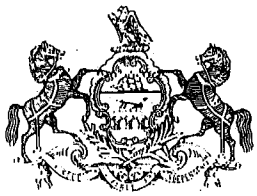
Environmental Hearing Board

Adjudications and Opinions



1993

Volume III

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1993

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1993.[1]

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

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[1] This volume also contains one adjudication issued in 1992. That adjudication, South Fayette Township v. DER, 1993 EHB 1, was unintentionally omitted from the 1992 volume.

ADJUDICATIONS

OPINIONS AND ORDERS

1993 DECISIONS

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M. DIANE SMITH
SECRETARY TO THE BOARD

RAYMOND AND CANDIA PHILLIPS	:	
	:	**EHB Docket No. 88-344-MJ**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 14, 1993

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

By Joseph N. Mack, Member

Synopsis

In an appeal from the denial of a claim under a mine subsidence insurance policy issued by DER, the claimants have the burden of showing by a preponderance of the evidence that the damage to their home was caused by a mine subsidence event. When a claimant fails to demonstrate a connection between the damage suffered and mine subsidence, DER's initial coverage decision must be sustained and the appeal must be dismissed.

PROCEDURAL BACKGROUND

The present proceeding arose from a suit filed on May 4, 1987 by Raymond Phillips and Candia Phillips ("Phillips") against the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") before the Commonwealth's Board of Claims. The genesis of the suit was DER's denial of a claim submitted by the Phillips under a mine subsidence policy for their home in McMurray, Washington County. DER refused to honor the Phillips' claim on the basis that the damage to their home was not caused by mine subsidence.

In May 1989, the Phillips filed a praecipe to discontinue the case before the Board of Claims and transfer the matter to the Environmental Hearing Board, based on the Commonwealth Court's holding in Commonwealth, DER v. Burr, 125 Pa. Cmwlth. 475, 557 A.2d 462 (1989), which stated that the Environmental Hearing Board, rather than the Board of Claims, has exclusive jurisdiction over appeals from DER denials of mine subsidence policy claims. In July of 1989, the Board of Claims denied the Phillips' praecipe and rendered an Opinion which upheld DER's action.

On August 28, 1989, the Phillips filed a Petition for Review in the Nature of a Writ of Prohibition with the Commonwealth Court. On June 28, 1990, the Commonwealth Court entered an order granting the Phillips' petition and ordering the transfer of the case to the Environmental Hearing Board. See Phillips v. Commonwealth of Pennsylvania, DER, 133 Pa. Cmwlth. 598, 577 A.2d 935 (1990). An appeal from this decision was taken to the Supreme Court by the Board of Claims, which the Supreme Court chose to treat as a petition for allowance of appeal. The Supreme Court denied the allowance of appeal by order dated June 17, 1991. Phillips v. Commonwealth, DER, ___ Pa. ___, 593 A.2d 427 (1991).

On August 19, 1991, the Board of Claims transferred its file to the Environmental Hearing Board. The transferred file was assigned EHB Docket No. 91-346-MJ. On September 5, 1992, this matter was consolidated with an earlier appeal filed by the Phillips at EHB Docket No. 88-344-MJ.[1] A hearing on the

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[1] EHB Docket No. 88-344-MJ represents an appeal *nunc pro tunc* filed by the Phillips with the Environmental Hearing Board on September 2, 1988 from DER's denial of their mine subsidence claim. The Environmental Hearing Board granted the Phillips' petition for allowance of appeal *nunc pro tunc* on

footnote continued

matter was held on January 21, 22, 23 and 28, 1992. The parties have filed post-hearing briefs and reply briefs.

After a full and complete review of the record in this matter, including the 657-page transcript and the 44 exhibits offered by the parties, we make the following findings of fact.

FINDINGS OF FACT

1. The appellants are Raymond and Candia Phillips, husband and wife, who reside at 129 West Edgewood Drive, McMurray, Pennsylvania, in a split level, split entry home which they purchased in June of 1978 for $77,000. The house was constructed in 1966. (Stip. 1, 2; TR. 13-14)[2]

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the agency charged with the duty and authority to administer the Commonwealth's Mine Subsidence insurance program established by the Act of August 23, 1961, P.L. 1068, as amended, 52 P.S. §3201 *et seq.*

3. The Phillips purchased a mine subsidence insurance policy in September of 1984. Their house was inspected by DER prior to the issuance of the said policy. The inspection indicated cracks in the floor of the garage and a hairline plaster crack in the laundry room, but no other notations. (TR. 16, 17)

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continued footnote
November 17, 1988. On December 5, 1990 this matter was continued generally pending a ruling by the Pennsylvania Supreme Court on the Board of Claims' appeal with respect to the issue of jurisdiction.

[2] The reference to "TR" herein is to the hearing transcript, reference to "Stip." is to the Joint Stipulation of the parties, references to "Comm. Ex. ___" are references to DER's exhibits, references to "App. Ex. ___" are references to the Phillips' exhibits.

4. The Consolidation Coal Company's Montour Number 4 mine underlies the entire area of the Phillips house and the surrounding area, and has a depth of 259 feet below the ground surface directly beneath the Phillips house. (TR. 96)

5. Mining conducted at the Montour Number 4 mine was by the room and pillar method. Pillars measuring 30 feet in width exist underneath the Phillips house. (TR. 96)

6. The Montour Number 4 mine was closed in September of 1980 as a result of flooding from the adjacent Montour Number 10 mine. Water levels in the mine have varied from 770 feet to 803 feet above sea level and there is between 15 and 50 feet of water in the mine under the Phillips house. (TR. 97)

7. Commonwealth Exhibit C, a map of the coal underlying the Phillips house, indicates that approximately one-half of the coal has been left in place. (TR. 339-341) To the west and north of the Phillips house, 60-65 percent of the coal had been extracted. (TR. 340-342)

8. The Phillips house is located approximately in the southwest corner of the room and pillar area of the mine. (TR. 341)

9. In the mine area to the east of the house are a set of mine entries running in a north-south direction with large blocks of coal on each side. (TR. 341)

10. To the south, there are butt entries with large blocks of coal separating them. (TR. 341)

11. To the west and north, where 60-65 percent of the coal has been extracted, there are pillars in place. (TR. 341-342)

12. The more stable areas in the mine are to the east and south of the home. (TR. 342) The pillars to the east and south of the home have high factors of safety. (TR. 343)

13. The pillars to the north and west are narrower and have a lower factor of safety. (TR. 343) If failure were to occur, it would likely be in this area of the mine. (TR. 343)

14. The Phillips first noticed damage to their house on November 9, 1985 while Raymond Phillips was replacing screens with storm windows. (TR. 18)

15. Mr. Phillips had installed the screens on the house in the spring of 1985 and had observed no damage whatsoever at that time. (TR. 19)

16. The Phillips noticed the cracks becoming wider and extending further after November 1985, but there was no additional noticeable damage after 1988. (TR. 44)

17. Appellants' Exhibit 22 is a sketch of the damages to the Phillips residence prepared by Mark Sakino, a geologist at DER. It depicts the location of cracking and damage throughout the Phillips house at the time of the hearing, with the exception of another crack on the right side of the house which appeared subsequent to preparation of the exhibit. (TR. 32-33)

18. Dr. Neil Styler was admitted as an expert in the mechanisms of mine subsidence. (TR. 89) Dr. Styler is employed by Geomechanics, a consulting geotechnical engineering firm, and has taught mining engineering and rock mechanics at the University of Pittsburgh. (TR. 81,82)

19. Dr. Styler's firm, Geomechanics, had been requested by Peters Township to evaluate cases of possible subsidence in the area, including the

Phillips. (TR. 89) As part of its investigation at the Phillips house, Geomechanics arranged for drilling to be conducted. (TR. 89, 90)

20. Dr. Styler agreed with the damages that were summarized on Appellants' Exhibit 22. (TR. 91)

21. Using a plumb bob and steel level, Dr. Styler examined whether any walls at the Phillips house were out of plumb. (TR. 92)

22. His examination revealed that the south and west walls were out of plumb. (TR. 260; App. Ex. 19X-19EE)

23. Dr. Styler's measurements showed that the north (front) wall of the house was plumb except for a porch column which was tilting. (TR. 92) He did not indicate the exact location of the porch column or in which direction it was leaning.

