's last submission of February 17, 1998 indicated that the spray irrigation alternative is within 110 percent of the direct discharge alternative and should have been considered under the EPA Guidance discussed with the Township. A complete description of the background of the dispute between the Township and the Department is set forth in an Opinion and Order issued today denying cross-motions for summary judgment and scheduling a pre-hearing conference.

The Board's Order dated October 29, 1998 granted a petition of Heidelberg Township Citizens Alert (HTCA) and Allen R. Maurer to intervene (collectively, Intervenors). The Presiding Judge held that as property owners and residents within the Township the Intervenors had a sufficient interest in the proceeding to intervene under the provisions of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516, and the Board's regulations at 25 Pa. Code § 1021.62.

OPINION

The Township's motion challenging the Intervenors' standing as a party states that HTCA is an unincorporated association that began in 1992. Mr. Mauer is the Chair of that organization. Mr. Mauer's residence is several hundred feet upstream from the proposed sewage treatment plant and

the discharge point and he owns the 18 acre parcel of land that would be the site of the sewage treatment plant. (Township's Motion, ¶¶23-26, Ex. D). The Township's motion contends that the members of HTCA are individuals who own land remote from Hammer Creek with the exception of two individuals who own land downstream from the proposed sewage treatment plant. None of the members of HTCA own the parcel designated for spray irrigation or adjacent thereto. The members of HTCA live two to four miles from the spray irrigation site. (Township's Motion, ¶22). The Township's motion describes the very limited usage made by the HTCA members and Mr. Mauer of Hammer Creek. (Township's Motion, ¶29-34). In addition, the motion asserts that neither Mauer nor members of HTCA have any evidence that the discharge would degrade the stream, that the discharge would adversely affect the aesthetics of the stream, or that the discharge would negatively impact the value of property or lead to increased development. In addition, the Township claims that no member of HTCA who owns a home can be compelled to hook up the public sewer system. (Township's Motion, ¶¶35-41).

As an alternative to a summary judgment against Intervenors, the Township's motion asks that Intervenors be limited in the issues that they may raise in the proceeding to issues raised in the Township's Notice of Appeal. This would mean that Intervenors could not raise any issue relating to the Department's or EPA's anti-degradation policies, the social and economic consequences of the plan, devaluation of property or the future development of the Township.

We recently reviewed the standard for intervention in Board proceedings in *Conners v. DEP,* EHB Docket No. 99-138-L (Opinion issued August 20, 1999). The law with respect to the necessary interest to intervene is fully set forth in that opinion and is incorporated herein. Briefly, Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), provides that "[a]ny interested party

may intervene in any matter pending before the board." The Commonwealth Court has explained that, in the context of intervention, the phrase "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. DER,* 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("BFI"). The interest required must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination. *Jefferson County v. DEP,* 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER,* 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI,* 598 A.2d at 1060-61; *Wurth v. DEP,* 1998 EHB 1319, 1322-23. Gaining or losing by direct operation of the Board's determination is just another way of saying that an intervenor must have standing. An organization can have standing and, therefore, intervene either in its own right or derivatively through the standing of at least one of its members. *Raymond Proffitt Foundation v. DEP,* 1998 EHB 677, 680; *Barshinger v. DEP,* 1996 EHB 849, 858.

Our examination of the Intervenors' response to the Township's motion leads us to conclude that there are material issues of disputed fact with respect to the interest of the Intervenors which requires us to deny the Township's motion for summary judgment. The Intervenors' answer states that the report of Ralph D. Heister, III establishes that the direct discharge will degrade Hammer Creek. That report is attached as Exhibit A-1 to the Intervenors' Motion to Strike and Answer to the Township's Motion For Summary Judgment/Motion to Limit Issues. The report of Alan R. Musselman, Exhibit A-2 to Intervenors' answer, also supports the claim that the direct discharge will impose potentially adverse effects on water quality and will induce incompatible development in the community.

This evidence is certainly sufficient to raise material issues of fact with respect to the interest

of the members of HTCA in this sewage facilities plan. Mr. Mauer clearly has an interest by virtue of his ownership of the property which would be used by the proposed sewage treatment facility and the proximity of his residence to the facility. (Intervenors' Answer, ¶¶25, 30-35, Ex. D). The interest of the others in the future impact of the approval of the Township's plan on their property or area surrounding their residences appears to be sufficient to give them an interest in the Township's sewage facilities plan.

We also reject the Township's argument that the Intervenors' case must be limited to issues raised by the Notice of Appeal. As pointed out in Intervenors' brief, many of those issues are incorporated within the issues raised by the Notice of Appeal. However, as the Board pointed out in the *Conners* opinion, the issues which may be raised by an intervenor are not automatically limited as a result of its status as an intervenor on what arguments it can make. That conclusion is in accordance with the Pennsylvania Supreme Court's holding in *Appeal of Municipality of Penn Hills*, 546 A.2d 50 (Pa. 1988).

In this case, we think that the Intervenors may properly raise the question of whether the Department should also require consideration of other land disposal alternatives. While this is a close question, we think the Intervenors' interest is likely to permit them to contend that the Department abused its discretion in not also requiring the Township to consider community on-lot disposal as an alternative. This claim is based on an Engineering Study attached as Exhibit E to the Intervenors' Answer and was submitted to the Department in opposition to the Township's request for approval of the sewage facilities plan.

We also think that it is proper for the Intervenors to raise the question of whether or not the Department's action complies with EPA's anti-degradation policy. The Township charges that the

Department abused its discretion in failing to consider whether or not the direct discharge would degrade the high quality stream. The EPA's anti-degradation policy which was in effect at the time the Department's action took place may very well conflict with the Department's use of the 1982 Guidance. The applicability of this guidance is at the heart of the Township's contentions in this case that the Department improperly failed to consider whether the proposed direct discharge would degrade Hammer Creek.

It is a closer question as to whether or not at the hearing on the merits the Board should take evidence with respect to the social and economic consequences of the Township's sewage facilities plan or the effect on the valuation of property within the Township. These issues appear to be far afield from the question of whether the Department's disapproval is an abuse of discretion and what alternative sewage facility plans should have been considered. While social and economic justification is certainly part of the Township's case, the analysis of social and economic justification at the plan approval stage may be less significant than at some possible future stage when the operator of the system applies for an NPDES permit. It may also be that the taking of evidence of comparative diminution in property values depending on what alternative is selected would be an unfruitful exercise at this time. These matters will be discussed with counsel by the Board at the pre-hearing conference scheduled by the Board's order.

Intervenors also move to strike the Township's motion for summary judgment on the ground that neither it nor the appendix of documents filed with the motion are supported by a properly verified affidavit. We will deny that motion. All of the matters referred to in the Township's motion and contained in the supporting appendix appear to be items from the record for summary judgment purposes, as defined by Rule 1035.1 of the Pennsylvania Rules of Civil Procedure. The Intervenors

rnade no challenge to the authenticity of those documents. Under these circumstances, no supporting affidavit is required.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEIDELBERG TOWNSHIP	:	
	:	
v.	:	**Docket No. 98-174-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, HEIDELBERG CITIZENS ALERT (HTCA) and ALLEN R. MAURER, Intervenors	:	

ORDER

AND NOW, this 24th day of September, 1999, IT IS HERBY ORDERED as follows:

1. The Township's Motion for Summary Judgment is denied.

2. The Intervenors' Motion to Strike is denied.

3. A pre-hearing conference in this case is scheduled for **October 15, 1999**. Counsel should be prepared to discuss (1) the schedule for a hearing on the merits to commence early next year and (2) the scope of the hearing, including whether the Board should consider evidence as to the economic and technical feasibility of spray irrigation that was not before the Department at the time of its decision. The conference will be held at 10:00 a.m. in Hearing Room No. 1 at the offices of the Environmental Hearing Board, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: September 24, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HEIDELBERG TOWNSHIP	:	
	:	
v.	:	**Docket No. 98-174-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, HEIDELBERG CITIZENS ALERT (HTCA) and ALLEN R. MAURER, Intervenors	:	**Issued: September 24, 1999**

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A Township's motion for summary judgment is denied where the proper disposition of its claim, that the Department abused its discretion in denying approval of the Township's Sewage Facilities Plan and in requiring an analysis of the feasibility of a spray irrigation alternative, requires the resolution of disputed issues of material fact. The Department's cross-motion is largely moot as a result of the Township's withdrawal of an objection in the Notice of Appeal.

Background

This appeal is from the disapproval by the Department of Environmental Protection (Department) of the October, 1997 Official Sewage Plan Submission (Act 537 Plan or plan) of Heidelberg Township, Lebanon County, submitted for Department approval on February 17, 1998, pursuant to the provisions of the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535,

as amended, 35 P.S. §§ 750.1 - 750.20a. This plan proposed, as the preferred alternative, the construction of conveyance pipes throughout the populated areas of the Township and construction of a central sewage treatment plant. This plant would discharge treated effluent into an unnamed tributary of Hammer Creek.

Following the Department's consideration of the plan, including numerous communications with Township authorities, the Department disapproved the plan submission on August 7, 1998. The reason stated for disapproval was "because the alternative selected to provide public sewer service to Schaefferstown and the surrounding area would result in a discharge to a stream [an unnamed tributary to Hammer Creek] classified as HQ under 25 Pa. Code Chapter 93, without adequately justifying the selection." The Department's letter explained that the plan did not adequately consider a spray irrigation alternative to discharge to the stream. According to the Department's letter, the Township's submission indicated that the cost of the spray irrigation alternative was within 110 percent of the Township's preferred alternative of direct discharge, so that spray irrigation should have been considered. The Department's letter explained that the source of this "110 percent rule" was the "Special Protection Waters Guidance" in effect at the time of the Department's approval of the Township's Act 537 Plan task activity report.

The Township's Notice of Appeal lists 28 specific objections to the Department's action. These objections may be broadly categorized as (1) the categorization of Hammer Creek as a HQ stream is improper and the Department improperly determined that the Township's plan would result in degradation of Hammer Creek; (2) spray irrigation is not economically feasible, environmentally

sound, could not be achieved at a cost roughly equivalent or within 110 percent of the cost of discharge utilizing Best Available Treatment Technology (BAT) and is not otherwise consistent with the Sewage Facilities Act and the regulations thereunder; (3) the application of the Special Protection Waters Guidance was improper; (4) the Township's application fully complied with and was consistent with all of the applicable Department regulations; and (5) the Department's application of the Clean Streams Law and Sewage Facilities Act and of specified regulations thereunder was improper. The Township claims in the case of each one of these categories of objections that the Department abused its discretion and acted in an arbitrary and capricious manner. The Notice of Appeal also claims that the Department is estopped from disapproving the Township plan in favor of spray irrigation when the Department, throughout the planning process, had implied that it would not be necessary for the Township to further consider a spray irrigation alternative. The Notice of Appeal also claimed that the Department's disapproval is inconsistent with the Governor's executive order relating to the protection of farmlands.

Intervenors, Heidelberg Township Citizens Alert (HTCA) and Allen R. Maurer, were granted leave to intervene on the side of the Department by order dated October 29, 1998. Maurer and members of HTCA reside and are owners of real estate in the community to be served by the proposed facility and in the vicinity of Hammer Creek.

The Township and the Department filed cross-motions for summary judgment on May 28, 1999. The Township's 55-page motion for summary judgment is based on many of the objections set forth in the appeal. It also asserts that the Department ignored a partnership with the Township

in reviewing the plan by denying approval without an opportunity to submit additional information and that the Township's Act 537 Plan was deemed approved in 1994. The motion asks the Board to either approve the plan or direct the Department to do so. In the alternative, it asks the Board to remand the matter to the Department with directions to decide whether the plan is approvable. The Township's Motion for Summary Judgment/Limit Issues designed to reverse the order granting intervention is denied for reasons set forth in a separate Opinion and Order issued today.

The Department's cross-motion seeks a partial summary judgment on the issues of the HQ designation of the upper basin of Hammer Creek. The Department states that the Township has no evidence to demonstrate that the Department's 1979 HQ classification of the upper basin of Hammer Creek was improper in any respect. The Department states that the Township's plan would result in discharge of treated sewage effluent directly into the unnamed tributary of Hammer Creek, and that the Township cannot bear its burden of proof that the HQ designation was improper or that a "down grade" to a lower quality was permissible. The Department's motion also seeks summary judgment on Objection 16 of the Notice of Appeal relating to the Governor's executive order relating to farmlands. The Township has withdrawn this objection. (Heidelberg's Response to Department's Motion for Partial Summary Judgment, ¶¶43-49). Accordingly this objection will be marked withdrawn by the Board's order.

The Township has moved to strike the major portion of the Department's motion and specific portions of affidavits submitted in support of the motion. The Intervenors have moved to strike the

Township's motion for summary judgment as not being properly supported by affidavits, and also ask that the motion for summary judgment be denied.

The parties have submitted extensive documentary evidence in support of their motions and have filed lengthy responses, replies and briefs in support of their positions. These materials are referred to below where material to the Board's disposition of the motions. The Board held an oral argument on September 13, 1999 on all issues raised by the motions of the parties. At the oral argument the Township withdrew Objection 3 of the Notice of Appeal which states that the Department abused its discretion by disapproving the Township's plan on the basis that Hammer Creek is an HQ stream.

OPINION

The Motions to Strike

The Township's motion to strike portions of the Corriveau affidavit will be granted in part, but the motion to strike the designated portions of the Department's motion will be denied. The motion to strike objects to designated portions of the affidavits on the ground that they are not statements of fact but are legal conclusions or argument beyond the knowledge or expertise of the witness. In the case of the principal Corriveau affidavit, paragraph 16 and all but the first sentence of paragraph 18 are legal conclusions or argument and are therefore stricken. The motion with respect to the Barron affidavit is now moot in view of the Township's withdrawal of Objection 3 of the Notice of Appeal at the oral argument.

While the Department's motion contains legal argument and may contain some misstatements of fact, the motion to strike the designated paragraphs will be denied. The Board will evaluate the contentions of law and fact set forth in the motion with the Township's response to the statements of fact contained in the designated paragraphs.

The motion of the Intervenors to strike the Township's motion for failure to be supported by an affidavit will also be denied. Rules 1035.1 through 1035.5 of the Pennsylvania Rules of Civil Procedure require that the motion be based on the "record." While this may include affidavits based on personal knowledge, no affidavit is required to be made in support of such a motion where the factual statements in the motion are otherwise supported by the record. If not supported by the record, affidavits based on personal knowledge are required, and the Board's rules only require that any affidavits made in support of a motion be filed with and attached to the motion. 25 Pa. Code § 1021.73(f). While the Township's motion is not completely supported by the record, it will not be stricken in its entirety.

The High Quality Stream Designation

Common to both motions of the parties is the question of the propriety of the designation of Hammer Creek as an HQ stream. Objection 3 of the Notice of Appeal charges that the Department abused its discretion in designating Hammer Creek as an HQ stream.

The withdrawal of Objection 3 at the oral argument renders the Department's cross-motion for summary judgment moot as to the original designation of Hammer Creek. The Department's motion at paragraph 36 appears to seek a summary judgment as to whether or not Hammer Creek

could be downgraded under the provisions of Chapter 93 of 25 Pa. Code. To the extent that it does so, that motion will be denied because the question of a possible downgrade of the stream is too closely related to the factual disputes arising from the Township's claim that the Department breached its duties to the Township in denying the Township's application. As indicated below, those factual disputes must be dealt with at a hearing on the merits of the Township's claims.

The Spray Irrigation Alternative

The Township's motion for summary judgment claims that the Department abused its discretion by concluding that spray irrigation was technically achievable in an area designated by the Township as GTS-21, when there is no evidence to support such a conclusion and the evidence contradicts such a conclusion. Motion, ¶183. The Township's memorandum of law goes further to claim that the Department concluded that the spray irrigation alternative *must be selected* and disapproved the plan for this reason. (Memorandum of Law, pp. 4-5). In support of this argument, the Township points to the *Pennsylvania Bulletin* notice which indicates that the Township's 537 Plan was disapproved because "[t]he cost of non-discharge alternative, spray irrigation, was found to be within 110 percent of the cost of the proposed discharge alternative. As per guidelines in effect at the time this plan was initiated, the non-discharge alternative should have been selected." 28 Pa. Bull. 4204 (1998).

The Department's 99-page response to the motion denies that it concluded that the spray irrigation alternative must be selected or that it concluded that the spray irrigation alternative was technically achievable. The Department's response denies that it has directed the Township to select

a particular alternative. Based on the Corriveau affidavit, it asserts that the Department only has authority to determine whether the plan complies with the applicable regulations, including the evaluation of alternatives. (Department Response, ¶6; Corriveau affidavit, ¶4-6). Mr. Corriveau states that the costs associated with the Township's proposed spray irrigation system were presented by the Township as being within 110 percent of the stream disclosure alternative. (Corriveau affidavit, ¶¶2, 55, 63). The Department acknowledged that it believed that the Township was obligated to select the spray irrigation alternative based on the materials contained in the Township's application. (Department Response, ¶165). However, the Department denies having made any independent evaluation of those costs or of the feasibility of spray irrigation. (Department Response, ¶¶34, 53, 54, 146, 148, 158, 165; Corriveau affidavit, ¶¶2, 29, 55).

Economic Feasibility. The actual cost comparison information submitted by the Township to the Department appears as part of the record in the Buchart-Horn Study of August 1977. That study concluded that the then proposed plant is only 1.5% less expensive than the best of the lagoon/land application alternative. (Township Appendix Vol. I, Tab 7, Corriveau Ex. 10). In addition, Exhibit 1 to the Sigouin affidavit contains a letter to Mr. Novinger of the Department from the Township's consultant, Mr. Michael S. Moulds, P.E. of Rettew Associates, Inc., dated August 13, 1997. That letter states on page 4:

> The spray irrigation alternative while within a 10% cost effective comparison of the stream discharge alternative, has a serious potential for increased cost due to land acquisition and potential site limitations.

In addition, Mr. Corriveau states in Exhibit 1 to his affidavit that the 1977 Buchart-Horn study submitted with the Township's applications in 1994 and 1998 indicated that the costs of the land application alternative to be within 1.4% of the costs of the recommended regional discharge system. At the very least, the evidence supports Mr. Corriveau's testimony and creates material issues of fact as to the basis for the Department's decision as to the economic feasibility of the spray irrigation alternative.

Technical Feasibility. Paragraph 197 of the Township's motion for summary judgment states that the Department abused its discretion "by concluding, either in contrast [sic] to the evidence or in the absence of evidence, that the spray irrigation alternative was technically achievable." The Township proceeds to argue in its memorandum of law that a determination of technical achievability cannot be done without specific information and field studies, including soil testing, hydrological analysis, geology assessment, topographic information, power lines, gas lines or other manmade improvements such as drainage tiles and other things. It points out that having this base of knowledge is critical because not all land is suitable for spray irrigation and the Department does not want municipalities using spray irrigation technology if it will result in other environmental problems. The Township goes on to argue that all this must be done before a determination can be made as to whether or not a technically achievable spray irrigation project is less or more than 110 percent of the direct discharge alternative. The Township's memorandum of law argues somewhat differently that the Department did not conclude that spray irrigation on GTS-21 was technically feasible, or in the alternative, that the Department (1) opined – contrary to the evidence or in absence of evidence – that

the spray irrigation alternative on GTS-21 was technically achievable; or (2) completely ignored the technical achievability requirement. (Memorandum of Law, pp. 7-12)

Nothing in these assertions presents a claim that the Department abused its discretion as a matter of law. Much of the Township's argument sounds to be precisely the Department's point: The Department needs to have precise information as to the feasibility of spray irrigation before it can determine whether or not a direct discharge would be permissible under its regulations at 25 Pa. Code § 95.1. After it has that information, which it has directed the Township to produce as a result of an appropriate study, the Department can then make a final determination as to whether or not spray irrigation is technically and economically feasible by applying, if appropriate, the 110 percent criterion. We see nothing wrong in the Department's requiring such a study by the Township. We see no merit in the Township's argument that the Department is bound, as a matter of law, to first make a determination as to whether a spray irrigation system is technically feasible before it can move on to the question of whether or not it is an economically feasible alternative. The Department's response indicates clearly that the Township has never submitted a proper study with respect to the feasibility of spray irrigation. Accordingly, nothing as a matter of law would require the Department to first make a decision on technical feasibility before it asks for a study to determine whether or not it would be both economically and technically feasible. (Department's Memorandum of Law, pp.10-14; Response to Township Motion for Summary Judgment, ¶¶145, 146)

The Township claims that the Department's response is contrary to the testimony given on deposition. It points particularly to the deposition testimony of Leon M. Oberdick, then manager

of the Department's Water Management Program. At that deposition, Mr. Oberdick testified in response to leading questions with respect to the *Pennsylvania Bulletin* notice that because the spray irrigation alternative proposed by Heidelberg Township was within 110 percent of the discharge, it should have been selected. The Township proceeds to argue that this is the equivalent of a finding that the spray irrigation alternative is feasible, and that the "finding" is not supported by the evidence. We see nothing inconsistent between Mr. Corriveau's affidavit and this testimony. Both are consistent with the conclusion that the Department based its decision on the materials submitted by the Township rather than on an independent evaluation.

More importantly, this argument cannot entitle the Township to an order from this Board directing the Department to approve the Township's plan for direct discharge to Hammer Creek. Nor do we think the Department's directive to the Township is unclear as a matter of law. The Department did not direct the Township to implement the spray irrigation alternative. Under the Department's letter denying approval, the Township is only directed to evaluate the spray irrigation alternative. The Department cannot direct the implementation of spray irrigation without evidence that it is technically and economically feasible. The Township itself claims that the Department has no such evidence. Accordingly, the Township is still free to demonstrate by way of further studies that spray irrigation is not economically or technically feasible. It would then be necessary for the Department to evaluate that information to determine whether or not spray irrigation is economically and technically feasible.

Regardless of what the witnesses may have said on deposition or in affidavits, the requirements of 25 Pa. Code § 95.1(d) seems to be clear. A direct discharge of additional pollutants into waters designated as HQ waters can be permitted only if the proposed facility utilizes the best available combination of treatment and land disposal technologies and practices for the waste where land disposal is economically feasible, environmentally sound and consistent with other provisions of the regulations. Accordingly, the Township's application materials may have left the Department with only a decision to require a proper evaluation of land disposal technologies. As indicated above, evidence from the Township's application indicated that the cost of spray irrigation was within 110% of the cost of discharge alternatives. The Department's evidence indicates that the Township's evaluation of spray irrigation has never been adequate under EPA Guidance. (Corriveau affidavit, ¶29) While a conclusion that the spray irrigation alternative should have been selected may carry with it a belief that it is technically achievable, there is evidence of record which supports the Department's denial of the application for the reasons stated. Accordingly, the existence of issues of material fact preclude the entry of summary judgment.

The Department as a Partner or Regulator

The Township's motion for summary judgment at paragraphs 184 and 185 states that the Department's review of an Act 537 Plan is a partnership that always involves interplay between the Department and the municipality. The Township contends that the Department abused its discretion by refusing to work as partners with the Township and disapproving the Township's plan without permitting the Township to submit additional information on the spray irrigation alternative.

The Township bases its claim of a partnership on provisions of the Sewage Facilities Act and on sections of the Department's regulations thereunder. That statute at 35 P.S. § 750.5(f) states that the Department is authorized to provide technical assistance to municipalities in *coordinating* official plans for a sewage system required by the Act. That Act at 35 P.S. § 750.10(19) also requires the Department to provide specific written reasons for its decision to any applicant whenever any plan application required by the Act has been returned because the Department has issued a denial. It specifically provides "such information shall specify the defects found in the submission, plan or permit application and describe the requirements which have not been met." We see no basis for a claim of partnership as a matter of law in those provisions. Finally, 25 Pa. Code § 71.32(b) requires the Department to act within 120 days after the submission of a complete official plan or official plan revision or supporting documentation. If the Department so fails to act under subsection (c), its failure to act will mean that the official plan is considered approved unless the Department informs a municipality prior to the end of 120 days that additional time is necessary to complete its review. That additional time may not exceed 60 days. That provision does not require the finding of a partnership as a matter of law.

The Department responds that the relationship is not one of a partnership but is a relationship between the Department as regulator and the Township as an applicant for an approval. In this relationship, the Department says it is bound to act under the terms of the regulations. The Department's evidence is that it has told the Township many times about the need for a proper examination of spray irrigation in accordance with a particular EPA Guidance, but that the Township

has never responded properly to those requests. (Department Response to Township's Motion for Summary Judgment, ¶¶44, 55, 56, 61, 63, 65, 96, 99, 139, 146, 148 and affidavits and deposition testimony referred to therein; Corriveau affidavit, ¶¶29, 60, 63).

It is true that the Department's review of an application involves a certain amount of interplay between the Department and the applicant. *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684. Unfortunately, the evidence in the record with respect to the nature of the relationship between the Department and the Township, what actually took place in the dealings between them and what certain actions by the Department meant with respect to ultimate approval of the plan, is conflicting. In view of these disputes of material fact, the motion for summary judgment as to the "partnership" claim will be denied.

A related claim advanced in paragraphs 186 and 187 of the Township's motion is the claim that the Department is estopped from relying on spray irrigation because the evidence demonstrates that the Department misled the Township into believing that spray irrigation was not a viable alternative that needed consideration. Proof of an equitable estoppel against a government agency requires proof by clear, precise and unequivocal evidence that the agency misrepresented a material fact and induced a party to act to his detriment, knowing or having reason to know, the other party would justifiably rely on the misrepresentation. *Bolduc v. Board of Supervisors of Lower Paxton Township,* 618 A.2d 1188 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied,* 625 A.2d 1195 (Pa. 1993); *Foster v. Westmoreland Casualty Company,* 604 A.2d 1131 (Pa. 1992). *See also*

Benco, Inc. of Pa. v. DER, 1994 EHB 168. A hearing on the merits of this claim is clearly required to determine whether the Township's proof can meet all of these requirements.

Our review of the evidence of record reveals marked disputes of material fact with respect to the Township's claim that the Department is estopped from requiring an evaluation of the spray irrigation alternative. The evidence relied upon by the Township indicates that the discussions between the Department and the Township focused on another alternative, that the Department never asked for information on spray irrigation, and that Mr. Corriveau specifically advised the Township that consideration of spray irrigation would be unnecessary. In response, the Department points to evidence that the issue of spray irrigation was raised in several letters in 1994, 1995 and 1997 and in meetings in 1995 and 1996. It was also an alternative included in the 1998 plan. The Department's deficiency letter of May 1, 1977 requesting comparisons of the costs of spray irrigation to the cost of discharge to the Lebanon system (Corriveau affidavit, Ex. 7) is alone sufficient to create an issue of material fact. Further, the possible need for the evaluation of a land disposal alternative is apparent from the provisions of 25 Pa. Code § 95.1(d).

Possible Justification of Direct Discharge

The Township claims in paragraphs 188-198 of the motion for summary judgment that the Department misapplied 25 Pa. Code § 95.1. A proper interpretation of this provision, according to the Township, means that the Department could not require an evaluation of spray irrigation without determining whether Hammer Creek is now an HQ stream, whether spray irrigation is technically and economically feasible, and without evaluating social justification for the discharge. The

Township claims that the Department improperly presumed that such a proper evaluation of these matters could not result in an approval of the proposed direct discharge to Hammer Creek. It also asserts that the Department abused its discretion in concluding without evidence that spray irrigation is feasible and in failing to conclude that the Township's plan met the requirements of 25 Pa. Code § 95.1. The Township's claims with respect to economic and technical feasibility have been dealt with above.

The HQ Designation. The Township claims in its memorandum of law that the Department abused its discretion in failing to conduct a study of the water quality of Hammer Creek when it had evidence that the upper portion of Hammer Creek was not deserving of its HQ designation. (Memorandum of Law, pp. 26-28) The motion does state at paragraph 93 that the subject of the HQ status of Hammer Creek and the potential downgrading of the stream was discussed but that the Department ignored this issue and did not specify how a redesignation process worked or the criteria for redesignation. The motion also refers to this subject in a footnote to paragraph 14 of the motion which states that Mr. Corriveau of the Department suggested that the water quality at Hammer Creek be assessed and that Mr. Barron of the Department was contacted to research the grounds for redesignating Hammer Creek. Nevertheless, the Township states that no testing was performed even though the Department has independent authority to petition for stream designation and even though the redesignation process only takes 18 months.

The Department admits that the Township's representative raised the issue of the HQ designation at the July 1995 meeting. The Department representatives took this merely as an idle

inquiry as to the validity of the designation. The Township presented no scientific evidence as to the propriety of the designation. In addition, the Department states that it did not refuse to specify how a redesignation process works and points out that this information is public as contained in the regulation at 25 Pa. Code, Chapter 23 (Department's Response to Township Motion for Summary Judgment, ¶93 and affidavits and deposition testimony referred to therein). More specifically, the Corriveau affidavit at paragraph 31 states that the Township's consultant had a copy of the 1992 Special Protection Waters Handbook which contains a thorough description of the regulatory downgrading process, the requirements for a petition and even a petition form and guidance for the completion of the petition form.

The Department's position is that it is not obliged to determine whether the HQ designation of Hammer Creek was valid. If that HQ designation is valid, the Department must act to maintain the quality of the stream. Accordingly, the Department claims it is not under a duty to re-examine the question of the validity of the designation every time the designation is applied in a permit or approval. The Board so stated in *Sanner Bros. Coal Co. v. DER,* 1987 EHB 202.

Nothing in the evidence described above gives us reason to believe that the Department had a duty as a matter of law to conduct such a study. Whether such a duty may have arisen under all of the factual circumstances can be determined only after a hearing on the merits. Accordingly, to the extent the parties rely on the subject of stream reclassification as a ground for summary judgment, their motions are denied.

Social Justification. The Department states that it is the duty of the Township to submit information sufficient to enable the Department to make a determination of whether or not there is a social justification for the discharge. The Department's regulations directly support the Department with respect to the burden in supplying information concerning social justification. The Department's regulations at 25 Pa. Code § 95.1(b) provide in relevant part that HQ waters "shall be maintained and protected at their existing quality or enhanced, unless the following is affirmatively demonstrated by a proposed discharger of sewage, industrial wastes or other pollutants." The first of these two demonstrations is:

> (1) The proposed new, additional or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of significant public value.

The second demonstration that the discharger must make under this subsection (b) relates to use and impact of the discharge on downstream users.

Subsection (d) of this regulation requires an additional showing with respect to land disposal. It provides:

> (d) A project or development which would result in a new, additional or increased discharge or discharges of sewage, industrial wastes or other pollutants into waters having a water use designated as "High Quality Waters" in § 93.9 will be permitted only in compliance with the requirements of subsection (b) and, furthermore, shall be required to:
>
> (1) Utilize the best available combination of treatment and land disposal technologies and practice for the wastes, where the land disposal would be economically feasible, environmentally sound and consistent with other provisions of this title; or
>
> (2) If the land disposal is not economically feasible, is not environmentally sound, or cannot be accomplished consistent with

> other provisions of this title, utilize the best available technologies and practices for the reuse and discharge of the waters.

The Department acknowledges that social justification may include a situation where a municipality has evidence of malfunctioning on-lot septic systems, but contends that this analysis is made only after it is determined that land disposal is not technologically or economically feasible. (Department Response to Township's Motion for Summary Judgment, ¶¶32, 50 and affidavits and deposition testimony referred to therein.) This is true in the sense that the question of social justification must also be considered at the later stage of the issuance of an NPDES permit. *Thornhurst Township v. DEP,* 1996 EHB 258.

While social justification must also be considered at the plan approval stage, the regulation at 25 Pa. Code 95.1 alone is not sufficient to tell us whether or not the "egg" of social justification comes before or after the "chicken" of the feasibility of land disposal. In addition, the Township's evidence does not require the Department to find that the discharge is justified as a matter of law under the Department's regulations. Resolution of these issues is clearly factual in nature and does not permit us to grant summary judgment to the Township.

Use of the 1982 Draft Proposal. Paragraph 199 of the Township's motion states that the Department abused its discretion by reviewing the Township plan under the 1982 draft Guidance rather than under the regulations and guidance "in effect" at the time of the Department's approval of the Township's Task Activity Report (TAR). The Department responds that it did not apply the Guidance except in conjunction with the applicable regulations where the Guidance did not conflict with the regulations.

We see nothing in the evidence of record or in the contentions of the parties that would suggest that the use of this Guidance for purposes of a 110 percent criterion for what is economically feasible under the requirements of 25 Pa. Code § 95.1(d) is unreasonable. Whether that is so in fact may be another question. Accordingly, the Township's motion for summary judgment on this ground is denied.

By contrast, the Township relies on this Guidance to claim that the Department abused its discretion by failing to determine whether or not the discharge from the proposed treatment plant would degrade Hammer Creek. (Notice of Appeal, ¶¶198, 195) The Township's memorandum of law claims that this is an abuse of discretion because the applicable regulation, 25 Pa. Code § 95.1, does not require consideration of land disposal alternatives unless it finds that the proposed discharge would actually degrade Hammer Creek. (Township Memorandum of Law, pp. 28-29). The Department responds that it could not consider whether or not the discharge would degrade the waters as the 1982 Guidance document proposed because it would contradict the regulatory requirement in 25 Pa. Code § 95.1. This provision of the regulation, according to the Department, does not permit a consideration of whether the discharge would degrade the waters until after the non-discharge alternatives are demonstrated to be infeasible. (Department Response, ¶90).

We see nothing in the record or in the provisions of the applicable regulation which indicates that the Department abused its discretion as a matter of law in not considering whether the discharge would degrade stream quality as the 1982 Guidance proposed. While any such consideration may be in violation of 25 Pa. Code § 95.1, consideration must also be given to the EPA's substitution on

December 9, 1996 of a anti-degradation policy for Pennsylvania which remained in effect at the time of the Department's denial of the Township's application. 61 F.R. 64832. That policy directed, among other things, that the Commonwealth shall assure that there be achieved the highest statutory and regulatory requirements for all new and existing point sources. It is not likely that the Department could consider the extent to which a discharge might degrade a water classified as HQ under that policy.[1]

Deemed Approval

The Township claims in paragraph 200 of the motion that the Department abused its discretion because the Township plan was deemed approved in 1994 by reason of the failure of the Department to act on the plan as then submitted within 180 days of its administrative completeness.

The Department responds that the deemed approved provision applies only to complete plans and the Township's plan was not complete. (Department Response to Township Motion for Summary Judgment, ¶¶200, 124 and deposition testimony referred to therein). Accordingly, summary judgment is not appropriate for this claim by the Township.

Accordingly, we enter the following:

[1] The Board was informed at oral argument that this EPA policy has now been replaced by the Department's new anti-degradation policy. 29 Pa. Bull. 3720 (1999).

COMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEIDELBERG TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 98-174-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, HEIDELBERG CITIZENS ALERT (HTCA) and ALLEN R. MAURER, Intervenors	:	

ORDER

AND NOW, this 24th day of September, 1999, in consideration of the cross-motions for summary judgment and related motions to strike, IT IS HEREBY ORDERED as follows:

1. Objection 3 of the Notice of Appeal relating to the original HQ designation of Hammer Creek is marked withdrawn.
2. Objection 16 to the Notice of Appeal relating to the Governor's Executive Order on farmlands is marked withdrawn.
3. The Township's motion to strike is granted and denied in part. The motion is granted with respect to paragraph 16 and all but the first sentence of paragraph 18 of the Corriveau affidavit. The motion is denied in all other respects, in part because the motion with respect to the Barron affidavit is now moot with the withdrawal of Objection 3 of the Notice of Appeal.

4. The Township's motion for summary judgment is denied.

5. The Department's cross-motion for partial summary judgment is denied in part because it is moot as a result of the withdrawal of Objection 3 of the Notice of Appeal.

6. A pre-hearing conference in this case is scheduled for **October 15, 1999**. Counsel should be prepared to discuss (1) the schedule for a hearing on the merits to commence early next year and (2) the scope of the hearing, including whether the Board should consider evidence as to the economic and technical feasibility of spray irrigation that was not before the Department at the time of its decision. The conference will be held at 10:00 a.m. in Hearing Room No. 1 at the offices of the Environmental Hearing Board, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: September 24, 1999

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

For the Commonwealth, DEP:
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Southcentral Region

EHB Docket No. 98-174-MG

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT K. GOETZ, JR. **d/b/a GOETZ DEMOLITION**	:	
v.	:	**EHB Docket Nos. 99-070-C, 99-095-C, and 99-136-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 30, 1999

OPINION AND ORDER
ON MOTIONS TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis

The Board grants three motions to dismiss appeals of inspection reports. The Board does not have jurisdiction over an appeal of an inspection report which merely lists alleged violations, and does not affect the recipient's preexisting rights or duties under the law.

OPINION

The Department of Environmental Resources (Department) has filed three identical motions to dismiss in appeals at EHB Docket Nos. 99-070-C, 99-095-C, and 99-136-C. All three matters are appeals filed by Robert K. Goetz (Appellant) challenging inspection reports issued to him by the Department. Appellant filed the appeal at EHB Docket No. 99-070-C on April 15, 1999, challenging a March 30, 1999, inspection report; Appellant filed the appeal at EHB Docket No. 99-095-C on April 30, 1999, challenging a April 14, 1999, inspection report; and Appellant filed the appeal at EHB Docket No. 99-136-C on July 16, 1999, challenging a June 18, 1999

inspection report. All of the relevant inspection reports allege that Appellants violated the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326. (Noncoal Surface Mining Act), with respect to certain activities he conducted at a site he operates in Franklin Township, Adams County.

On August 13, 1999, the Department filed identical motions to dismiss in all three appeals, as well as a supporting memorandum of law. The Department argues that we should dismiss Appellant's appeals because the Board's jurisdiction is limited to appeals of Department "actions" and inspection reports are not Department actions. Appellant failed to respond to the Department's motion.

We will grant the Department's motions to dismiss. Section 4(a) of the Environmental Hearing Board Act, 35 P.S. § 7514(a), provides, "The board has the power and duty to hold hearing and issue adjudications ... on orders, permits, licenses or decisions of the Department." The Board's own rules address the matter in more detail. They provide that a Department "action" is "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person...." 25 Pa. Code § 1021.2(a). The inspection reports that the Department issued to Appellant merely recite violations Appellant is alleged to have committed at the site. They do not direct him to pay a civil penalty, nor do they otherwise affect his personal or property rights, or his privileges, immunities, duties, liabilities or obligations. Where, as here, an inspection report merely lists violations, and does not affect the recipient's preexisting rights or obligations under the law, the inspection is not an "action" to which the Board's jurisdiction can attach. *Hapchuk, Inc. v. DEP*, 1992 EHB 1134, *Malak v. DEP*, EHB Docket No. 99-074-L (opinion

issued September 14, 1999). *See also Sunbeam Coal Corp. v. Department of Environmental Resources,* 341 A.2d 556 (holding that the Board lacked jurisdiction over appeals of Department notices of violation where the notices simply listed alleged violations committed by the recipients, and did not affect their preexisting rights or duties under the law).

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR.	:	
d/b/a GOETZ DEMOLITION	:	
	:	
v.	:	**EHB Docket Nos. 99-070-C,**
	:	**99-095-C, and 99-136-C**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 30th day of September, 1999, it is ordered that the Department's motions to dismiss are granted and Appellant's appeals at EHB Docket Nos. 99-070-C, 99-095-C, and 99-136-C are dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket Nos. 99-070-C,
99-055-C and 99-136-C

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 30, 1999

c: **DEP, Bureau of Litigation:**
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Harrisburg, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 8, 1999**

OPINION AND ORDER ON
MOTION TO QUASH
SUBPOENA OF DEPOSITION OF EXPERT WITNESS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

A subpoena to depose the Department's expert witness is quashed without prejudice because it is inconsistent with the Board's rules regarding the discovery of expert witnesses.

OPINION

Dauphin Meadows, Inc. ("Dauphin Meadows") appeals from the Department of Environmental Protection's (the "Department's) denial of Dauphin Meadows's permit application to expand its landfill. Dauphin Meadows served a deposition subpoena on Orth-Rodgers and Associates ("Orth-Rodgers"), a traffic consulting firm retained by the Department. The Department has moved to quash the subpoena because it is inconsistent with the discovery rules regarding expert witnesses who will be called to testify at the hearing on the merits.

In a slight departure from the Pennsylvania Rules of Civil Procedure, this Board's rules provide that expert reports and answers to all expert interrogatories need not be served until certain

specified times after the completion of factual discovery. 25 Pa. Code § 1021.81(a)(1) and (2). In all other respects, unless the Board orders otherwise, discovery regarding experts is governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.111(a).

The Rules lay out an orderly process for discovery regarding experts who are expected to be called as witnesses at the merits hearing such as Orth-Rodgers. The focus is not so much on the individual expert involved, but on "the facts known and opinions held" by an expert. If those facts and opinions were "acquired or developed in anticipation of litigation or for trial," a party who wishes to discover them must first serve interrogatories. Pa. R. Civ. P. 4003.5(a)(1). It is as simple as that. The responding expert must then either describe the facts and opinions to which the expert is expected to testify and the grounds therefor in the answers to the interrogatories, or supply a separate report that does the same thing. Pa. R. Civ. P. 4003.5(a)(1)(b). The Board may then order *further* discovery of the expert by other means (e.g. by deposition) upon cause shown. Pa. R. Civ. P. 4003.5(a)(2). Although the party who retains the expert is expected to pay the expert's fees for answering interrogatories, a party who wants to take the expert's deposition will often be required to pay fees and expenses that this Board deems appropriate. *See* Explanatory Note to Pa. R. Civ. P. 4003.5. Indeed, the financial implications associated with expert discovery are part of the justification for treating expert discovery separately from other forms of discovery.

In addition to the financial implications, the drafters of the Rules apparently believed that requiring the preparation of a detailed written report was more cost-effective and useful than conducting depositions in most cases. Even if a deposition is necessary, the deposition will be more guided and efficient if the questioner has had prior access to a written report. Thus, even the federal

rules of civil procedure, which now authorize expert witness depositions as a rule, provide that the deposition should follow the preparation and service of a report. Fed. R. Civ. P. 26(b)(4).

In seeking to prevent the deposition of Orth-Rodgers,[1] the Department emphasizes Orth-Rodgers's retention as an expert witness to testify in the litigation that the Department believed would inevitably follow its permitting decision. On the other hand, Dauphin Meadows emphasizes Orth-Rodgers's role in providing advice and support to the Department in the permit application review process itself. In truth, we think it is clear that Orth-Rodgers was retained to do both things. Indeed, the Department does not contend that Orth-Rodgers had no part in the permit review, and Dauphin Meadows does not seriously dispute that Orth-Rodgers was retained from the beginning at least in part as a potential expert witness. (Even if Dauphin Meadows made such an argument, we would reject it as contrary to the Department's uncontradicted affidavits to that effect.)[2]

Thus, we are presented with a situation in which the very same facts and opinions were acquired and developed both as an integral part of the underlying occurrences that are the subject of the appeal and in anticipation of litigation. As a result, many if not all of the cases that Dauphin Meadows relies upon are simply not helpful. *See, e.g., Nelco Corp. v. Slater Electric, Inc.*, 80 F.R.D. 411 (E.D.N.Y. 1978)(the inventor of a patented article who was *later* designated as an expert witness could be deposed on facts and opinions held *prior to* his involvement as an expert).

Dauphin Meadows argues that it should be permitted to conduct a partial deposition of Orth-

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[1] We are using the term "Orth-Rodgers" loosely to mean the firm itself and/or any of its employees or principals who are acting on behalf of the firm.

[2] The Department's claim is further bolstered by the fact that three lawsuits regarding the proposed expansion had already been filed at the time it retained Orth-Rodgers.

Rodgers now regarding Orth-Rogers's role in providing advice during the permit application review, while reserving its right at a later time to seek permission to conduct a second deposition regarding Orth-Rodgers's work following the permit denial. In other words, the expert discovery rules do not apply to Orth-Rodgers, even though it is indisputably an expert witness, because and to the extent that it also aided in the permit review process. We do not agree.

First, there is simply no logical basis for drawing a line between Orth-Rodgers's involvement prior to the permit denial and following the permit denial. Facts and opinions can be, and here, were, developed in anticipation of litigation prior to the Department's final action. In other words, development of facts and opinions in anticipation of litigation and prior to the Department's final action are not mutually exclusive concepts. We can sympathize with Dauphin Meadows futile attempt to draw a temporal distinction because there is really no other way to distinguish Orth-Rodgers work product as it relates to the permit review and as it relates to this Board's *de novo* review of the Department's action. In both cases, the work product is likely to be nearly the same. For Dauphin Meadows to assert that it will "only" depose Orth-Rodgers on the advice that it gave during the permit review process is somewhat disingenuous. Where, as here, the very same set of facts and opinions were acquired by an expert for use in the permit review and in bona fide anticipation of litigation, the expert discovery rules will apply.

Our conclusion is supported by the fact that Pennsylvania's expert discovery rule does not on its face create the interpretation espoused by Dauphin Meadows. It does not say that the facts and opinions must have been developed exclusively and for the sole purpose of being used in litigation. Even the comments to the rule only provide for an exception when the alleged "expert" is a defendant being sued for the improper exercise of his professional skills. Although one can

speculate that an additional Board-created exception might make sense where a given individual's factual role greatly predominates over his expert role, we see no indication that Orth-Rodgers fits that description. Indeed, quite the contrary appears to be true. Given the absence of an express exception in the Pennsylvania rule, we are hesitant to write our own.

There is a great deal of merit to treating a given individual in Orth-Rodgers's position as either an expert for purpose of the rules or not in the vast majority of cases. The likelihood of multiple depositions as threatened here is only one example of the inefficiencies that would result otherwise.

Dauphin Meadows suggests that allowing a party to denominate a person as an expert gives the party too much power and creates a potential for abuse by "shielding" that person from discovery. First, this Board always retains authority to control bad faith or unreasonable conduct. We see no evidence of that here. Secondly, Dauphin Meadows is not being deprived of the right to conduct full and complete discovery. No information is being "shielded." The issue raised by the Department's motion is more one of timing than of substance. Even though Dauphin Meadows cannot conduct an immediate deposition, it is entitled to receive detailed expert interrogatory responses and/or a report. If those responses are inadequate, or even if they are not, Dauphin Meadows can petition for the right to conduct a deposition, and this Board would be hard-pressed to deny such a request assuming appropriate financial arrangements are made. (The right to conduct reciprocal depositions of each party's experts without paying fees is one common and strongly encouraged financial arrangement that would be appropriate.) Dauphin Meadows can rest assured that no hearing will be held until both parties' needs in this respect have been duly satisfied.

Furthermore, with regard to Dauphin Meadows's claim of harm, it is important to be clear

about Orth-Rodgers's role in the permit review process. Orth-Rodgers was obviously not empowered to make any binding decisions or take any appealable actions itself regarding the permit application. That authority is vested in the Department. Orth-Rodgers was merely one of several resources called upon by the Department to assist *the Department* in making its final decision. Dauphin Meadows is not precluded from deposing Departmental personnel regarding how the Department used Orth-Rodgers's advice and how it affected the Department's review. Orth-Rodgers's prior reports, to the extent they were used by the Department in making its decision, are immediately discoverable, and the Department has not contended otherwise. We fail to see how Dauphin Meadows is being prejudiced by our decision to allow the deferral of Orth-Rodgers's deposition pending discovery in accordance with the rules.

Both parties cite *New Hanover Township v. DEP*, 1989 EHB 31, but that decision involved experts who were not identified as witnesses to be called at the hearing. An entirely separate discovery procedure applies to such experts. Pa. R.Civ.P. 4003.5(a)(3). Pointedly, a party is not necessarily required to start out with interrogatories for such an expert. The holding in *New Hanover Township* is not on point. Even if it were, the Board noted, in dicta, that the individuals involved might be considered fact witnesses despite the fact that they were *later* retained as experts. 1989 EHB at 34. As previously noted, that change over time does not exist in this case; Orth-Rodgers was retained as an expert witness in anticipation of and for use in litigation from day one.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of October, 1999, the Department's motion to quash the subpoena for the deposition of Orth-Rodgers and Associates is GRANTED without prejudice to Dauphin Meadows's right to petition this Board to conduct the deposition at a later date pursuant to Pa. R.Civ.P. 4003.5(a)(2).

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 8, 1999

See next page for a service list.

c: **VIA FAX & 1st class mail**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEFFERSON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 98-071-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 13, 1999**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO DISMISS AND IN THE ALTERNATIVE, MOTION TO DENY PETITION FOR SUPERSEDEAS WITHOUT HEARING

By George J. Miller, Administrative Law Judge

Synopsis:

The Department's motion to dismiss is granted. The Board has no jurisdiction over a municipality's appeal of an Order directing the municipality to implement a previously adopted and approved sewage facilities plan where the municipality contends that its official plan is unsuitable but failed to appeal the Department's prior approval of the official plan. The appropriate remedy under the Pennsylvania Sewage Facilities Act[1] is for the municipality to submit a revision to the plan for Department approval.

BACKGROUND

The Department of Environmental Protection (Department) originally issued an Administrative Order to Jefferson Township on May 19, 1989 (May 19 Order), which required the Township to: (1) adopt and submit to the Department within 90 days an

[1] Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20(a).

adequate Official Plan which addressed the total sewage needs of the Township; (2) develop the Official Plan in a format conforming with the Department's rules and regulations; (3) include in the official plan an adequate schedule and mechanism for the implementation and correction of all sewage needs in the Township; and (4) implement its Official Plan, as approved by the Department, according to the implementation schedule.

On June 12, 1991, the Department filed a petition to enforce the May 19 Order with the Commonwealth Court. On November 25, 1991, the Commonwealth Court approved a Consent Decree entered into by the Department and the Township which required the Township to develop and adopt an Official Sewage Facilities Plan Update Revision. Since the entry of the Consent Decree, the Department has approved three Official Plan Update Revisions previously adopted by the Township. The Official Plans were approved by the Department on April 17, 1992, February 9, 1996 and October 16, 1997.

On March 23, 1998, the Department issued an Administrative Order (March 23 Order) to the Township and the Jefferson Township Sewer Authority (Authority) requiring, among other things, the Township and the Authority to implement the October 16, 1997 Official Sewage Facilities Plan Update Revision by September 30, 1999. On April 22, 1998, the Jefferson Township Board of Supervisors (Township) filed a notice of appeal with this Board challenging the Department's March 23 Order and on May 12,

1998, the Township filed an amended notice of appeal.[2] In its notice of appeal, the Township asserts that its Official Plan is not suitable due to, among other reasons, excessive cost.

In April of 1998, the Department also filed a petition to enforce the March 23 Order with the Commonwealth Court. On May 13, 1998, the Commonwealth Court granted the Department's petition to enforce but stayed the implementation of the March 23 Order for 90 days unless the Environmental Hearing Board entered an order further staying implementation. *Department of Environmental Protection v. Jefferson Township*, No. 391 M.D. 1998 (Pa. Cmwlth filed May 13, 1998). The Board has stayed the proceedings until now. On April 6, 1999, the Township filed a petition for supersedeas and on May 18, 1999 filed an amended petition for supersedeas (collectively, petition). In support of its petition for supersedeas, the Township alleges that the Official Plan is unsuitable because, among other things, the plan is too expensive and is not necessary.

Currently before the Board is the Department's motion to dismiss appeal for lack of jurisdiction and, in the alternative, motion to deny petition for supersedeas without

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[2] On May 11, 1998, the Board consolidated this case with EHB Docket No. 98-070-MG, which involved the Jefferson Township Homeowners Association's (Association) challenge of the March 23 Order. On March 18, 1999, the Board issued an Order acknowledging the Association's withdrawal of its appeal and marking the appeal closed and discontinued. The Sewer Authority failed to appeal the Department's Order in spite of the fact that the Order was issued to both the Township and the Authority. A petition to intervene filed by the Sewer Authority was denied since the Authority failed to appeal the Department's Order and the petition was filed over a year after the Order was issued. *Jefferson Township v. DEP*, EHB Docket No. 98-071-MG (Opinion issued August 27, 1999).

hearing and supporting memorandum of law. The Township filed a memorandum of law in opposition to the motion[3] and the Department in turn filed a reply.

DISCUSSION

The Sewage Facilities Act requires each municipality to officially adopt and submit to the Department a plan for sewage services for all areas within its jurisdiction. 35 P.S. § 750.5. This official plan is to include an implementation schedule which designates the time periods within which the specific phases of the facilities or program will be completed. *Id.* The Department states in its motion that it has been working with the Township since November of 1983 to develop, adopt and implement an Official Plan in accordance with the Act and its corresponding regulations. The Authority has yet to adopt a resolution which was passed by the Township regarding the Official Sewage Facilities Plan Update Revision.

In its motion, the Department argues that the Board has no jurisdiction over the suitability of an Official Plan in an appeal of an order to implement the Official Plan. The Department also asserts that the petition for supersedeas is deficient. Because we are granting the Department's motion to dismiss, we do not need reach the merits of the Department's motion to deny petition for supersedeas without hearing.

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[3] Jefferson Township only filed a memorandum of law. The non-moving party is required to file a response to a motion setting forth in correspondingly-numbered paragraphs "all factual disputes and the reason the opposing party objects to the motion." 25 Pa. Code § 1021.70(e). *See Heidelberg Heights Sewerage Co. v. DEP*, 1998 EHB 538. Failure to respond to a motion in correspondingly numbered paragraphs may result in the sanction of the Board deeming admitted the well-pleaded facts in the motion, particularly where the Board cannot ascertain the factual disputes. *Id.* Here, the parties' factual disputes and arguments are readily discernible and the Board finds the error to be *de minimus*. We therefore decline to deem the moving party's allegations as admitted. 25 Pa. Code § 1021.4; *See Wayne v. DEP*, EHB Docket No. 98-175-R (Opinion issued June 10, 1999).

Failure to Appeal

The Board must view a motion to dismiss in the light most favorable to the non-moving party. *See Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995); *Tinicum Township v. DEP*, 1996 EHB 816. The Township asserts that in the four months during which the Official Plan was submitted to and approved by the Department, an election campaign was being held which culminated in the election of a new majority in Jefferson in November of 1997. The Township argues that the Department arbitrarily and capriciously rejected any criticisms of the Official Plan by not allowing the new majority of Supervisors to adopt or revise the Official Plan. In reply, the Department correctly states that its March 23, 1998 Order did not preclude the Township from revising its Plan.

Under Section 5 of the Act, 35 P.S. § 750.5(a), ". . . a municipality may at *any time* initiate and submit to the department revisions of the said plan." (Emphasis added) The Township had four months in between the elections in November of 1997 and the date when the Order was issued on March 23, 1998 in which to submit a revision to the Official Plan. The Township has had an additional year and a half since the March 23 Order was issued in which to submit a revision to the Official Plan. Yet the fact remains that the Township has failed to either develop a revision or implement any of the adopted and approved Official Plans.

The Commonwealth Court has held that where an appeal is filed as an attack to a previously adopted and approved sewage facilities plan, the only way to change that municipality's official sewage facilities plan is to follow the specific procedures set forth in Sections 5(a) and 5(b) of the Sewage Facilities Act by having the Township submit a revision to the plan for Department approval or pursuing a private request for a revision.

35 P.S. §§ 750.5(a), 750.5(b). *Carroll Township v. Department of Environmental Resources*, 409 A.2d 1378 (Pa. Cmwlth. 1980); *Kidder Township v. Department of Environmental Resources*, 399 A.2d 799 (Pa. Cmwlth. 1979).

The Sewage Authority in *Kidder Township* appealed a Department order to construct and operate sewage facilities described in a Water Quality Management Permit. The Authority argued that the plan was larger and more expensive than what was necessary to address the township's sewage disposal needs. The Commonwealth Court held that the remedy was for the township to revise its official plan in accordance with Section 5 of the Sewage Facilities Act, 35 P.S. § 750.5, rather than to attack the Department's order.

Similarly, in *Carroll Township*, the township submitted a comprehensive facilities plan to the Department which was subsequently approved and scheduled for gradual implementation. When the township decided not to implement the official plan, the Department issued an order directing the township to commence implementation. The township appealed the order, arguing that the plan was unsuitable. The Commonwealth Court concluded that:

> [T]he revision procedures of the [Act] provide an exclusive procedural course for a municipality which finds its official approved plan to be unsuitable . . . . Absent any attempt by the Township here to revise its official plan, therefore, we must also conclude that the Township here has not exhausted its administrative remedies under the [Act], and cannot appeal the [Department]'s order to implement its plan.

409 A.2d at 1381.

Jefferson Township neither appealed the Department's most recent approval of its Official Plan nor developed and submitted a revision to the Plan. If the Township

decided that its sewage facilities plan was unsuitable, the Township had ample opportunity to either challenge the Official Plan when it was being formulated or develop a revision to the plan. The record shows that no attempt was made to pursue either route. We recently held that this Board does not have jurisdiction to re-open, by way of an untimely appeal, a previously adopted sewage facilities plan which was approved by the Department. *Scott Township Environmental Alliance v. DEP*, EHB Docket No. 98-209-MG (Opinion issued June 17, 1999). We cannot permit the Township to challenge the Official Plan now that an enforcement action is being taken to implement it. The Board therefore has no jurisdiction over the present matter since Jefferson Township is attempting to attack the Department's approval of its Official Plan through an appeal of the Department's March 23 Order.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFFERSON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 98-071-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

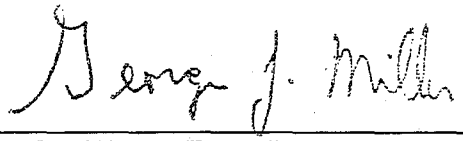
ORDER

AND NOW, this 13th day of October 1999, IT IS HEREBY ORDERED as follows:

(1) The Department's motion to dismiss and, in the alternative, motion to deny petition for supersedeas without hearing is **GRANTED**.

(2) The Department may now seek enforcement relief as granted by the Commonwealth Court in *Department of Environmental Protection v. Jefferson Township*, No. 391 M.D. 1998 (Pa. Cmwlth filed May 13, 1998), and the Board's pre-existing stay in accordance with the Commonwealth Court's Order of May 13, 1998 in the aforementioned memorandum and order is hereby **VACATED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 98-071-MG

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 13, 1999

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

HERBERT KILMER	:	
	:	
v.	:	**EHB Docket No. 98-102-L**
	:	**(Consolidated with 98-182-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: October 19, 1999**
PROTECTION	:	

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

An appeal from a compliance order that the Department vacated is dismissed as moot. The Board cannot grant any meaningful relief regarding an order that no longer exists. The Board has no jurisdiction to review a second order issued by the Department following the withdrawal of the first order because no appeal was filed from the second order.

OPINION

The Department of Environmental Protection (the "Department") issued a compliance order to Herbert Kilmer ("Kilmer") on May 14, 1998. The order cited Kilmer for conducting noncoal mining at a site in Harmony Township, Susquehanna County without a permit. The order directed Kilmer to cease mining and to either apply for a permit or reclaim the site. Kilmer filed a timely appeal from that order, which we docketed at 98-102-L. By a letter dated June 10, 1998, the Department vacated the order because it failed to cite Kilmer for operating without a license (as well

as without a permit) and because it gave Kilmer the option of applying for a permit when, in fact, Kilmer had no such option in the Department's view because he was considered to be a forfeited operator and was, therefore, unable to obtain a permit.

The Department then issued a second order regarding the same site that was the subject of the first order, which cited Kilmer for mining without a license and a permit and ordered him to reclaim the site. The Department did not afford Kilmer the right to apply for a permit in the second order. Kilmer did not appeal from the second order.

The Department now moves to dismiss Kilmer's appeal from the first order as moot.[1] The Department would have us focus exclusively on the first order. Indeed, neither its motion nor its brief even mentions that there was a second order. The Department apparently believes that everything that happened after the first order was vacated is irrelevant. Once the first order was vacated, there was nothing left for this Board to review, so the appeal became moot.

In contrast, Kilmer builds his case upon the second order. He argues that the second order was really just an "amendment" of the first order, so his appeal from the first order covers the second order. To require a "needless" second appeal would be an "unnecessary burden."

Unfortunately for Kilmer, it does not matter whether we focus upon the first or the second order, or more appropriately, view the totality of the circumstances. In any event, Kilmer's appeal must be dismissed.

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[1] Kilmer has also filed an appeal from an unrelated compliance order regarding another site. That appeal was originally docketed at 98-182-L, but was consolidated with the appeal under discussion (98-102-L). In light of our ruling on the Department's motion to dismiss, the appeals will be unconsolidated. Our ruling today does not affect 98-182-L.

When we focus upon the first order, we have no difficulty concluding that this appeal is moot. This Board cannot grant any meaningful relief because the order has been vacated. It no longer exists. It may as well have never existed. Because the order was vacated, it cannot serve as the basis for any future civil penalties or be considered in permit or license reviews. *Contrast Al Hamilton Contracting Co. v. DER*, 494 A.2d 516, 518 (Pa. Cmwlth. 1985) (appeal from order that was not withdrawn but was complied with is not moot because it would be considered in the appellant's compliance history). The order in this case is a complete nullity. Kilmer obviously has no liability or obligations regarding a nonexistent order. Ruling on the validity of an order that does not exist would be useless exercise, a matter of, at best, academic, historical interest. There is no case or controversy, and the Board's ruling would be merely advisory.

The Department's position is well supported by a long line of Board cases that are directly on point. *Power Operating Company v. DEP,* 1998 EHB 466, 468 (appeal from vacated provision in order moot); *Rannels v. DER*, 1993 EHB 586, 587 (appeal from rescinded order moot); *Farmer v. DER*, 1993 EHB 1842, 1844-45 (appeal from superseded order moot); *Magarigal v. DER*, 1992 EHB 455, 456 (appeal from rescinded order moot); *Avery Coal Co. v. DER*, 1991 EHB 146, 147 (appeal from superseded order moot); *Glenworth Coal Co. v. DER*, 1986 EHB 1348, 1350 (same). *But see Horsehead Resource Development Company v. DEP*, 1998 EHB 1101, 1103-04 (dicta). We could not rule in Kilmer's favor without overruling most of these earlier cases. For example, in language that is precisely applicable here, we stated in *Farmer* as follows:

> Where an order of DER is superseded by a subsequent order which renders the earlier order null and void, any appeal taken from the earlier order must be dismissed as moot.

1993 EHB at 1844, quoting *Avery*, 1991 EHB at 147. We see no reason to overrule this well-established, well-reasoned case law.

When the Department vacated the order, it deprived the Board of the ability to grant any meaningful relief. The inability to do anything meaningful beyond opining whether the Department made a mistake is the essence of the mootness doctrine. *Magarigal*, 1992 EHB at 456. If we suppose that Kilmer's substantive arguments are all correct and the order was issued in error, what relief could we grant? We cannot overturn an order that does not exist. The Department issuance of the order could have been an egregious error, but there is absolutely nothing we can do about it that has any practical significance.

Kilmer, however, in focusing on the second order, argues that the first order is not a nullity here because it was resurrected in the form of the second order. Although the Department characterizes its second order as an entirely separate and distinct action, Kilmer characterizes the two orders as two manifestations of the same action. In other words, the second order is merely an amendment of the first. The Department's stated act of vacating the first order should be disregarded. Therefore, as Kilmer's argument goes, Kilmer's appeal from the first order is sufficient to cover the reissuance of the second order.

There is no question that the second order was an appealable action in its own right. Kilmer could have and should have appealed the second order. Doing so would have required very little effort. Furthermore, had he done so, he would have had no incentive to contest the motion to dismiss that is now before us. All of his arguments would have been preserved. There would be no question of the Board's ability to grant effective relief. Kilmer's opposition to the Department's

motion, then, is really a request that he be excused from the second effort. Unfortunately for Kilmer, we see no good reason to excuse his failure to file a second appeal, and several good reasons not to.

Aside from the Board precedent that is squarely against Kilmer's position, were we to adopt Kilmer's argument, we would in effect be holding that this Board has jurisdiction to review a DEP action (the second order) even though it was not itself appealed. Requiring parties to file appeals from challenged actions goes to the heart of this Board's authority. We are neither a court of equity nor a court of general jurisdiction. We are an administrative agency with limited, defined jurisdiction charged with reviewing appeals that are brought before us. We do not have the authority to substitute our initiative for that of aggrieved parties.

Although we are not prone to elevate form over substance, Kilmer would have us ignore form altogether, which we are not willing to do, particularly given the fact that we are dealing with the Board's subject matter jurisdiction. We are not willing to write legal fiction. The Department did not take one action here, it took three: it issued an order, vacated that order, and issued a new order. It did not "amend' the first order. It was very clear in what it was doing.

Deciding when two Departmental actions should be treated as one puts us on a slippery slope. We think it would establish a dangerous precedent to hold that a party's appeal of one DEP action can, in effect, sometimes cover subsequent, similar acts of the Department. For example, if the Department issues a compliance order and follows it up with a permit suspension that expressly supersedes the prior order, and both the order and the suspension are based on the same set of facts and circumstances, would it be necessary to appeal the permit suspension? Most observers would not hesitate to conclude that an appeal would need to be filed from the suspension. This case is not

that different. In the first order, the Department gave Kilmer the option of applying for a permit, but it took that option away in the second order. In both the order-suspension situation and the order-order situation, the second action imposed a significantly harsher consequence for the wrongdoing.

It is not difficult to postulate other troublesome examples. Suppose the Department finds certain violations, issues an order to remediate, decides that no remediation is necessary, withdraws the order, but issues a civil penalty assessment for the past violations. Should an appeal from the superseded order be deemed to cover the follow-up civil penalty? We simply do not want to get in the business of making these types of determinations, particularly when it is such a simple matter to file a second appeal.

We are not imposing a particularly burdensome requirement when we hold that each Departmental action must be appealed separately. Filing a notice of appeal is a relatively straightforward procedure. If the two Departmental actions are very similar, the two notices of appeal will doubtless be very similar, and the second notice should require very little incremental effort. Similar appeals can readily be consolidated.

There is a great deal of value in maintaining certainty and clarity when it comes to defining this Board's authority. Holding that parties need only sometimes appeal from serial Departmental actions would mean that neither the Department nor the public can predict whether this Board will hold that subsequent DEP actions are really just resurrected versions of prior actions. It is much easier, clearer, and not the least bit burdensome to hold that each DEP action—even if it is similar to, repetitive of, or overlaps a prior DEP action – must be separately appealed.

Our holding does not create a serious potential for abuse. We do not believe the Department will as a result of our holding be encouraged to vacate and issue new orders in the hopes of trapping unwary parties into losing their appeal rights. We are not willing to ascribe such motives to the Department. Issuing multiple orders creates confusion and more work for all concerned, and we are confident that the Department will avoid issuing multiple orders in order to create confusion as to when an appeal should be filed.

Kilmer suggests that his failure to appeal the second order should be excused because he was acting without counsel at the time. Kilmer is now represented by able counsel, and Kilmer offers no explanation for his ill-considered decision to represent himself. Even if he did, absent a showing of bad faith or estoppel, which has not been attempted to be made here, or justification for allowance of an appeal *nunc pro tunc*, which also does not exist here, a party's motive for failing to file an appeal is irrelevant. The scope of our jurisdiction cannot turn on whether a party seeks the advice of counsel. We have repeatedly held that appellants opting to appear before this Board *pro se* assume the risk that their lack of legal expertise may be their undoing. *Santus v. DER,* 1995 EHB 897, 923; *Taylor v. DER*, 1991 EHB 1926; *Welteroth v. DER*, 1989 EHB 1017.

Kilmer seems to suggest that we can review the Department's findings in the first order (e.g that Kilmer is an operator) because those findings were repeated in subsequent Department actions and may have an impact on future Department actions. The argument has no merit. We cannot review Department findings independent of a Department action. If the findings are repeated in another action we can review them then, but we cannot deal with findings that are disembodied from an appealable action. Our statutory duty is to review actions, not findings. We have held in the

past that the existence of a simmering controversy because of an ongoing disagreement regarding a finding does not prevent a case from becoming moot when there is no appealable action pending. *Magarigal,* 1992 EHB at 456.

In short, there is simply no avoiding the conclusion that Kilmer's appeal from the first order was moot the moment that it was vacated, and we cannot rule on the findings in the second order because Kilmer did not appeal that order. Because we cannot grant any relief as to the first order and because Kilmer did not appeal the second order, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HERBERT KILMER	:	
	:	
v.	:	**EHB Docket No. 98-102-L**
	:	**(Consolidated with 98-182-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of October, 1999, the consolidated appeal docketed at 98-102-L is unconsolidated into two appeals docketed at 98-102-L and 98-182-L. The appeal docketed at 98-102-L is DISMISSED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 19, 1999

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

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Southcentral Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT K. GOETZ, JR. d/b/a GOETZ DEMOLITION	:	
	:	**EHB Docket No. 97-226-C**
	:	**(Consolidated with 97-147-C,**
v.	:	**97-224-C, 97-225-C, 98-115-C**
	:	**and 98-158-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 21, 1999

OPINION AND ORDER ON MOTION FOR COMPULSORY NONSUIT

By Michelle A. Coleman, Administrative Law Judge

Synopsis

A motion for nonsuit is denied. Under the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Surface Mining Act), the Department need not introduce evidence showing that an individual falls outside the exceptions to "surface mining" activity to make a prima facie case that he engaged in surface mining activity without a permit or license. The exceptions to the definition of "surface mining" activity are in the nature of affirmative defenses, and a party arguing that its conduct falls within one of those exceptions bears the burden of proof on that issue.