24. Dr. Styler's measurements showed that the south (back) wall was leaning to the north at the southwestern corner of the house. (TR. 92)

25. Dr. Styler also detected a bulge in the west wall of the house on the first floor. (TR. 92)

26. Dr. Styler considered and eliminated seven other types or causes of surface movement which might have caused the damage to the Phillips property before concluding that mine subsidence had occurred: (1) differential settlement, which occurs where a house is built partly on existing soil and partly on fill; (2) lateral earth pressure from soil, groundwater, or hydrostatic forces; (3) landslides, hillside creep, or gentle slope movement; (4) subgrade heaving, in which certain minerals or slag oxidize and increase in volume; (5) solution cavities or subgrade erosion, which is the erosion of a limey shale or a limestone in the bedrock; (6) bearing capacity failure, which means that the foundation load exceeds the

soil strength; and (7) structural deficiencies, which is a failure in the building itself due to inadequate or improper construction. (TR. 100-121)

27. Dr. Styler characterized the Phillips house as not resembling a classical mine subsidence case because there had been only slight movement of the house and surrounding area. (TR. 129)

28. There are two basic mechanisms involved in subsidence; the first is that the pillars in the mine will yield at the time of mining. The second mechanism comes about through flooding or changed conditions in the mine itself causing subsidence. (TR. 129-130)

29. The pillars under the Phillips house had not failed. (TR. 264)

30. Dr. Styler testified that one will usually find a pattern of subsidence in an area rather than an isolated occurrence. (TR 131)

31. If there was a collapse at the mine level, one would find damage not only to the Phillips house but also in the surrounding area. (TR. 267)

32. There were no noticeable damages to other houses or to the street in the neighborhood of the Phillips house. (TR. 133)

33. The only evidence which the Phillips presented of other damage in the surrounding area was that their neighbors across the street at 130 West Edgewood Drive, the Propchecks, had minor cracks in their house. The Propchecks had mine subsidence insurance but had not filed a claim. (TR. 67-68)

34. The nearest claim for mine subsidence to the Phillips property is the Frazier property, located on Edgewood Avenue approximately one thousand feet from the Phillips property. (TR. 146; App. Ex. 15)

35. In a subsidence event which occurred more than one quarter of a mile away from the Phillips property, there was damage to several structures.

There was also damage to the street itself and to the driveways and sidewalks of the streets, as well as problems with the underground and overhead utilities serving the area. (TR. 362-364)

36. All of the eight houses on West Edgewood Drive, where the Phillips house is located, are insured against mine subsidence. (TR. 347) Seven of the policies were written in 1984, and one was issued in 1986. (TR. 347-348)

37. Of the eight insured houses, only the Phillips property has been the subject of a claim for subsidence damage. (TR. 349-350)

38. Edward Motycki, who testified on behalf of DER, is the engineering supervisor of the McMurray office of DER's Bureau of Mining and Reclamation. Mr. Motycki has personally handled over 200 investigations of subsidence. His office handled over 700 subsidence claims under his supervision between 1985 and the time of the hearing. (TR. 289-292; Comm. Ex. L)

39. One of the steps DER takes in a subsidence claim is to find out if the problems are isolated, relating to one particular structure, or whether they encompass other surface features. In this case, DER searched for signs of other structures or surface features that had been subject to some type of ground movement. (TR. 310-311)

40. There was no evidence of cracking either in West Edgewood Drive, on which the Phillips property is located, or in adjoining Rahway Street to indicate ground movement. (TR. 312)

41. None of the utility poles in the area showed any departure from being plumb nor was there any tightness in any of the lines. (TR. 312)

42. Mr. Motycki observed no damage to any other structures in the immediate area around the Phillips home. (TR. 313)

43. Using an engineer's level, Mr. Motycki took measurements at the Phillips house. (TR. 323) Mr. Motycki set up the engineer's level so that he was able to observe at least two sides of the Phillips house from a single position. (TR. 416-417)

44. The front of the west wall of the Phillips house, which is the northwest corner, was slightly lower than the southwest corner. (TR. 325; Comm. Ex. M)

45. The west corner of the north side of the house was 9/16 of an inch higher than the east corner of the north side of the house. (TR. 326-327)

46. There was not a consistent direction of movement of the house; in the front of the house the left corner or the east corner was lower than the west corner, and in the rear of the house the opposite was true. (TR. 328, 428, 429)

47. There was no sense of directional movement that could be derived by looking at the crack pattern or the measurements taken with the engineer's level. (TR. 331-332; Comm. Ex. M)

48. It is DER's policy that if, after investigation, it is unable to rule out mine subsidence as a possible cause, it will find in favor of the home owner and pay the insurance claim. (TR. 462- 463)

49. The only indication of damage and movement with respect to the Phillips' claim was the Phillips home itself. There was no damage or movement in the area surrounding the home, which indicates a localized site-specific problem and not a broader subsidence problem. (TR. 530-531)

50. Richard M. Gray, Senior Vice President of GAI Consultants, a consulting firm on a number of areas including mining and geotechnical engineering, was admitted as an expert in mine subsidence and geotechnical engineering. (TR. 563, 571) Mr. Gray has conducted a number of studies for DER's Bureau of Mining and Reclamation on coal mine subsidence. (TR. 569)

51. Mr. Gray reviewed a report prepared by Geomechanics in 1988 dealing with the drilling of three bore holes at the Phillips residence. (TR. 573; Comm. Ex. F)

52. The drilling was done by using an air rotary drill. This type of drill works by using an air compressor which blows high pressure air down through the drill stem and out through the drill itself. The air carries the cuttings from the drill bit up the hole between the angular space inside the boring and the drill stem. (TR. 284)

53. Boring hole number 1 revealed a void overlying some broken material on the mine floor. (TR. 577)

54. Boring hole number 2 hit a coal pillar. (TR. 577)

55. Boring hole number 3 encountered a void at a depth of 250 feet to 253 feet and then broken, fallen roof material at a depth of 253 feet to 277 feet. (TR. 577)

56. Boring hole number 3 was drilled 33 feet from the northwest corner of the Phillips house. (TR. 577)

57. The drilling fluid air was not lost in boring hole number 3 until the roof void was reached at 252 feet in depth. (TR. 578)

58. Water was encountered in all of the holes at an approximate depth of 252 feet. (TR. 578)

59. The logs for each of the boring holes show no loss of air until the drill reached an area at or near the depth of the coal mine underlying the Phillips house. (TR. 578)

60. The net results of the drilling indicated that subsidence had not occurred beneath the Phillips home. (TR. 578)

61. The movements at the Phillips house were in the opposite direction from that which would have been expected if they were caused by coal mine subsidence. (TR. 586)

DISCUSSION

The initial issue in this discussion is the question of which party bears the burden of proof in the appeal before us. The Phillips argue that the Act creating the mine subsidence insurance fund, the Act of August 23, 1961, P.L. 1068, as amended, 52 P.S. §3201 *et seq.*, ("the Act") should be liberally construed to place the burden of proof on DER, because of the recognition in the Act of the hardship to those individuals that may be affected by mine subsidence. Our rules, however, require that the party asserting the affirmative of an issue bears the burden of proof and of going forward. See 25 Pa. Code §21.101(a). In this case, the Phillips are asserting the affirmative of the proposition that they have suffered damage due to mine subsidence and that they have a claim against the policy which they secured to insure their premises against subsidence. Therefore, they are asserting the affirmative of the issue and under 25 Pa. Code §21.101(a) have the burden of proof.