OPINION

This matter was initiated with the October 21, 1997, filing of a notice of appeal by Robert K. Goetz, Jr., (Appellant) challenging a noncoal inspection report the Department of

Environmental Protection (Department) issued on September 9, 1997. The report alleged that Appellant violated the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Surface Mining Act), in Franklin Township, Adams County. Among other things, the notice of appeal asserts that the inspection report is legally insufficient and factually inaccurate.

On December 16, 1997, pursuant to a Department motion, we consolidated Appellant's appeal of the noncoal inspection report with three other appeals he had pending before the Board: (1) an appeal challenging a June 6, 1997, noncoal inspection report identifying alleged violations at the site (docketed at EHB Docket No. 97-147-C); (2) an appeal challenging a September 19, 1997, civil penalty assessment (docketed at EHB Docket No. 97-223-C); (3) an appeal challenging a September 30, 1997, noncoal inspection report identifying alleged violations at the site (docketed at EHB Docket No. 97-224-C); and, (4) an appeal challenging a September 3, 1997, noncoal inspection report identifying alleged violations at the site (EHB Docket No. 97-225-C). We consolidated all four appeals at the instant docket number, EHB Docket No. 97-226-C.[1]

On May 3, 1999, pursuant to a second Department motion, we consolidated two other appeals Appellant had pending at other Board docket numbers: (1) an appeal challenging a May 20, 1998, noncoal inspection report identifying alleged violations at the site, and a June 2, 1998, compliance report (docketed at EHB Docket No. 98-115-C); and (2) an appeal challenging a July

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[1] The appeal of the September 19, 1997, civil penalty assessment has since been dismissed. *See, Goetz v. DEP,* EHB Docket No. 97-226-C (opinion issued February 12, 1999).

23, 1998, noncoal inspection report identifying alleged violations at the site, and a July 23, 1998, compliance report (docketed at EHB Docket No. 98-158-C).

Administrative Law Judge Michelle A. Coleman presided over a hearing on the merits on May 18, 19, and 28, 1999. Appellants filed a brief in support of compulsory nonsuit and an accompanying memorandum of law on July 6, 1999. On July 26, 1999, the Department filed a memorandum in response to the motion for compulsory nonsuit. On August 4, 1999, Appellant's filed a reply to the Department's response.

In its brief in support of compulsory nonsuit, Appellant argues that, to make a prima facie case, the Department had to not only prove that Appellant extracted minerals from the earth without first obtaining a permit or license, the Department had to also show that Appellant did not fall within any of the exceptions listed under the definition of "surface mining" at section 3 of the Act, 52 P.S. § 3303. According to Appellant, it is entitled to nonsuit because the Department failed to elicit any evidence showing that Appellant fell outside the "landowner" or the "building construction" exceptions.

In its response to Appellant's motion, the Department argues that it made a prima facie case that Appellant violated the Clean Streams Law, the Noncoal Surface Mining Act, and its regulations by refusing to allow Department inspectors onto his property to inspect the mine site; and that Appellant violated the Noncoal Surface Mining Act and its regulations by engaging in surface mining activity without first obtaining a permit or license from the Department, by refusing to reclaim the site, as required in a compliance order. The Department also argued that its prima facie case did not require evidence that Appellant's conduct fell outside the exceptions to the definition of "surface mining" at section 3 of the Noncoal Surface Mining Act, 52 P.S. §§

3303, because the Board held in *Linde Enterprises, Inc. v. DEP,* 1996 EHB 382, *aff'd* 692 A.2d 645 (Pa. Cmwlth. 1997), that those exceptions are in the nature of affirmative defenses, and, therefore, a party arguing that it falls within one of the exceptions bears the burden of proof on that issue.

In its reply, Appellant argued that portions of the Department's response relied on certain deposition testimony from Appellant, that the Department had agreed not to use that testimony for the purposes it did in the response, and that, therefore, the portions of the Department's response referring to the deposition should be stricken.[2]

Appellant is not entitled to nonsuit. Appellant premises his motion on the assumption that, to make its prima facie case against him, the Department had to not only prove that he extracted minerals from the earth, it had to also prove that he did not fall within any of the exceptions to "surface mining" listed in section 3 of the Noncoal Surface Mining Act. This assumption is incorrect. The Department did not have to prove that he fell outside these exceptions to make a prima facie case against him. The exceptions listed under the definition of "surface mining" are in the nature of affirmative defenses, and an appellant arguing that he falls within one of those exceptions bears the burden of proof on that issue. *Linde Enterprises, Inc. v. DEP,* 1996 EHB 382, 401. Therefore, the Department did not have to elicit evidence showing that Appellant fell outside the exceptions to "surface mining" to make a prima facie case against him.

---

[2] Appellant filed a motion for oral argument on this issue. We denied that motion in a previous opinion and order. *See Goetz v. DEP*, EHB Docket No. 97-226-C (opinion issued
(Footnote continued on next page.)

Since Appellant's motion for nonsuit does not turn on the testimony that the Department cited from his deposition, we need not rule on his request that we strike the references to his deposition testimony in the Department's response.

Accordingly, we issue the following order:

September 3, 1999).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR.	:	
d/b/a GOETZ DEMOLITION	:	**EHB Docket No. 97-226-C**
	:	**(Consolidated with 97-147-C,**
v.	:	**97-224-C, 97-225-C, 98-115-C**
	:	**and 98-158-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued:**
PROTECTION	:	

ORDER

AND NOW, this 21st day of October, 1999, it is ordered that Appellant's motion for nonsuit is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 21, 1999

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

ALBERT H. WURTH, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 98-179-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN WASTE OF BETHLEHEM, INC., Permittee and CITY OF BETHLEHEM, Intervenor	:	**Issued: October 21, 1999**

OPINION AND ORDER ON APPELLANTS' MOTION TO COMPEL DOCUMENT PRODUCTION AND TO EXTEND DEADLINE FOR THE FILING OF DISPOSITIVE MOTIONS

By George J. Miller, Administrative Law Judge

Synopsis:

The applicant for approval of transfer of a solid waste permit must disclose in discovery the compliance history of all solid waste processing or disposal facilities in Pennsylvania which it or related parties owned or operated at the time of the application or within the previous ten years whether those facilities were acquired through purchase of assets or shares of corporate stock.

BACKGROUND

This appeal is from the approval by the Department of Environmental Protection (Department) of the transfer of a solid waste permit from the City of Bethlehem to Eastern Waste of Bethlehem, Inc. (Permittee) pursuant to the provisions of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003. The motion seeks

additional information from the Permittee with respect to certain facilities acquired by it, or parties related to it, of waste processing or disposal facilities by means of asset acquisition, among other things. The response to the motion by Permittee indicates that it has supplied all the information required by the Department's regulations with respect to waste processing or disposal facilities that they acquired through purchase of shares of corporate stock. Appellants believe that under the Department's regulations they are also entitled to information with respect to the compliance history of any such solid waste processing or disposal facility which the applicant or a related party to the applicant acquired by asset purchase.

The compliance history of the applicant for a permit is relevant because of the "permit bar" provisions of subsections 503(c) and (d) of the Solid Waste Management Act, 35 P.S. § 6018.503(c) and (d). Subsection (c) authorizes the Department to deny or revoke a permit if it finds that the Permittee has shown a lack of ability or intent to comply with the Act or regulations or permits thereunder as indicated by past or continuing violations. Subsection (d) provides in relevant part as follows:

> Any person or municipality 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 or license required by this act unless the permit or license application demonstrates to the satisfaction of the Department that the unlawful conduct has been corrected.

The Department's regulations at 25 Pa. Code § 271.124, applicable to permit applications, is entitled "Identification of interests". It provides in subsection (e) as follows:

> An application shall identify the solid waste processing or disposal facilities in this Commonwealth which the applicant or a person or municipality identified in subsection (b) and other related parties to the applicant currently owns or operates, or owned or

> operated in the previous ten years. For each facility, the applicant shall identify the location, type of operation and State or Federal permits under which they operate or have operated. Facilities which are no longer permitted or which were never under permit shall also be listed.

This requirement appears to require the submission of the described information with respect to any such facility regardless of whether or not the facility was acquired by way of purchase of assets or shares of corporate stock.

Section 271.125(a)(6) of the Department's regulations requires specified compliance information for facilities and activities identified pursuant to § 271.124 of the regulations. Subsection (a)(6) provides as follows:

> For facilities and activities identified under § 271.124 (relating to identification of interests), a statement of whether the facility or activity was the subject of an administrative order, consent agreement, consent adjudication, consent order, settlement agreement, court order, civil penalty, bond forfeiture proceeding, criminal conviction, guilty or no contest plea to a criminal charge or permit or license suspension or revocation under the act or the environmental protection acts. If the facilities or activities were subject to these actions, the applicant shall state the date, location, nature and disposition of the violation. In lieu of a description, the applicant may provide a copy of the appropriate document.

As Appellants point out, nothing in any of these statutory or regulatory provisions make any distinction as to the means through which any such facilities were acquired.

The discovery rules under which Appellants have filed interrogatories and sought the production of documents provide 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 a claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not ground for objection that the information sought will be inadmissible at the trial if the

information sought appears reasonably calculated to lead to the discovery of admissible evidence. *See* Rule 4003.1(a) and (b) of the Pennsylvania Rules of Civil Procedure.

Many of the interrogatories filed by the Appellants seek information that is well beyond any permissible scope of discovery with respect to the compliance history of related parties as required by the Department's regulations, and the Permittee has objected to those interrogatories as being beyond the scope of proper discovery. For example, section 271.124 of the regulations requires disclosure of information only for "solid waste processing or disposal facilities in this Commonwealth. . . ." Many of the Appellants' interrogatories plainly relate to disposal facilities located elsewhere than in Pennsylvania. Our review of the documents submitted by the Permittee in response to the Appellants' proper discovery requests appear to properly respond to those requests except with respect to any waste processing or disposal facilities in Pennsylvania which the Permittee may have acquired by asset purchase which were owned or operated by the Permittee or related parties at the time of the application or in the previous ten years.

For purposes of this discovery motion we see no basis for the Permittee's apparent failure to provide information with respect to any such solid waste processing or disposal facilities in Pennsylvania which the applicant or other related parties acquired by asset purchase. The purpose of the Department's requiring information with respect to the compliance history of disposal facilities which were acquired by asset acquisition may have no relevance at all to whether or not the "permit bar" provisions of the Solid Waste Management Act should be applied. It may be that the Department only seeks background information on those facilities as a lead to future needs for enforcement. However, it may also be that the disclosure of the compliance history of disposal facilities which the applicant or the related parties owned or operated in the previous ten years may

lead to discoverable evidence with respect to the Permittee's ability or intent to comply with the Department's requirements under the Solid Waste Management Act.

Accordingly, the Permittee will be directed to produce for Appellants' inspection, to the extent it has not already done so, the compliance history documents required by 25 Pa. Code §§ 271.124 and 271.125 relating to all solid waste processing or disposal facilities in Pennsylvania which the applicant or other related party to the applicant either owned or operated at the time of the submission of the permit application or owned or operated in the previous ten years regardless of the means through which they were acquired. We note that "facility" is defined by the Department's regulations as "Land, structures or other appurtenances or improvements where municipal waste disposal or processing is permitted or takes place." 25 Pa. Code § 271.1.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALBERT H. WURTH, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 98-179-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN WASTE OF BETHLEHEM, INC., Permittee and CITY OF BETHLEHEM, Intervenor	:	

ORDER

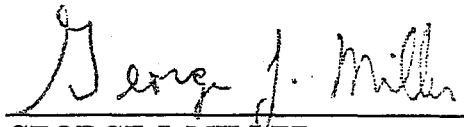
AND NOW, this 21st day of October, 1999, in consideration of Appellants' Motion to Compel Document Production and to Extend Deadline for the Filing of Dispositive Motions, IT IS HEREBY ORDERED as follows:

1. The Permittee is hereby directed to respond to Appellants' interrogatories and requests for production of documents by providing all documents relating to the compliance history (as defined by 25 Pa. Code § 271.125(a)(6)) of any solid waste processing or disposal facility in Pennsylvania which the Permittee acquired by asset acquisition which either it or other related parties to the applicant owned or operated at the time of the filing of the application or owned or operated in the previous ten years.
2. These documents shall be produced within 30 days of the date of this Order.

3. Appellants shall file any dispositive motion it may choose to file within 15 days of the Date of this Order, but may supplement their dispositive motion to account for additional discovery material obtained as a result of this Order within 20 days after that documentary evidence is served upon Appellants.

4. The Permittee, the City of Bethlehem and the Department need not respond to the Appellants' dispositive motion until the Appellants supplement their dispositive motion as permitted above or within 20 days after the time for filing any such supplement has expired.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 21, 1999

c: **DEP Bureau of Litigation**
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EHB Docket No. 98-179-MG

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RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 26, 1999

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT and MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion for summary judgment in an appeal of an administrative order for access to a contaminated property pursuant to the Hazardous Sites Cleanup Act. The Board finds that the Department was authorized by HSCA to enter the property for the purpose of evaluating the need for a remedial response.

OPINION

Before the Board is a motion for summary judgment filed by the Department of Environmental Protection which seeks dismissal of the claims raised in the notice of appeal filed by Ronald L. Clever (Appellant).

This appeal arose when the Department issued an administrative order dated April 16, 1998, which ordered the Appellant to provide access to a property located in the Borough of Marcus Hook, Delaware County, in order to assess the need for a response to a hazardous substance or contaminant,

pursuant to the Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. §§ 6020.101-6020.1305. On May 18, 1998, the Appellant filed a notice of appeal challenging the order on the grounds that he is not the owner of the property and that there is no contamination on the property to justify the Department's order. Specifically, the Appellant maintains that he is an attorney for clients who were the successful bidders for the property at a tax sale. He further maintains that the documentation relied upon by the Department is over ten years old and the Department has access to studies performed by the former owner of the property.

The Department filed a motion for summary judgment contending that (1) according to the information that is available to it, the Appellant is the owner of the property, and (2) the Department's order is fully authorized by HSCA.[1]

The Board's consideration of motions for summary judgment is governed by Rules 1035.1 through 1035.5 of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.73(b). The party moving for summary judgment has the burden of proving the non-existence of any genuine issue of material fact. *Kilgore v. City of Philadelphia*, 717 A.2d 514 (Pa. 1998). The record must be viewed in the light most favorable to the non-moving party. *Id.* However, the adverse party may not rest upon the mere allegations or denials of the pleading but must file a response within thirty days after service of the motion identifying one or more issues of fact arising from evidence in the record[2]

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[1] Disposition of these motions was delayed by the Appellant's filing of a petition for review in the Commonwealth Court of the Board's order denying his request for a temporary supersedeas. That court quashed the Appellant's appeal on August 13, 1999.

[2] The "record" for the purposes of summary judgment is defined as the pleadings, depositions, answers to interrogatories, admissions and affidavits as well as signed reports of expert witnesses. Pa. R.C.P. No. 1035.1. To the extent the motion is based on affidavits, they must be based on personal knowledge. Pa. R.C.P. No. 1035.4; *Heidelberg Township v. DEP*, EHB Docket

controverting the evidence cited in support of the motion. Pa. R.C.P. No. 1035.3. If the adverse party fails to respond to a motion for summary judgment as required by Rule 1035.3, or an examination of the motion and response indicate that there are no disputes of material fact, the moving party is entitled to judgment as a matter of law. *Washington v. Baxter,* 719 A.2d 733 (Pa. 1998).

We find that the Department's order was appropriate under HSCA. Section 503 of HSCA, 35 P.S. § 6020.503, authorizes the Department to issue orders requiring, among other things, entry onto a property. In reviewing such orders on appeal, the Board shall uphold an order where the Department 1) "has a reasonable basis to believe that there may be a release or threat of release of a hazardous substance or contaminant" and 2) the order is "reasonably related to determining the need for a response, to choosing or taking any response to otherwise enforcing the provisions of this act." 35 P.S. § 6020.503(f)(4).

The Department's evidence is that it had a reasonable basis to believe that there was a release of a hazardous substance or contaminant on the property. In support of this claim the Department has included as exhibits a series of reports and site assessments performed from 1984 to 1993. These exhibits document the existence of substances such as asbestos, PCBs, benzene, mercury, cadmium and others in the groundwater, soil, surface waters and other locations on the property. (Department Motion Exs. D, E, G, H, I)

Although the Appellant has denied the averments of the Department relating to the history of contaminants on the property, he has offered nothing in response to support his denials. The Rules of Civil Procedure provide an adverse party to a motion for summary judgment may not rest upon

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No. 98-174-MG (Opinion issued September 24, 1999); *Yourshaw v. DEP*, 1998 EHB 819.

the denials of the pleadings, but must come forward to "one or more issues of fact *arising from evidence in the record controverting evidence cited in support of the motion* . . . ." Pa. R.C.P. No. 1035.3(a)(1)(emphasis added). Here, the Appellant has not challenged the evidence adduced by the Department with any of own which shows that there is no contamination or that the Department does not have reasonable grounds to believe that there is a need for response as a result of the release indicated by the documents.

However, the Appellant does appear to argue that as a matter of law these reports can not provide a reasonable basis for the Department's action because they are not of recent vintage. We do not believe this fact alone is sufficient to defeat the Department's authority to act under HSCA. First, there is no limitation in HSCA which requires the Department to act within a certain amount of time upon discovering that there may be a release or threat of release of a hazardous substance. Second, the Appellant has not offered any evidence which shows that the substances identified in the reports are no longer present on the property because they have been remediated. Therefore, it is not unreasonable for the Department to conclude that if these substances were present historically they may still be present, and further investigation is required.

The Appellant also suggests, alternatively, that if the Department has this information there is no need for it to investigate the property. On the contrary, the Department must have complete and up-to-date information to appropriately evaluate the scope of the contamination and the need for response or enforcement. Clearly further investigation is reasonable and necessary.

In sum, we conclude that there are no material facts in dispute that the Department had a reasonable basis to believe that there may be a release or threatened release of a hazardous substance

and that ordering access to the property for further investigation is reasonably related to determining the need for a response. Therefore the Department's order was authorized by HSCA. 35 P.S. § 6020.503(f)(4).

Next, the Department contends that it is entitled to judgment in its favor because the order was properly directed to the Appellant. The Appellant contends that the Department's order is invalid because he is not the owner of the property in question.

Section 503(e) of HSCA imposes a duty of cooperation on owners or occupiers of land to allow the Department "access or right of entry and inspection as may be reasonably necessary to determine the nature and extent of the release of a hazardous substance or contaminant." 35 P.S. § 6020.503(e). Section 503(f) of HSCA further authorizes the Department to issue orders requiring access to such property. 35 P.S. § 6020.503(f). In its motion for summary judgment, the Department argues that the Appellant is the owner of the property according to the only indicia of ownership that the Department has been able to discover. In support of this contention the Department has proffered two exhibits: the tax sale receipt which names the Appellant, and recorded deeds to the parcels which name the Appellant as the grantee and the recipient of the tax bills for the property. (Department Motion Exs. A, B) In response to the motion for summary judgment the Appellant only includes his own affidavit maintaining that he is not the owner of the property, but merely represents those who are. At the same time he contends that he need not reveal the identity of the person for whom he acted despite a Board order requiring him to disclose that information in response to an interrogatory from the Department. *Clever v. DEP*, 1998 EHB 1174.

We hold that the Department's evidence of the Appellant's rights in relation to the site are

sufficient to make him an owner of the site for purposes of the Department's right to access under Sections 503(e) and (f) of HSCA. 35 P.S. §§ 6020.503(e)(f).

The property in question in this matter was purchased by the Appellant at a tax sale. The law surrounding these sales is governed by the Real Estate Tax Sale Law, Act of July 7, 1947, P.L. 1368, *as amended,* 72 P.S. §§ 5860.101-5860-803. Section 607 of the Act provides that, absent objections, "the sale shall be deemed to pass a good and valid title to the purchaser, free from any liens or encumbrances . . . ." 72 P.S. § 5860.607. Section 608 requires that a deed be provided to the purchaser, in the purchaser's name and recorded in the office for the recording of deeds. 72. P.S. § 5860.608. The Appellant protests that he is only a "bidder" and not a "purchaser," but provides no evidence from the record or legal basis for the distinction. At the very least legal title has passed to him as a matter of law. In the absence of his disclosure of the identity of the equitable owners, the Department's order directed to him was proper and not an abuse of discretion.[3] The Department is clearly entitled to judgment in its favor on this issue as a matter of law, and we therefore grant its motion. *See Washington v. Baxter*, 719 A.2d 733 (Pa. 1998); *Kilgore v. City of Philadelphia*, 717

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[3] By drawing an analogy from agency law, we could find in the alternative that the Department's order is valid even if the Appellant was not the legal owner of the property. It is black letter law that an agent for an undisclosed principal may be held personally liable for a breach of contract. For example, in *Shelly v. Gribben*, 54 A.2d 862 (Pa. Super. 1947), the court held that real estate brokers were personally liable for the return of hand money where the property was sold to another purchaser because they were acting as agents for the owner of the property whose identity was not revealed to the plaintiffs. *Id.* at 863. Similarly, in tort law a person who is injured by one acting as an agent for another may choose to recover against either the agent or the principal. *See Mamalis v. Atlas Van Lines, Inc.*, 528 A.2d 198, 200 (Pa. Super. 1987), *aff'd,* 560 A.2d 1380 (Pa. 1989)(explaining the doctrine of vicarious liability). Drawing from these doctrines, we believe the Department's order is proper even if the Appellant were not the legal owner of the property because he admits that he is acting as an agent for another whose identity is undisclosed.

A.2d 514 (Pa. 1998)(summary judgment may be granted where the right is clear and free from doubt).

We therefore enter the following:[4]

[4] The Department also filed a motion to dismiss this appeal as a sanction because the Appellant failed to answer interrogatories concerning the identity of his clients despite being ordered by the Board to do so. Due to our disposition of the Department's motion for summary judgment and the Appellant's submission of answers we do not reach the Department's motion to dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of October, 1999, upon consideration of the motion for summary judgment filed by the Department of Environmental Protection in the above-captioned appeal, it is hereby ordered that the motion for summary judgment of the Department of Environmental Protection against Ronald L. Clever is **GRANTED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-086-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 26, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MGS GENERAL CONTRACTING, INC.	:	
	:	
v.	:	**EHB Docket No. 99-059-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: October 28, 1999**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants the Department of Environmental Protection's Motion to Dismiss an appeal of a civil penalty assessment issued under Section 9.1 of the Air Pollution Control Act, 35 P.S. § 4009.1, where the appellant has failed to pre-pay the penalty as required by Section 9.1(b) of the Act. Where the appellant has promised to make payment, but failed to do so, on two occasions, and requested cancellation of a hearing on its financial ability to pre-pay, the appellant has waived its original claim of financial inability to pre-pay the penalty.

OPINION

MGS Contracting, Inc. (MGS) appeals from a civil penalty assessment issued by the Department of Environmental Protection (Department) pursuant to Section 9.1 of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4000 – 4106, at §

4009.1. The Department assessed a civil penalty of $7,500 against MGS for allegedly failing to provide requisite notification prior to demolishing a structure potentially containing asbestos material. MGS appealed the civil penalty assessment on March 24, 1999.

Section 9.1(b) of the Air Pollution Control Act, 35 P.S. § 4009.1(b), requires persons who wish to appeal a civil penalty assessment to either pre-pay the penalty or post an appeal bond with the Environmental Hearing Board (Board) within thirty days of notification of the Department's action, unless a claim of financial inability is asserted and established. In its notice of appeal, filed on March 24, 1999, MGS asserted a lack of financial ability to pre-pay the penalty or post an appeal bond. Because Section 9.1(b) of the Air Pollution Control Act, 35 P.S. § 4009.1(b), requires that a hearing be held within thirty days on a claim of financial inability to pre-pay a civil penalty, the Board scheduled a hearing on April 23, 1999 on MGS's claim. In addition, the parties agreed to a deposition of MGS's corporate designee on matters related to its financial inability to pre-pay.

On April 22, 1999, the parties submitted to the Board a Joint Motion to Cancel Hearing and For Order (Joint Motion). The Joint Motion stated that MGS agreed to forward the amount of the assessed penalty to the Board on or before May 24, 1999 if the deposition and hearing were cancelled. (Exhibit C to Department's Motion, paragraphs 7 and 8) The Joint Motion further stated that the parties agreed the appeal should be dismissed if MGS failed to forward the civil penalty amount to the Board by May 24, 1999. Based on the Joint Motion, the Board entered an order on April 22, 1999 canceling the hearing.

On or about May 21, 1999, MGS submitted a check to the Board, made payable to the Commonwealth of Pennsylvania, Clean Air Fund, in the amount of $7,500, the amount of the assessed civil penalty. The Board forwarded the check to the Department's Bonding Office for

deposit into the Commonwealth's financial accounts. Thereafter, the check was returned unpaid by MGS's bank for "Not Sufficient Funds." (Exhibit E to Department's Motion)

On August 16, 1999, the Department filed a Motion to Dismiss/Motion for Summary Judgment based on MGS's failure to prepay and further based on the terms of the parties' Joint Motion.

In its response to the motion, filed on September 7, 1999, MGS admits that its check was returned for insufficient funds, but denies that it intentionally submitted a bad check. It states, "due to an accounting administrative error and a delay of one (1) month in the check being submitted for payment, there were insufficient funds to pay the check. MGS was unaware of this administrative error until it was notified by the Department of Environmental Protection." The response further states that MGS would submit a certified check for $7,500 as a pre-payment of the assessed civil penalty in order to remedy the administrative error.

Following receipt of MGS's response, the Board held a conference call with the parties and on September 9, 1999 issued an Order stating, *inter alia*, "If the Appellant submits to the Board a certified check in the amount of $7,500 on or before Thursday, September 16, 1999, then the Department will withdraw its dispositive motion pending before the Board."

The Department subsequently filed a reply to MGS's response to its motion, stating that as of September 24, 1999, MGS still had not submitted pre-payment of the civil penalty.

The Board has given MGS every opportunity to comply with the pre-payment requirements of Section 9.1(b). Based on MGS's assurances that it would forward payment of the penalty amount by May 24, 1999, the Board cancelled the April 23, 1999 hearing on MGS's financial ability to pre-pay. After MGS's check was returned for insufficient funds, the Board gave MGS a second

opportunity to comply with the pre-payment provision of Section 9.1(b), and MGS assured the Board that it would submit payment by September 16, 1999. A review of the Board's docket on October 15, 1999 revealed that MGS still had failed to submit payment nearly eight months after the Department issued the civil penalty assessment. MGS's failure constitutes a violation of both the requirements of Section 9.1(b) of the Air Pollution Control Act and its obligations under the Joint Motion submitted to the Board on April 23, 1999.

Additionally, by agreeing to submit payment, first on May 24, 1999 and subsequently on September 16, 1999, and by further requesting a cancellation of the April 20, 1999 hearing, MGS has waived its argument of financial inability to pre-pay the penalty.

Section 9.1(b) states that where there is no allegation of financial inability, a failure to forward payment or an appeal bond shall result in a waiver of all legal rights to contest the violation or the amount of the civil penalty. 35 P.S. § 4009.1(b). Where an appellant fails to pre-pay a civil penalty pursuant to Section 9.1(b), its appeal may be dismissed. *Swartley v. DEP*, EHB Docket No. 99-017-L (Opinion issued April 28, 1999).

Based on MGS's repeated failure to submit pre-payment of the civil penalty pursuant to Section 9.1(b) of the Air Pollution Control Act, we find that MGS has waived its legal right to contest the violation and amount of the penalty. We, therefore, grant the Department's Motion to Dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MGS GENERAL CONTRACTING, INC.	:	
	:	
v.	:	EHB Docket No. 99-059-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of October, 1999, the Department of Environmental Protection's Motion to Dismiss is **granted**. The appeal of MGS General Contracting, Inc. is **dismissed**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 99-059-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 28, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BUDDIES NURSERY, INC.	:	
	:	
v.	:	**EHB Docket No. 98-165-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 4, 1999

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

Where the Department of Environmental Protection vacates the action that is the basis for an appellant's appeal and the Board has previously dismissed the appeal as to the only other party to the appeal, there is no action over which the Board may assert jurisdiction and the appeal is dismissed as moot.

OPINION

This matter involves an appeal from an administrative order issued by the Department of Environmental Protection (Department) on August 3, 1998 to Buddies Nursery, Inc. and Donald L. Pfeifer. Donald L. Peifer died on August 25, 1998. A notice of appeal was filed with the Board on September 1, 1998 on behalf of Buddies Nursery, Inc. and Donald L. Peifer. In granting a motion for summary judgment filed by the Department, the Board dismissed Donald L. Peifer's appeal, holding that a deceased person has no capacity to participate in legal proceedings. *Buddies Nursery, Inc. v. DEP*, EHB Docket No. 98-165-MG (Opinion issued February 26, 1999). Buddies Nursery,

Inc., therefore, is the sole appellant remaining in this matter.

On October 6, 1999 the Department filed a motion and supporting memorandum of law to dismiss the appeal as moot. Buddies Nursery, Inc. failed to file a response to the Department's motion. Under the Board's Rules at 25 Pa. Code § 1021.70(f), the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion. *Smedley v. DEP*, 1998 EHB 1281. Therefore, the facts set forth in the Department's motion are deemed admitted and are not in dispute. The Department's motion states that by letter dated September 13, 1999, the Department vacated the administrative order as to Buddies Nursery, Inc. (Department's Motion, Exhibit A) Based on this action, the Department contends that the appeal has become moot since the Board can no longer grant any effective relief. In reviewing the Department's motion, we must view it in a light most favorable to the non-moving party. *Florence Township v. DEP*, 1996 EHB 282.

A matter becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *In re Gross*, 382 A.2d 1000 (Pa. Super. 1980); *Moriniere v. DER*, 1995 EHB 395; *New Hanover v. DER*, 1991 EHB 1127. Here, the Department's action that was appealed by Buddies Nursery, Inc. has been vacated. Buddies Nursery, Inc. has therefore already obtained the relief sought. While counsel for the Appellants may wish that the Department's administrative order had also been withdrawn as to Donald L. Peifer, we have dismissed his appeal and therefore cannot grant relief as to that individual. Consequently, this appeal is dismissed as moot since there is no action over which the Board may assert jurisdiction. Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUDDIES NURSERY, INC.	:	
	:	
	:	
v.	:	**EHB Docket No. 98-165-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of November, 1999, it is hereby ordered that the Department's Motion to Dismiss is **GRANTED** and the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-165-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: November 4, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAWN ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO III	:	
v.	:	**EHB Docket No. 98-074-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	**Issued: November 23, 1999**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where a permittee has withdrawn its original plan approved under the Nutrient Management Act and the State Conservation Commission has approved a second plan, an appeal of the first plan is dismissed as moot since there is no effective relief which the Board can grant. Nor does this matter fall within the exception to the mootness doctrine, where a case is "capable of repetition, yet evading review." There is no evidence that the permittee has engaged in forum shopping or that such action is likely to occur in future proceedings.

OPINION

This appeal was filed by Dawn Ziviello, Angela J. Ziviello and Archimede Ziviello III (the Ziviellos), challenging the approval of a nutrient management plan submitted by Ting-Kwang Chiou

and Chiou Hog Farm, LLC (collectively, Chiou) pursuant to the Nutrient Management Act, Act of May 20, 1993, P.L. 12, 3 P.S. §§ 1701 – 1718. Chiou is the owner and operator of a hog farm in Bedford County. Pursuant to Section 6 of the Nutrient Management Act, 3 P.S. § 1706, operators of concentrated animal operations must develop and implement a nutrient management plan in accordance with the terms of the Act. Chiou's plan was approved by the Bedford County Conservation District, pursuant to authority delegated to it by the State Conservation Commission, on March 25, 1998. The Ziviellos appealed the plan approval on April 24, 1999.

In October 1998, Chiou filed a motion with this Board seeking a stay of the proceedings on the basis that it intended to amend its plan. The stay was denied in an Opinion and Order issued on October 27, 1998. *Ziviello v. State Conservation Commn.*, 1998 EHB 1138.

Subsequently, Chiou submitted a new nutrient management plan (the second plan) to the State Conservation Commission. The second plan was approved by the Commission on June 30, 1999. The Ziviellos appealed the second plan, and that appeal is docketed at EHB Docket No. 99-185-R.

Subsequently, Chiou's counsel notified the Board and the Bedford County Conservation District by letter that Chiou was withdrawing the first plan effective July 12, 1999. Based on the approval of the second plan and its withdrawal of the first plan, Chiou has filed a motion to dismiss the present appeal.

In their response, the Ziviellos oppose dismissal of the appeal. They argue that even though Chiou's second plan has been approved, the State Conservation Commission has taken no action to vacate the Bedford County Conservation District's approval of the first plan, and, therefore, Chiou retains the legal right to proceed under the first plan.

In reply, both Chiou and the State Conservation Commission note that neither the Nutrient Management Act nor the regulations, at 25 Pa. Code §§ 83.201 – 83.491, prescribe the manner in which a previously approved plan is to be withdrawn or require that further action be taken by the approving agency. They further point out that Chiou has made a binding judicial admission in its motion that it will not implement the first plan. The Commission further states that it considers the first plan to be no longer in effect and would take appropriate enforcement action if Chiou attempted to implement the first plan.

We agree with the State Conservation Commission and Chiou. Where an event occurs during the pendency of an appeal which deprives the Board of the ability to provide effective relief, the matter becomes moot. *Buddies Nursery, Inc. v. DEP*, EHB Docket No. 98-165-MG (Opinion on Motion to Dismiss issued November 4, 1999), p. 2. Here, Chiou has filed a letter with the Board stating that it has withdrawn the first plan. It has further represented to the Board in both its motion and reply that the first plan "was not and will not be implemented by Chiou." Finally, the State Conservation Commission has stated that it will take enforcement action against Chiou if it attempts to implement the first plan. There is no further relief which the Board can provide.

Nor does this matter fall within the exception to the mootness doctrine for those cases which are "capable of repetition, yet evading review." The Ziviellos argue that this case demands review by this Board because it one of first impression, capable of repetition. They assert "it is of highest public importance whether Permittee may 'forum shop' by obtaining a favorable but procedurally flawed determination on a deficient Nutrient Management Plan from a county conservation district and thwart the appeal by filing a substantially similar plan with the State Conservation Commission."

First, we see no evidence that "forum shopping" occurred here. County conservation districts may act only pursuant to the authority delegated to them by the State Conservation Commission in accordance with Section 4(8) of the Nutrient Management Act, 3 P.S. § 1704(8). Where such delegation of authority has occurred, the State Conservation Commission retains concurrent power to administer and enforce the Act. 25 Pa. Code § 83.241(e).

Second, as pointed out by the State Conservation Commission in its reply, this situation is akin to that in *Power Operating Co., Inc. v. DEP*, 1998 EHB 466. In that case, the Department of Environmental Protection (Department) had issued an administrative order citing the appellant for unlawful use of an access road for its coal mining activity. The appellant obtained a supersedeas from the Board. The Department then vacated those portions of the order dealing with use of the access road and moved to dismiss the appeal as moot. The appellant argued that the appeal fit into the exception to the mootness doctrine because the Department could continue to issue administrative orders, but withdraw them prior to a hearing. The Board rejected the appellant's argument, holding as follows:

> The fact that no legal impediment may exist to prevent future action does not, by itself, prevent the application of the mootness doctrine. In virtually every case dismissed on grounds of mootness – both before the Board and elsewhere – no legal impediment exists preventing repetition of the action or omission which is the subject of the case. However, the mootness doctrine still applies, absent some indication that the conduct is likely to recur and could evade review at that time. Although the Appellant contends that the Department could repeatedly issue and vacate orders with similar provisions, effectively denying Appellant an opportunity for review, there is no indication at this point that the Department intends to issue any subsequent order on the issue, much less multiple ones. If the Department issues such orders in the future, then vacates them, Appellant may have a more compelling case against applications of the mootness doctrine. At this stage, however, that contingency is

> sufficiently remote that it will not prevent application of the mootness doctrine.

Id. at 469-70.

Here, there is no indication that permittees are likely to engage in the type of conduct that the Ziviellos fear. If such actions do occur regularly in the future, that may present a compelling argument against application of the mootness doctrine. At this stage, however, there is no justification for the Board to adjudicate the merits of a plan which is no longer in effect.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAWN ZIVIELLO, ANGELA J. ZIVIELLO, And ARCHIMEDE ZIVIELLO III	:	
v.	:	**EHB Docket No. 98-074-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION, TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	

ORDER

AND NOW, this 23rd day of November, 1999, the above-captioned appeal is **dismissed**. This docket shall be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 23, 1999

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

For the Commonwealth, State Conservation Commission
Mary Martha Truschel, Esq.
Central Region

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David DeSalle, Esq.
RYAN, RUSSELL, OGDEN & SELT

For Permittee:
Mark Stanley, Esq.
Stacey L. Morgan, Esq.
Kevin M. French, Esq.
HARTMAN, UNDERHILL & BRUBAKER, LLP

mw

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PHILIP O'REILLY FOR NO-MART COALITION	:	
v.	:	**EHB Docket No. 99-166-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	**Issued: November 23, 1999**
MIKE SIEGEL	:	
v.	:	**EHB Docket No. 99-167-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	

OPINION AND ORDER
ON MOTION TO CONSOLIDATE

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

A motion to consolidate is granted where the appeals involve numerous common questions of fact and law. The Board may consolidate appeals pursuant to 25 Pa. Code §1021.80 in order to promote judicial and administrative efficiency, reduce the inconvenience of witnesses, and limit unnecessary cost and expense to the parties and the Board.

OPINION

The Department of Environmental Protection ("Department") and JDN Development Company, Inc. ("JDN") filed a joint motion to consolidate the appeals docketed with the Board at 99-166-L and 99-167-L. Appellants, Philip O'Reilly for No-Mart Coalition ("O'Reilly") and Mike Siegel ("Siegel"), oppose the motion claiming that their respective interests on appeal are distinct.

This Board may consolidate proceedings involving common questions of law and fact. 25 Pa. Code §1021.80. The decision to consolidate such proceedings rests within our discretion. *Columbia Gas v. DEP and Eighty-Four Mining Company et al.*, 1996 EHB 22, 24-25. Consolidation is designed to promote judicial economy and administrative efficiency, and limit unnecessary cost and delay to the parties and to the Board. *Barshinger v. DEP and Clocktower Woods, LTD,* 1996 EHB 1021, 1022.

Here, both appeals challenge the same NPDES permit issued to JDN for a construction project in Lower Macungie Township, Lehigh County. Although there is not a perfect overlap, the appellants raise many of the same challenges in their notices of appeal. The witnesses to be called in each matter are likely to be the same. Consolidation of these appeals will promote judicial economy and administrative efficiency and reduce inconvenience to witnesses.

Although this would appear to be an obvious case for consolidation, O'Reilly and Siegel contend that consolidation should be denied because their ultimate interests in this matter are distinct. Consolidation, however, is an administrative tool designed to increase efficiency. The act of consolidation does not limit the factual or legal arguments that the parties may raise, it simply provides that all of those arguments will be made in the same proceeding. We certainly are not limiting the ability of O'Reilly and Siegel to independently offer their factual observations and to present differing legal arguments on the issues set forth in the notices of appeal. O'Reilly and Siegel will not be prejudiced in any way by consolidating their appeals.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PHILIP O'REILLY FOR NO-MART COALITION	:	
	:	
v.	:	**EHB Docket No. 99-166-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	
MIKE SIEGEL	:	
	:	
v.	:	**EHB Docket No. 99-167-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 23rd day of November, 1999, the Joint Motion to Consolidate the appeals is GRANTED. The following caption and docket number shall be reflected on all future filings with the Environmental Hearing Board:

PHILIP O'REILLY FOR NO-MART COALITION and MIKE SIEGEL	:	
	:	
v.	:	**EHB Docket No. 99-166-L**
	:	**(Consolidated with 99-167-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **November 23, 1999**

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

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Northeastern Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ENTERPRISE TIRE RECYCLING	:	
	:	
v.	:	**EHB Docket No. 99-112-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 29, 1999**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003, clearly mandates that a permit is needed before a person can operate a residual waste processing or disposal facility. The appellant's assertions that it did not know it needed a permit and that it is in the process of applying for a permit are not valid defenses to a compliance order since ignorance is no excuse for violating the law and the Act requires that a permit must be obtained before conducting activities at the facility.

OPINION

Enterprise Tire Recycling (Enterprise) operates a waste tire processing facility located in Morgan, Pennsylvania. On June 1, 1999, Enterprise filed an appeal from a compliance order (Order) issued on May 12, 1999 by the Department of Environmental Protection (Department). The Order cited Enterprise for receiving, handling, and/or processing waste tires at its facility without having a

valid permit. (Department's Motion, Exhibit A) The Order required Enterprise to immediately cease accepting, handling and processing waste tires at the facility until Enterprise received a valid permit and to remove all waste tires from the facility until an appropriate permit is issued.

Currently before the Board is the Department's motion to dismiss and supporting memorandum of law. Enterprise failed to file a response to the Department's motion. Under the Board's rules at 25 Pa. Code § 1021.70(f), the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion. *Smedley v.* DEP, 1998 EHB 1281. Therefore, the facts set forth in the Department's motion are deemed admitted and are not in dispute. We must view the motion to dismiss in the light most favorable to the non-moving party. *See Ducjai v.* Dennis, 656 A.2d 102 (Pa. 1995); *Tinicum Township v. DEP*, 1996 EHB 816.

In its motion, the Department contends that the appeal should be dismissed since Enterprise raises no legally valid objections to the Department's Order. Enterprise raises only two objections in its notice of appeal: (1) it was unaware that it needed a permit; and (2) it is in the process of applying for an appropriate permit. Issues not raised by an appellant in a notice of appeal or an amended notice of appeal are deemed waived. 25 Pa. Code § 1021.51(e) and 1021.53; *Pennsylvania Game Commission v. Department of Environmental Protection*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989).

Section 301 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003, states:

> No person or municipality shall store, transport, process or dispose of residual waste within this Commonwealth unless such storage, or transportation, is consistent with or such processing or disposal is authorized by the rules and regulations of the department and no

> person or municipality shall own or operate a residual waste processing or disposal facility unless such person or municipality has first obtained a permit for such facility from the department.

35 P.S. § 6018.301.

The Act clearly mandates that a permit is needed *before* a person can operate a residual waste processing or disposal facility. Enterprise does not deny that the facility is a residual waste processing facility which is required by law to be permitted by the Department. Nor does it deny that it was operating the facility without a permit. Enterprise also does not challenge the reasonableness of the Department's Order or the Department's requirement that it obtain a permit.

Enterprise merely states that it did not know it needed a permit and that it is in the process of applying for a permit. Ignorance of the law's requirements is not a defense to a violation. *See Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board v. 302 Chelten, Inc.*, 459 A.2d 893 (Pa. Cmwlth. 1983) (fact that a liquor licensee was a novice in the restaurant business and was not aware that his activities were violations of the law did not excuse the violations); *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465 (fact that the appellant transported hazardous waste without realizing that it did not have a hazardous waste transporter license did not excuse the violations). The fact that Enterprise was not aware that a permit was necessary is not a valid defense to the Department's Order. Additionally, the fact that Enterprise is in the process of applying for a permit is not a valid defense. The permit should have been obtained prior to receiving, handling and/or processing waste tires at the facility. Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ENTERPRISE TIRE RECYCLING	:	
	:	
v.	:	**EHB Docket No. 99-112-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of November, 1999, the Department's Motion to Dismiss is hereby **granted.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 99-112-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **November 29, 1999**

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

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

HERBERT KILMER	:	
	:	
v.	:	**EHB Docket No. 98-182-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 30, 1999**

OPINION ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Department's motion to dismiss an individual's appeal from an order as untimely is denied where the Department stipulates that the individual filed his appeal within 30 days of the date that he personally received notice of the order.

OPINION

The Department of Environmental Protection (the "Department") issued a compliance order dated July 20, 1998 (the "Order") to Herb Kilmer ("Kilmer"), an individual. The Department has moved to dismiss Kilmer's appeal from the Order as untimely. The motion has been fully briefed.

We scheduled an evidentiary hearing for December 2, 1999 because we believed that unresolved questions of fact were raised by the Department's motion, and because the matter relates to our jurisdiction. On November 24, however, the parties jointly requested that the hearing be cancelled. They attached a stipulation of facts to their cancellation request, and stated: "The parties

believe this stipulation is sufficient to enable each to argue their respective positions concerning the 'timeliness' of Mr. Kilmer's appeal." By Order dated November 29, the Board granted the parties' request to cancel the hearing, accepted the stipulation for filing, denied the request for further briefing, and denied the Department's motion to dismiss. This opinion is written in support of our denial of the motion to dismiss.

The parties' stipulation is short and worth quoting in its entirety:

> 1. Compliance Order No. 98-5-063-N ("July 20, 1998 Compliance Order") was addressed to Herb Kilmer at RR 1 Box 331, Kingsley, PA 18826.
>
> 2. Herb Kilmer & Sons, Inc. Is [sic] a Pennsylvania corporation with a business address of RR 1 Box 331, Kingsley, PA 18826.
>
> 3. Herbert Kilmer is an officer of Herb Kilmer & Sons, Inc.
>
> 4. Herb Kilmer's usual place of business is Herb Kilmer & Sons, Inc.
>
> 5. Andy Wesolowski is an employee of Herb Kilmer & Sons, Inc.
>
> 6. Andy Wesolowski has accepted certified mail from the Department addressed to Herb Kilmer at the above address numerous time [sic] in the past two years.
>
> 7. The July 20, 1998 Compliance Order was sent via both certified and first class mail on July 20, 1998. The copy sent certified mail was received on July 21, 1998 as indicated by a certified mail receipt signed by Andy Wesolowski. The copy sent via first class mail was not returned.
>
> 8. Herb Kilmer filed an appeal of the July 20, 1998 Compliance Order within 30 days of the date that he personally received notice of the July 20, 1998 Compliance Order.

The operative rule is as follows:

> The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.

25 Pa. Code § 1021.52(a)(1).

Kilmer filed his appeal on September 14. It is stipulated that Kilmer did not receive actual notice of the Order until after August 15. Therefore, the only way that the Department can prevail on its motion to dismiss is to point to something that happened before August 15 that constitutes legal notice for purposes of starting the appeal period running, even though Kilmer did not receive actual notice.

Notice to a corporate entity is not at issue in this case. Whether service at an individual's residence is effective is also not implicated here. Regarding service at a place of business, we are not willing to hold as an absolute, blanket rule of law that sending notice to an individual's usual place of business automatically constitutes notice to that individual in all cases, particular where, as here, the Department is willing to stipulate that sending notice to the place of business did not effectuate actual notice to the individual. Even if we assume for purposes of discussion that such service would ordinarily create a presumption of notice, that presumption would have been overcome here by the Department's concession that Kilmer was not personally notified. Under the Pennsylvania Rules of Civil Procedure – which do not apply here but are useful for purposes of comparison – service at a person's usual place of business must be upon an agent or a person in charge of the office. Pa. R. Civ. P. 402(a)(2) (iii). If we were to adopt a blanket rule, service on a receptionist who immediately throws the document in the trash would automatically constitute notice to an individual who works at the same place. Such an unalterable rule is obviously inappropriate.

Even if we assume, again solely for purposes of argument, that notice to an individual's agent can in some cases suffice under the Board's rules, the evidence of record here falls far short of showing that service upon Wesolowski must be imputed to Kilmer. Neither the fact that Wesolowski

has signed for other certified mailings to Kilmer, nor the fact that Wesolowski is employed by a corporation of which Kilmer is officer, establishes any actual or apparent agency.

In the final analysis, we are left with the rather compelling stipulation that Kilmer filed this appeal within 30 days of when he was first personally notified of the Order. There is no basis on the truncated record before us, even assuming that the legal theories most favorable to the Department apply, for us to create a legal fiction that Kilmer was notified any earlier. Accordingly, the Department's motion to dismiss is denied, and this matter will be scheduled for a hearing on the merits.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: November 30, 1999

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

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

RAYMOND MALAK d/b/a NOXEN SAND & GRAVEL	:	
v.	:	**EHB Docket No. 99-080-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 30, 1999**

OPINION & ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

A motion for summary judgment is denied where there are open issues of fact and law regarding (1) the Department's administrative-finality claim, (2) the relevance of the appellant's alleged post-forfeiture regulatory violations, and (3) the continuing utility of this appeal in light of parallel Commonwealth Court proceedings.

OPINION

The Department of Environmental Protection (the "Department") issued a compliance order to Raymond Malak d/b/a Noxen Sand & Gravel ("Malak") on October 20, 1997 for mining off-permit. The Department issued another order for off-permit mining on October 31, 1997. On August 19, 1998, the Department forfeited Malak's bonds, revoked his permits, and informed him that he would not be able to obtain any permits in the future. Malak did not appeal.

One week later, however, on August 26, the Commonwealth Court issued an order pursuant to a stipulation of the parties. The order afforded Malak the opportunity to apply for a permit, notwithstanding the forfeiture letter, which could very well explain why Malak did not appeal the bond forfeiture.

Malak applied for a permit in accordance with the Commonwealth Court order. The Department denied the permit application on March 26, 1999. The only basis stated for the denial was that Malak's status as a forfeited operator prevented the Department from issuing the permit.

The Department has now filed a motion for summary judgment. The Department argues that Malak's failure to appeal the August 19, 1998 forfeiture letter precludes him from challenging the finding that he is a forfeited operator, and because that finding in turn served as the only basis for the permit denial, Malak is also precluded by the doctrine of administrative finality from challenging the permit denial.

The Department is not entitled to judgment as a matter of law on this issue. Notwithstanding the August 19, 1998 forfeiture letter, the Department entered into a stipulated order, which was approved by the Commonwealth Court, that specifically afforded Malak the right to apply for a permit. It would certainly seem that the Department's agreement to allow Malak to apply for a permit included an agreement on the Department's part to process the permit in good faith, notwithstanding the forfeiture letter. Otherwise, Malak would have been engaged in a futile exercise. Yet, when the Department eventually denied the permit, the only reason stated in the denial letter was Malak's status as a forfeited operator. We are finding it very difficult to jibe the Department's entry

into a stipulated court order that allowed Malak to seek a permit with its current position, which would suggest that Malak never had a chance. The possibility that development of a factual record will support an estoppel argument precludes the entry of summary judgment.

The Department's motion alludes to other alleged violations by Malak, such as ongoing illegal mining, but the relevance of those other alleged violations is an open question in light of the only stated basis for the Department's permit denial. The current record does not contain any evidence that the other violations were considered by the Department in denying the permit. Although our proceedings are *de novo* and we are not *necessarily* limited to the bases stated by the Department in support of its action, the parties have not had an opportunity to argue whether any other alleged violations, if proven, *should* be considered by the Board in reviewing the permit denial. This question, along with the administrative finality question, will require further elaboration as this appeal moves forward.

In short, given the current state of the record, it is clear that summary judgment is inappropriate. We have been advised in a status report filed by the Department, however, that the Commonwealth Court has recently issued a contempt order against Malak that requires Malak to stop mining and reclaim his site. We are not clear on whether that order has been appealed to the Pennsylvania Supreme Court. If the order is final and requires Malak to reclaim his site in all events, we do not understand the purpose of this appeal (which challenges the denial of a permit for a site Malak may not be able to mine in any event). The parties should be prepared to address how the Commonwealth Court case affects this appeal.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

RAYMOND MALAK d/b/a NOXEN SAND & GRAVEL	:	
v.	:	**EHB Docket No. 99-080-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of November, 1999, the Department's motion for summary judgment is DENIED.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: November 30, 1999

See next page for a service list.

EHB Docket No. 99-080-L

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES, PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R 95-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee and INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA AND DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	**Issued: December 3, 1999**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS PETITION FOR AWARD OF COSTS AND ATTORNEY'S FEES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the Commonwealth Court has determined that the Board's Adjudication, which remanded a portion of an appeal to the Department for further action, is not a final order, the appellant's Petition for Award of Costs and Attorney's Fees is dismissed without prejudice.

OPINION

This matter involves a consolidated appeal of the Department of Environmental Protection's (Department) approval of a permit revision to allow Eighty-Four Mining Company to longwall mine certain areas in Washington County. On July 2, 1999, the Board issued an Adjudication in this

matter. *See People United to Save Homes v. DEP*, EHB Docket No. 95-232-R (Consolidated) (Adjudication issued July 2, 1999). The Adjudication sustained the appeal of People United to Save Homes (PUSH) with regard to the issue of the adequacy of the $10,000 subsidence bond approved by the Department and remanded this matter to the Department for recalculation of the bond amount. The Adjudication dismissed PUSH's remaining issues.

On July 30, 1999, PUSH filed with the Board a Petition for Award of Costs and Attorney's Fees. PUSH sought to recover costs and attorney's fees pursuant to Section 5(g) of the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1 – 1406.21, at § 1406.5(g), and Section 307 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001, at § 691.307.

In addition to seeking attorney's fees, PUSH also appealed the Board's Adjudication by filing a Petition for Review with the Commonwealth Court on August 2, 1999. On or about August 13, 1999, Eighty-Four Mining Company filed its own cross-appeal with the Commonwealth Court and a Motion to Quash PUSH's appeal. In an order issued by Senior Judge Morgan on September 22, 1999, the Commonwealth Court granted Eighty-Four Mining Company's motion and quashed both PUSH's appeal and Eighty-Four Mining Company's cross-appeal on the basis that the Board's July 2, 1999 Adjudication was interlocutory and not immediately appealable pursuant to Pa.R.A.P. 311(f).

In a footnote, the order stated as follows:

> We note that upon calculation of the bond by the Department of Environmental Protection *and in the absence of any appeal of that calculation to the Environmental Hearing Board*, the Environmental Hearing Board's order of July 2, 1999 shall be deemed final and

> appealable. Any party aggrieved by that order may take an appeal to this Court within thirty (30) days of the date of finality.

(Emphasis added)

Following the court's ruling, the Department filed a Motion to Dismiss PUSH's petition for attorney's fees without prejudice on the basis that the Commonwealth Court had held that the Board's July 2, 1999 Adjudication was not a final order. Eighty-Four Mining Company notified the Board that it joined in the Department's motion. No response to the motion was filed.

Subsequently, by letter dated October 6, 1999, the Department notified Eighty-Four Mining Company that it had recalculated the subsidence bond and required Eighty-Four Mining Company to submit additional bonding in the amount of $2,140,498.50 to the Department. Eighty-Four Mining Company submitted the additional bond amount to the Department on October 21, 1999. On November 5, 1999, Eighty-Four Mining Company appealed the Department's calculation of the additional bond amount to the Board. This appeal is docketed at EHB Docket No. 99-225-R.

Before an appellant may recover attorney's fees and costs under the Mine Subsidence Act and the Clean Streams Law, the following must be established: 1) there is a final order; 2) the applicant for costs and fees is the prevailing party; 3) the applicant achieved some degree of success on the merits; and 4) the applicant made a substantial contribution to a full and final determination of the issues. *Big B Mining Co. v. Department of Environmental Protection*, 624 A.2d 713, 715 (Pa. Cmwlth. 1993), *appeal denied*, 633 A.2d 153 (Pa. 1993); *Raymond Proffitt Foundation v. DEP*, EHB Docket No. 98-020-R (Opinion issued March 26, 1999), p. 4-5.

Pursuant to the Commonwealth Court's ruling, the Board's July 2, 1999 Adjudication is not a

final order. Moreover, pursuant to footnote one of Judge Morgan's order, as long as there is an appeal of the Department's recalculation of the subsidence bond before the Board, our Adjudication is not final. Since Eighty-Four Mining Company has appealed the Department's recalculation of the subsidence bond, the July 2, 1999 Adjudication cannot be deemed a final order at this time. Because the July 2, 1999 Adjudication is not a final order, the first prong of the test for attorney's fees has not been met. Therefore, the Department's Motion to Dismiss is granted, and PUSH's Petition for Award of Costs and Attorney's Fees is dismissed without prejudice.[1]

[1] We note that PUSH can protect itself by petitioning to intervene in the companion appeal at EHB Docket No. 99-

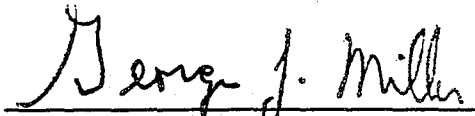
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES, PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R 95-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee and INTERNAITONAL UNION UNITED MINE WORKERS OF AMERICA AND DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	

ORDER

AND NOW, this 3rd day of December, 1999, the Department's Motion to Dismiss Appellant's Petition for Award of Costs and Attorney's Fees without prejudice is **granted**. PUSH's Petition for Award of Costs and Attorney's Fees is hereby dismissed without prejudice.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

225-R. In this way, it will have ample notice as to when the underlying Adjudication becomes final.

EHB Docket No. 95-232-R
(Consolidated with 95-233-R
95-223-R and 96-226-R)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: December 3, 1999

EHB Docket No. 95-232-R
(Consolidated with 95-233-R
95-223-R and 96-226-R)

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF CHAMBERSBURG	:	
	:	
v.	:	**EHB Docket No. 99-092-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** December 3, 1999

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies a Motion to Dismiss an appeal for lack of jurisdiction. The Board maintains jurisdiction over an appeal of a Department letter notifying an appellant that appellant owns a run-of-the-river dam and informing appellant of its duties under the Run-of-the-River Dam Act. The Notice of Appeal, when construed in the light most favorable to the appellant, challenges the Department's determination that the appellant owns a run-of-the-river dam.

OPINION

This motion arises from an appeal filed on April 30, 1999, by the Borough of Chambersburg (the Borough) challenging the Department of Environmental Protection's (Department) April 1, 1999, letter (letter) informing the Borough that it owns an Intake Dam (Intake Dam) located on Birch Run in Franklin Township, Adams County which the Department determined to be a run-of-the-river dam subject to the requirements of the Run-of-the-River Dam

Act, Act of June 18, 1998, P.L. 702, 30 Pa. C.S.A. §§ 3510-3512 (Run-of-the-River Dam Act). The Run-of-the-River Dam Act requires permitees and owners of such designated dams to meet specific time and place requirements for posting signage and buoys as regulated by the Fish and Boat Commission. *See* § 3510 (c) – (d).

On September 27, 1999, the Department filed a Motion to Dismiss the Borough's appeal and supporting memorandum of law arguing that the Board lacks jurisdiction over the appeal because the Notice of Appeal does not challenge the Department's run-of-the-river dam determination but rather, that portion of the Department's letter providing information regarding the requirements of the Run-of-the-River Dam Act. Further, on October 26, 1999, the Department filed a reply to the Borough's answer and supporting memorandum of law extending its argument that the Borough failed to appeal the run-of-the-river dam designation. In response to the Department's motion, the Borough filed on October 10, 1999, an answer and supporting memorandum of law arguing that the Board does have jurisdiction over its appeal because it has appealed the Department's determination that its Intake Dam is a run-of-the-river dam. We agree.

Jurisdiction

The Board has jurisdiction to review final determinations made by the Department. *See* the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, 35 P.S. § 7514; *Tussey Mountain Log Homes Inc. v. Department of Environmental Resources,* 1993 EHB 187, 188-89; *Borough of Ford City v. Department of Environmental Resources,* 1991 EHB 169, 171-72. The determination must "effect . . . the personal property or rights, immunities, duties, obligations or liabilities" of the appellant. *Tussey Mountain Log Homes Inc.* 1993 EHB at 188-89; *Borough of Ford City* 1991 EHB at 171-72. In

addition, the Board has jurisdiction over an appeal when a statute like the Run-of-the-River Dam Act specifically grants jurisdiction to the Board over certain actions or determinations. Under the Run-of-the-River Dam Act, the Department is required to "compile and maintain a current list of existing dams on the waters of . . . [the] Commonwealth that the department determines to be run-of-the-river type dams." 30 Pa.C.S.A. § 3510 (b) (1). "If the permitee or owner of the run-of-the-river dam disagrees with" the Department's determination, they may file a timely Notice of Appeal with the Board. 30 Pa.C.S.A. § 3510 (b) (2). Further, the Run-of-the-River Dam Act grants the Fish and Boat Commission the power to provide by regulation the size, content and location of signs and the buoys marking run-of-the-river dams. *See* § 3510 (d). Penalties for violating these regulations may be recovered in a civil action brought by the Fish and Boat Commission. *See* § 3510 (h).

In the instant appeal, the Department's letter expressly states that the Department determined that the Run-of-the-River Dam Act regulated the Borough's Intake Dam: "After reviewing inspection reports and other information contained in our file and after consultation with the local PFBC [Pennsylvania Fish and Boat Commission] field personnel, we have determined Intake Dam to be a run-of-the-river dam subject to the requirements of Act 91." The Act defines a run-of-the-river dam as:

> A manmade [sic] structure which:
>
> (1) is regulated or permitted by the Department of Environmental Protection pursuant to the act of November 26, 1978 (P.L. 1375, No. 325), known as the Dam Safety and Encroachments Act;
>
> (2) is built across a river or stream for the purposes of impounding water where the impoundment at normal flow levels is completely within the banks and all flow passes directly over the entire dam structure within the banks, excluding abutments, to a natural channel downstream; and

> (3) the department determines to have hydraulic characteristics such that at certain flows persons entering the area immediately below the dam may be caught in the backwash.

30 Pa. C.S.A. § 3510 (i). Therefore, the Board has jurisdiction over an appeal of the Department's determination of Intake Dam as a run-of-the-river dam; however, the Notice of Appeal must indicate that the appellant challenges the Department's run-of-the-river dam determination. *See* 25 Pa. Code § 1021.51 (e).

Notice of Appeal

The Board's rules require that the Notice of Appeal

> shall set forth in numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by appeal or an amendment thereto... shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection.

25 Pa. Code § 1021.51 (e). The Board lacks jurisdiction under section 1021.51 (e) if a party fails to appeal with the requisite specificity unless the appellant proves good cause. The Borough does not assert a good cause argument and therefore, we do not examine good cause on the merits.

The Department's Motion asserts that the Borough's Notice of Appeal does not challenge the Department's run-of-the-river dam designation, but rather the safety provisions outlined in section 3510 of the Act concerning the placement of warning signs and buoys around the dam. (Department's Motion, ¶ 10). In contrast, the Borough makes two arguments in its Memorandum of Law supporting its contention that its Notice of Appeal provides the Board with jurisdiction over its appeal. First, the Borough claims that because the only action it could appeal was the Department's run-of-the-river dam designation, its Notice of Appeal accordingly appealed that issue. Second, the Borough claims that it appealed the run-of-the-river dam

designation by virtue of the language in its Notice of Appeal stating, "[b]ut for the reasons stated above and the small size of the dam, we feel that the Chambersburg Intake Dam should not be required to comply with Act 1998-91 as history shows the dam is of little or no hazard to the public."

On its face, the Borough's Notice of Appeal fails to specifically state that it was appealing the Department's run-of-the-river designation. It reads:

> 1) An 8 foot high chain link fence with (3) rows of barbed wire on top surrounds the entire perimeter of the Intake Dam property. This fencing is also built over the Conococheague Creek preventing any access to the dam site via the stream.
>
> 2) Eight "no Trespassing" signs are also posted at strategic locations along the fence line to prevent entry into the Intake Dam area. We realize the dangers associated with low-head, run of the river dams. But for the reasons stated above and the small size of the dam, we feel that the Chambersburg Intake Dam should not be required to comply with Act 1998-91 as history shows the dam is of little or no hazard to the public.

However, the Board evaluates Motions to Dismiss in the light most favorable to the non-moving party. *See Tinicum Township v. DEP*, 1996 EHB 816, 821; *Solar Fuel Co., Inc. v. DER*, 1994 EHB 737, 741. Moreover, the Board will grant a Motion to Dismiss only when there are no material factual disputes and the moving party is entitled to judgment as a matter of law. *See Wheeling and Lake Erie Railway v. DEP*, EHB Docket No. 97-252-R (Opinion issued May 26, 1999) (citing *Smedley v. DEP*, 1998 EHB 1281, 1282). Consequently, we will not grant the Department's Motion to Dismiss because, when read in the light most favorable to the Borough, the Notice of Appeal does challenge the Department's determination that Intake Dam is a run-of-the-river dam, and it claims that the dam is of little or no hazard to the public. One of the principal hazards that the Act is aimed to eliminate is the risk that "at certain flows persons

entering the area immediately below the dam may be caught in the backwash." 30 Pa. C.S.A. § 3510 (i) (3).

Nonetheless, the Borough's Notice of Appeal is hardly a model of the specificity required by section 1021.51 (e) of the Board's rules. The Notice of Appeal should have simply stated that Borough was appealing the Department's run-of-the-river dam designation specifying the reasons why the Department erred in so classifying the dam under the definitional term of the Act. Notwithstanding these flaws, the Borough's objections are sufficient to create a material issue of fact, making dismissal of the appeal inappropriate. *See Wheeling and Lake Erie Railway v. DEP*, EHB Docket No. 97-252-R (Opinion issued May 26, 1999) (citing *Smedley v. DEP*, 1998 EHB 1281, 1282).

Accordingly, we must deny the Department's Motion to Dismiss the Borough's appeal and enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF CHAMBERSBURG	:	
	:	
v.	:	**BOARD Docket No. 99-092 MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of December, 1999, IT IS ORDERED that the Department's Motion to Dismiss the Borough's appeal for lack of jurisdiction is **denied.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: December 3, 1999

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER DAUPHIN AREA CITIZENS' ACTION COMMITTEE, Intervenor	:	**Issued: December 6, 1999**

OPINION AND ORDER ON PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

A senator's petition to intervene is granted based upon his personal stake in the resolution of traffic issues on a haul route where he maintains an office. The senator's participation is limited to that issue. The senator may not intervene on behalf of his constituents.

OPINION

Senator Jeffrey E. Piccola sent a letter to this Board on October 26, 1999 asking to be allowed to intervene in this appeal. The Board's Secretary informed Senator Piccola by letter dated October 28 that he would need to proceed in accordance with the Board's rules regarding petitions to intervene before the Board would be in a position to consider his request.

Senator Piccola sent the same letter back to the Board on November 3, except that his signature was now attested to by a notary public. Senator Piccola also attached certificates of service indicating that he had served copies of the letter on the parties in this appeal.

On November 10, Dauphin Meadows, Inc. moved to strike the Senator's letter on an expedited basis on procedural grounds because the letter fell short of a proper petition to intervene. On the same day that we issued an order directing Senator Piccola and the other parties to respond to Dauphin Meadows' motion (November 15), Senator Piccola filed an amended motion to intervene that addressed some of the defects raised in Dauphin Meadows' motion. On November 16, we issued a second order, which superseded our November 15 order and directed any party wishing to file an answer to Senator Piccola's amended motion to do so on or before December 1.

Dauphin Meadows filed an answer to the amended motion on November 30. The answer opposes the Senator's intervention. The Department and the existing intervenors have not filed a response to the Senator's motion.

We dealt with a legislator's standing in *Levdansky v. DEP*, 1998 EHB 571. Although *Levdansky* involved standing, the standards for permitting intervention and for conferring standing are the same, *Conners v. State Conservation Commission*, EHB Docket No. 99-138-L (Opinion issued August 20, 1999), Slip op. at 3, so *Levdansky* controls here.

In *Levdansky*, a State Representative appealed from DEP's issuance of a major permit modification for a landfill. Representative Levdansky claimed standing to appeal both as a legislator whose legislative district included the landfill, and as an individual who lived close to the site. We held that the Representative had no standing as a legislator, but that he did have standing as a neighbor of the facility. In language directly applicable here, we stated as follows:

> In order for Representative Levdansky to have standing to challenge the Department's action, he must demonstrate a direct, immediate and substantial interest in the litigation challenging that governmental action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). An interest is "direct" if the matter complained of caused harm to the party's interest. *Id.* An "immediate" interest is one with a sufficiently close causal connection to the challenged action. *Id.* A "substantial" interest is an interest in the outcome of the litigation which surpasses the abstract common interest of all citizens seeking compliance with the law. *Id.*
>
> The Commonwealth Court has applied the *William Penn* test to a legislator seeking to participate in a matter by virtue of his status as a legislator. *Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)....The Court held that legislators, as legislators, are only granted standing when specific powers unique to their functions under the Constitution are diminished or interfered with. The Court determined that "[s]ome other nexus must then be found to challenge the allegedly unlawful action." *Id.* at 881.
>
> The Board has held that a legislator has no personal stake in the outcome of the appeal where he is seeking to intervene in his capacity as a state representative and his interest is not direct, immediate and substantial. *Concord Resources Group of Pennsylvania, Inc. v. DER*, 1992 EHB 1563. While Representative Levdansky is permitted to participate as an *amicus curiae* in the capacity of a state legislator, his position as a legislator does not confer upon him any special status in proceedings before the Board; he must demonstrate an interest beyond any citizen's general interest. *Id.*

1998 EHB at 573-74.

We went on to hold that, although he lacked representational standing, Representative Levdansky had standing as an individual landowner because he lived close to the site. 1998 EHB 574-75. As a nearby landowner, Representative Levdansky could raise challenges regarding noise, odor, groundwater contamination, and improper closure.

Several paragraphs in Senator Piccola's amended motion to intervene relate to the Senator's capacity as a legislator representing citizens of northern Dauphin County who would allegedly be affected by any landfill expansion. (See, e.g., paragraphs 1, 2, 5, 12, 14, 16, and 18.) The motion expresses the Senator's understandable interest in championing the rights of his constituents. In

accordance with *Levdansky*, however, Senator Piccola may not intervene on that basis.