The Phillips then argue that, even if the Board finds that they carry the burden of proof in this matter, once they present a prima facie case they have met their requisite burden, and the burden of going forward then shifts

to DER to demonstrate that the damages in question were not caused by mine subsidence. The Phillips contend that DER failed to meet this burden. The Commonwealth Court in Phillips v. Commonwealth, DER, 133 Pa. Cmwlth. 598, 577 A.2d 935 (1990), recognized that the underlying dispute on this claim is whether mine subsidence caused the damage to the Phillips property. DER denied the claim on the basis that there has not been subsidence. It, therefore, becomes the burden of the Phillips to demonstrate that their loss is a result of subsidence and from no other cause.

Lastly, the coverage provided in the policy itself is as follows:

> Coverage: This policy covers Loss to the Insured Structure during the policy period, which is caused by lateral or vertical subsidence of the earth from past or present coal or clay mining operations. It does not cover Loss resulting from i. erosion, ii. landsliding, or iii. the normal settling, shrinkage, or expansion of foundations, floors, walls or ceilings.
>
> (App. Ex. 1, para. 2)

Thus, DER can only issue insurance against damage from mine subsidence because DER is not statutorily authorized to insure against any other risks. See Dale H. Clapsaddle *et al.* v. DER, 1992 EHB 1029. It follows that the burden does not lie with DER to prove an exception from coverage for all risks, but on the contrary, it is the burden of the appellants to demonstrate a nexus between the damage to their homes and the risk insured against, that is mine subsidence.

In addition to the burden of proof, the Phillips assert that the standard of proof in the present case is the standard which DER follows in its investigation of mine subsidence claims. DER's Edward Motycki testified that if, after investigation of a mine subsidence claim, DER is not able to rule

out mine subsidence as a cause of the damage, DER will often pay the insurance claim. (F.F. 48)[3] While this may be a rule of thumb used within the Department, the standard of proof which is required by our cases is that a party must meet its burden of proof by a preponderance of the evidence. 25 Pa. Code §21.101(a). This standard was defined in the case of Midway Sewerage Authority v. DER, 1991 EHB 1445, as requiring that "the evidence of facts and circumstances on which the [party] relies and the inferences logically deducible therefrom must so preponderate in favor of the basic proposition he is seeking to establish as to exclude any equally well-supported belief and any inconsistent proposition." *Id.* at 1476 (quoting Henderson v. National Drug Co., 343 Pa. 601, 23 A.2d 743, 748 (1942).) We, therefore, hold that the Phillips have the burden of demonstrating that the subject property was damaged by mine subsidence and that the evidence thereof must so preponderate as to exclude any other equally well-supported belief or any other proposition inconsistent therewith.

Having determined that the Phillips have the burden of proof and the burden of going forward, the next question is whether they have met this burden.

The Phillips called Dr. Neil Styler of Geomechanics as their expert witness. Dr. Styler, who has been with Geomechanics for six years and has taught mining engineering and rock mechanics at the University of Pittsburgh, was admitted as an expert on mine subsidence. (F.F. 18) Using a plumb bob and a carpenter's level, Dr. Styler examined whether any of the walls of the Phillips house were out of plumb. His measurements indicated the front

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[3] "F.F. ___" is a reference to a finding of fact herein.

(north) wall of the house was plumb, except for a porch column near the front door. Along the back (south) wall, he detected that the wall was leaning toward the north near the southwestern corner. He also noticed a bulge in the west wall of the first floor of the house. Based on his measurements, Dr. Styler concluded that the south and west walls were out of plumb. (TR. 260)

Before concluding that mine subsidence had caused the damages and movement of the Phillips house, Dr. Styler first set out to eliminate other potential causes. Because the Phillips house is situated on a gently sloping hillside, Dr. Styler first examined the site for evidence of differential settling, which can occur when a house which sits on a slope is built on part fill and part original soil. However, Dr. Styler ruled out this possibility because the damage was not along the southwest corner of the house where differential settling would be likely to occur because of softer soils. Another factor which led Dr. Styler to rule out this possibility was the timing of the damage, which occurred rather suddenly between the spring and fall of 1985, after nearly twenty years of no observable problems. According to Dr. Styler, this pattern was not indicative of differential settling.

Dr. Styler next ruled out the possibility of lateral earth pressure from soil and groundwater or hydrostatic force on walls below the exterior grade. He eliminated this possibility because the damage to the Phillips house was not consistent with the type of inward bulging or horizontal cracking indicative of lateral earth pressure.

Dr. Styler then considered the possibility of landslides, or in the case of the Phillips house, hillside creep or gentle slope movement. Dr. Styler observed none of the conditions associated with this type of movement, such as slumping on downslope areas, tension cracks at ground surface, leaning

trees, or stretching of the side walls of the house, at the Phillips property. Moreover, according to Dr. Styler, hillside creep would have been a more progressive process, rather than going from minor cracking in 1984 to major cracks in 1985. Finally, the Phillips house is not in an area identified by the U.S. Geological Survey as being susceptible to landslides.

The fourth factor which Dr. Styler considered was subgrade heaving, in which either certain types of minerals or slag will oxidize and expand in volume causing an upward pushing in the ground. This condition is often manifested in a heaving of the basement floor slab of a building. However, according to Dr. Styler, this condition would have occurred over time due to seasonal changes, and, if occurring, would have been observable in 1984 when DER issued the mine subsidence insurance policy.

Dr. Styler next eliminated the possibility of solution cavities or subgrade erosion in which limey shale or limestone is eroded due to the presence of solution in the groundwater. However, boring holes drilled in the Phillips yard indicated that the bedrock did not consist of a substance susceptible to solution action by groundwater.

The sixth factor rejected by Dr. Styler was bearing capacity failure, which means that the foundation load exceeds the strength of the soil. Dr. Styler rejected this factor because the damage at the Phillips house did not occur in areas of weaker soil or more heavily-loaded foundation.

Finally, Dr. Styler considered whether there were structural deficiencies with the house itself, due to inadequate or improper construction. However, he found no evidence of this.

In addition to eliminating other potential causes of the damage to the Phillips property, Dr. Styler also considered the direction of movement of

the house in concluding that mine subsidence had occurred. Based on his measurements, Dr. Styler determined that the house was moving in a northwesterly direction. This direction of movement he found correlated to an area of marginally stable pillars within the underlying mine workings located approximately west and north of the house.

Dr. Styler also considered the timing of the damage to be indicative of mine subsidence. DER had inspected the house in late 1984 to issue mine subsidence insurance and had found only minimal cracking. Then, in November 1985, the Phillips discovered the damage now in question, indicating that it occurred sometime in 1985. According to Dr. Styler, the timing of the damage, occurring over a relatively short period of time rather than progressively, is consistent with what occurs with mine subsidence.

DER then presented Edward Motycki, the engineering supervisor of the McMurray office of DER's Bureau of Mining and Reclamation. Mr. Motycki has investigated over 200 cases of alleged subsidence; his office has investigated over 700 such cases. (F.F. 38) Mr. Motycki visited the Phillips site on at least three separate occasions and took measurements on the soils in the area with a probe. The soils near the house were wet and the probe that was used could not reach bedrock. Mr. Motycki looked for subsidence damage on other properties near the Phillips property, specifically looking for separations of driveway pads where the driveways meet the house. Mr. Motycki looked at the road and the road junction; he looked at utility lines and whether the utility poles were plumb or were tilted. Finally, Mr. Motycki observed the entire area surrounding the Phillips property to get a sense of movement of the house and other features on the ground.