Several paragraphs in the Senator's motion state in various ways that Senator Piccola is knowledgable about the landfill and its history. (See, e.g., paragraphs 2, 3, 4, 6, 7, and 18.) While the Senator's knowledge may someday qualify him as a witness, that knowledge does not serve as an independent basis for allowing intervention.

Finally, the Senator states in the motion that he is a long-time tenant of office space in Elizabethville "on the doorstep of the most important haul route intersection approaching the landfill [State Routes 225 and 209]." (Paragraph 9.) He alleges that his work is affected by frequent traffic backlogs and noise caused by trash trucks. (Paragraphs 12, 13.) These allegations relate to Senator Piccola personally. Although it is true that the Senator's work at the office has to do with his legislative duties, these particular allegations relate more to the Senator's ability to work safely and effectively than they relate to the rights of his constituents. Although the work happens to be legislative, the situation is analogous to that of a business person whose ability to carry on her trade will allegedly suffer as a result of a Board decision. The business person is concerned at least as much with her own ability to work as she is with the convenience of her customers. In that respect, the allegations demonstrate that the Senator personally (as opposed to as a representative of others) has a direct, immediate, and substantial interest in the outcome of one aspect of the litigation. They qualify him as an "interested party" with the meaning of Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), and, therefore, entitle him to intervene in this appeal.

Pursuant to our authority to limit the issues as to which intervention will be allowed, 25 Pa. Code § 1021.62(f), Senator Piccola's participation as an intervenor in this matter will be limited to those factual and legal objections which relate directly to the allegations which justified his

intervention in the first instance. *See Conners, supra*, slip op. at p. 8 n. 5 and p. 10; *Estate of Charles Peters v. DER*, 1992 EHB 358, 366 (same principle regarding standing). Specifically, Senator Piccola may only be heard on traffic concerns on the haul route where his office is located that are alleged to be associated with the landfill expansion.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER DAUPHIN AREA CITIZENS' ACTION COMMITTEE, Intervenor	:	

ORDER

AND NOW, this 6th day of December, 1999, pursuant to 25 Pa. Code § 1021.62, Senator Jeffrey E. Piccola's Amended Motion to Intervene is GRANTED IN PART. Senator Piccola's participation as an intervenor is limited to presenting evidence and argument regarding the effect of the landfill expansion on traffic on the haul route that includes the intersection of State Routes 209 and 225. The caption is revised as follows:

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER DAUPHIN AREA CITIZENS' ACTION COMMITTEE and SENATOR JEFFREY E. PICCOLA, Intervenors	:	

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 6, 1999

c: DEP Bureau of Litigation
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bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VALLEY CREEK COALITION	:	
	:	
v.	:	**EHB Docket No. 98-228-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: December 15, 1999**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies three motions for summary judgment filed in an appeal from the Department's issuance of a National Pollutant Discharge Elimination System permit issued to the Pennsylvania Department of Transportation (Permittee) for storm water discharges relating to a highway construction project. The Appellant's motion is denied because there are material questions of fact concerning whether or not the water quality of an exceptional value watershed will be adversely impacted even though the Department may have failed to adequately consider certain factors such as the permanent nature of the pollution controls proposed by the permit and the cumulative impact of other similar discharge permits which have been issued for construction projects in the watershed. Similarly, the Permittee's motion is also denied because there are outstanding questions of material fact concerning the effect of the pollution control facilities on the water quality in the watershed. Finally, the Department's motion is denied because it

failed to sustain its burden of demonstrating that the Appellant does not have standing to pursue this appeal. Further the Board has jurisdiction to decide whether or not the Department abused its discretion in issuing the permit which permits construction of permanent facilities affecting storm water flow to an exceptional value stream even though the permit only regulates discharges from construction activities and not discharges which will occur after construction is completed and the permit term has expired.

BACKGROUND

Before the Board are motions for summary judgment filed by Valley Creek Coalition (Appellant),[1] the Department of Transportation (Permittee), and the Department of Environmental Protection (Department). These motions arise from an appeal filed by the Appellant on November 25, 1998, to a National Pollutant Discharge Elimination System (NPDES) permit issued to the Permittee by the Department. This permit authorized the discharge of storm water from construction activities related to a construction project on a section U.S. Route 202 in Treddyffrin Township, Chester County. The parties have completed discovery and have filed their expert reports[2] and now seek summary judgment.[3]

---

[1] The Valley Creek Coalition is composed of several organizations including the Green Valleys Association of Southeastern Pennsylvania; Open Land Conservancy of Chester County; Pennsylvania Environmental Defense Foundation; Raymond Proffitt Foundation; Schuylkill River Keeper; Valley Forge Chapter of Trout Unlimited; and West Chester Fish, Game & Wildlife Association.

[2] The Appellant notes that it may request additional discovery based on information in the expert reports which it alleges was not available during the discovery period. (Reply to the Department's Response to Motion for Summary Judgment and Response to Department's Motion for Summary Judgment, Section II.B, ¶ 6).

[3] Both the Permittee and the Department moved to strike the Appellant's motion

The NPDES permit was issued by the Department to the Permittee for storm water discharges related to construction activities for Section 402 of the U.S. 202, Section 400 project (Section 402 Project). Although not explicitly clear from the motions here, it seems that the Permittee proposes a plan utilizing a series of swales and basins, among other things, to control storm water runoff during the construction of the Section 402 Project. Many of these facilities are permanent and will remain in place even when the project has been completed. (See Permittee Motion for Summary Judgment ¶ 129) As described by the Appellant, the permit allows discharges from six different outfalls along U.S. Route 202. This permit incorporates by reference the approved Erosion and Sedimentation Control plans (E&S plans) as general effluent limitations. (Permittee Motion for Summary Judgment, Ex. A) No specific numeric effluent limits have been identified.

The Appellant filed a timely appeal of the issuance of the permit contending that the Department abused its discretion because, among other things, it failed to consider whether these permanent facilities will decrease infiltration (groundwater recharge) and increase runoff and pollutants into the watershed, resulting in a degradation of the water quality in contravention of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as*

---

for failure to comply with the Board's rules concerning motions for summary judgment. The Appellant requested and was granted leave to amend its motion by order dated October 21, 1999. The Department and the Permittee were also granted additional time to file supplemental responses and legal memoranda. The final briefs in these motions were received on November 18, 1999. The Department's response to the amended motion included a restatement of its cross-motion. Only Paragraph 37, including subparagraphs 1-57 are responsive to the amended motion. Since leave was only granted for a supplemental response to the amended material filed by the Appellant, we have disregarded the remaining material and the Appellant's response thereto which was included in the reply filed on November 18, 1999.

amended, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law), and the regulations promulgated thereunder.

The Appellant's amended motion for summary judgment contends that the Department abused its discretion in issuing the permit because (1) it improperly treated the discharge from the construction project to be a non-point source discharge rather than a point source discharge; (2) it improperly relied upon the initial review of this project by the Chester County Conservation District; (3) it made no independent review of post-construction discharges; and (4) it failed to consider the cumulative effect of all storm water discharges into Valley Creek, an exceptional value stream under the Department's regulations. Appellant argues that the construction of more impervious surfaces connected with the highway project will reduce infiltration to the ground water and result in increased flow of polluting substances to Valley Creek after construction is completed. Appellants seek a remand of the permit to the Department with instructions to evaluate under more stringent standards permanent discharges after consideration of other storm water discharges to Valley Creek and to require the Department to issue an NPDES permit for permanent discharges following the completion of construction.

The Department and the Permittee respond that (1) Appellant has no standing to appeal this action because there is no evidence that it has been injured; (2) that the Board has no jurisdiction to consider a failure of the Department to consider post-construction discharges since the issued permit relates only to discharges during construction; (3) that the construction project will not result in increased discharges to the stream; and (4) that there is neither a federal or state regulatory program requiring the issuance of an NPDES permit for storm water discharges related to highway construction. The Department also

denies that its review of the permit application and the action of the Chester County Conservation District was improper in any respect.

Both the Department and the Permittee have also moved for summary judgment. The Department claims that the Appellant has no standing to bring this appeal and that the Board has no jurisdiction to review matters relating to post-construction discharges when the permit issued by it relates only to discharges during construction. The Permittee contends that the construction permit complies with all relevant requirements and that the construction project will in fact improve infiltration and will reduce the flow of storm water to Valley Creek.

OPINION

The Board's consideration of motions for summary judgment is governed by Rules 1035.1 through 1035.5 of the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.73(b). The party moving for summary judgment has the burden of proving the non-existence of any genuine issue of material fact. *Kilgore v. City of Philadelphia*, 717 A.2d 514 (Pa. 1998). The "record" for the purposes of summary judgment is defined as the pleadings, depositions, answers to interrogatories, admissions and affidavits as well as signed reports of expert witnesses. Pa. R.C.P. No. 1035.1. To the extent the motion is based on affidavits, they must be based on personal knowledge. Pa. R.C.P. No. 1035.4; *Heidelberg Township v. DEP*, EHB Docket No. 98-174-MG (Opinion issued September 24, 1999); *Yourshaw v. DEP*, 1998 EHB 819. The adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response identifying one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion. Pa. R.C.P. No. 1035.3. If the adverse party fails to respond to a

motion for summary judgment as required by Rule 1035.3, or an examination of the motion and response indicate that there are no disputes of material fact, the moving party is entitled to judgment as a matter of law. *Washington v. Baxter,* 719 A.2d 733 (Pa. 1998); *Reading Anthracite Company v. DEP,* 1997 EHB 581.[4] The record must be viewed in the light most favorable to the non-moving party. *Kilgore v. City of Philadelphia,* 717 A.2d 514 (Pa. 1998).

The Department's Motion

The Department raises two challenges to the Appellant's appeal. First, it contends that the appeal must be dismissed because the Appellant lacks standing. Second, it argues that the Appellant's objections to the permit involve solely post-construction discharges and are beyond the Board's authority to review. We will first address the standing question.

We have held many times that it is the burden of the party moving for summary judgment to show that it is clearly entitled to judgment in its favor. *E.g., DePaulo v. DEP*, 1997 EHB 137. *See also Gambler v. DEP*, 1997 EHB 751(a moving party has a

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[4] We have overlooked many procedural deficiencies in the motions which are presently before us. 25 Pa. Code § 1021.4 (the Board may disregard any error or defect of procedure which does not affect the substantial rights of the parties). For example, the Department's response to the Appellant's motion does not precisely set forth all factual disputes in correspondingly numbered paragraphs as required by 25 Pa. Code § 1021.70(e). The Department also includes additional averments which are akin to a "new matter," and the Appellant explicitly includes a section entitled "new matter" in its response to the Permittee's motion. Neither the Board's rules nor the Rules of Civil Procedure provide for the use of a new matter to offer additional evidence in opposition to a motion for summary judgment. *See University Area Joint Authority v. DER*, 1994 EHB 1671. However, this material essentially repeats the factual allegations in support of their respective summary judgment motion, therefore we will not exclude it from our consideration. *Marilungo v. DEP*, EHB Docket No. 96-271-R (Opinion issued March 31, 1999).

duty to present its best case; the Board will not do so by default). Where a party seeks dismissal of another on the basis of standing, it is the moving party's burden to demonstrate that the appellant lacks standing to seek resolution of its appeal. *Seder v. DEP,* EHB Docket No. 98-058-MG (September 21, 1999); *City of Scranton v. DEP*, 1997 EHB 985. We find that the Department has failed to sustain its burden of demonstrating that the Appellant lacks standing.

The Department first argues that the appeal should be dismissed for lack of standing because there are no verifications in the notice of appeal which demonstrate the standing of the Appellant. This argument lacks merit. There is no requirement in the Board's rules requiring an appellant to aver facts sufficient to show that it has standing in its notice of appeal. *City of Scranton v. DER*, 1995 EHB 104; *County Commissioners, Somerset County v. DER*, 1995 EHB 820. A notice of appeal need only contain the appellant's objections to the actions of the Department. 25 Pa. Code §1021.51(e); *City of Scranton.* Accordingly, the fact that the notice of appeal does not demonstrate that the Appellant has standing does not mandate dismissal of the appeal.

The Department next argues that the appeal should be dismissed for lack of standing because the Appellant has not demonstrated its standing in its motion for summary judgment. As a procedural matter, there is no affirmative burden upon an appellant to demonstrate that it has standing in its own motion for summary judgment. However, the Department also argues that the Appellant is not "aggrieved" by its action in granting the permit. Since this properly challenges the standing of the Appellant to maintain this appeal, it has an obligation to produce facts supporting its standing in response to the Department's motion. *County Commissioners, Somerset County.*

Accordingly, we will next consider whether the Appellant is sufficiently aggrieved by the Department's issuance of the permit to maintain this appeal.

The Board recently reviewed the standard for determining whether an organization has standing to pursue an appeal:

> It is well-settled that an organization can have standing either in its own right or as a representative of its members. Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has been aggrieved by an action of the Department. To establish that a member has been aggrieved the Appellant must show that the individual has a "substantial" interest in the subject matter of the particular litigation, which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered.

Raymond Proffit Foundation v. DEP, 1998 EHB 677, 680 (citations and footnote omitted). It has been observed that the representation of individuals with similar aggrievement by an organization is particularly appropriate where there are a large number of potential parties. *Parents United for Better Schools, Inc. v. School District of Philadelphia,* 646 A.2d 689 (Pa. Cmwlth. 1994). In this case, the Appellant is an organization which represents several organizations. Logically, it would have standing if any one of its member organizations has standing either in its own right or derivatively through its members.

In response to the Department's motion for summary judgment the Appellant proffered evidence from the record in the form of answers to interrogatories and also affidavits from representatives of the organization of which the Appellant is comprised.

The evidence generally describes the organizational interests of the groups in the Valley Creek Watershed and that each group has members who use the creek and its watershed for various recreational and business activities. (See Reply to DEP's Response to Motion for Summary Judgment and Response to DEP's Motion for Summary Judgment Exs. 10 and 11) For example, in answers to interrogatories the Appellant stated that the Valley Forge Chapter of Trout Unlimited "has devoted considerable time, resources and money toward improving the quality of the Valley Creek Watershed." Some of these activities include education of the public, clean-up campaigns, funding of studies, and the possession of conservation easements with owners of land bordering the watershed. Further, the organization has members who fish the entire length of the watershed, and who "walk, jog, picnic, study the ecology, and generally recreate beside the Valley Creek Watershed." (Reply to DEP's Response to Motion for Summary Judgment and Response to DEP's Motion for Summary Judgment Exhibit 10 at 4-6; Ex. 11 (Affidavit of Carl Dusinberre)).

The Department has not challenged the interest of the Appellant in the Valley Creek Watershed or its use of the creek itself, but argues that its interest in the Department's action is not "direct" or "immediate" because of the absence of proof of any harm flowing from the Department's action and that the Board's review of the permit is limited to the discharges related to construction activities whereas the Appellant's only concern is the permanent discharges which may occur after the expiration of the permit.

We will not dismiss the Appellant for lack of standing at this time. The Appellant has objected to the permit issued by the Department on the basis that it abused its discretion in issuing the permit without considering the effect of the post-construction

discharges and the cumulative effects of other similarly issued permits which will harm Valley Creek and its watershed, which its members use and enjoy for a variety of purposes.[5] Regardless of the merits of the claim, it relates to the Department's decision to issue the permit. The purpose of the standing doctrine is to determine whether an appellant is the appropriate party to file an appeal from an action of the Department; it does not evaluate whether or not a particular claim has merit. *County Commissioner, Somerset County v. DER*, 1995 EHB 820; *cf. Parents United for Better Schools, Inc. v. School District of Philadelphia*, 646 A.2d 689, 691 (Pa. Cmwlth. 1994) (The purpose of the standing doctrine is to assure that the litigants have "alleged such a personal stake in the outcome of the controversy as to . . . sharpen the presentation of the issues. . . .") (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). We may ultimately find that the Department had no obligation to consider post-construction discharges, and deny the Appellant's request for relief, but that does not negatively impact its ability to seek relief in the first instance. Even if an appellant's position substantively lacks merit, it may nevertheless procedurally seek resolution of its appeal. Accordingly, the Department's motion for summary judgment on the issue of standing is denied.

We note, however, that the Permittee's expert reports submitted with its motion suggest that the Appellant may not be aggrieved because the construction activity will in fact increase recharge and decrease the flow of storm water to the stream. The Commonwealth Court has recently had occasion to emphasize the critical importance of a causal relationship between the claimed injury and the action in question. *George v.*

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[5] The Board has recognized that an aesthetic appreciation of, or enjoyment of an environmental resource can confer standing. *See, e.g., Blose v. DEP*, 1998 EHB 635;

Pennsylvania Public Utility Commission, 735 A.2d 1282 (Pa. Cmwlth. 1999); *see also Tessifor v. Department of Environmental Resources,* 682 A.2d 434 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied,* 693 A.2d 591 (Pa.1997). Accordingly, our denial of the Department's motion does not in any way affect the requirement that Appellant demonstrate at the hearing on the merits a direct and immediate interest in the Department's action.

The Department next argues that our review of this permit is limited to discharges related to construction activities, relying solely on this Board's decision in *Belitskus v. DEP*, 1997 EHB 939. Accordingly, it asks the Board to dismiss all issues other than those which directly relate to the discharges from construction activities. We do not believe our review is so limited and deny the Department's motion. The argument which the Appellant makes is that the Department erred by issuing the storm water permit without considering the permanent discharges and the cumulative effect of similarly issued permits, because to do so violates other laws of the Commonwealth. It should go without saying that the Department may not issue a permit under one program which violates the statute or regulations of another. *See Oley Township v. DEP*, 1996 EHB 1098. We believe it is well within our scope of review to consider such matters.

Our decision in *Belitskus v. DEP*, 1997 EHB 939, does not apply to the facts of this case. There, the appellants challenged the Department's approval of coverage under a general NPDES permit for the construction of a "chip plant." Yet, many of the objections raised in their notice of appeal related to the local municipality's decision to place the chip plant on the site in the appellant's neighborhood. We noted that the Board

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Belitskus v. DEP, 1997 EHB 939; *Barshinger v. DEP*, 1996 EHB 949.

does not review local land use decisions and stated:

> [The Appellants] would not have been able to litigate the land use issues before the Board. DEP's role, when acting under The Clean Streams Law, is limited to regulating the discharge of polluting substances from the land being developed. Thus, Appellants could only have litigated issues related to the control of polluting substances in the storm water run-off during construction.

Belitskus, 1997 EHB at 950 (citation omitted). Read in context, we do not believe that the language in *Belitskus* limits our review in the way the Department proposes. It merely contrasts the review of environmental issues to the related land use issues, such as zoning, which are not within the purview of the Board's jurisdiction. Accordingly, the Board dismissed the objections in the notice of appeal which were related to local land use decisions and not relevant to the Department's consideration of the application. *Belitskus* does not, as a matter of law, limit the Board's review of an NPDES permit for storm water discharges related to construction for reasons set forth below in the discussion of the Appellant's motion. Therefore, we do not believe that the *Belitskus* decision requires us to grant summary judgment in the Department's favor, and we decline to do so.

The Appellant's Motion

The Appellant explains that the focus of the its motion is the manner in which the Department issued this permit, rather than the factual question of the harm which may occur to the Valley Creek watershed. The Appellant argues that the Department abused its discretion because it failed to consider the effect of the permanent discharges on the Valley Creek Watershed, failed to apply its point-source discharge policy instead of the less stringent non-point source review, and failed to consider the cumulative effect of

similarly issued permits. Specifically, the Appellant contends that the swales and basins which will be constructed by the Permittee will remain in place after construction of the project has been completed resulting in permanent, unpermitted, unmonitored point source discharges. These discharges may ultimately result in the degradation of the water quality in the watershed in contravention of antidegredation regulations and other water quality laws. Similarly, the cumulative effect of discharges authorized by other construction permits may result in the degradation of the water quality. Accordingly, the Appellant requests the Board to remand the permit to the Department for further consideration. In addition, the Appellant's amended papers appear to urge that even the facilities' approval for construction by the permit are inadequate and that the issuance of the permit as a construction permit was an abuse of discretion. (Amended Motion for Summary Judgment, ¶¶ 49-54)[6]

The Department counters that the permit was properly issued as a construction permit and that it was not required to consider the impact of the constructed facilities on storm water flow. It argues that its sole duty in reviewing the permit application was the effectiveness of the controls proposed by the Permittee for the regulation of storm water discharges *during construction* of the Section 402 Project.

Contrary to the Department's narrow construction of its duties, we believe that the

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[6] The Appellant initially acknowledged that the permit adequately controls the discharge from construction activities. *See* Department Cross Motion for Summary Judgment and Appellant's response thereto. We need not reach the question now as to whether or not the Appellant is bound by this admission. We note, however, that the Appellant's expert, Thomas Cahill, has stated that there are no further measures that he would recommend with respect to the discharge from construction activities. (Deposition of Thomas Cahill, Ex. 2 to Department Response to Appellant's Amended Motion for Summary Judgment).

disputed factual issues and legal issues raised by the Appellant's motion are inextricably intertwined because it is clear that the permanent facilities constructed under the permit may have a continuing impact on storm water flow. Accordingly, we will not grant the relief which the Department seeks.

For purposes of the present motion, we believe that the Department's duties under the circumstances may not be limited to considering only the construction phase of the project. The General Assembly recognized the importance of the Commonwealth's water resources and has charged the Department with the duty to protect them:

> The department in adopting rules and regulations . . . in issuing orders or permits . . . shall in the exercise of sound judgment and discretion, and for the purpose of implementing the declaration of policy set forth in section 4 of this act, consider, where applicable, the following:
>
> (1)Water quality management and pollution control in the watershed as a whole;
>
> (2)The present and possible future uses of particular waters;
>
> . . . .
>
> (4) The state of scientific and technological knowledge . . . .

Section 5 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. § 691.5 (a)(footnote omitted). The declaration of policy of the Clean Streams Law emphasizes the importance of clean, unpolluted water for the prosperity of Pennsylvania and its citizens, and states that it is an objective of the act to prevent pollution and restore polluted waters to a clean, unpolluted condition. 35 P.S. § 691.4. As part of the program for achieving the objectives set forth in the Clean Streams Law, and following its legislative mandate, the Department has classified waters of the Commonwealth based on water uses which will be protected. 25 Pa. Code § 93.2. Certain waterways are identified as those requiring special protection, and are classified as High Quality Waters (HQ) or

Exceptional Value Waters (EV). 25 Pa. Code § 93.3.[7] The Valley Creek Basin is designated as Exceptional Value. 25 Pa. Code § 93.9f. Exceptional Value Waters are accorded the highest protection of any streams in the Commonwealth. The regulations of the Department require that they "shall be protected at a minimum at their existing quality." 25 Pa. Code § 95.1(c). Accordingly, the water quality of an EV water may not be degraded. It is with this principle in mind that the Department must consider proposed discharges into such waterways.

Storm water runoff is not generally considered a point source discharge requiring an NPDES permit. However, federal law requires that a storm water discharge from construction activity be treated as a point source requiring an NPDES permit. 40 C.F.R. § 122.26. The regulations of the Department provide for two types of NPDES permits: a general NPDES permit and an individual permit. General permits are issued for projects similar enough in nature to be regulated by standardized conditions. *See Belitskus v. DEP*, 1997 EHB 939. However, because the proposed project under review here involves a discharge into an exceptional value water, the Permittee was required to apply for an individual permit. 25 Pa. Code § 92.81(a).

The Department argues that there is no regulatory requirement that an NPDES permit is required for such discharges on a permanent basis with discharge limits and required monitoring as the Appellant claims. We note that the structure of the Clean Streams Law is to require permits for discharges of industrial wastes and sewage. With respect to other discharges, Section 402(a) of the Clean Streams Law, 35 P.S. §

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[7] Sections 93.1, 93.3, 93.4, 93.7 and 95.1 of the Department's regulations were amended effective July 17, 1999. 29 Pa. Bull.3720.

691.402(a), merely authorizes the Department the require permits or other conditions for the activity causing other discharges that may create a danger of pollution. The Department points out in its Reply to Appellant's Amended Response to the Department's Cross Motion for Summary Judgment that EPA's recently promulgated Phase II storm water permitting regulations were only published in the Federal Register in December 8, 1999 and are not scheduled to become effective until February 7, 2000. Even they do not contain provisions which would include post-construction discharges. We also note that the Appellant's practical suggestions for solving the problem of permanent structures are in the nature of best management practices rather than a practical suggestion as to facilities for monitoring against effluent limits in a permit.

However, the possible absence of a legal requirement for a permit with effluent limits may not be dispositive of the Appellant's claim that the Department was required to give consideration to the effect of the permanent facilities on storm water discharges in deciding under what conditions the construction of these highway facilities would be authorized. Indeed, the absence of any program for the permitting of discharges from the permanent facilities may be a factor the Department should consider in deciding what conditions it should impose in the construction permit. The Department does have a duty under the Clean Streams Law and its regulations to maintain the water quality of the Valley Creek Watershed. Where it receives an application for storm water discharges for construction activities which does not propose only *temporary* controls, but also *permanent* fixtures which affect storm water discharge and which will remain in place after the conclusion of construction, it may be that it must at least consider the effect those permanent fixtures will have on the water quality of the receiving waters. The

Department can not properly perform its duty to protect the environmental resources of the Commonwealth by reviewing permit applications in a vacuum. *See Oley Township v. DEP,* 1996 EHB 1098.

Further, the Department admits that it did not consider the cumulative effect of all storm water discharges in the watershed.[8] It is unclear whether it failed to give *any* consideration to the discharges which may occur after the term of the permit has expired. Even though it does not appear from the evidence that the Department explicitly considered the long-term impact of the discharges, it may had done so indirectly. (See Permittee's Response to Appellant's Amended Motion for Summary Judgment ¶¶ 32-36; Permittee's Memorandum of Law in Response to Appellant's Amended Motion for Summary Judgment at 3)

Similarly, where the Department has issued a series of similar permits which will allow similar discharges into the same watershed, it is logical to take those other permits into consideration in order to assure that water quality will not suffer. While one or two permits may not degrade the water quality of receiving streams, the addition of the discharges related to a third permit might. *Cf.* 25 Pa. Code § 92.81(a)(7)(a general permit may only be issued for a group of discharges which "individually and *cumulatively* do not have the potential to cause significant adverse environmental impact." (emphasis added)).

The Permittee argues that the plain language 25 Pa. Code § 93.4c(b)(1)(i)(B),[9] of the antidegredation regulations only require that the "DEP look at the project alone and determine if it will maintain and protect the existing water quality . . . ." (Permittee's

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[8] Department's Response to the Appellant's Motion for Summary Judgment at 11 ¶ 3.

Memorandum of Law in Response to Appellant's Amended Motion for Summary Judgement at 5). We do not believe the language of the regulation is as narrow as the Permittee proposes.

Section 93.4c(b)(1)(i)(B) of the Department's new antidegredation regulations provides that "[a] person proposing new, additional or increased discharge to . . . Exceptional Value Waters . . . shall demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters . . . ." It seems only logical that to show that an "additional discharge" will maintain water quality, some consideration must be given to discharges which are already occurring. Section 5 of the Clean Streams Law directs the Department to consider, where applicable, water quality management and pollution control in the watershed as a whole. The broad purposes and objectives of the Clean Streams Law and the regulatory scheme of protecting and maintaining existing water quality of exceptional value waters may best be effectuated by a broader reading of the regulations than the Permittee advances.

The Department argues that even if it should have considered these factors, the impact of the storm water controls proposed in the permit will be to maintain and improve the water quality of the watershed. Supplemental analysis performed by the Permittee may further support this conclusion.[10] Moreover, the Appellant's evidence included in its motion is not precise concerning the harm which may come to pass due to

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[9] This new regulation became effective with the July 17, 1999 amendments.

[10] Although the Department did not consider the Permittee's supplemental evaluation of the pollutant removal efficiency of some of the control facilities, it is well with the Board's *de novo* review to do so. *Pequea Township v. Herr,* 716 A.2d 678, 685 (Pa. Cmwlth. 1998); *Warren Sand and Gravel Co., Inc. v. Commonwealth of Pennsylvania, DER*, 341 A.2d 556 (Pa. Cmwlth. 1975).

the permanent discharges. As we explain in more detail below, this is a factual matter that must be resolved at the hearing. Accordingly, we decline to remand this permit to the Department for further consideration at this time. The Appellant's right to require further consideration by the Department is not clear. Further, there is no purpose to be served by remanding the permit if the evidence is that the project as constructed will in fact improve the water quality of the watershed. *See Oley Township v. DEP*, 1997 EHB 660, 692. The Appellant's motion for summary judgment is denied.

Permittee's Motion

The Permittee makes two basic arguments in its motion for summary judgment. First it argues that the sediment controls in its E&S Plan, which are incorporated into the NPDES permit, are adequate as a matter of law for the construction activities related to the Section 402 Project. Second, it argues that these controls protect the quality of the Valley Creek watershed after construction is completed. In support of its contentions the Permittee has submitted voluminous exhibits which include, among other things, detailed excerpts from its E&S permit application and large multi-paged engineering plans and maps. However, the Appellant strenuously contests the effectiveness of the storm water controls to prevent degradation of the water quality of the Valley Creek watershed submitting further voluminous reports and deposition testimony.

This complex issue obviously requires the Board to resolve disputed factual matters at hearing. For instance, the Permittee contends, with supporting expert testimony, that there will be an increase of base flow to the watershed as a result of the storm water controls. The Appellant contends, with supporting expert testimony, that there will be a reduction in base flow. (Permittee's Motion for Summary Judgment ¶¶

157-227 and Responses thereto). The Permittee believes, with supporting evidence, that there will be a decrease in runoff and a decrease of pollutants entering the watershed. The Appellant has proffered evidence that it believes the opposite is true. (Permittee's Motion for Summary Judgment ¶¶ 228-69 and Response thereto).

The Permittee contends that it is entitled to summary judgment in its favor pursuant to Pa. R.C.P. No. 1035.2(2), because the evidence offered by the Appellant does not establish a *prima facie* case. Specifically, the Permittee contends that the Appellant's expert did not perform the proper calculations or consider the appropriate factors in reaching his conclusions concerning the alleged loss of infiltration, increased runoff and discharge of pollutants into the watershed as a result of the permanent fixtures which will negatively impact water quality. The Permittee further argues that we should reject the proffered expert evidence of the Appellant because they allegedly failed to perform field studies themselves. The Appellant denied these allegations and cited portions of its expert report which address infiltration loss using a different method of calculation and provided estimates for the increased runoff and pollutants. (Permittee's Motion for Summary Judgment ¶¶ 160-68 and Responses thereto).

It does not follow that the Appellant has not made its *prima facie* case because the Permittee believes that its experts are superior to that of the Appellant. It is not the Board's role to determine which party's evidence is more credible in the context of a motion for summary judgment. *Wayne v.* DEP, EHB Docket No. 98-175-R (Opinion issued June 10, 1999); *Raymond Proffit Foundation v.* DEP, 1998 EHB 667. Our only role is to determine whether there are factual disputes requiring a hearing. *New Hanover Corp. v. DER*, 1993 EHB 510 (the role of the Board is not to resolve issues of fact, but to

decide whether they exist). Clearly, in this case there are significant factual disputes.

In sum, we find that there are significant disputed material facts concerning the effectiveness of the storm water controls proposed for this project for the protection of the exceptional water quality of the Valley Creek watershed. Accordingly, this complex issue is inappropriate for summary judgment and the Permittee's motion is denied.

While a hearing on the merits must be held in this matter, we caution the parties that the Board's power of *de novo* review under which it may consider evidence as to the effect of the construction on storm water flow, may not mean that the matter will not ultimately be remanded to the Department. While the Board may consider the expert evidence which the Permittee has offered, it may well be that under all the circumstances that this evidence is of a type that should have been considered by the Department in the first instance along with other evidence of the impact of the construction project on Valley Creek. We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VALLEY CREEK COALITION	:	
	:	
v.	:	**EHB Docket No. 98-228-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION,: Permittee	:	

ORDER

AND NOW, this 15th day of December, 1999, IT IS HEREBY ORDERED that:

1. The motion for summary judgment of the Valley Creek Coalition in the above-captioned matter is **DENIED**.

2. The motion for summary judgment of the Department of Environmental Protection in the above-captioned matter is hereby **DENIED**.

3. The motion for summary judgment of the Department of Transportation in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: December 15, 1999

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

For the Commonwealth, DEP:
Martha Blasberg, Esquire
Southeast Region

For Appellant:
John Wilmer, Esquire
Media, PA

For Permittee:
John M. Hruboveak, Esquire
Kenda Jo M. McCrory, Esquire
Department of Transportation
Harrisburg, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

POTTS CONTRACTING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-236-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HL&W COAL COMPANY, Permittee	:	**Issued:** December 21, 1999

OPINION AND ORDER ON MOTION FOR SANCTIONS

By Michelle A. Coleman, Administrative Law Judge

Synopsis

The Board dismisses an appeal challenging the issuance of a National Pollution Discharge Elimination System (NPDES) permit and an underground coal mining permit as a sanction for a corporate appellant's failure to file a pre-hearing memorandum, retain counsel, and abide by the Board's rules concerning discovery.

OPINION

This matter arises from a notice of appeal filed on behalf of Potts Contracting Company, Inc. (Appellant) by Joyce Potts Lengel (Potts Lengel), Appellant's vice president, challenging the Department's October 3, 1997, issuance of an underground coal mining permit and NPDES permit.[1] The Department issued the permits to HL&W Coal Company (Permittee) for a mining

[1] The convoluted facts surrounding the filing and perfection of the appeal are set forth in *(Footnote continued on next page.)*

operation in Tremont Township, Schuylkill, County. In the notice of appeal, Appellant asserts that the Department's decision to issue the permits resulted from fraud, collusion, conspiracy, usurpation of corporate opportunity, and other malfeasance.

The Board has issued one previous decision in this appeal. On June 8, 1998, we issued an opinion and order denying a motion for judgment on the pleadings filed by Permittee.

On April 14, 1999, Permittee filed a motion to impose sanctions and a supporting memorandum of law. In the motion and memorandum, Permittee asserts that Appellant has failed to comply with discovery orders, agreements, and deadlines; that Appellant is no longer represented by counsel; and that Appellant has failed to show that Potts Lengel had the authority to appeal on behalf of Appellant. Permittee argues, therefore, that, under 25 Pa. Code § 1021.125, we should either dismiss Appellant's appeal or preclude Appellant from introducing any evidence not listed in the pre-hearing memorandum it submitted in May of 1998.

On April 26, 1999, the Department filed a letter stating that it concurred with Permittee's motion. Appellant never responded to the motion. Since Appellant failed to respond, we will treat the facts alleged in the motion as admitted.[2]

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greater detail in our June 8, 1998 opinion and order denying Permittee's motion for judgment on the pleadings, at 1998 EHB 589-591. Among other things, Permittee has questioned Potts Lengel's authority to file an appeal on behalf of Appellant.