Mr. Motycki testified from his field notes that with an engineer's level he sighted along a mortar joint to indicate whether the Phillips house was level or out of level and found that the front of the west wall of the Phillips' house, which is the northwest corner, was slightly lower than the southwest corner. (F.F. 44) He also discovered that the east corner of the house was 9/16 of inch lower than the west corner. (F.F. 45) Mr. Motycki conducted research in the DER files, and by overlying the Peters Township map with the Consolidation Coal Company map, he was able to determine that approximately 50 percent of the coal underneath the Phillips house had been removed and 50 percent remained as support. Near the house, 60 to 65 percent of the coal had been removed. (F.F. 7) However, Mr. Motycki specifically checked eight dwellings, including the Phillips' house, which were in the same area as the Phillips house and which fronted on the same street as the Phillips property. These were numbered 128 through 131 and 201 through 204, the Phillips property being 129 at one corner of the area. All of the eight properties had subsidence insurance. (F.F. 36) According to Mr. Motycki, in any theory of subsidence, the subsidence trough would show on other houses in the area. However, there had been no claims filed by any of the properties other than the Phillips. (F.F. 37) The only evidence presented of any homes other than the Phillips' undergoing any type of damage of this sort involved the house at 130 West Edgewood Drive, across the street from the Phillips house. The former owner of the house at 130 West Edgewood Drive, Jean Propcheck, who moved out of the house in 1986, testified that she had observed cracks in late winter or early spring of 1986. She described these as being primarily on the exterior of the house as well as some very fine, "subtle" cracks on the interior. Based on Mrs. Propcheck's testimony and photographs

taken of the cracks, labeled App. Ex. 43, the cracking does not appear to be extensive. Mrs. Propcheck did not testify to any movement of the house, nor was the house ever examined to determine if the cracks bore any relation to an occurrence of mine subsidence. Without more, we cannot rely simply on Mrs. Propcheck's observation of cracks in her house as evidence of mine subsidence. Moreover, although the Propchecks owned mine subsidence insurance, they did not file a claim for damages. Although this, in and of itself, is not evidence that mine subsidence did not cause the cracks at the Propcheck home, it does support Mr. Motycki's testimony that there was no evidence of mine subsidence in the area of the Phillips home. Mr. Motycki further noted that there was no street damage of any sort in the area of the Phillips home. (F.F. 40)

Mr. Motycki also concluded that the Phillips house is sinking or moving in different directions. (F.F. 46) According to Mr. Motycki, this type of movement is not the type which would occur where subsidence is involved; rather, the motion caused by subsidence would be in a single direction into the trough. The Phillips house was moving in two directions, both of which were into the hill and not into the valley behind the house. This differs entirely from the testimony of Dr. Styler who maintained that the house had moved in a single, northwesterly direction. Mr. Motycki reached his conclusion based on measurements taken with an engineer's level during his inspection of the house, as well as the pattern of cracking. The readings taken by Mr. Motycki revealed that on the south (back) wall of the house, the west side was lower than the east side, whereas on the north (front) wall, the

east side was lower than the west side. This was also evident in the pattern of cracking of the house, which also indicated no common direction of movement.

The Phillips, in their post-hearing brief, challenge the measurements taken by Mr. Motycki using an engineer's level, as opposed to a carpenter's level, which was used by Dr. Styler. They base their challenge on the following testimony given by Mr. Motycki:

> Q. You are saying there are a lot of assumptions in this work that you did?
>
> A. To say that this corner is two and a half inches higher than that corner and use that number, two and a half inches, with any degree of certainty that is assumption.
>
> It is an assumption if you are going to use that number.
>
> From what I was able to see, the northeast corner from the measurements I took here, was lower than the northwest. That's not an assumption; that was a fact.
>
> The southwest corner was lower than the southeast corner. That's a fact. But when you start adding all of these together, and I said we have to use some caution, when you add all of these together and you start adding numbers, then that is where a lot of assumptions are built in.
>
> (TR. 437)

In the case of the Phillips, the decisive question is not <u>how far</u> the house has moved but, rather, the <u>direction</u> of movement. As acknowledged by both sets of witnesses, in a case of mine subsidence, one would expect to find movement in only <u>one</u> direction. Using the engineer's level, Mr. Motycki found that movement had occurred in <u>two</u> different directions. The precise distance the house had moved in either direction was not decisive. Moreover, with an

engineer's level, Mr. Motycki was able to observe at least two sides of the Phillips house from one position, giving him a better overall sense of the direction of the house's movement.

With respect to Dr. Styler's theory that the movement of the Phillips house correlated to the area of marginally stable pillars located in the area of the mine west of the Phillips house, Mr. Motycki testified that if these pillars had collapsed it would have encompassed other homes in addition to the Phillips'. Mr. Motycki found no evidence of this in the area surrounding the Phillips property. The results of Mr. Motycki's surface reconnaissance showed no cracking, damage, or movement in the street; no indication that the driveway coming into the Phillips house had moved; and no separation around the sidewalk. Based on Mr. Motycki's investigation, he concluded that mine subsidence had not occurred.

The Phillips argue that it is not unusual that nearby homes might not display signs of mine subsidence due to different types of construction and where the act of subsidence is relatively small. However, according to both Mr. Motycki and DER's expert, Richard Gray, this is unlikely particularly in this case, where, according to Mr. Motycki, a collapse of the pillars in the mine area to the west of the Phillips home would encompass other nearby homes and would most likely manifest itself in other signs of damage to the area.

The Phillips argue that statements made by Mr. Motycki and DER's Mark Sakino at the beginning of their investigations indicated that they believed mine subsidence had been the cause of the damage to the Phillips house. However, a letter sent by Mark Sakino to the Phillips (App. Ex. 3) and an internal memorandum sent by him to a mine subsidence insurance supervisor within DER (App. Ex. 28) at the start of DER's investigation indicate that he

believed further testing was necessary to determine whether mine subsidence was the cause. Mr. Motycki, who took over the case from Mr. Sakino, testified that he considered mine subsidence to be a possibility at the start of his investigation, but ruled it out after completing his investigation. He testified that, although he discussed the subject of mine subsidence with the Phillips, he did not advise them that subsidence had occurred. Moreover, even if Mr. Motycki and Mr. Sakino believed at the start of their investigations that mine subsidence was a likely cause of the damage to the Phillips home, DER was not compelled to reach this conclusion if further investigation proved otherwise.

Richard E. Gray was called as an expert witness by DER. He is a senior vice president of GAI, which does geotechnical engineering work, and is a geotechnical engineer who has done extensive work on subsidence problems. In addition, he has done a study for DER's Bureau of Mines on coal mine subsidence. (F.F. 50) Mr. Gray's testimony dealt with test borings which had been done in the area of the Phillips property. Mr. Gray testified that, in examining the drilling logs, he noted that the pressure of the drill was not lost until the drill reached the coal mine itself, which would indicate that there was no failure and subsidence. He further noted that two of the three holes showed rockfall with voids at the mine level and nothing above that in the area between the surface and the mine. (F.F. 59) The results of the drilling tests indicate that subsidence did not occur. Finally, Mr. Gray agreed that subsidence is a one direction movement, and that Mr. Motycki's measurements indicating that there has been movement in two directions are not consistent with a finding of subsidence. According to Mr. Gray, these factors, combined with the lack of evidence of other movement or damage on the

surface to any nearby property, discredit Dr. Styler's conclusion that mine subsidence occurred.

Reviewing the evidence which was introduced by the Phillips and the countervailing evidence introduced by DER and considering the evidence as a whole, our conclusion is that the Phillips have not proven by a preponderance of the evidence that the damage to their house was related to mine subsidence. As a result, we find that DER did not err in denying the claim.[4] Therefore, we make the following conclusions of law and enter the order as hereinafter indicated.

CONCLUSIONS OF LAW

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

2. The insurance policy issued to the Phillips by DER under the Act of August 23, 1961, P.L. 1068, as amended, 52 P.S. §3201 *et seq.*, provides insurance coverage to the Phillips for damages to their home caused by mine subsidence only and for no other risks.

3. The Phillips have the burden of proving, by a preponderance of the evidence, as defined in Midway Sewage Authority, *supra*, that the damage to their home was caused by mine subsidence.

4. The Phillips did not prove by a preponderance of the evidence that the damage to their home was caused by mine subsidence, and their appeal, therefore, cannot be sustained.

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[4] In arriving at this conclusion, we do not reach the issue of the amount of damages to the Phillips' home.

ORDER

AND NOW, this 14th day of July, 1993, it is ordered that the appeal of Raymond and Candia Phillips at EHB Docket No. 88-344-MJ (Consolidated), is dismissed.

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DATED: July 14, 1993

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SECRETARY TO THE BOARD

CONCERNED RESIDENTS OF THE YOUGH, INC. (CRY)	:	
v.	:	**EHB Docket No. 89-133-MJ**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	**Issued:** July 19, 1993

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

DER's approval of a closure plan for an impoundment designated as "Impoundment No. 5" at Mill Service's Yukon Facility is sustained. The Appellant has not met its burden of proving that DER abused its discretion or acted in contravention of the law in approving the closure plan.

The Appellant has not demonstrated that in-place closure of Impoundment No. 5 violates Article I, §27 of the Pennsylvania Constitution nor the regulations in effect at the time of the closure plan approval. Secondly, §505(a) of the SWMA does not require that a closure bond cover the cost of unexpected contingencies or alternate methods of closure. Finally, the closure of Impoundment No. 5 is not subject to the insurance requirements of 25 Pa. Code §267.42(b).

Although the Appellant raised a host of other objections in its notice of appeal, these were not preserved in its post-hearing brief and, thus, are deemed to be waived.

Procedural History

This appeal was filed by Concerned Residents of the Yough, Inc. ("CRY") on May 10, 1989 challenging approval by the Department of Environmental Resources ("DER") of a closure and post-closure plan ("closure plan") for an impoundment, designated as Impoundment No. 5, at a waste treatment, storage, and disposal facility owned and operated by Mill Service, Inc. ("Mill Service") in South Huntingdon Township, Westmoreland County, known as the Yukon facility.

DER approved the closure plan through the issuance of a Closure and Post-Closure Plan Approval Order on April 7, 1989. By letter dated April 14, 1989, DER modified the Closure and Post-Closure Plan Approval Order by, *inter alia*, increasing the number of wells subject to groundwater monitoring.

On May 10, 1989, Mill Service appealed certain conditions contained in the Closure and Post-Closure Plan Approval Order. On December 11, 1989, the Environmental Hearing Board ("Board") approved a Consent Adjudication in settlement of the aforesaid appeal by Mill Service, at Mill Service, Inc. v. DER, EHB Docket No. 89-134-W. Several of the special conditions contained in the Closure and Post-Closure Plan Approval Order were modified as a result of the Consent Adjudication. No appeals of the Consent Adjudication were filed, and, therefore, any revisions to the closure plan which were affected by the Consent Adjudication are now final. Polar/Bek, Inc. v. DER, EHB Docket No. 91-387-MJ (Opinion and Order issued April 29, 1992).

The closure plan which is the subject of this appeal was prepared by Mill Service pursuant to paragraphs 4 and 5 of an earlier Consent Order, known as the Yukon Consent Order ("Yukon CO") into which Mill Service and DER had entered on May 24, 1985 in settlement of litigation brought by DER in Commonwealth Court involving violations at the Yukon facility. The Yukon CO was approved by the Commonwealth Court at DER v. Mill Service, Inc., No. 1406 C.D. 1985.

A joint stipulation was filed by the parties on February 4, 1991. A hearing on CRY's appeal was held on February 12, 1991 through February 15, 1991. Post-hearing briefs were filed by Mill Service on June 3, 1991 and CRY on June 6, 1991. DER did not file a brief. Mill Service also filed a reply brief on June 25, 1991.

After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The appellant is CRY with a mailing address of Box 368, Yukon, Pennsylvania 15698. (Notice of Appeal)

2. DER is an administrative agency empowered with the duty and authority to administer and enforce, *inter alia*, the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; 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 rules and regulations promulgated pursuant to these acts.

3. The permittee is Mill Service, a Pennsylvania corporation with a principal place of business at 1815 Washington Road, Pittsburgh, Pennsylvania 15241. (J.S. 1)[1]

4. Mill Service owns and operates a waste treatment, storage, and disposal facility located in South Huntingdon Township, Westmoreland County, known as the Yukon facility. The facility has been operated as both a residual and hazardous waste treatment, storage, and disposal site. (J.S. 2)

5. The present appeal involves the closure of one of the impoundments at the Yukon facility designated as Impoundment No. 5. (J.S. 3)

Operation of Impoundment No. 5

6. Impoundment No. 5 was in operation from late 1977 to the end of June 1985. (T. 154)

7. Until 1978 or 1979, Impoundment No. 5 accepted primarily inorganic, liquid wastes. (T. 155, 156) The primary waste handled by the Yukon facility was waste pickle liquor from the steel industry. (T. 153)

8. The Department determined that, at least as early as March 7, 1983, hazardous waste in the form of leachate had begun to migrate through the walls of Impoundment No. 5, causing groundwater contamination at the Yukon site. (T. 25, 26; MS Ex. 6, para. O) The leachate was contaminated with chloride and nitrate nitrogen. (T. 25)

9. Mill Service had never applied for nor had DER issued a permit for the discharge of hazardous waste from Impoundment No. 5 into the waters of the Commonwealth. (MS Ex. 6, para. S)

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[1] "J.S. ___" refers to a paragraph in the parties' Joint Stipulation filed on February 4, 1991. "T. ___" refers to a page in the transcript of the hearing. "MS Ex. ___" refers to an exhibit introduced by Mill Service at the hearing.

10. DER determined that Impoundment No. 5 could not be permitted as a hazardous waste disposal facility because it did not meet the design standards for disposal of hazardous waste set forth in 25 Pa. Code §75.264 (MS Ex. 6, para. T)[2]

Yukon CO

11. On May 24, 1985, DER and Mill Service entered into a Consent Order ("the Yukon CO") in settlement of litigation brought by DER before the Commonwealth Court in connection with DER's charges that hazardous wastes had discharged from Impoundment No. 5 contaminating waters of the Commonwealth. (J.S. 7; MS Ex. 6, para. O)

12. The Yukon CO was approved by the Commonwealth Court at Commonwealth, Department of Environmental Resources v. Mill Service, Inc., No. 1406 C.D. 1985. (J.S. 7)

13. Pursuant to paragraphs 2 and 5(a) of the Yukon CO, Mill Service was to cease disposing of waste in Impoundment No. 5 except as set forth in the CO and to implement the closure of Impoundment No. 5 upon approval of the closure plan by DER. (MS Ex. 6)

14. The following wastes continued to be placed in Impoundment No. 5 after June 30, 1985, pursuant to the terms of the Yukon CO: waste from Impoundment No. 4 and sludge from the NPDES treatment system at the site. (T. 154-155)

15. Pursuant to paragraph 5(b) of the Yukon CO, closure of Impoundment No. 5 was to be completed by October 31, 1987. (MS Ex. 6)

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[2] The provisions of 25 Pa. Code §75.264 were renumbered at 25 Pa. Code, Chapter 264 on February 9, 1990, effective February 10, 1990. 20 Pa. Bulletin 909.

Closure Plan

16. The closure plan was not approved by DER until April 7, 1989. (T. 192, 210)

17. Carl L. Spadaro, a sanitary engineer with DER's Bureau of Waste Management, Pittsburgh Regional Office, at the time of the hearing, was the lead engineer in the review of the closure plan for Impoundment No. 5. (T. 23, 25)

18. His review involved primarily two documents submitted by Mill Service: a consolidated closure plan and a post-closure permit application. (T. 26, 27)

19. The closure plan submitted by Mill Service and approved by DER involves an in-place closure of Impoundment No. 5. (T. 187)

20. "In-place closure" consists of the containment of previously disposed waste to prevent exposure and the further migration of any contamination. (T. 50)

21. In submitting the closure plan, Mill Service did not suggest any alternatives to in-place closure of Impoundment No. 5; nor did the closure plan make any comparison of the environmental benefits of in-place closure as opposed to another method of closure. (T. 27, 35)

22. The closure plan took into account the groundwater contamination at the Yukon site and incorporated a groundwater collection and monitoring system. (T. 38, 41)

23. The closure plan for Impoundment No. 5 consists of the following steps:

(a) The wastes remain in place, and a cap consisting of several components is placed over the wastes. (T. 187)