[2] Section 1021.64(d) of the Board's rules, 25 Pa. Code § 1021.64(d), provides, in pertinent part:

> A party failing to respond to a ... motion shall be deemed in default and at the Board's discretion sanctions may be imposed under § 1021.125 (relating to sanctions). The sanctions may include treating all relevant facts stated in the ... motion as admitted.

Section 1021.125 of the Board's rules of practice and procedure governs sanctions in proceedings before the Board. It provides:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include the dismissal of an appeal or an adjudication against the offending party, orders precluding the introduction of evidence or documents not disclosed in compliance with an order, barring the use of witnesses not disclosed in compliance with an order, barring an attorney from practice before the Board for repeated or flagrant violations of orders, or other sanctions as a permitted in similar situations by Pa. R.C.P. for practice before the court of common pleas.

Appellants have failed to comply with a number of Board orders and rules of practice and procedure.

Under section 1021.22 of the Board's rules, 25 Pa. Code § 1021.22, corporations appearing as parties before the Board must be represented by counsel. Nevertheless, Appellant failed to secure an attorney before filing its notice of appeal. On November 18, 1997, we informed Appellant that corporations had to be represented by counsel and directed Appellant to secure legal representation by December 18, 1997. In an attempt to accommodate Appellant, the Board granted a number of extensions to this deadline, until February 11, 1998, when James J. Munnis (Munnis) entered his appearance for Appellant. On or about February 1, 1999, however, Munnis indicated that he had withdrawn as Appellant's counsel. In the more than 10 months since then, Appellant has neither had another attorney file an entry of appearance on its behalf nor contacted the Board to explain its failure to secure legal representation. The Board has previously dismissed appeals filed by corporations where the corporations fail to retain an attorney. *See, e.g., Mountain Valley Management v. DEP*, EHB Docket No. 98-194-L (opinion issued May 25, 1999).

Appellant also violated section 1021.82 of the Board's rules, 25 Pa. Code § 1021.82.

Subsection (a) of that rule contains the requirements for pre-hearing memoranda, and subsection (b) provides that the Board can impose sanctions—including precluding evidence or canceling a hearing—for failure to comply with the requirements in subsection (a). Under section 1021.82(b) and the Board's general rule governing sanctions, at 25 Pa. Code § 1021.125, we may dismiss an appeal for failure to file a pre-hearing memorandum. *Yourshaw v. DEP,* 1998 EHB 1063. Although, on April 8, 1999, the Board ordered Appellant to file a pre-hearing memorandum by May 14, 1999, Appellant failed to file the memorandum, and never requested an extension or sought to explain its failure to comply with the Board's order.

Appellant also failed to comply with section 1021.111(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.111(a), which provides that the Rules of Civil Procedure govern discovery proceedings before the Board unless the Board's rules specifically provide otherwise. Pa. R.C.P. 4009.12(a) provides that, within 30 days of service of a request for documents, the party receiving a request must either file objections, produce the documents, or make the documents available. Appellant failed to take any of these measures in response to Permittee's request for corporate records.

As noted above, we have previously dismissed appeals where an appellant fails to file a pre-hearing memorandum or a corporate appellant refuses to retain counsel. Appellant not only meets both of these criteria; it has refused to comply with the discovery rules as well. It has drawn out the proceedings, driving up the costs for opposing parties, while economizing itself by refusing to retain counsel as required by the Board's rules.[3]

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[3] In addition to Appellant's other transgressions, Potts Lengel—Appellant's vice president and the person who instituted this appeal on Appellant's behalf—failed to attend her *(Footnote continued on next page.)*

Under the circumstances, dismissal of Appellant's appeal is appropriate. It is pointless to go to a hearing. Appellant's vice president has deprived Permittee and the Department of the opportunity to depose one of the central witnesses in the appeal—herself—hamstringing Permittee and the Department in the preparation of their defense. Appellant's failure to file a pre-hearing memorandum further hobbled Permittee and the Department in the preparation of their defense. And Appellant's failure to secure legal representation or comply with other Board rules and orders suggests that Appellant believes it can flaunt those rules and orders with impunity. This it cannot do.

If Appellant had merely committed the discovery violations, we might be content to direct Potts Lengel to allow herself to be deposed and to produce the corporate documents requested by Permittee. If Appellant had merely failed to file its pre-hearing memorandum, we might be content to simply preclude Appellant from introducing any evidence not listed in its previous pre-hearing memorandum, filed in May of 1998. And, if Appellant had simply failed to secure legal representation before filing its appeal, and failed to secure new representation after its first attorney withdrew, then we might be content to issue a rule to show cause directing Appellant retain counsel within 20 days or risk dismissal of its appeal. But Appellant did not simply do one of these things; it did all of them. Given its repeated violations of Board rules and orders, dismissal of Appellant's appeal is appropriate.

Accordingly, we enter the following order:

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deposition, without providing prior notice to opposing counsel that she would not attend and without subsequently explaining her absence. Significantly, the deposition had been scheduled, in large part, to accommodate Potts Lengel, who resides out of state.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

POTTS CONTRACTING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-236-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HL&W COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 21st day of December, 1999, it is ordered that Permittee's motion for sanctions is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: December 21, 1999

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

For the Commonwealth, DEP:
Charles B. Haws, Esquire
Southcentral Region

For Appellant:
Potts Contracting Co., Inc.
c/o Joyce Potts Lengel
713 Bradburn Drive
Mt. Pleasaant, SC 29464
and
Potts Contracting Co., Inc.
c/o John E. Jones, III, Esquire
Route 61 North
P. O. Box 149
Pottsville, PA 17901-0149

For Permittee:
James P.Wallbillich, Esquire
CERULLO, DATTE & WALLBILLICH, PC.
450 West Market Street, Garfield Square
P. O. Box 450
Pottsville, PA 17901

jb/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CHARLES E. BRAKE CO., INC.	:	
	:	
v.	:	**EHB Docket No. 98-026-C**
	:	**(Consolidated with 98-136-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** December 21, 1999

ADJUDICATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis

An appeal of a compliance order issued under the Noncoal Surface Mining Act is dismissed, while an appeal of a civil penalty assessed under the Noncoal Surface Mining Act and the Clean Streams Law is sustained. The Department has the authority to order a surface mine operator to cease operations he is conducting on land that he neither owns nor has bonded. The Department need not issue him a notice of violation beforehand.

The Department lacks the authority to assess a civil penalty against the operator where he made a timely request for an assessment conference, and the Department did not hold an assessment conference before assessing the civil penalty. The fact that the operator requested a delay in the conference after it was first scheduled is immaterial where he never indicated that he wished to waive the conference, the Department never notified him that it cancelled the scheduled conference, and the Department never explained that granting his request for delay might result in his not having an assessment

conference before the penalty was assessed.

INTRODUCTION

This matter was initiated with the February 13, 1998, filing of a notice of appeal by Charles E. Brake Company, Inc. (Appellant) challenging a compliance order the Department issued to it on January 22, 1998. The compliance order alleged that Appellant had violated Section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Surface Mining Act), and Sections 77.101 and 77.104 of the Department's Noncoal Surface Mining Regulations, 25 Pa. Code §§ 77.101 and 77.104, because Appellant lacked a bonding increment and landowner consent for land it mined in St. Thomas Township, Franklin County (site). Among other things, the compliance order directed Appellant to either submit the materials required for a surface mine bonding increment or reclaim the site.

On August 4, 1998, Appellant appealed a related Department action, a July 8, 1998, civil penalty the Department assessed against it for conduct alleged to have occurred before the Department issued the compliance order. The civil penalty assessment (assessment) alleged that, by conducting mining at the site without a permit or bonding increment, Appellant had violated the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law), and the Noncoal Surface Mining Act. The Department assessed a civil penalty of $800. The appeal of the assessment was initially docketed at EHB Docket No. 98-136-C. However, upon a motion by Appellant, the Board consolidated both appeals at EHB Docket No. 98-026-C on August 25, 1998.

Administrative Law Judge Michelle A. Coleman presided over a hearing on the merits on May 4, 1999. The Department filed its post-hearing memorandum on June 18, 1999. Appellant filed its response and a motion for directed adjudication on July 23, 1999.[1] Although the Department did not file a response to Appellant's motion for a directed adjudication, it anticipated that Appellant would file a motion for compulsory nonsuit, and addressed that issue in its own post-hearing memorandum.

We need not address Appellant's motion for a directed adjudication. Appellant could not prevail on its motion for a directed adjudication unless it was also entitled to prevail on a conventional adjudication. This is the result of two factors: the scope of evidence considered in a motion for directed adjudication, and the fact that the Board does not use a jury to make factual determinations. When ruling on a motion for a directed adjudication, the Board considers all of the evidence submitted by all parties—the same evidence it would consider if adjudicating the merits. *Ron's Auto Service v. DER,* 1992 EHB 711, 722. Furthermore, whether the Board is ruling on a motion for directed adjudication or adjudicating the merits, the Board itself is the decision maker; it need not defer to a jury on factual issues in an adjudication.

Given these similarities, the only material difference between a directed adjudication and the Board adjudicating the merits is how the Board weighs the evidence before it. When adjudicating the merits, the Board must determine whether the existence

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[1] Appellant styled its motion a "Motion for Directed Verdict." However, since Board decisions are made by the Board's administrative law judges, rather than juries, we traditionally refer to such motions as motions for "directed adjudication." *See, e.g., Byler v. DEP*, 1994 EHB 874, 876 n.1. For all practical purposes, however, the two motions *(Footnote continued on next page.)*

of contested facts is more probable than not. *South Hills Health System v. Department of Public Welfare*, 510 A.2d 934, 936 (Pa. Cmwlth. 1986); *C & K Coal Co. v. DER*, 1992 EHB 1261, 1289. The standard for a directed adjudication is higher. When ruling on a motion for directed adjudication, the Board must construe all the evidence in the light most favorable to the non-moving party: we must "accept as true all facts and inferences which support contentions made by the party against whom the motion is made and shall reject all testimony and references to the contrary." *Parkside Townhomes Associates v. Board of Assessment Appeals of York County,* 711 A.2d 607, 612 (Pa. Cmwlth. 1998) (*citing Shedrick v. William Penn School District*, 654 A.2d 163 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 668 A.2d 1142 (Pa. 1995). Thus, for Appellant to prevail on its motion for directed adjudication, we would have to conclude that the Department could not prevail in this appeal even if the totality of the evidence was *construed in the light most favorable to the Department*; whereas, for Appellant to be entitled to prevailing on the merits of the adjudication, we would only have to conclude that it was *more probable than not* that the Department could not prevail based on the totality of the evidence. In other words, Appellant could not prevail on its motion for directed adjudication unless it was also entitled to prevail on a conventional adjudication.

Therefore, rather than ruling on Appellant's motion for a directed adjudication, we will proceed directly to the adjudication on the merits, examining the compliance order first, then turning our attention to the civil penalty assessment. In its post-hearing memorandum, the Department justifies the compliance order by arguing that Appellant

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are virtually identical.

excavated shale from land that Appellant neither owned nor had bonded, in violation of Section 7(a) of the Noncoal Surface Mining Act and 25 Pa. Code §§ 77.101, 77.104, and 77.193. Appellant's post-hearing brief responds that the Department erred by issuing the compliance order because (1) Appellant did not excavate the shale; (2) Appellant would not have violated Section 7(a) of the Noncoal Surface Mining Act or 25 Pa. Code §§ 77.101, 77.104, or 77.193, even if it had excavated the shale; and (3) even assuming Appellant had violated the Act or the noncoal mining regulations, the Department could not order Appellant to cease operations where it had not issued Appellant a notice of violation beforehand.

As for the civil penalty, the Department argues that the assessment was appropriate because (1) civil penalties are required where the Department issues a cessation order; (2) the penalty assessed is reasonable for Appellant's violations; (3) the Department delayed the notice of penalty assessment conference (assessment conference) at Appellant's request; and (4) Department personnel discussed the assessment with Appellant after the assessment was issued. In its post-hearing memorandum, Appellant responds that the Department erred by assessing the penalty because (1) 25 Pa. Code § 77.293 precludes civil penalties where a cessation order is improperly issued, and there is no environmental damage, no injury to person or property, and the violations are corrected within the required time; (2) the Department failed to honor Appellant's timely request for an assessment conference before it assessed the penalty; and (3) the amount of the penalty was unreasonable for the violations.

The record consists of the notes of testimony and 14 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Charles E. Brake Co., Inc., a Pennsylvania corporation engaged in the mining of industrial minerals, with a business address of 6450 Lincoln Way West, P.O. Box 275, St. Thomas, Franklin County, PA 17252. (Ex. B-1, p. 1, ¶ 2)[2]

2. Appellee is the Department, the agency with the authority to administer and enforce the Noncoal Surface Mining Act; the Clean Streams Law; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L.177, *as amended,* 71 P.S. § 510-17; and the regulations promulgated pursuant to each. (Ex. B-1, ¶ 1)

3. Appellant has a noncoal surface mining permit to operate the St. Thomas Shale Pit, located near Legislative Route 28005 in St. Thomas Township, Franklin County. (N.T. 14; Ex. B-1, ¶ 5)

4. James Leigey is a Surface Mine Conservation Inspector in the Department's Pottsville regional office. (N.T. 12)

5. As part of his duties, Leigey is responsible for routine inspection of facilities that have surface mining permits, and for investigating alleged violations of the state's surface mining laws. (N.T. 12-13)

6. Leigey visited Appellant's site on January 13, 1998, and January 22, 1998. (N.T. 17-18)

7. Leigey's visits were prompted, in part, by complaints from one of Appellant's neighbors who asserted that Appellant had mined on his property. (N.T. 17)

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[2] Board exhibits are denoted "Ex. B-___," while those of the Department are marked "Ex. C-___." Appellant's exhibits are marked "Ex. A-__."

8. During his visits to Appellant's site, Leigey discovered that approximately two to five feet of shale had been removed from a 20-foot-high shale embankment that lay just outside the southwest side of property owned by Harold and Delores Brake (Brakes). (N.T. 32, Ex. C-7, Ex. C-8)

9. Approximately a third of an acre of land was affected by the removal of the shale. (N.T. 25)

10. The excavated shale was piled just inside Brakes' southwestern-side property line, between the shale embankment and Appellant's pit. (N.T. 43-45, Ex. C-8)

11. During his January 13, 1998, visit, Leigey spoke to Harold Brake (Brake), about the excavation of the shale on site. (N.T. 18, 25)

12. Brake is Appellant's president. (Ex. B-1, ¶ 3)

13. Brake admitted that Appellant had removed the shale. (N.T. 18, 25, 62-63)

14. Appellant removed the shale because the shale embankment interfered with a line-of-sight requirement necessary for Appellant to obtain a highway occupancy permit from the Department of Transportation. (N.T. 18, 25, 62-63)

15. The excavation of the shale resulted in only minimal harm to the environment. (N.T. 127, 150-151, 157-158)

16. The excavation of the shale resulted from nothing more than simple negligence. (N.T. 127-128, 151)

17. Brake did not own the property from which the shale was removed. (N.T. 73, 113-114, 151)

18. The land from which the shale was excavated lies in lots owned by Roy

and Alice Snider, and James and Sandra Scott. (N.T. 73-74, Ex. C-8)

19. The bank from which the shale was removed lies within the area covered by Appellant's noncoal surface mining permit. (N.T. 31; Ex. C-7, C-8)

20. The only land that Appellant had bonded was that owned by the Brakes. (N.T. 27-28)

21. Appellant did not bond the property from which the shale was removed. (N.T. 23, 28, 31, 57-59, 82; Ex. C-8)

22. Appellant did not have a landowner consent form for the property from which the shale was removed. (N.T. 114)

23. The Department issued Appellant a compliance order on January 22, 1998. (Ex. B-1, ¶ 7)

24. Under "Corrective Action Required or Activity to be Ceased," the compliance order states, "Operator shall cease operation and submit to the Department all necessary material and information, landowner consent and bond required to apply for a surface mine bonding increment. Or, the operator shall backfill and fine grade the affected area between the operator's issued bonding increment and L[egislative] R[oute] 28005. Topsoiling, seeding and mulching of the affected area shall follow within 30 days after backfilling." (Ex. C-6, p. 2)

25. On the first page of the compliance order, in response to a question asking whether cessation was ordered, the Department checked "yes." (Ex. C-6)

26. The compliance order did not require Appellant to cease all surface mining activity; it simply required that Appellant stop its activity on the unbonded land from which the shale was removed. (Ex. B-1, ¶ 8)

27. The Department routinely issues cessation orders—without first issuing a notice of violation—when it discovers surface mining activity on land that is not bonded. (N.T. 101, 110)

28. On February 4, 1998, the Department sent Appellant a notice of the proposed civil penalty assessment. (Ex. B-1, ¶ 11)

29. The notice of the proposed civil penalty assessment informed Appellant that it potentially faced a civil penalty of $800 for violating the Noncoal Surface Mining Act, and that the Department would hold an assessment conference with Appellant if Appellant submitted a written request for the meeting within 15 days. (Ex. B-1, ¶ 11; Ex. C-9, p.2)

30. On February 18, 1998, Harold Brake wrote to the Department requesting an assessment conference. (Ex. B-1, ¶¶ 3 and 12; Ex. C-10)

31. The Department wrote back on February 25, 1998, informing Brake that it scheduled the assessment conference for March 25, 1998. (Ex. B-1, ¶ 13; Ex. C-11)

32. On March 4, 1998, Brake again wrote to the Department, this time requesting that the meeting be "deferred" until the Board ruled on Appellant's appeal of the compliance order. (Ex. B-1, ¶ 14; Ex. C-12)

33. After it received Brake's March 4, 1998, letter, the Department canceled the March 25, 1998, assessment conference it had scheduled. (N.T. 145-146)

34. Walter Dieterle is a Monitoring and Compliance Manager with the Department's Pottsville District Office. (N.T. 118-119).

35. Dieterle spoke to Brake about the possibility of scheduling an assessment conference. (N.T. 133, 148, 158)

36. Dieterle was unsure whether the conversations about the assessment conference occurred before or after the Department received Brake's March 4, 1998, letter requesting a delay in the conference or whether they took place before or after the Department issued the final assessment, on July 8, 1998. (N.T. 133, 148, 158)

37. At least some of the conversations between Dieterle and Brake about scheduling the assessment conference took place after the Department issued the final assessment. (N.T. 140-141)

38. The notice of the proposed assessment referred only to violations of the Noncoal Surface Mining Act. (Ex. C-9, p. 2)

39. The actual civil penalty assessment cited violations of Section 315(a) of the Clean Streams Law, in addition to violations of Section 7(a) of the Noncoal Surface Mining Act. (Ex. C-13, pp. 2-3)

40. On July 23, 1998, Brake again wrote to the Department and requested a "formal assessment conference." (Ex. A-1)

41. Dieterle had a difficult time rescheduling the conference because he was very busy and wanted to visit the site himself beforehand. (N.T. 146)

42. Dieterle also wanted to visit the site to determine who owned what property, and to ask Brake who told Appellant to excavate the shale. (N.T. 149)

43. Brake never indicated that Appellant wished to waive its right to an assessment conference. (N.T. 160-161)

44. Dieterle ultimately decided to issue the assessment without having the assessment conference first because it was Department policy to issue final assessments within 120 days of the underlying compliance order. (N.T. 146)

45. On or about September 15, 1998, Dieterle met with Brake at the site. (N.T. 159-160)

46. During his visit to the site, Dieterle examined the situation first-hand, and he and Brake discussed the violations, the civil penalty assessment, and the corrective actions required by the compliance order. (N.T. 150, 158)

47. Although Dieterle thought that "it was understood" that his September 15, 1998, visit to the site was Appellant's assessment conference, since he and Brake discussed the civil penalty, he does not remember whether he ever informed Brake that this was the assessment conference. (N.T. 159-160)

DISCUSSION

Under Section 1021.101 of the Board's rules, 25 Pa. Code § 1021.101, the Department bears the burden of proof with respect to both the compliance order and the civil penalty assessment. Subsection (b)(4) provides that the Department bears the burden of proof in appeals of orders, while subsection (b)(1) provides that the Department bears the burden of proof in appeals of civil penalty assessments.

I. The compliance order

In its post-hearing memorandum, the Department justifies the compliance order by arguing that Appellant excavated shale from land that Appellant neither owned nor bonded, in violation of Section 7(a) of the Noncoal Surface Mining Act and 25 Pa. Code §§ 77.101, 77.104, and 77.193. Appellant's post-hearing brief responds that the Department erred by issuing the compliance order because (1) Appellant did not excavate the shale; (2) Appellant would not have violated Section 7(a) of the Noncoal Surface Mining Act or 25 Pa. Code §§ 77.101, 77.104, or 77.193, even if it had excavated

the shale; and (3) even assuming Appellant had violated the Act or regulations, the Department could not order Appellant to cease operations where it had not previously issued Appellant a notice of violation. We shall address these issues separately below.

A. Did the Department prove that Appellant excavated shale from land that it did not own and that was not bonded?

The Department argues that Appellant excavated shale from land that it did not own and had not bonded. In support of this assertion, the Department points to testimony and exhibits admitted at the hearing on the merits, and to certain alleged admissions Appellant made in its pre-hearing memorandum. Appellant denies that it mined on the land and that the land was not bonded, and argues that the Department cannot rely on the alleged admissions in its pre-hearing memorandum because the statements from the memorandum were never admitted into the record at hearing.

We need not decide whether the Department could rely on the alleged admissions in Appellant's pre-hearing memorandum. Even assuming that Appellant is correct, and that we could not consider the alleged admissions in its pre-hearing memorandum, ample evidence exists in the record to prove that Appellant excavated shale from land that it did not own and had not bonded.

James Leigey, a Surface Mine Conservation Inspector with the Department, visited Appellant's site on January 13, 1998, and January 22, 1998. His visits were prompted, in part, by complaints from one of Appellant's neighbors who asserted that Appellant had mined on his property. Two to five feet of shale had been removed from a 20-foot-high shale embankment that lay just outside the southwest side of property owned by Harold and Delores Brake (Brakes). Approximately a third of an acre of land was affected. The excavated shale was piled just inside Brakes' southwestern-side

property line, between the shale embankment and Appellant's pit.

During his January 13, 1998, visit, Leigey spoke to Harold Brake (Brake), Appellant's president, about the excavation of the shale on site. Brake admitted that Appellant had removed the shale, and he explained that Appellant did so because the shale embankment interfered with a line-of-sight requirement necessary for Appellant to obtain a highway occupancy permit from the Department of Transportation.

Brake also admitted to Liegey that he did not own the property from which Appellant had removed the shale. (He made a similar admission to Walter Dieterle, a Monitoring and Compliance Manager with the Department.) Furthermore, the site plan Appellant submitted for a previous bond increment indicates that the land from which the shale was excavated lies in lots owned by Roy and Alice Snider, and James and Sandra Scott.

The bank from which the shale was removed lies within the area covered by Appellant's noncoal surface mining permit. However, the only land that Appellant had bonded was that owned by the Brakes. Appellant did not bond the property from which the shale was removed. Nor did Appellant have a landowner consent form for that property.

B. Did Appellant violate Section 7(a) of the Noncoal Surface Mining Act, 52 P.S. § 3307(a), and 25 Pa. Code §§ 77.101, 77.104, and 77.193 by removing shale from land that was not bonded?

By proving that Appellant removed the shale from land that it had not bonded, the Department proved that Appellant violated 25 Pa. Code § 77.193, but not that it violated Section 7(a) of the Noncoal Surface Mining Act or Sections 77.101 or 77.104 of the Department's regulations.

Section 77.193(b) of the Department's regulations, 25 Pa. Code § 77.193(b), provides that persons engaged in noncoal surface mining "may not disturb surface acreage or extend operations prior to receipt of approval from the Department of a bond ... covering the surface area to be affected." Therefore, by proving that Appellant removed shale from land that was not bonded, the Department proved that Appellant violated 25 Pa. Code § 77.193(b).

However, the Department failed to prove the other alleged violations of the Noncoal Surface Mining Act and its regulations. Section 7(a) of the Noncoal Surface Mining Act and 25 Pa. Code § 77.101 both require that persons engaged in noncoal surface mining activity must have a permit, and must comply with the terms of that permit.[3] The Department failed to prove that Appellant either lacked a permit or that he refused to comply with the terms of its permit. As noted above, the evidence shows that Appellant excavated the shale from *within* the area covered by Appellant's noncoal surface mining permit. Therefore, the Department did not prove that Appellant lacked a permit. Furthermore, since the Department failed to introduce any evidence concerning the terms of the permit, the Department failed to prove that Appellant's excavation of the shale violated the permit's terms.

The Department failed to prove that Appellant violated 25 Pa. Code § 77.104 for

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[3] Section 7(a) of the Noncoal Surface Mining Act provides, in pertinent part: "No person shall operate a surface mine ... unless the person has first obtained a permit from the department in accordance with this act and unless the person is operating in accordance with the conditions provided in the permit...."

Similarly, Section 77.101(a) of the Department's regulations provides, "A person may not conduct noncoal mining activities ... without first obtaining a permit."

similar reasons. Section 77.104 does not contain any requirements concerning bonding; it simply contains the requirements for permit applications. However, the Department never even alleges that Appellant's permit application was deficient—either because the application failed to conform to the requirements at Section 77.104 or for other reasons. Nor did the Department introduce any evidence at hearing concerning alleged deficiencies in the permit application. Therefore, the Department failed to prove that Appellant violated Section 77.104.

C. Did the Department have the authority to issue a compliance order rather than a notice of a violation?

Under "Corrective Action Required or Activity to be Ceased," the compliance order states, "Operator shall cease operation and submit to the Department all necessary material and information, landowner consent and bond required to apply for a surface mine bonding increment. Or, the operator shall backfill and fine grade the affected area between the operator's issued bonding increment and L[egislative] R[oute] 28005. Topsoiling, seeding and mulching of the affected area shall follow within 30 days after backfilling." On the first page of the order, in response to a question asking whether cessation was ordered, the Department checked "yes."

Appellant contends that the Department could not issue the compliance order because (1) the order requires that Appellant cease operations, (2) 25 Pa. Code § 77.228(a) requires that the Department issue a notice of violation before issuing a cessation order, and (3) the Department did not issue a notice of violation before issuing the order. We disagree.

Section 77.228(a) of the Department's regulations provides:

If a permittee fails to post promptly additional bond required under §

> 77.205(a) (relating to adjustments) or fails to make timely deposits of bond according to the schedule submitted under § 77.226 (relating to phased deposits of collateral), the Department will issue a notice of violation to the permittee, and if the permittee fails to show satisfactory compliance, the Department will issue a cessation order for the permittee's permit areas and thereafter may take appropriate actions.

Given the language in the Department's compliance order, it certainly qualifies as a cessation order. [4] If the Department had been acting pursuant to Section 77.228(a) when it issued the order, then the Department would have had to issue a notice of violation before issuing the compliance order. However, Section 77.228(a) is not implicated where—as here—the Department orders a mine operator to cease surface mining activity *on land that is not currently bonded.*

As its language makes clear, Section 77.228 applies only to bond adjustments under 25 Pa. Code § 77.205(a) or phased deposit bonds under 25 Pa. Code § 77.226. There is no evidence to suggest that any of Appellant's bonds were phased collateral bonds, so Section 77.226 clearly does not apply. As for Section 77.205(a), it provides, "The permittee shall deposit additional bond amounts upon notification by the Department if *the existing bond* does not meet the requirements of this subchapter...." (Emphasis added.) The language referring to "the existing bond" shows that Section 77.205(a) applies only where the Department or Appellant want to adjust the amount of a

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[4] Significantly, the Department's compliance order did not require that Appellant cease all surface mining activity on land covered by the permit. Instead, the parties have stipulated that the compliance order simply required Appellant to cease operation on the unbonded land from which the shale was removed. In other words, the Department's order merely directed Appellant to cease surface mining activities that Appellant had never been authorized to conduct in the first place. The order did not affect Appellant's surface mining activity on land covered by the permit where the land had been properly
(Footnote continued on next page.)

bond for land *that is already bonded*; it does not apply where the Department orders a mine operator to stop unlawful mining on land that is not already bonded. Similarly, Section 77.228 refers only to deficiencies in the *amount* of bond payments to the Department. It makes no reference to landowner consent or other factors that the Department ordinarily reviews when evaluating applications to bond land that is not already bonded.

Sound public policy supports our construction of Section 77.228. At least where a permittee engages in unlawful surface mining activity on land that is bonded, the bond guarantees that the Commonwealth will have sufficient funds to cover the cost of any reclamation, restoration, and abatement necessary. There is no similar guarantee where a person engages in unlawful activity on land that is not bonded. Therefore, the Department has a substantially greater interest in promptly stopping violations that occur on unbonded land. Under our construction of Section 77.228, the Department can immediately order a permittee to cease unlawful activity on unbonded land. Were we to construe Section 77.228 in the manner Appellant suggests, the Department would be forced to issue a notice of violation first, wait to see whether the permittee desisted, and—if the permittee did not desist—then issue a cessation order.[5]

---

bonded.

[5] Furthermore, the Department's interpretation of Section 77.228 appears to be consistent with our interpretation of the regulation, but not Appellant's. While the Department did not offer direct evidence of its interpretation of Section 77.228 at hearing, the Department did elicit testimony that it routinely issues cessation orders—without first issuing a notice of violation—when it discovers surface mining activity on land that is not bonded. Thus, the Department does not seem to regard Section 77.228 (with its requirement that a notice of violation must be filed before issuing a cessation *(Footnote continued on next page.)*

II. The civil penalty assessment

The Department issued Appellant the civil penalty assessment on July 8, 1998. The assessment alleges that Appellant had engaged in surface mining on land that had not been bonded, in violation of Section 315(a) of the Clean Streams Law, 35 P.S. § 691.315(a), and Section 7(a) of the Noncoal Surface Mining Act, 52 P.S. § 3307(a). Although the Clean Streams Law authorizes maximum penalties of $10,000 per violation per day, and the Noncoal Surface Mining Act authorizes maximum penalties of $5,000 per violation per day, the Department assessed Appellant a penalty totaling only $800 because Appellant's violations resulted in only minimal harm to the environment, and they resulted from nothing more than simple negligence.

Appellant argues that the Department erred by issuing the civil penalty assessment because:

> (1) the Department did not honor Appellant's timely request for an assessment conference—as required by 25 Pa. Code §§ 77.301 (c)(2) and 77.301(d)—before assessing the penalty;
>
> (2) under 25 Pa. Code § 77.293, civil penalties are not permitted where a cessation order is improperly issued, and there is no environmental damage, no injury to persons or property, and the violations are corrected within the required time; and,
>
> (3) the amount of the assessment was unreasonable given the factors 25 Pa. Code § 77.294 requires the Department to consider when assessing the penalty.

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order) as applying in situations where an operator is mining on unbonded land. The Department's interpretation of Section 77.228 is significant because the Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. *Hatchard v. DER*, 612 A.2d 621 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 622 A.2d 1378 (Pa. 1993), *Morton Kise v. DER*, 1992 EHB 1580.

The Department disagrees. In its post-hearing memorandum, it argues that the penalty was appropriate because:

> (1) the Department scheduled an assessment conference before issuing the assessment, but the conference was delayed at Appellant's request;
>
> (2) the Department met with Appellant after issuing the assessment and discussed the civil penalty;
>
> (3) civil penalties are required under 25 Pa. Code § 77.293 where, as here, the Department issues a cessation order; and,
>
> (4) the amount of the penalty assessed is reasonable given the violations proved.

We need not address all of the issues the parties raised regarding the assessment, because we find the Department's failure to grant Appellant's request for an assessment conference dispositive: the Department could not issue the assessment without providing Appellant with an assessment conference beforehand.

On February 4, 1998—almost two weeks after the Department issued the compliance order to Appellant—the Department sent Appellant a notice of the proposed civil penalty assessment. The notice informed Appellant that it potentially faced a civil penalty of $800 for violating the Noncoal Surface Mining Act, and that the Department would hold an assessment conference with Appellant if Appellant submitted a written request for the meeting within 15 days. On February 18, 1998, Harold Brake—Appellant's president—wrote to the Department requesting the conference. The Department wrote back on February 25, 1998, informing Brake that it scheduled the conference for March 25, 1998.

On March 4, 1998, Brake again wrote to the Department, this time requesting that the meeting be "deferred" until the Board ruled on Appellant's appeal of the compliance

order. (Appellant had appealed the compliance order on February 13, 1998—five days before Appellant requested the conference on the proposed civil penalty.) The Department responded by canceling the scheduled assessment conference. However, there is no evidence in the record showing that the Department ever informed Appellant—either orally or in writing—of how it chose to act on Brake's request. Although Dieterle testified that he spoke to Brake about the possibility of scheduling an assessment conference, Dieterle was unsure whether the conversations occurred before or after the Department received Brake's March 4, 1998, letter requesting a delay in the conference, or whether they took place before or after the Department issued the final assessment, on July 8, 1998. However, Dieterle did testify that at least some of the conversations about scheduling the assessment conference took place after the final assessment was issued.

The Department assessed the civil penalty on July 8, 1998. Although the amount of the penalty was the same as that in the notice of the proposed assessment, the basis of the penalty changed. The notice of the proposed assessment referred only to violations of the Noncoal Surface Mining Act. The actual assessment cited violations of Section 315(a) of the Clean Streams Law, in addition to violations of Section 7(a) of the Noncoal Surface Mining Act.

On July 23, 1998, Brake again wrote to the Department and requested a "formal assessment conference." There is no evidence in the record showing that the Department ever responded in writing to this request.

Dieterle testified that he had a difficult time rescheduling the conference because he was very busy and wanted to visit the site himself beforehand. He also explained that

he wanted to visit the site to determine who owned what property, and to ask Brake who told Appellant to excavate the shale. Brake never indicated that he wished to waive his right to an assessment conference. However, Dieterle ultimately decided to issue the assessment without having the assessment conference first because it was Department policy to issue final assessments within 120 days of the underlying compliance order.

On or about September 15, 1998, Dieterle met with Brake at the site. There, Dieterle examined the situation first-hand; and he and Brake discussed the violations, the civil penalty assessment, and the corrective actions required by the compliance order. Although Dieterle thought that "it was understood" that this was Appellant's assessment conference, since he and Brake discussed the civil penalty, he does not remember whether he ever informed Brake that this was the case.

The Department violated Section 77.301 of its regulations, 25 Pa. Code § 77.301, by assessing the civil penalty without providing Appellant with an assessment conference beforehand. Section 77.301 governs the procedures for assessing civil penalties. It provides that, if the Department intends to assess a civil penalty against an alleged violator, the Department must send him the results of the initial review, including the calculation of the proposed civil penalty. 25 Pa. Code § 77.301(a). The alleged violator has a right to an assessment conference, to discuss the results of the initial review, if he submits a written request for the conference within 15 days. 25 Pa. Code § 77.301(b). At the conference, "[t]he Department will consider relevant information on the violation," and, based on that evidence, decide whether it will affirm, raise, lower, or vacate the penalty it assesses. 25 Pa. Code § 77.301(c)(2).

Given the right to an assessment conference afforded by Section 77.301(b), the

Department could not assess a civil penalty against Appellant without holding an assessment conference beforehand. We have often noted that the Department is bound by its own regulations. *See, e.g., People United to Save Homes v. DEP*, 1996 EHB 1411, 1421-22. And the Department's regulations require that it hold an assessment conference before issuing the assessment. Appellant had submitted a timely request for the conference, in writing, and it submitted a written request to have the conference rescheduled well in advance of the date the Department had selected for the conference. While the scheduling of the conference may have been complicated by Appellant's request to have the conference delayed, Appellant never expressed a desire to waive its right to a conference. Furthermore, the Department exacerbated the situation by failing to respond to Appellant's request to reschedule it. When the Department received that request, it should have responded—either denying the request, and going through with the March 25, 1998, hearing; or granting the request and rescheduling the conference for some time before it issued the civil penalty assessment. By failing to respond at all, canceling Appellant's March 25, 1998, hearing, and assessing the penalty without re-scheduling the conference, the Department effectively deprived Appellant of the assessment conference guaranteed by Section 77.301(b).

Although the Department implies that the assessment conference requirement is a mere formality, we disagree. The procedure for assessing civil penalties under the Noncoal Surface Mining Act, set forth at Section 77.302, is virtually identical to the procedure for assessing civil penalties under the Surface Mining Conservation and

Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a. (Surface Mining Act), set forth at 25 Pa. Code § 86.201.[6] The Commonwealth Court has previously made it clear that it does not regard the assessment conference requirement at Section 86.201 as a mere formality. In *Boyle Land & Fuel Company v. Environmental Hearing Board,* 475 A.2d 928 (Pa. Cmwlth. 1984), the Court explained the assessment conference provision in Section 86.201, writing, "The obvious purpose of this provision is to prevent an arbitrary or capricious action by DER."[7, 8] 475 A.2d at 930.

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof in appeals of compliance orders

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[6] The similarity is not coincidental. When the regulations under the Noncoal Surface Mining Act were first proposed, the Department of Environmental Resources explained, "Due to the substantial similarity between the Surface Mining Act and the Noncoal [Surface Mining] Act, the proposed Chapter 77 resembles the coal mining regulations found at Chapters 86 and 87.... The enforcement sections concerning civil penalties, enforcement and inspection, Subchapters E and F... follow the corresponding sections in Chapter 86, Subchapters G and H." 18 Pa. Bull. 2667 (June 11, 1988).

[7] The Department of Environmental Resources (DER) was the antecedent of the Department of Environmental Protection.

[8] Dieterle's statement at hearing, that he thought he and Appellant both understood that the September 15, 1998, meeting at the site was the assessment conference, does not alter our conclusion that the Department had to hold the assessment conference *before* issuing the civil penalty. Subsections (b) and (c) of Section 77.301 provide that upon the written request of a person issued a proposed assessment, the Department must hold an assessment conference *before* affirming the penalty. Were we to allow the Department to hold the assessment conference afterwards, we would frustrate the "obvious purpose" of the assessment conference provision: preventing arbitrary or capricious action by the Department. The penalty would be a fait accompli
(Footnote continued on next page.)

and appeals of civil penalty assessments. 25 Pa. Code § 1021.101(b)(1) and (b)(4).

3. Excavation of shale from land that is not bonded amounts to "disturb[ing] the surface acreage" of land that is not bonded, in violation of 25 Pa. Code §§ 77.193(b).

4. Excavation of shale from land that is not bonded does not violate Section 7(a) of the Noncoal Surface Mining Act, 52 P.S. § 3307(a), or 25 Pa. Code § 77.104 where the excavation takes place on land that is within a noncoal surface mining permit, and conducted in a manner consistent with the terms of that permit.

5. Section 77.228(a) of the Department's regulations, 25 Pa. Code § 77.228(a) applies only to adjustments of preexisting bonds under 25 Pa. Code 77.205(a) or phased deposit bonds under 25 Pa. Code 77.226; it does not apply where the Department orders a mine operator to stop unlawful mining on land that is not already bonded.

6. The Department must conduct an assessment conference where an operator submits a written request within 15 days of receiving notice from the Department of a proposed civil penalty assessment. 25 Pa. Code § 77.301(b).

---

before Appellant had an opportunity to comment on it.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

CHARLES E. BRAKE CO., INC.	:	
	:	
v.	:	**EHB Docket No. 98-026-C**
	:	**(Consolidated with 98-136-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of December, 1999, IT IS ORDERED that Appellant's appeal of the Department's January 22, 1998, compliance order is dismissed, and its appeal of the Department's July 8, 1998, civil penalty is sustained, and the penalty eliminated.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-026-C
(Consolidated with 98-136-C)

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: December 21, 1999

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MORGAN BROTHERS BUILDERS, INC. & MICHAEL P. MORGAN	:	
v.	:	**EHB Docket No. 99-194-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 21, 1999**

OPINION AND ORDER ON RESPONSE TO PETITION FOR SUPERSEDEAS

By: Michael L. Krancer, Administrative Law Judge

Synopsis:

The Department's request to dismiss a Petition For Supersedeas without a hearing is denied but Petitioners must supplement their petition, before the Supersedeas hearing, with further particular facts and legal authority to support its assertions of irreparable harm and likelihood of success on the merits.

Opinion

Morgan Brothers Builders, Inc., (Morgan Brothers) and Michael P. Morgan (Morgan) filed an appeal with the Board on September 20, 1999 of a Department of Environmental Protection (Department) order requiring that certain steps be taken to avoid undue erosion and sedimentation on its Haverfield Subdivision development in East Vincent Township. The Department's Order asserts that there was a failure to comply with the erosion and sedimentation plan and certain actions are ordered to be

completed by August 23, 1999 including: (1) installing a silt fence; (2) regrading an area between Meredith Drive and Kathryn Lane; (3) seeding and mulching all exposed areas; (4) repairing rills and gullies that have formed at the site and stabilizing these areas; and (5) for health and safety reasons backfilling the foundation excavations on Lots 37 & 38 and backfill around the foundation on Lot 27.

Morgan Brothers' and Morgan's Notice of Appeal asserts, among other things, that they have not failed to comply with the erosion and sedimentation plans for the Haverfield subdivision development. In the alternative, they assert that to the extent any violations of the erosion and sedimentation plan exists, such violations were proximately caused by the conduct of East Vincent Township officials in preventing Morgan Brothers and Morgan from complying. Morgan Brothers, Morgan, and a third party that is not a litigant in this case have filed a six-count civil complaint in the United States District Court for the Eastern District of Pennsylvania against East Vincent Township alleging; violation of civil rights; breach of contract and estoppel; interference with existing and prospective contract; defamation; fraud and misrepresentation; and common law conspiracy. The Department has filed a Petition to Enforce Compliance Order in Commonwealth Court.

Morgan Brothers and Morgan filed a Petition for Supersedeas with the Board on December 13, 1999, seeking an order of Supersedeas from the Department's order. The Department filed a Response to Petition for Supersedeas on December 20, 1999, requesting that the Board deny Morgan's Petition.

Under the Board's Rules, a Petition for Supersedeas may be denied either upon motion or *sua sponte* without a hearing, if there is a lack of particularity in the facts

pleaded; a lack of particularity in the legal authority cited as the basis for the grant of the supersedeas; an inadequately explained failure to support factual allegations by affidavits; or a failure to state grounds sufficient for the granting of a supersedeas. 25 Pa. Code § 1021.77(c).[1]

Applying this standard, we find two deficiencies with the Petition that could require dismissal of the Petition before a hearing. First, Petitioners fail to provide sufficient factual or legal explanation of its irreparable harm assertions. Second, there is not a sufficient factual or legal explanation of the Petitioners' likelihood of success on the merits. Instead of the draconian measure of dismissing the Petition out of hand, without a hearing, however, we are allowing Petitioners to bolster those aspects of the Petition before the hearing. Providing the Petitioners an opportunity to cure deficiencies which we think at this point in time may be curable also serves the interest of judicial economy.

As to irreparable harm, the only allegation is that due to certain circumstances, Petitioners cannot comply with the Department's Order "without considerable and undue financial hardship" and that ordering Morgan Brothers to comply with the Department's current order would render "considerable financial hardship, and irreparable harm" upon Morgan Brothers and Morgan. These are merely "boilerplate" allegations with no explanation. If Petitioners are relying on financial hardship to constitute the irreparable harm, Petitioners must provide a more detailed and specific explanation of the exact

[1] 25 Pa. Code §1021.77(c) provides that the Board may undertake this analysis and dismiss a Petition for Supersedeas without a hearing *sua* sponte or by motion from the opposing party. Thus, it does not matter for present purposes, whether we are undertaking this analysis pursuant to our treating DEP's request in its response as a motion or pursuant to the Board's inherent power under 25 Pa. Code §1021.77(c). Suffice it to say that to the extent DEP's request is not intended by DEP to be a motion under the Rule, we are subjecting the Petition to this analysis and issuing the accompanying Order pursuant to our inherent authority under the Rule.

nature and extent of the alleged "considerable financial hardship" and "irreparable harm". There are no allegations at all about what the cost of compliance with any of the five ordered actions in the Order might be or any attempt to relate those costs to Petitioners' financial situation. Petitioners must provide allegations relating to the cost to comply of each of the five elements of the Order, both of individual items of the Order, and the Order as a whole, and relate these costs to Petitioners' financial condition.

As to likelihood of success on the merits, the Petition is likewise lacking. The Petition needs to provide an explanation, with legal citations, of the Petitioners' factual and legal theory of how they suggest that, in this case, the Department's action was an abuse of discretion or otherwise contrary to law. It is not enough to simply allege an overall factual scenario as Petitioners have done without tying that scenario in, with legal citations, to a theory that Petitioners will eventually win in its overarching allegation that the Department's Order was an abuse by the Department of its discretion or is otherwise contrary to law. Obviously, the Board has said on many occasions before, and we will not belabor the point now, that Petitioners do not have to prove their case lock, stock and barrel at this point, but there must be some level of explanation now demonstrating that it will eventually do so. Here there is no such explanation at all. Petitioners must tie the myriad of facts they have alleged to a theory of how they contend that these facts demonstrate, under law and/or Board precedent, that the Department abused its discretion or acted contrary to law in issuing the Order or any parts of the Order.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MORGAN BROTHERS BUILDERS, INC. & MICHAEL P. MORGAN	:	
	:	
v.	:	**EHB Docket No. 99-194-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

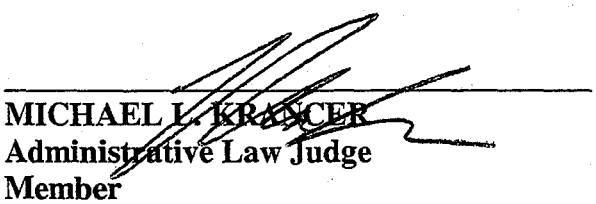
ORDER

The Department's request that the Petition for Supersedeas be denied without a hearing is denied. Petitioners shall supplement the Petition with respect to the issues of irreparable harm and the likelihood of success on the merits consistent with the Board's Opinion of this date by no later than December 30, 1999. Department may renew its request for dismissal of the Petition without a hearing if this deadline is not met or at the below-referenced hearing if the Department contends that the supplementation as ordered herein is insufficient.

A hearing on the Petition for Supersedeas shall be held in Courtroom 1, Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400

Market Street, Harrisburg, Pennsylvania, on **Thursday, December 30, 1999 and Tuesday, January 4, 2000** beginning at 9:30 a.m. on each day.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: December 21, 1999

VIA FACSIMILE AND FIRST CLASS MAIL

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	**Issued:** December 22, 1999

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle Coleman, Administrative Law Judge

Synopsis:

Permittee's motion for summary judgment in an appeal of a major permit modification under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003. (Solid Waste Management Act), is granted in part and denied in part. The motion is granted in several respects including with respect to appellants' objections that (1) the modification conflicts with the definitions in 25 Pa. Code § 271.1; (2) the Department erred by accepting Permittee's environmental impact of the modification without conducting a separate, independent investigation; (3) the Department erred by acting on Permittee's application before it was administratively complete and before the review period expired; and, (4) the Department erred because Permittee's application did not address pending litigation. Otherwise, the motion for summary judgment is denied.

OPINION

This matter was initiated with the July 30, 1997, filing of a notice of appeal by Throop Property Owner's Association, Andy Kerecman, and Sharon Soltis-Sparano (collectively, Appellants) challenging a major permit modification (modification) the Department of Environmental Protection (Department) issued to Keystone Sanitary Landfill (Permittee) on June 10, 1997.[1] The modification authorized an expansion to Permittee's landfill in Dunmore and Throop Boroughs, Lackawanna County. In their notice of appeal, Appellants raise eight major objections to the Department's action. They aver that the Department erred by issuing the modification because:

I. the modification is inconsistent with the definitions in 25 Pa. Code § 276.1;

II. the Department violated 25 Pa. Code §§ 271.3 and 276.126 by simply accepting Permittee's characterization of the environmental impact of the modification, rather than assessing the extent of the impact itself;

III. the Department violated 25 Pa. Code § 271.127 because the application failed to contain a detailed analysis of the potential impact of the modification on the environment, public health, and safety; and the application failed to detail the need for the modification and its social and economic benefits;

IV. the public notice for the modification violated 25 Pa. Code §§ 271.128, 271.141, 271.142, 271.144, and 271.202 because the notice described the action as a "Phase II application made or approved in regard to Permit No. 101247," rather than describing it as a "major permit modification";

V. the Department violated 25 Pa. Code § 271.143 of its regulations;

VI. the Department violated 25 Pa. Code § 271.201 because the need for the expansion does not clearly outweigh the potential harm; there is no need for the facility; the host county plan does not address the landfill; and the

[1] The appeal was initially assigned to Administrative Law Judge Robert Myers. However, upon his retirement on September 11, 1998, the appeal was reassigned to Administrative Law Judge Michelle Coleman.

application was incomplete and inaccurate, and failed to address potential problems resulting from mine subsidence and the proximity of wetlands;

VII. the Department violated 25 Pa. Code § 271.203 by acting on Permittee's application before it was administratively complete and before the review period expired; and,

VIII. the Department violated 25 Pa. Code § 271.123 because Permittee's application was incorrect and incomplete.

The Board has issued four previous decisions in this appeal: a February 5, 1998, opinion and order denying Permittee's motion for sanctions and motion for a protective order; an April 17, 1998, opinion and order granting Appellants' motion to compel; a June 19, 1998, opinion and order granting in part and denying in part a Permittee motion for partial summary judgment, and a denying a Permittee motion to strike; and a July 8, 1998, opinion and order denying a Permittee petition for reconsideration.

Permittee has filed a motion for summary judgment, to which Appellants have filed a timely response. The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record, and affidavits show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party, *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995), and will enter summary judgment only where the right is clear and free from doubt. *Hayward v. Medical Centre of Beaver County*, 608 A.2d 1040 (Pa. 1992). The motion must set forth, with adequate particularity, the reasons for summary judgment. *See, e.g., Barkman v. DER*, 1993 EHB 738, 745, *County of Schuylkill v. DER*, 1990 EHB 1370. To the extent that the memorandum supporting the motion is inconsistent with the motion itself, the motion controls. *See, e.g., Barkman v. DER*, 1993 EHB 738, 745. The same rationale applies to inconsistencies between the answer and memorandum in opposition. *Id.*

I. Appellants' claim that the modification is inconsistent with the definitions in 25 Pa. Code § 276.1

Permittee argues that it is entitled to summary judgment on this issue because Appellants failed to state a claim. According to Permittee, the definitions in 25 Pa. Code § 271.1[2] alone do not impose any duties on the Department or on permit applicants, and therefore, the Department could not have violated these definitions by approving the modification. Appellants argue that their objection states a claim on which relief can be granted because, when the Department uses words defined in Section 271.1 in its communications, the Department has a duty to use those terms in accordance with the definitions set forth in Section 271.1

We agree with Permittee that Appellants' objection fails to state a claim on which relief can be granted. Department communications need not ordinarily use words as they are defined in Section 271.1. Section 271.1 provides, in pertinent part, "The following words and terms, *when used in this article*, have the following meanings, unless the context clearly shows otherwise...." (Emphasis added) The phrase "when used in this article" shows that the definitions in Section 271.1 control only for purposes of interpreting the regulations in Article VII; they do not apply to every use of the words in all Department communications.

Furthermore, Permittee is correct when it argues that Section 271.1 does not independently impose any rights or obligations on the Department or the regulated community. All the definitions in Section 271.1 do is delineate how the words and phrases used in other sections of Article VII are to be interpreted. If the Department failed to comply with one of these other regulations, as read in light of the definitions set forth in Section 271.1, the Department would have violated the other regulation, but it would not have engaged in a separate violation of Section 271.1 as well.[3]

---

[2] The Board assumes, and the parties seem to assume, that Appellants mean to refer to 25 Pa. Code § 271.1 of the Department's regulations, rather than Section 276.1. There is no Chapter 276 in the Department's regulations.

[3] This is consistent with how we treat violations of the regulations in other contexts. For instance, if we find a member of the regulated community has violated a Department regulation,
(Footnote continued on next page.)

II. Appellants' claims that the Department violated 25 Pa. Code §§ 271.3 and 276.126 by simply accepting Permittee's characterization of the environmental impact of the modification, rather than assessing the extent of the impact itself

In their notice of appeal, Appellants raised the following objections with respect to Sections 271.3 and "276.126" [4] of the Department's regulations:

> Section 271.3
> Environmental Protection: Despite the obvious and overwhelming environmental impact of the conversion of such a large tract into a disposal area, the [Department] failed to investigate on its own, [sic] and merely accepted as fact the claims of the applicant.
>
> Section 276.126
> Requirement for Environmental Assessment: Same as above.

(Notice of appeal, p. 4.)

Permittee argues that it is entitled to summary judgment with respect to these issues because Appellants failed to state a claim under either Section 271.3 or Section 276.126. According to Permittee, Appellants failed to state a claim under Section 271.3 of the Department's regulations because Section 271.3 does not require that the Department independently confirm matters set forth in a verified application. As for the Section 271.126 claim, Permittee argues that it submitted its application on a form prescribed by the Department, as required by 25 Pa. Code § 271.126(a). Appellants contend that the Department had a duty to independently investigate the assertions in Permittee's application and, therefore, that the Department violated its duty by not investigating those assertions or requiring additional information from Permittee.

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and he committed the violation because he misinterpreted a term defined elsewhere in the regulations, we hold him liable for one violation—the violation of the regulation imposing the duty—not for separate violations of the regulation imposing the duty and the regulation defining the terms.

[4] Again, the citation to 276.126 has been identified as a typographical error that should read "271.126."

Section 271.126 of the Department's regulations provides, "[A]n application for a municipal waste disposal or processing permit shall include an environmental assessment on a form prescribed by the Department." 25 Pa. Code § 271.126(a). Section 271.3, meanwhile, provides:

> (a) The Department may ... request information from a permit applicant ... not specifically identified in this article that the Department deems necessary to implement the purposes and provisions of the act, the environmental protection acts and the regulations promulgated thereunder.

Neither Section 271.3 nor Section 271.126 impose a duty to conduct an independent investigation upon the Department. Section 271.126 simply requires that applicants submit an environmental assessment on a form prescribed by the Department. Permittee supported its motion with an affidavit showing that it submitted an environmental assessment on such a form. (Motion, Appendix A, affidavit of Joan Luck, Ex. 3, pp. 0004, 0013-0017, 0021-0034; Motion, Appendix D, affidavit of Joan Luck, Ex. 14.) Appellants' response fails to point to anything in the record which might show that Permittee did not submit an environmental assessment on the required form. Therefore, Permittee is entitled to summary judgment with respect to Appellants' Section 271.126 challenge.

Permittee is entitled to summary judgment on Appellants' Section 271.3 challenge for similar reasons. Section 271.3 does not impose a duty upon the Department to conduct an independent investigation to verify assertions in the environmental assessment. It simply authorizes the Department to request information in addition to that enumerated in the municipal waste regulations if the Department needs the information to ensure compliance with environmental protection laws. Instead, Appellants seem to argue that the Department acted unreasonably simply because it relied on information submitted to it *by an applicant*. The Department may have a duty under other regulations to probe behind representations in an application, but it does not have that duty under Section 271.3. By its very terms, Section 271.3 concerns requests of additional information "*from a permit applicant*." (Emphasis added.) Although the Department can certainly request additional information if the information it

already has received raises some doubt about whether the applicant can comply with the relevant environmental laws, the Department does not have a *duty* under Section 271.3 to conduct an *independent investigation.*

Although Appellants now seek to raise issues with respect to Sections 271.3 and 271.126 that go beyond the Department's duty to conduct an independent investigation (for instance, whether the environmental assessment was properly verified), Appellants may not raise those issues. Appellants limited the objections in their notice of appeal to the Department's failure to conduct an independent investigation. They waived any issues not raised in their notice of appeal. *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986) *affirmed*, 555 A.2d 812 (Pa. 1989).

III. Appellants' claim that the Department violated 25 Pa. Code § 271.127 by submitting an application that failed to contain a detailed analysis of the potential impact of the modification on the environment, public health, and safety; and failed to detail the need for the modification and its social and economic benefits

In their notice of appeal, Appellants raise the following objection with respect to Section 271.127 of the Department's regulations:

> SECTION 271.127
>
> Environmental Assessment: Appellants received Keystone permit application on September 23, 1996, and it did not contain a detailed analysis of the potential impact on the environment, public health and public safety and other areas covered under 271.127(a). The [Department] failed to comply with section 271.127(b). Also, the applicant failed to describe in writing the assumed social and economic benefits of the project to the public. There was no detailed explanation of the need for the facility, etc. The Applicant and the [Department] both failed to address the issues in section 271.127. (Notice of appeal, p. 4.)

A. Do Appellants' Section 271.127 claims concern the adequacy of the copy of the permit application Appellants received or the copy of the permit application Permittee submitted to the Department?

Permittee argues that Appellants' Section 271.127 objections are limited to the adequacy of the copy of the application *Appellants obtained from the Department*, not whether the application *Permittee submitted to the Department* was adequate. According to Permittee,

therefore, it is entitled to summary judgment with respect to Appellants' Section 271.127 objection because the Department has no duty under Section 271.127 to ensure that Appellants have a complete copy of the application.

It is clear from any but the most constrained reading of Appellants' objection, however, that Appellants challenge the adequacy of the application *submitted to the Department*; they are not simply asserting that the Department abdicated its duty to ensure that *they themselves received* a complete copy of the application. We reject Permittee's argument.

B. Appellants' claim that the Section 271.127(a) analysis in the permit application was deficient

Permittee argues that it is entitled to summary judgment to the extent that Appellants contend that the application violated Section 271.127(a) because it did not include a detailed analysis of the potential impact on the environment, public health, public safety, and other areas covered by Section 271.127(a). In support of its position, Permittee points to the permit application itself, and it argues that Appellants failed to provide any support for the proposition that the permit application was inadequate.

Appellants argue that they are not so much asserting that the application lacked *any* analysis, but rather, that the environmental impact analysis that was performed was inaccurate and insufficiently detailed. One of the Appellants' expert reports (which we decline to strike at this time despite its late submission) explains the Appellants' position as follows:

> It is technically and scientifically inconceivable that an expansion of the size proposed by Keystone would not have any harms or potential harms.... [T]he potential for the ... expansion to cause harm is significant and a detailed analysis of each potential impact was required ... in [the] environmental assessment. Examples of potential impacts that could occur as a result of the proposed expansion include: noise ...; vibrations; odors; dust; vectors; impacts on stream flow in Eddy Creek; discharge of contaminants to Eddy Creek; impacts on stream flow in Eddy Creek; discharge of contaminants to Eddy Creek; impacts on stream flow in Little Roaring Creek; impacts on fish, wildlife, plants, aquatic habitat and water quality in Eddy Creek, Little Roaring Brook and their watersheds; impact

> on Dunmore Reservoir No. 1 and associated watershed; impacts on local infrastructure ...; and impacts on local wetlands.... A majority of the potential impacts listed above were not evaluated by Keystone and those that were discussed in the application were not identified as potential impacts and a detailed analysis was not performed."

(pp. 40-41 of Appellant's response to Permittee's motion for summary judgment; p. 2 of Ahlert's Supplemental Report, at Response, Vol. I, Ex. 2C.) It is obvious from this excerpt that there are disputed issues of fact on this issue. Therefore, Permittee is not entitled to summary judgment on this issue.

C. Appellants' argument that the Department violated Section 271.127(b).

Permittee also argues that it is entitled to summary judgment on Appellants' claim that the Department failed to comply with Section 271.127(b) of its regulations, 25 Pa.Code § 271.127(b).

Section 271.127(b) provides:

> The Department, after consultation with appropriate governmental agencies and potentially affected persons, will evaluate the [environmental] assessment provided under subsection (a) to determine whether the proposed operation has the potential to cause environmental harm. In determining whether the proposed operation has the potential to cause environmental harm, the Department will consider its experiences with a variety of factors, including, but not limited to, engineering design, construction and operations deviances at comparable facilities; with inherent limitations and imperfections in similar designs and materials employed at comparable facilities; and with the limitations on future productive use of the land after closure of the facility. If the Department determines that the proposed operation has this potential, it will notify the applicant in writing.

In support of their assertions that the Department violated Section 271.127(b), Appellants argue that (1) the Department failed to consult with potentially affected persons, (2) Permittee failed to notify the Department of potential environmental harm resulting from the facility, and (3) the application did not adequately address the mitigation measures for the proposed environmental harms. In addition to citing certain specific evidence to support their various assertions, Appellants also state that they "rel[ied] upon the documents identified and produced

in discovery, the Department's responses to interrogatories, the documents reviewed at the offices of the Department, and their responses to discovery, including [A]ppellants' expert reports." (Response, paragraph 70, p. 46.)

In considering whether Appellant has raised an issue of fact regarding whether the Department violated Section 271.127(b), we will only consider the evidence Appellants' response identified specifically, and not the other evidence which it tried to incorporate by referring to "the documents identified and produced in discovery, the Department's responses to interrogatories, the documents reviewed at the offices of the Department, and their responses to discovery, including [A]ppellants' expert reports." We have previously held that a party who moves for summary judgment bears the responsibility for sifting through the affidavits and other documents he uses to support the motion, and to frame his best case. *Barkman v. DER,* 1993 EHB 738, 735. Similar reasoning applies to a party responding to a motion for summary judgment—especially where, as here, that party bears the burden of proof. It is his responsibility—not the Board's—to identify the support for his position. And he must identify, the "specific" support for his position.

Appellants argue that the Department violated Section 271.127(b) because the Department failed to consult with potentially affected persons. In support of this argument, Appellants point to, among other things, the Department's response to interrogatory no. 7 of Appellants' First Set of Interrogatories. The Department's response:

> (1) identifies at least nine Department personnel and two involved in the review of the environmental assessment;
>
> (2) incorporates the Department's response to interrogatory no. 4, which includes references to a public hearing, a local municipal involvement meeting, a public notice, and notice to Dunmore Borough, Throop Borough, Lackawanna County Commissioners, City of Scranton Sewer Authority, Soil Conservation Service,

> Pennsylvanian America Water Company, "adjacent property owners," and the Lackawanna Planning Commission; and,
>
> (3) incorporates the Department's response to interrogatory no. 3, which identifies at least two additional DEP personnel involved in matters relating to public notice and review, and four additional DEP personnel involved in the technical review of the application by the Department of Waste Management.

This response is adequate to demonstrate that there are disputed issues of fact regarding this question, making summary judgment inappropriate at this time.

Appellants' argue that the Department violated Section 271.127 because: (1) Permittee failed to notify the Department of potential environmental harm resulting from the facility and (2) the application did not adequately address the mitigation measures for the potential environmental harms. Section 271.127(c) provides, in pertinent part, "If the Department or the applicant determines that the proposed operation may cause environmental harm, the applicant shall provide the Department with a written explanation of how it plans to mitigate the potential harm...." Under Section 271.127(c), therefore, both the permit applicant and the Department have a duty to determine whether the proposed activity could potentially result in environmental harm, and, if either one of them concludes it would, the applicant must provide a written explanation of how it will mitigate the harms. It follows, therefore, that Permittee had a duty under Section 271.127(c) to notify the Department of potential environmental harms, and describe the measures that it would employ to mitigate those harms.

The evidence Appellants cite is sufficient to raise issues of fact on both of their objections. The permit application and Appellants' expert reports provide support for Appellants' claim that Permittee failed to notify the Department of potential environmental harm that would result from the expansion. In the permit application, Permittee wrote, "No harms or potential harms have been identified...." (Motion, Appendix D, Ex. 15, p. K00468.) However,

Appellants' expert pointed to a number of potential harms in their reports. For instance, in his supplemental report, the expert writes:

> It is technically and scientifically inconceivable that an expansion of the size proposed by Keystone would not have any harms or potential harms.... Examples of potential impacts that could occur as a result of the proposed expansion include: noise ...; vibrations; odors; dust; vectors; impacts on stream flow ...; discharge of contaminants ...; impacts on fish, wildlife, plants, aquatic habitat and water quality ...; impact on Dunmore Reservoir No. 1 and associated watershed; impacts on local infrastructure ...; and impacts on local wetlands.... A majority of the potential impacts listed above were not evaluated by Keystone and those that were discussed in the application were not identified as potential impacts and a detailed analysis was not performed.

(Appellant's response to Permittee's motion for summary judgment, pp. 40-41; Ahlert's supplemental report, at Response, Vol. I, Ex. 2C, p. 2.) If the application failed even to identify potential environmental harms, then it follows that it also failed to explain what measures applicant would use to mitigate those harms. Thus, by making a case that the application failed to identify the potential environmental harms, Appellants have preserved the factual issue of whether the application failed to address the corresponding mitigation measures.

D. Appellants' claim that the Department violated Section 271.127 because Permittee's application failed to describe in writing the social and economic benefits of the project for the public

Section 271.127(d) provides that permit applications for municipal waste landfills shall "describe in writing the social and economic benefits of the project to the public." Appellants assert in their notice of appeal that "the applicant failed to describe in writing the assumed social and economic benefits of the project to the public."

Permittee's application did contain a description in writing of some of the social and economic benefits of the expansion. (*See, e.g.,* Motion, Appendix A, Ex. 3, pp. 0033-0034.) Even so, however, Permittee is not entitled to summary judgment on this issue. Although Appellants objected in their notice of appeal that "the applicant failed to describe in writing the assumed social and economic benefits," this language tracks the requirement in Section

271.127(d) that applications must "describe in writing the social and economic benefits." Thus, by objecting that "the applicant failed to describe in writing the assumed social and economic benefits," Appellants were not necessarily asserting that the application contained no written description at all of those benefits; Appellants were simply asserting that the application did not contain a description which comported with Section 271.127(d). To comport with that section, the description must not only be written; it must be accurate as well. If, as Appellants, allege here, an application had a written description which listed benefits which would *not* result from the project, then the application may not have complied with Section 271.127(d). Since Appellants supported their position with expert testimony that the expansion would not result in some of the benefits listed in the application, (Response, Ex. 2, Part C, pp. 12-13), Permittee is not entitled to summary judgment on this issue.

E. Appellant's claim that the Department violated Section 271.127 because Permittee's application omitted a detailed explanation of the need for the facility

In their notice of appeal, Appellants assert that the Department violated Section 271.127 by issuing the modification because "[t]here was no detailed explanation of the need for the facility...."[5] (Notice of appeal, p. 4.) Permittee argues that it is entitled to summary judgment on this issue because it did submit a detailed explanation of the need for the facility and, even if it had not, the facility is presumed to be needed under Section 271.127(g) because the facility is listed in the Lackawanna County Municipal Waste Management Plan.[6] Appellants argue that

[5] Section 271.127(f), 25 Pa. Code § 271.127(f), provides, in pertinent part: "The description [of the social and economic benefits] shall include a detailed explanation of the need for the facility...."

[6] Section 271.127(g) provides:

(Footnote continued on next page.)

Permittee is not entitled to summary judgment because its explanation of the need for the expanded facility is not *sufficiently* detailed, and because Permittee failed to show that the facility was provided for in the Lackawanna County Municipal Waste Management Plan.

Permittee has failed to provide adequate support for us to conclude as a matter of law that it submitted a sufficiently detailed explanation of the need for the expanded facility. In its motion, Permittee points to 59 pages from Form D of its permit application and a February 27, 1997, update to Form D. (Motion, paragraphs 80 and 81, p. 22.) Fifty-five of these pages are entirely unrelated to the need for the facility. The remaining four pages are only tangentially related to the issue. On one of these pages, for instance, Permittee simply asserts, "A mandatory ingredient of future commercial, industrial, and residential expansion [in Permittee's service area] is a long term guaranteed source of low cost municipal and residual solid waste disposal." (Motion, Appendix A, Ex. 3, p. 0034.) This does not necessarily qualify as a "detailed explanation" of the need for the facility. The remaining three pages consist of the "Planning" portion of the February 27, 1997, update to Form D. (Motion, Appendix D, Ex. 14, pp. 0042-0044.) In these pages, Permittee (1) states that its application is consistent with existing solid waste plans and laws, (2) characterizes the type and source of the waste it received in 1994, and

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The Department may consider a proposed municipal waste landfill or resource recovery facility, or proposed expansion thereof, to be needed for municipal waste disposal or processing if the following are met:

> (1) The proposed facility or expansion is provided for in an approved county plan.
>
> (2) The proposed facility will actually be used to implement an approved county plan based on implementing documents submitted under § 272.245 (relating to submission of implementing documents) or other clear and convincing evidence acceptable to the Department.

(3) asserts that it was recognized in certain regional and county plans, including the Lackawanna County Waste Management Plan. This also is not necessarily a sufficiently "detailed explanation" of the need for the facility.

Permittee's assertion that the facility is presumed to be needed under Section 271.127(g) because it is listed in the Lackawanna County Municipal Waste Management Plan also raises disputed issues of fact and law, including an interpretation of the plan, thereby preventing issuance of summary judgment.

IV. Appellants' claim that the public notice for the modification was deficient

In their notice of appeal, Appellants argue that the public notice for the modification violated Sections 271.128, 271.141, 271.144, and 271.202 of the Department's regulations because the public notice described the action as a "Phase II application made or approved in regard to Permit No. 101247" rather than describing it as a "major permit modification."[7] Permittee argues that it is entitled to summary judgment with respect to the alleged violations because, among other things, none of the regulations required that the public notice describe the action as a "major permit modification," as Appellants contend.