(b) The initial component of the cap, placed immediately above the deposited wastes, is a stabilizing support layer consisting of several feet of compacted soil. (T. 187)

(c) A drainage pattern is set up in such a way so that any runoff is directed to four areas of piping which will carry the runoff to tributary streams. (T. 188)

(d) Before placing the final layers of the cap, there is a monitoring or waiting period during which settlement and dewatering of materials occurs. (T. 188)

(e) The final layers of the cap consist of high density polyethylene (HDPE) material placed immediately above the support zone. (T. 189)

(f) Above the HDPE layer is a drainage zone, which includes a drainage net composed of HDPE material to serve as a conveyance mechanism for any precipitation which might infiltrate through upper layers. (T. 189)

(g) Immediately above the drainage net is a non-woven geotextile fabric to serve as a filter media to protect the drainage net from the intrusion of soil particles. (T. 190)

(h) Finally, two feet of soil and vegetation are placed above the drainage zone. (T. 189)

24. To begin taking steps toward implementing the closure of Impoundment No. 5, Mill Service began to apply a support zone of stabilizing soils in 1985. (T. 192-193, 208-209) This was continued until the end of October 1989. (T. 192-193)

25. At the time of the hearing, the support zone had been applied, and drainage pipes had been installed to carry surface water off the structure. (T. 194) The snythetic layer had not been placed. (T. 194)

26. From October 1989 to the time of the hearing, Mill Service had been in the monitoring stage where settling occurs. (T. 193) Mill Service had initially proposed this to be a one-year period; however, settling was still occurring after one year. (T. 193)

27. The amount of time which would be required before settling was complete was indefinite. (T. 193) DER granted Mill Service an extension for the monitoring period. (T. 211-212)

28. The support zone may not be considered complete until there is no additional amount of substantial settling. (T. 242)

29. The closure plan contained the following remedial measures:

(a) A monitoring program for groundwater-bearing zones that could potentially be affected by Impoundment No. 5. (T. 52)

(b) Three groundwater pumping wells installed in the Pittsburgh Coal Seam mine pool to pump the water to a treatment system. (T. 52)

(c) A series of collection drains along the outside of the impoundment dike to collect any seepage migrating through the dike which would then be discharged to the treatment system. (T. 52)

30. Mill Service's closure plan did not demonstrate how long leachate will continue to migrate from Impoundment No. 5 into the groundwater after closure. (T. 27)

In-Place Closure v. Clean Closure

31. The purpose of placing a cap over the impoundment in an in-place closure is to prevent continued infiltration of precipitation into the impoundment. (T. 52)

32. The purpose of stopping the infiltration of precipitation is to prevent a constant recharge of liquids into the waste and, eventually, to eliminate the further leaching of liquid from the structure. (T. 65)

33. The layer of soil which covered Impoundment No. 5 at the time of the hearing was in the configuration of a dome and was compacted to a fairly high degree of intensity such that it would be effective in diverting precipitation flow even before the liner was placed on it. (T. 126-127)

34. Even after capping the impoundment, leachate will continue to be generated from the waste and liquids in the impoundment for a period of time. In the case of Impoundment No. 5, this leachate will continue to migrate through the walls of the impoundment. (T. 78)

35. CRY's expert, hydrogeologist Burt Waite, concluded that groundwater contamination from Impoundment No. 5 will continue for "many years and probably decades" after it has been capped. (T. 74-75)

36. An alternative to in-place closure is to remove the waste from the impoundment and transfer it to another site. This is known as "clean closure". (T. 50)

37. When a facility is clean-closed, no cap is placed on it. During the removal process, precipitation continues to infiltrate the impoundment. (T. 66)

38. The impoundment cannot be maintained in a dry state during the removal process, and there would be continual leachate generation during the entire removal process. (T. 66-67)

39. Even with removal of the waste from Impoundment No. 5, there would still be some residual groundwater contamination for an undetermined amount of time which would have to be addressed by Mill Service. (T. 58)

40. There is no certainty that removal of the waste from Impoundment No. 5 would result in less groundwater contamination than in-place closure. (T. 58)

41. The removal of waste from Impoundment No. 5 could take an estimated eleven years at an approximate cost of $300,000,000.00. (T. 51)

42. In his review of the closure plan, DER's lead engineer, Carl Spadaro, determined there to be no benefit of clean closure or removal over in-place closure. (T. 51)

43. Mr. Spadaro was satisfied that in-place closure would minimize the need for further maintenance and control and would minimize the risk of post-closure escape of hazardous waste leachate and the threat to human health and the environment. (T. 51)

Groundwater Monitoring

44. There are three separate and distinct groundwater flow horizons at the Yukon site: the Pittsburgh Coal Seam, the Redstone Coal Seam, and the Pittsburgh Limestone Hydrostratigraphic Unit ("the Pittsburgh Limestone"). (J.S. 24)

45. The direction of flow in each of the groundwater horizons is to the northwest. (J.S. 26)

46. Portions of Impoundment No. 5 overlie portions of the Pittsburgh Coal Seam, including mine workings within the Klondike and Magee Mines. (J.S. 21)

47. The Yukon CO was based in part on DER's determination that leachate from Impoundment No. 5 had migrated through the bottom liner of the impoundment and into the Pittsburgh Coal Seam, evidencing itself in high chlorides and nitrates. (MS Ex. 6, para. Q)

48. The groundwater within the Pittsburgh Coal Seam is also contaminated with acid mine drainage, which is unrelated to leachate from Impoundment No. 5. (T. 92)

49. Pursuant to paragraph 18 of the Yukon CO, Mill Service submitted to DER a plan to pump, collect, and treat water from the Pittsburgh Coal Seam which is hydrogeologically downgradient of Impoundment No. 5. The plan was approved by DER and has been implemented by Mill Service. (J.S. 31)

50. The groundwater monitoring program at the Yukon facility includes, *inter alia*, a series of wells specifically designed to monitor the impact of Impoundment No. 5 on the Pittsburgh Coal Seam and the Pittsburgh Limestone. These horizons have been monitored since 1983. (J.S. 27)

51. As part of the Closure and Post-Closure Plan Approval Order, DER imposed a series of additional special conditions relating to groundwater monitoring assessment and abatement. As part of those conditions, Mill Service is required to monitor the Pittsburgh Coal Seam and Pittsburgh Limestone at certain well locations. (J.S. 33)

Bonds

52. Paragraph 7(a) of the Yukon CO required Mill Service to submit a letter of credit in the amount of $662,594 to secure the closure of Impoundment No. 5. Under paragraph 8 of the Yukon CO, additional bonding could be required by DER if there was any change in criteria or policy. (MS Ex. 6)

53. Mill Service posted separate bonds for the closure of Impoundment No. 5 and for post-closure maintenance. (T. 55)

54. The amount of the closure bond posted for Impoundment No. 5 is $654,909.00. (T. 235; MS Ex. 41-C)

55. The amount of the post-closure bond for Impoundment No. 5 is $581,855.00. (T. 238, 593-594; MS Ex. 41-J, 41-D)

56. The closure bond covers the actual closure of the impoundment, which involves covering and capping the impoundment. (T. 45) It was calculated based on the cost of implementing the closure measures, including the synthetic cap and related geotextile material, soil and vegetative cover, and minor equipment needs in support of the closure. (T. 55-56)

57. The post-closure bond covers the cost of post-closure groundwater monitoring, leachate treatment and resultant offsite disposal of sludge generated during treatment, maintenance to the system, and inspections, as well as miscellaneous items, for a period of thirty years after closure of Impoundment No. 5. (T. 45, 56)

58. A 15 percent contingency cost is calculated into the amount of each bond which DER requires for general cost overruns. (T. 45)

59. Other than the 15 percent contingency noted above, the bonds do not include a reserve for unexpected contingencies or for clean-up or remedial measures other than those set forth in the closure plan. (T. 45-46)

Insurance

60. At the time of the hearing, Mill Service maintained public liability insurance in the form of two policies. (J.S. 42)

61. Policy No. NTA125977301, issued by Planet Insurance Company, provides coverage for Pollution Legal Liability coverage in the amount of $2,000,000 per occurrence with an annual aggregate of $4,000,000. (J.S. 42; MS Ex. 40-A)

62. Policy No. NG1259100-02, issued by Planet Insurance Company, provides Commercial General Liability coverage in the amount of $2,000,000 per occurrence with an annual aggregate of $2,000,000. (J.S. 42; MS Ex. 39-A)

63. DER required that Impoundment No. 5 be insured as a hazardous waste storage and treatment facility. (T. 534)

64. DER did not require that Impoundment No. 5 be insured as a hazardous waste disposal facility because it was DER's opinion that Impoundment No. 5 was no longer actively operating as a facility for the disposal of hazardous waste. (T. 534)

DISCUSSION

The burden of proof in this third party appeal lies with CRY to demonstrate by a preponderance of the evidence that DER's approval of the closure plan for Impoundment No. 5 was an abuse of discretion or contrary to law. 25 Pa. Code §21.101(c)(3); J. C. Brush v. DER, 1990 EHB 1521.