A. Section 271.128 of the Department's regulations

Section 271.128 lists the application fees that apply to new permits, permit modifications, permit reissuances, and permit renewals under Chapter 271 of the Department's regulations. The only portion of Section 271.128 which is even tangentially relevant to Permittee's application is 25 Pa. Code § 271.128(b)(2). It provides that applications for permit modifications for municipal waste landfills must be accompanied by a $4,600 fee.

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[7] Appellants' notice of appeal also alleged that the modification violated 25 Pa. Code § 271.142 for the same reasons. However, we have already dismissed that aspect of Appellants' appeal previously. *See, e.g., Throop Property Owner's Association v. DEP*, EHB Docket No. 97-164-MR (opinion issued June 19, 1998).

Appellants admit in their notice of appeal that: (1) Permittee's application "clearly meets criteria for [sic] Major Permit Modification," and (2) "[t]he Applicant paid $4,600.00 ..., which was the fee for a Major Permit Modification...." (Notice of appeal, pp. 4-5.) Similarly, Appellants admit in their response to the motion for summary judgment that "the proper fee for a permit modification is $4,600" and that "the $4,600 fee was paid." (Response, paragraphs 105 and 106, p. 72.) Given these admissions, Appellants cannot prevail on their argument that the Department violated Section 271.128 by issuing Permittee's modification.

B. Section 271.141 of the Department's regulations

Appellants argue that Permittee violated Section 271.141 of the Department's regulations because the public notice of the application referred to a "Phase II application made or approved in regard to Permit No. 101247" rather than a "major permit modification." Later in their notice of appeal, Appellants addressed the alleged Section 271.141 violation again, this time separately. The objection reads:

> SECTION 271.141 Public notice by applicant
>
> > Incorrect and purposely misleading to the public. The Applicant did not comply with this section. The public notice never mentioned a "Major Permit Modification". [sic] This entire section was not followed by the Applicant, nor by the [Department].
>
> (Notice of appeal, p. 5.)

When Permittee's interrogatories requested the basis for these objections concerning Section 271.141, Appellants responded, in pertinent part:

> The notice published by [Permittee] was inadequate to fulfill the requirements of 25 Pa. Code § 271.141 in that it failed to identify the true nature of the major permit modification and [sic] instead, identified the application as a "Phase II Site Development." The term "Phase II Site Development" [sic] in addition to being nebulous, has no regulatory meaning and provides those intended to receive notice under this section with no information as to the extent of the expansion. The notice does not identify that the application includes an increase in acreage and in site volume; rather, it merely notes that the "Phase II Site Application does not contain a request to increase the present average daily or maximum daily tonnage of municipal solid waste." The notice given to

> Keystone does not provide an adequate description of the operations as required under Section 271.141.

(Motion, Appendix F, Ex. 4, paragraph 6, pp. 18-19.)

The relevant portion of the published notice provides:

> Keystone Sanitary Landfill, Inc., P.O. Box 249, Dunham Drive, Dunmore ... has submitted an Application for the Phase II Site Development of Permit No. 101247 to the ... Department....
>
> The Phase II Site Development will consist of a 186 acre double lined municipal, solid waste disposal sanitary landfill and related support stormwater, wastewater, and gas management facilities. The Phase II Site Development will be located along the easterly flank of the property included in the PaDEP Permit No. 101247 in the Boroughs of Dunmore and Throop, Lackawanna County. The Phase II Site Development is predicated upon providing continuous service to the present customer base of Keystone ... into the first quarter of the 21st Century [sic]. Accordingly, the Phase II Site Application does not request to increase the average daily, nor [sic] maximum daily tonnage of municipal solid waste.

(Motion, Appendix B, Ex. 1)

Appellants contend that Permittee "purposefully created the misimpression that the application concerned small changes to the existing solid waste permit" because "the title 'Phase II Site Development' ... bears a confusing resemblance to the Department's 'Phase II' application requirements, which ordinarily refers [sic] to merely the more detailed landfill design application materials, and does [sic] not refer to a new huge expanded disposal area." (Response, pp. 73-74, paragraph 112.) They assert that the Department and Permittee intentionally misled the public. Although we question whether Permittee's purpose has any relevance, whether the notice was materially misleading raises factual issues which must be addressed at a hearing.

C. Section 271.202 of the Department's regulations

Appellants also argue that the Department violated Section 271.202 of its regulations by issuing the modification because Section 271.202 "clearly states that the Phase I and Phase II parts of an application must be submitted together for approval to be administratively complete. If they are submitted separately, the application is administratively incomplete, [sic] and must be

returned to the applicant." (Notice of appeal, pp. 4-5.) Later in their notice of appeal, Appellants address the alleged Section 271.202 violation again, this time separately. That objection reads:

> SECTION 271.202 Completeness Review
>
> As stated before, Keystones [sic] Application should have been returned as Administratively [sic] incomplete when it termed its Major Permit Modification as a "Phase II site development."

(Notice of appeal, p. 6.)

Appellants cannot prevail on their Section 271.202 objections. They failed to state a cause of action, as Permittee contends.

Section 271.202 provides, in pertinent part:

> After receipt of a permit application, the Department will determine whether the application is administratively complete. For purposes of this section, an application is administratively complete if it contains necessary information, maps, fees and other documents, regardless of whether the information, maps, fees and documents would be sufficient for issuance of the permit. If the Phase I and Phase II parts of the application for a landfill are submitted separately, the application will not be considered to be administratively complete until both parts are determined to be administratively complete.

25 Pa. Code § 271.202(a).

Although Appellants insist that Section 271.202 requires that the Department must return an application if Phase I and Phase II are not submitted simultaneously, the last sentence of the regulation clearly refutes their position. That sentence provides that, where an applicant submits the two phases of an application separately, the application is administratively complete when both phases are administratively complete. The clear inference is that the Department may act on an application even where Phase I and Phase II of the application arrive separately.

Nor can Appellants prevail on their argument that the application was incomplete under Section 271.202 because Permittee called it a "Phase II Site Development" rather than a "major permit modification." We have already explained that Permittee did not run afoul of Section 271.141 by referring to the application as a "Phase II Site Development." The standard under Section 271.202 is even lower. While Section 271.141(a)(1) requires that applicants publish

notice including a "a brief description of the location and proposed operation ... of the facility," Section 271.202 simply requires that "an application is administratively complete if it contains necessary information, maps, fees and other documents, regardless of whether [they] would be sufficient for issuance of the permit." Appellants' notice of appeal never alleges that the application was missing material listed in Section 271.202. Furthermore, whatever the actual title of the application, it is patently clear from the other information in the application that Permittee was requesting a major permit modification involving an expansion to its landfill. The mere fact that Permittee referred to the application as a "Phase II Site Development" did not render the application incomplete. Accordingly, Permittee is entitled to summary judgment on this issue.

D. Section 271.144 of the Department's regulations

In their notice of appeal, Appellants argue that the Department violated Section 271.144 of its regulations because the public notice of the application referred to a "Phase II Site Development" rather than a "major permit modification." In its motion for summary judgment, Permittee argues that Appellants failed to state a claim regarding Section 271.144 because they never allege that the Department failed to treat the application as a major permit modification, and the evidence of record shows that the Department treated the application as a major permit modification.

Even assuming Appellants had an independent basis for their Section 271.144 claim, they could not prevail on it. Section 271.144 does not contain any particular requirements regarding notice or public hearings. It simply provides that, if an application involves a change in the site capacity or permitted acreage, the Department must treat the application as a major permit modification.

Appellants also object to the public notification under Section 271.143. That section, however, contains no requirements concerning the content of notice for public hearings. All that Section 271.143 says regarding notice is that "[a]t least 30 days prior to conducting a hearing, the

Department will publish notice of the hearing in a newspaper of general circulation in the proposed permit area." Since Appellants did not aver that the Department failed to publish notice of the hearing in an appropriate newspaper more than 30 days before the hearing, they cannot prevail on this aspect of their Section 271.143 claim. Appellants' claim that the Department violated Section 271.143 of the regulations because the Department failed to provide three of Appellants with a summary of the comments submitted at the hearing and the Department's responses—despite requests from those Appellants for information concerning the application.

Permittee argues that it is entitled to summary judgment on this issue because (1) Appellants were not harmed by the oversight, and therefore, have no standing, and (2) even if they had standing, Appellants would not have stated a claim because they received copies of the comments and responses eventually, and Section 271.143 does not require that the Department distribute the comments and responses within a particular time.

In their response and memorandum in opposition, Appellants argue that they were harmed by the oversight because, if they had the comments and responses, they could have galvanized opposition to the modification among their neighbors and other area residents. However, Appellants never responded to Permittee's argument that they failed to state a claim because they eventually received copies of the comments and responses, and Section 271.143 does not require that the Department distribute the comments and responses within a particular time.

Even assuming the Department never sent the comments and responses to the Appellants, Appellants would still be unable to prevail on this aspect of their Section 271.143 challenge. Section 271.143 provides, in pertinent part:

> (c) After a hearing, the Department will prepare a summary of the written and oral comments submitted at the hearing, the Department's responses to the comments and the reasons therefor. The Department will provide copies of this summary to persons who submitted comments and to other persons who request a copy.

While Section 271.143 does require that the Department provide copies of its summary to persons who submit comments or request a copy, that does not mean that, if the Department neglects to send the summary to some individuals, the Board will overturn the Department's action.

Section 271.143 has a twofold purpose. Subsection (a), by providing that the Department may conduct public hearings "whenever there is a significant public interest or the Department otherwise deems appropriate," ensures that the Department will know of public concerns during sensitive permitting decisions, and it affords citizens an opportunity to influence those decisions. Subsection (c), meanwhile, is primarily educational. By requiring that the Department distribute copies of its summary of the meeting, subsection (c) ensures that interested persons will know the Department's position on their comments, and what action, if any, the Department intends to take concerning them.

When evaluating alleged violations of Section 271.143, it is important to distinguish between *violations of subsection (a)*, which compromise an interested person's ability to comment on applications (and thereby potentially influence the Department's permitting decision), and *violations of subsection (c)*, which simply interfere with interested persons knowing the Department's response to the comments it receives. Appellants do not allege that the Department prevented them from commenting on the application.[8] Therefore, the Department's failure to send them the summary did not deprive them of the *opportunity to affect the Department's decision-making process*; it merely deprived them of the *opportunity to know what the Department's responses to the public comments were*. This distinction is crucial, and it persuades us that the Department's failure to provide the three Appellants with the summary does not justify reversal of the permit issuance. However, Appellants' arguments seem to

[8] Indeed, Appellants freely admit that three Appellants had each submitted written comments to the Department before the hearing and spoken at the hearing itself. (Notice of appeal, p. 5.)

include the suggestion that the public notice was inadequate in proving the general public with an understanding that the change was a major plan revision, and therefore, fewer members of the public were able to comment on and influence the Department's position. Accordingly, we will not grant summary judgment on this aspect of Appellants' Section 271.143 objections.

E. Appellants' claim that the Department violated section 271.143 because it failed to adequately address the comments it received from the public

In its motion, Permittee argues that it is entitled to summary judgment on this issue because the Department did adequately respond to the comments submitted to it. In support of its position, Permittee points to the Department's summary of the comments and responses. Appellants, meanwhile, insist that the Department failed to adequately respond to the comments. Appellants confine their argument, however, to the response concerning the July 17, 1989, agreement.

Permittee is entitled to summary judgment on this issue. The Department's responses to the public comments are adequate under the circumstances. Appellants focus on the response concerning the July 17, 1989, agreement. In response to the comment "Keystone Landfill has violated the 1989 Throop, Dunmore, Keystone Landfill agreement," the Department wrote, "This issue is outside the Department's jurisdiction as stated above." Motion, Appendix C, Ex. 4, p. 1. In the previous response, the Department stated, in part:

> The Department can only enforce the Municipal Waste Regulations and the conditions contained in Waste Management and Air Quality permits. The Department has no authority to enforce local zoning ordinances or contracts to which the Department is not a party or has no regulatory authority. These agreements or contracts are enforceable only between the parties involved.

Id. This response to Appellants' comment is adequate.

F. Appellants' claim that the Department violated Section 271.143 because the Department's review of the permit application did not conform to Executive Order 1996-5 (Executive Order)

In its motion for summary judgment, Permittee argues that it is entitled to summary judgment on this issue because the Executive Order does not create a private right of action..

Appellants failed to respond to Permittee's argument that the Executive Order does not create a private right of action. We agree with Permittee that Appellants do not have a right of action under the Executive Order. The terms of the Executive Order could hardly be clearer. Paragraph 5(b) provides, "This order is intended only to improve the internal management of executive agencies and *is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Commonwealth [or] its agencies....*" (Emphasis added.) Consequently, Permittee is entitled to summary judgment on Appellants' objection that the Department's review of the application violated the executive order.

VI. Appellants claim that the Department violated 25 Pa. Code § 271.201 because the need for the expansion does not clearly outweigh the potential harm; there is no need for the facility; the host county plan does not address the landfill; and the application was incomplete and inaccurate, and failed to address potential problems resulting from mine subsidence and the proximity of wetlands

In their notice of appeal, Appellants assert that the Department violated Section 271.201 of its regulations for five reasons:

(1) The permit application was incomplete and inaccurate;

(2) The need for the facility does not clearly outweigh the potential harm posed by operation of the facility;

(3) A potential for mine subsidence exists and was not addressed;

(4) Wetlands will be affected; and

(5) The host county plan does not address the expansion.

Permittee served an interrogatory on Appellants requesting the factual and legal bases for the Section 271.201 objections. In response, Appellants raised 12 frequently overlapping, legal bases for their objections. We agree that Appellants are precluded from raising what in fact are new legal bases for the appeal in the discovery responses that go beyond the bases raised in the notice of appeal. Permittee asserts that it is entitled to summary judgment on all the legal bases Appellants identified in their response to the interrogatory.

A. Appellants' claim that the Department violated Section 271.201 because the application failed to include the demonstration regarding mine subsidence required under 25 Pa. Code § 271.201(a)(5)

Permittee argues that it is entitled to summary judgment because there is no potential for mine subsidence, and even if there were, the measures for mitigating subsidence in the permit application are adequate to guard against the potential danger. Appellants argue that a potential for mine subsidence exists and that the mitigation measures proposed in the application are inadequate to address the potential danger.

Section 271.201(a) of the Department's regulations provides, in pertinent part:

> (a) A permit application will not be approved unless the applicant affirmatively demonstrates that the following conditions are met:
>
> > (5) When the potential for mine subsidence exists, subsidence will not endanger or lessen the ability of the proposed facility to operate in a manner that is consistent with the act, the environmental protection acts and this title, and will not cause the proposed operation to endanger the environment or public health, safety and welfare.

Whether there is a potential for mine subsidence and, if so, whether the proposed mitigation measures are adequate to guard against the potential danger are disputed issues of fact that will need to be addressed at the hearing on the merits.

B. Appellants' claim that the Department violated Section 271.201 because it either failed to conclude or erred when it concluded that the need for the facility outweighs the potential harm

Appellants asserted in their notice of appeal that the Department erred by either failing to conclude or erring when it concluded that the need for the facility outweighed the potential harm. Permittee argues that it is entitled to summary judgment on this issue because the Department has the authority, under Section 271.127(g) of the regulations, to consider a facility "needed" if the facility is provided for in an approved county plan, and the approved county plan provides for Permittee's facility. In addition, it argues that its application contained mitigation measures, the Department imposed additional permit conditions to safeguard the environment, and the

application contained ample evidence showing that the need for the facility did, in fact, outweigh the potential harm.

Section 271.201(a) provides, in pertinent part:

> A permit application will not be approved unless the applicant affirmatively demonstrates that the following conditions are met:
>
> > (3) ... the need for the facility shall clearly outweigh the potential harm posed by operation of the facility, based on factors described in § 271.127.

Section 271.127(g), meanwhile, provides:

> The Department may consider a proposed municipal waste landfill ... or proposed expansion thereof, to be needed for municipal waste disposal or processing if ...:
>
> > (1) The proposed facility or expansion is provided for in an approved county plan.
> >
> > (2) The proposed facility will actually be used to implement an approved county plan based on implementing documents submitted under § 272.245 ... or other clear and convincing evidence acceptable to the Department.

Whether Permittee is entitled to summary judgment under Section 271.127(g)(1) depends, at least in part, on whether Permittee's proposed facility or expansion is "provided for" in the Lackawanna County Plan. The parties have conflicting interpretations of the Plan which raise issues of fact and law that we will need to resolve at the hearing on the merits. In addition, there are other disputed factual issues regarding whether Permittee has affirmatively demonstrated that the need for the facility outweighs its potential harms. Accordingly, Permittee is not entitled to summary judgment on this issue.

Permittee is also not entitled to summary judgment with respect to Appellants' other objection, that Permittee failed to comply with Section 271.201(b)(2)(iii) of the Department's regulations. By its terms, Section 271.201(b)(2)(iii) applies only to facilities that accept out-of-county waste that is not provided for in the host county's plan.[9] Whether Permittee was required

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[9] Section 271.201(b) provides, in pertinent part:

(Footnote continued on next page.)

to comply with Section 271.201(b)(2)(iii) raises disputed issues of fact and law that will require further consideration.

VII. Appellants' claim that the Department violated 25 Pa. Code § 271.203 by acting on Permittee's application before it was administratively complete and before the review period expired

In their notice of appeal, Appellants argue that the Department violated Section 271.203 of its regulations because "Keystone's Application was NOT administratively complete and the review period was premature." (Notice of appeal, p. 6, emphasis in original.) Permittee argues that it is entitled to summary judgment on this challenge to its modification because Section 271.203 imposes *maximum* time limits on the Department's review, not minimum limits. Appellants respond that the Department violated Section 271.203 because the application was never administratively complete.

Appellants cannot prevail on their Section 271.203 objections. The Department violates Section 271.203 only when it waits *too long* to act on a permit application. Section 271.203 provides, in pertinent part:

> (a) The Department will issue or deny permit applications ... within 9 months from the date of the Department's determination under § 271.202 ... that the application is administratively complete.

> [A] permit application for a municipal waste landfill ... will not be approved unless the applicant affirmatively demonstrates to the Department's satisfaction that the following conditions are met:
>
> . . .
>
> (2) The facility meets the following *if the facility would receive waste that is not provided for in the approved plan for the host county*:
>
> . . .
>
> (iii) No site in a county where waste was generated is more suitable for a municipal waste disposal facility ... than the proposed location of the facility.

(Emphasis added.)

The Department determined that the application was administratively complete, and Appellants point to no evidence showing that more than nine months elapsed between that date and the date the Department issued the modification. Appellants seem to be trying to use their Section 271.203 challenge to make a collateral attack on the Department's determination that the application was administratively complete under Section 271.202. We rejected Appellants' Section 271.202 argument, when they made it expressly, previously in this opinion. The objection is no more viable when cast as a Section 271.203 objection. Accordingly, Permittee is entitled to summary judgment on this issue.

VIII. Appellants' claim that the Department violated 25 Pa. Code § 271.123 because Permittee's application was incorrect and incomplete

In their notice of appeal, Appellants argued that the Department violated Pa. Code § 271.123 because "Keystone's application is incorrect and incomplete." (Notice of appeal, p. 6.) Permittee argues that it is entitled to summary judgment on Appellants' Section 271.123 objections because (1) documentation submitted as part of the application demonstrated that it is entitled to operate the facility on the land; (2) it was not required to list the July 1989 settlement agreement as a restrictive covenant or pending litigation; (3) the Board has previously ruled that it would not interpret or enforce the settlement agreement; and (4) Appellants waived any objections they may have had based on the settlement agreement by failing to challenge other Department actions authorizing the expansion of the facility which occurred after July 1989.

Section 271.123 of the Department's regulations provides, in pertinent part:

> (a) An application shall contain a description of the documents upon which the applicant bases the legal right to enter and operate a municipal waste processing or disposal facility with the proposed permit area. The application shall also state whether that right is the subject of pending litigation.

(b) The application shall provide one of the following for lands within the permit area:

(1) A copy of the written consent to the applicant by the current landowner to operate a municipal waste processing or disposal facility.

(2) A copy of the document of conveyance that expressly grants or reserves the applicant of the right to operate a municipal waste processing or disposal facility and an abstract of title relating the documents to the current landowner.

In response, Appellants claim that the Department violated Section 271.123 because the permit modification violates the July 1989 settlement agreement and the closure plan on which it is based. Appellants cannot prevail on this issue because, even assuming the expansion was inconsistent with the settlement agreement or closure plan, that would not mean that the Department violated Section 271.123 by issuing the modification. Nothing in the language of subsections (a) or (b) of that regulation requires that a permit modification must be consistent with a settlement agreement or a closure order. Permittee did not rely upon either document as a document of conveyance, or to show that it had the consent of the landowner, or to show that it was otherwise entitled to operate the facility on the land. And Appellants never aver that litigation concerning the settlement agreement or closure order was pending when the Department approved the modification. Therefore, even assuming the modification was inconsistent with the settlement agreement or closure order, the Department would not have violated Section 271.123 by approving the modification. Therefore, Permittee is entitled to summary judgment on this issue.

Appellants also claim that the Department violated Section 271.123 because the application did not list the July 1989 settlement agreement as a restrictive covenant affecting the land involved in the expansion. Our analysis regarding this issue parallels our analysis on the preceding issue. Appellants cannot prevail on this issue because Section 271.123 does not

require that restrictive covenants be listed in permit applications. Therefore, even assuming the July 1989 settlement agreement is a restrictive covenant affecting the land involved in the expansion, Section 271.123 would not require Permittee to identify it as such in their application.[10] Accordingly, Permittee is entitled to summary judgment on this issue.

Appellants claim that the Department violated Section 271.123 because the application failed to list pending litigation concerning the use of the land. In their response to Permittee's interrogatory, Appellants averred that the Department violated Section 271.123 by approving the modification because the application failed to list the settlement agreement and "other pending civil litigation concerning the use of the land." (Motion, Appendix F, Ex. 4, paragraph 14(a), p. 30.) Permittee never addressed the "other pending civil litigation" in its motion for summary judgment. Whether there was other pending civil litigation regarding Permittee's use of the land, and, if so, whether Permittee failed to list the litigation in its application, remain open questions. Therefore, we will not grant Permittee summary judgment on this issue.

Appellants claim that the Department violated Section 271.123 because Permittee's application failed to show that it had a right to operate a municipal waste processing or disposal facility on the land, and failed to provide an abstract of title. Permittee argues that it is entitled to summary judgment on this issue because its application included copies of the written consent of all the landowners to its proposed municipal waste processing and disposal activities on their property, as well as copies of the relevant deeds. Appellants argue in their response that Permittee failed to establish its right to operate on the "Davlisa tract" because Permittee provided

[10] Far from trying to conceal the existence of the settlement agreement, Permittee submitted the agreement as part of its application. Appellants object simply because Permittee failed to list the agreement separately, as a restrictive covenant.

only the written consent of owner of the surface rights to that property, and landfilling necessarily involves excavating below the surface.

Permittee is entitled to summary judgment on this issue. Permittee has satisfied the requirement in Section 271.123(b) that it provide a document of conveyance or written consent from all current landowners establishing its right to operate on the land involved in the expansion. (Motion, Appendix A, Ex. 2, pp. 0004-0006, and Ex. 4.) While Appellants argue that the consent regarding the "Davlisa" tract is deficient because the persons who signed it own only the surface rights to the property, the language Appellants point to comes from the consent regarding "Tabor"—not the "Davlisa"—tract. The "Davlisa" tract was conveyed to Permittee by Davlisa Enterprises, Inc., and included "the right to mine, dig and convey away the ... minerals under, on or above" the tract. (Motion, Appendix A, Ex. 4, pp. 0008-0009.)

As for the "Tabor" tract, the consent for that tract *was* signed by an entity that possessed only the surface rights to the property. (Motion, Appendix A, Ex. 4, p. 0015.) However, Permittee owns the rights to "all coal and minerals under, on, and above" the tract, including "the right to mine, dig and convey the ... minerals." (Reply, Appendix D, p. 2.) Although Permittee neglected to include that information in its application for the modification, and the Department may have erred by not requiring that Permittee submit the information during the application process, we have the power of *de novo* review.[11] Since Permittee has established that it owns all the required property rights, the Board would not disturb the Department's issuance of a modification simply because Permittee failed to show that it owned all those rights in its application.

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[11] Where an appellant challenges the exercise of the Department's discretionary authority, the Board's scope of review is *de novo*; the Board is not limited to considering the evidence the
(Footnote continued on next page.)

To the extent that they have not been discussed above, we have reviewed the other myriad arguments set forth in Permittee's motion and concluded that they raise disputed issues of fact, and therefore, do not allow for the grant of summary judgment. Accordingly, the Board will schedule a hearing on the merits for those issues remaining after Permittee's motion for summary judgment, and we enter the following order:

Department actually had before it at the time it acted. *Warren Sand and Gravel Co., Inc. v. Commonwealth of Pennsylvania, DER*, 341 A.2d 556 (Pa. Cmwlth. 1975).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	

ORDER

AND NOW, this 22nd day of, 1999, Permittee's motion for summary judgment is granted with respect to the following claims:

a. Appellants' objection that the modification is inconsistent with the definitions in 25 Pa. Code § 271.1;

b. Appellants' objections that the Department violated 25 Pa. Code §§ 271.3 and 271.126 by accepting Permittee's characterization of the environmental impact of the modification, rather than conducting an independent investigation;

c. Appellants' objection that the public notice and comment procedures regarding the modification violated 25 Pa. Code §§ 271.127, 271.128, 271.141, 271.144, and 271.202.

d. Appellants' objections that the Department violated 25 Pa. Code § 271.143—except to the extent that Appellants argue that the Department violated section 271.143 with regard to the public notice and comment procedures concerning the modification;

e. Appellants' objection that the Department violated 25 Pa. Code § 271.203 by acting on Permittee's application before it was administratively complete and before the review period expired; and,

f. Appellants' objections that the Department violated Section 271.123 because the application failed to list pending litigation concerning the use of the land.

The motion is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: December 22, 1999

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

PENNSBURG HOUSING PARTNERSHIP, L.P. : **EHB Docket No. 99-216-K**

v. :

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION : **Issued: December 30, 1999**

OPINION AND ORDER ON PETITION TO INTERVENE

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The township whose Sewage Facilities Plan is the subject of a residential housing developer's Private Request to Revise Official Sewage Facilities Plan is permitted to intervene in the appeal by the developer of DEP's denial of the private request. The township has interests that might be harmed in a substantial, direct, and immediate manner when a developer seeks to revise the township's sewage facilities plan.

OPINION

Background

Pennsburg Housing Partnership, L.P., (Pennsburg) has appealed the Department's denial of Pennsburg's "Private Request to Revise Official Sewage Facilities Plan" (Private Request). Pennsburg filed the Private Request pursuant to section 5 of the Sewage Facilities Act which provides that "any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its

official plan where said person can show that the official plan is inadequate to meet the resident's or the property owner's sewage disposal needs". 35 P.S. § 750.5(b). According to Pennsburg's Notice of Appeal, the Private Request was related to its development of a 70 unit residential facility consisting of 51 multi-family dwellings and 19 single-family dwellings. The development straddles the line between Pennsburg Borough and Upper Hanover Township (Upper Hanover). All of the multi-family units and 10 of the 19 single-family units are situated in Pennsburg Borough. The other nine single-family units are situated in Upper Hanover. We presume that under the current official sewage facilities plans of Upper Hanover and the Upper Montgomery Joint Authority, which has Pennsburg Borough as a constituent member, the 61 units situated in Pennsburg Borough are to attach to the Red Hill Interceptor which feeds into the Upper Montgomery Joint Authority (UMJA) sewage treatment plant and the nine single family units situated in Upper Hanover Township are to connect to Upper Hanover's Macoby Sewage Treatment Plant. Pennsburg's Private Request sought a Department order requiring Upper Hanover to revise its official sewage facilities plan to allow the nine single-family units physically located in Upper Hanover Township to make a connection to the UMJA's Red Hill Interceptor. The Department denied the Private Request by letter dated September 15, 1999 and Pennsburg filed its appeal on October 20, 1999.[1]

---

[1] Pennsburg cited a host of reasons to support the request and the Department cited a host of reasons in denying it. None of either side's reasons are discussed herein in connection with Upper Hanover's Petition to Intervene because we do not believe that any of those contentions are important to our decision on the pending Petition. Review and deliberation of those matters is to be the subject of future forensic combat. Upper Hanover is seeking here merely to enlist for that fight.

Upper Hanover filed a petition to intervene on December 6, 1999. The essential allegations of the Petition are that: (1) the decision rendered by the Board will effect a legally enforceable interest of Upper Hanover; (2) Upper Hanover wishes to defend against the appeal to maintain the status quo which it identifies as the official sewage facilities plan as currently constituted; (3) Upper Hanover's interest is not already adequately represented; (4) an adverse decision granting the appeal may subject Upper Hanover to civil liability; and (5) Upper Hanover will offer evidence and legal argument to demonstrate the propriety of its plan. The petition also alleges that Upper Hanover has not unduly delayed in filing the petition and that it has an interest greater than that of the general public.

Neither the Department nor Pennsburg filed an answer to the Petition; however, the Department by letter dated December 13, 1999, and Pennsburg by facsimile dated December 21, 1999, informed the Board neither had an objection to granting the Petition and that neither intended to file an answer.

Standard for Intervention

The Environmental Hearing Board's Rules allow a person to "petition the Board to intervene in any pending matter prior to the initial presentation of evidence." 25 Pa. Code §1021.62 (a). When a person has properly filed a petition to intervene, the Board will grant intervention when that person is determined to be an "interested party." Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, 35 P.S. §7514 (e); *Browning-Ferris, Inc., v. Department of Environmental Resources,* 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). An interested party is "any person or entity interested, *i.e.*, concerned, in the proceedings before the Board.

The interest required . . . must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Browning-Ferris, Inc.,* 598 A.2d at 1060-61; *Jefferson County v. Department of Environmental Protection*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Heidelberg Township v. DEP*, EHB Docket No. 98-174-MG slip op. at 4 (opinion issued September 24, 1999); *Conners v. Commonwealth of Pennsylvania, State Conservatory Commission and Dauphin County Conservation District*, EHB Docket No. 99-138-L slip op. at 2 (opinion issued August 20, 1999). Further, the Board's recent decisions on intervention hold that "gaining or losing by direct operation of the Board's ultimate determination is just another way of saying that an intervenor must have standing." *Heidelberg Township*, EHB Docket No. 98-174-MG slip op. at 4 (quoting *Conners*, EHB Docket No. 99-138-L slip op. at 2). Similarly, the Commonwealth Court held that a person meets the criteria for intervention if it can satisfy the test for standing enunciated in *Wheeling Penn Parking Garage, William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280 (1975). *See Borough of Glendon v. DER*, 603 A.2d 226, 231.

To have standing, the appellant's interest must be aggrieved in a substantial, direct, and immediate manner. *See William Penn Parking Garage*, 346 A.2d at 280; *Conners*, EHB Docket No. 99-138-L slip op. at 3 (citing *Borough of Glendon*, 603 A.2d at 233; *Tortorice v. DEP*, 1998 EHB 1169, 1170); *Belitskus v. DEP*, 1998 EHB 846, 859 (citing *Barshinger v. DEP*, 1996 EHB 849, 853). "[T]he requirement of a 'substantial' interest simply means that the individual's interest must have substance – there must be some discernable adverse effect to some interest other than the abstract interest of all

citizens, in having others comply with the law." *William Penn Parking Garage*, 346 A.2d at 282; *Conners*, EHB Docket No. 99-138-L slip op. at 3 (citing *Darlington Township Board of Supervisors v. DEP*, 1997 EHB 934, 935). Further, a direct interest "simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." *Id.* Finally, "[a]n immediate interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue." *Belitskus*, 1998 EHB at 859 (citing *William Penn Parking Garage*, 346 A.2d at 283; *Barshinger*, 1996 EHB at 853).

DISCUSSION

Pennsburg's appeal centers on Upper Hanover's sewage facilities plan. Taking the Petition's allegations as true, Upper Hanover meets the criteria for intervention as Pennsburg's appeal might result in harming Upper Hanover's interests in a substantial, direct, and immediate manner.[2]

Upper Hanover's interest is substantial. First, Pennsburg's appeal necessarily involves an attack on Upper Hanover's sewage facilities plan, which in turn affects how sewage is maintained in Upper Hanover, *See Franklin Township v. DEP*, 452 A.2d 718, 720 (holding "the interest of local government in protecting the environment which is part of the physical environment is 'substantial'"). Second, Pennsburg's appeal regards how sewage will be transported from residential housing located in Upper Hanover.

[2] We take the allegations in the Petition to be true for present purposes because both the Department and Pennsburg have stated on the record that neither has an objection to the petition and both have stated they would not be filing an answer thereto.

Third, Upper Hanover alleges that it will be subject to civil liability if Pennsburg wins its appeal.[3]

Besides having a substantial interest, Upper Hanover also has a direct and immediate interest. No collateral or intervening issues separate its interest in its Sewage Facilities Plan and the harm the might result if the Plan is ordered revised. *See William Penn Parking Garage v. City of Pittsburgh,* 346 A.2d at 283-286. In short, the causal connection between a decision in this case and the effect on the Township is not circuitous, it is direct and immediate.

We find the case of *Wesley H. Young et. al. v. DER,* 1991 EHB 1323 to be helpful to our analysis as well. In that case, the Board granted the petition to intervene of Harris Township in an appeal by a developer of DEP's refusal, upon the Private Request of the developer, to order Harris Township to revise its Sewage Facilities Plan. Thus, that case is much like this one. The Board said:

> [I]t is also apparent from the Township's petition that the nature of the evidence which it has offered to present at trial will assist the Board in resolving the underlying appeal without broadening the scope of the appeal or clouding the issues. The Township is able to produce evidence relating specifically to its reasons for choosing to develop sewage services in the municipality in the manner set forth in the official plan and its subsequent reasons for denying the Appellants' planning module.

Id. at 1328.

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[3] Upper Hanover does not specify how and in what way it may be subjected to civil liability if the Board sustains the appeal. However, it is so alleged and not denied by either of the other parties and therefore, we take this allegation to be so even if not explained.

For all the reasons stated above, Upper Hanover's interest in this matter is substantial and direct and immediate. Therefore, it is an interested party and may intervene.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSBURG HOUSING PARTNERSHIP, L.P.	:	
	:	
v.	:	
	:	**EHB Docket No. 99-216-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 30th day of December, it is HEREBY ORDERED THAT, Upper Hanover Township's Petition to Intervene is GRANTED. The Caption in this matter is amended to read as follows:

PENNSBURG HOUSING PARTNERSHIP, L.P.	:	
	:	
v.	:	
	:	**EHB Docket No. 99-216-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER HANOVER TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **December 30, 1999**

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