Before proceeding, we shall summarize the issues which are before us. Although CRY raised a multitude of objections to the closure plan approval in its notice of appeal, CRY limited the presentation of its case and the discussion in its post-hearing brief to only a small portion of these issues. Since any matter which is not preserved by a party in its post-hearing brief is deemed to be waived, only those issues which CRY has preserved in its post-hearing brief are before us for review. Lucky Strike Coal Co. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).[3]

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[3] CRY's appeal contained a total of 77 objections. As noted above, most of these were not pursued by CRY at hearing or in its post-hearing brief and, thus, have been waived. Because of the number involved we shall not detail each and every objection which was waived but, rather, shall focus on the few remaining objections which were preserved by CRY in its post-hearing brief.

Secondly, we must address one issue which appeared to have been preserved in CRY's post-hearing brief, but which, in fact, was not. Paragraphs 15 and 18 of CRY's notice of appeal contend that DER had a de facto policy of requiring that the contents of impoundments where hazardous waste had been disposed must be removed whenever that impoundment lost interim status or was denied a permit for the disposal of hazardous waste. CRY contended that this policy was enunciated in a line of cases involving Commonwealth, DER v. Fiore. Although CRY makes reference to the Fiore case in its post-hearing brief (in its Proposed Conclusions of Law, but not in its Discussion), this reference does not relate to its argument regarding DER's de facto policy but, rather, deals with a separate argument that DER failed to follow the regulations in existence at the time the closure plan was approved. Because no further reference was made to the "de facto policy" argument in CRY's post-hearing brief, this matter, too, is deemed waived. Lucky Strike, *supra*.

Thus, the issues which are before us in this appeal are as follows:

1. Whether DER abused its discretion by requiring an inadequate bond amount to be posted by Mill Service in connection with the closure of Impoundment No. 5.

2. Whether DER abused its discretion by requiring Mill Service to maintain an inadequate amount of insurance during the closure and post-closure periods.

3. Whether DER has abused its discretion by allowing the continuing discharge of hazardous waste leachate from Impoundment No. 5 into the groundwater.

4. Whether it was an abuse of discretion for DER to allow in-place closure of Impoundment No. 5 where hazardous waste from Impoundment No. 5 which has contaminated the groundwater will continue to leach indefinitely from the walls of the impoundment causing further contamination.

5. Whether the regulations in existence at the time the closure plan was approved prohibited the in-place closure of a facility where hazardous waste had been disposed, when that facility had lost interim status or had been denied a permit for the disposal of hazardous waste.

6. Whether DER violated its own regulations by failing to require a dewatering or solidification of the wastes contained in Impoundment No. 5.

Bond Amount

Section 505(a) of the SWMA contains the following language with respect to bonding requirements:

> The amount of the bond required shall be in an amount determined by the secretary [of DER] based upon the total estimated cost to the Commonwealth of completing final closure according to the permit granted to such facility and such measures as are necessary to prevent adverse effects upon the environment; such measures include but are not limited to satisfactory monitoring, post-closure care, and remedial measures.
>
> 35 P.S. §6018.505(a)

CRY contends that DER failed to require Mill Service to post a bond in an amount "necessary to prevent adverse effects on the environment" as required by §505(a). CRY argues that, while the major portion of the closure and post-closure bonds posted by Mill Service would cover the cost of installation of the cap, post-closure monitoring, leachate treatment, and maintenance and monitoring of the treatment facilities, the bonds do not cover

"unexpected contingencies or alternative methods of closure." (CRY Post-Hearing Brief, p. 39) According to CRY, the total amount of the bond for closure and post-closure is $581,855.00.

Mill Service counters that CRY's argument is flawed because it is based on two mistaken beliefs: first, that the total amount of the bonds is $581,855.00 and, second, that the SWMA or the regulations require the bonds to provide for unexpected contingencies or alternate methods of closure and remediation. We agree that CRY's argument is flawed for the reasons that follow.

In its discussion questioning the adequacy of the bonds required by DER, CRY states that "[t]he total bond posted by Mill Service for both closure and post-closure is $581,855.00." (CRY Post-Hearing Brief, p. 39) However, this amount represents less than one-half of the total bond amount posted by Mill Service. A bond in the amount of $581,855.00 was posted to cover post-closure activities, including groundwater monitoring, leachate treatment, and maintenance. (F.F. 55, 57) An additional bond in the amount of $654,909.00 was posted in connection with the actual closure of Impoundment No. 5. (F.F. 54, 56) Thus, CRY's argument regarding the adequacy of the bond amount required by DER is initially flawed because it is based on an incorrect amount.

Secondly, CRY asserts that the bonds were not posted in an amount necessary to prevent adverse effects upon the environment, as required by §505(a) of the SWMA. CRY does not dispute that the amount of the bonds is sufficient to cover the closure and post-closure measures outlined in the closure plan, which includes the cost of capping the impoundment, groundwater monitoring, leachate treatment, and post-closure maintenance. Rather, CRY's

objection is that the bonds do not provide for any unexpected problems not covered by the closure plan nor the cost of any alternate means of closure or remediation.

We disagree, first of all, with CRY's contention that the bonds do not take into account unexpected contingencies which might occur. Incorporated into the amount of the bonds is a 15 percent contingency allowance. This is required by DER as a safety measure in the event that costs run higher than estimated for closure and post-closure. (F.F. 58)

Secondly, as Mill Service points out, CRY has provided no statutory or regulatory authority for its proposition that the bonds must provide for unexpected contingencies or the cost of alternate means of closure or remediation. Section 505(a) of the SWMA requires that the amount of the bond be based upon "the total estimated cost to the Commonwealth of completing final closure according to the permit...and such measures as are necessary to prevent adverse effects upon the environment...[including] monitoring, post-closure care, and remedial measures." 35 P.S. §6018.505(a). The statute does not mention "unexpected contingencies", nor does it require that the cost of alternate methods of closure or remediation be part of the calculation. Nor are these required by 25 Pa. Code §267.18, which lists factors to be considered in determining the amount of the bond.

In accordance with the terms of §505(a) of the SWMA and 25 Pa. Code §267.18, the bonds posted by Mill Service cover the cost of closing the impoundment as well as post-closure activities aimed at detecting and preventing adverse effects on the environment, including groundwater monitoring, leachate treatment and sludge disposal, and post-closure maintenance and inspections for a period of thirty years. (F.F. 56, 57)

Moreover, we note that the Yukon CO had required Mill Service to submit a letter of credit in the amount of $662,594 to secure the closure of Impoundment No. 5. (F.F. 52) The actual bonds posted by Mill Service in connection with the closure of Impoundment No. 5 are almost double that amount.

For these reasons, we find that the bonds posted by Mill Service meet the requirements of §505(a) of the SWMA and 25 Pa. Code §267.18, and that CRY has not met its burden of proving that the amount of the bonds is inadequate.

Insurance Coverage

CRY asserts that DER abused its discretion by failing to require Mill Service to maintain adequate insurance for Impoundment No. 5 during the closure and post-closure periods.

Financial responsibility for owners and operators of hazardous waste storage, treatment, and disposal facilities is addressed in §506 of the SWMA, which places this matter in the hands of the Environmental Quality Board, as follows:

> The Environmental Quality Board shall adopt such additional regulations to provide for proof of financial responsibility of owners or operators of hazardous waste storage, treatment, and disposal facilities, as necessary or desirable for closure of the facility, post-closure monitoring and maintenance, sudden and accidental occurrences, and nonsudden and accidental occurrences...
>
> 35 P.S. §6018.506

The regulations adopted by the Environmental Quality Board governing financial responsibility are found at 25 Pa. Code §267.42.[4] At the time of the closure plan's approval,[5] the regulations required insurance coverage as follows:

> (a) A permit applicant, or permittee of a hazardous waste storage, treatment or disposal facility shall submit proof that the owner or operator has in force a liability insurance policy for personal injury or property damage to third parties caused by sudden accidental occurrences arising out of operation of the facility. The minimum amount of coverage for sudden accidental occurrences shall be $2 million per occurrence with an annual aggregate of at least $4 million, exclusive of legal defense costs... 25 Pa. Code §267.42(a).
>
> (b) A permit applicant, or permittee of a hazardous waste surface impoundment, land treatment or disposal facility shall submit proof that the owner or operator has in force a liability insurance policy for personal injury and property damage to third parties caused by nonsudden accidental occurrences arising out of operation of the facility. The minimum amount of coverage for nonsudden accidental occurrences shall be $4 million per occurrence with an annual aggregate of at least $8 million, exclusive of legal defense costs... 25 Pa. Code §267.42(b).

Thus, while the permit applicant or permittee of a hazardous waste storage and treatment facility would be required only to maintain coverage as set forth in (a) above, the permit applicant or permittee of a hazardous waste disposal facility would be required to comply with both (a) and (b). DER's Carl Spadaro, the lead engineer in the review of the closure plan for

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[4] Renumbered from 25 Pa. Code §75.332. 20 Pa. Bulletin 909.

[5] The language of 25 Pa. Code §267.42 was revised on January 15, 1993, effective January 16, 1993, 23 Pa. Bulletin 363; corrected January 22, 1993, 23 Pa. Bulletin 462.

Impoundment No. 5, testified that DER determined that Impoundment No. 5 did not require insurance coverage as a hazardous waste disposal facility since it was no longer in operation. (F.F. 64) Therefore, DER required only that Mill Service maintain insurance coverage for Impoundment No. 5 as a treatment and storage facility in the amounts set forth in paragraph (a) of §267.42. (F.F. 63) At the time of the hearing, Mill Service did hold a pollution legal liability policy for Impoundment No. 5 with coverage in the amount of $2,000,000 per occurrence with an annual aggregate of $4,000,000, pursuant to §267.42(a).

CRY argues, however, that DER also should have required Mill Service to comply with the insurance requirements of §267.42(b) for a hazardous waste disposal facility because Impoundment No. 5 is and will continue to be a "disposal facility" for as long as hazardous waste leachate continues to be discharged through its walls into waters of the Commonwealth.[6]

Mill Service counters that §§267.42 (a) and (b) apply only to permit applicants and permittees and that, while Mill Service is a permittee of a hazardous waste treatment facility at the Yukon site, it is not a permit applicant nor a permittee of a hazardous waste disposal facility at the Yukon site. Mill Service contends that, with respect to Impoundment No. 5, it stands in the position of a respondent to an administrative and judicial order (the Yukon CO), rather than a permit applicant or permittee. Mill Service argues that whether or not it is in compliance with the insurance requirements

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[6] CRY had also argued in paragraph 9 of its notice of appeal that the Yukon site did not have adequate insurance under the federal Resource Conservation and Recovery Act ("RCRA"). However, in its post-hearing brief, CRY limited its discussion to the insurance requirements under the SWMA and state regulations and did not address the requirements of RCRA. Therefore, this argument is deemed to be waived. Lucky Strike, *supra*.

of the regulations is irrelevant since DER has not issued a permit to Mill Service but, rather, has issued an order requiring closure of Impoundment No. 5, and that CRY's reasoning would have the effect of precluding DER from ordering closure to proceed absent the posting of certain insurance policies.

It is true that Mill Service is neither an applicant for nor the holder of a permit for a hazardous waste disposal facility at the Yukon site. However, hazardous waste was disposed in Impoundment No. 5, and, as CRY points out, hazardous waste leachate continues to migrate through the walls of the impoundment into waters of the Commonwealth and is likely to continue for some uncertain period of time after closure of the impoundment. (F.F. 34, 35) As CRY further points out, the term "disposal" includes all of the following:

> The incineration, deposition, injection, dumping, spilling, **leaking**, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth.
>
> 35 P.S. §6018.103. (Emphasis added)

However, DER takes the position that subsection (b) of §267.42 applies only to a site which is actively operating as a hazardous waste disposal facility. (F.F. 64) Generally, DER's interpretation of its own regulations is entitled to deference unless clearly erroneous. Manor Mining & Contracting Corp. v. DER, EHB Docket No. 86-544-F (Adjudication issued March 23, 1992); Baumgardner v. DER, 1988 EHB 786.

The purpose of the liability coverage required by §267.42(b) is to insure against "nonsudden accidental occurrences arising out of the operation of the [disposal] facility." (Emphasis added) Because Impoundment No. 5 is no longer operating as a disposal facility, it is not subject to the insurance

requirements of subsection (b) of §267.42. However, because Mill Service continues to treat hazardous waste at the site, it is required to maintain insurance in the limits imposed by subsection (a) of §267.42.

DER is not necessarily limited from imposing further insurance requirements on Mill Service if it determines that circumstances warrant it and it can justify its decision. The issue of the type of insurance which Mill Service could be required to obtain for the Yukon site was examined in the case of Mill Service, Inc. v. DER, 1987 EHB 73. In that appeal, Mill Service challenged a condition which DER had inserted into Mill Service's permit for Impoundment No. 6. Although Impoundment No. 6 had been permitted as a residual waste facility, DER required Mill Service to obtain environmental impairment insurance. Mill Service argued that DER lacked the authority to impose this requirement on a residual waste facility since the regulations in question (then numbered at 25 Pa. Code §75.332) required only that hazardous waste facility permittees obtain environmental impairment insurance, and there was no corresponding requirement that residual waste permittees obtain such insurance. DER argued that, although it did not have a specific grant of power to require this type of insurance for residual waste facilities, it did have the authority to do so under §502(f) of the SWMA, dealing with "Permit and license application requirements". Section 502(f) gives DER the power to " ... impose such other terms and conditions as it deems necessary or proper to achieve the goals and purposes of this act." 35 P.S. §6018.502(f). The Board agreed, holding that "DER may properly impose conditions on a permittee on an individual basis pursuant to Section 502(f)" so long as DER can justify those conditions. Mill Service, 1987 EHB at 80. However, while the Board found that DER had the authority to impose an

environmental impairment insurance requirement under §502(f), it concluded that DER had not adequately justified its imposition in the permit in question. In reaching this conclusion, the Board relied on the lack of any information demonstrating that Impoundment No. 6 posed a greater risk than any other residual waste facility, as well as DER's admission that the facility met, and in some cases exceeded, the existing standards for a residual waste facility. In response to DER's assertion that there was a high level of concern among the public with regard to Impoundment No. 6, the Board noted that "mere controversy is not a basis for compelling an operator of a residual waste facility to obtain environmental impairment insurance." *Id.* at 82-83. Clearly, however, the question of insurance is left in the hands of DER to make these determinations on an individual basis depending on the circumstances of the particular case.

In the present case, DER has required Mill Service to maintain insurance coverage for the operation of a hazardous waste treatment facility, as set forth in subsection (a) of §267.42. However, because Impoundment No. 5 is not being actively operated as a site for the disposal of hazardous waste, DER has not required Mill Service to be insured as an operator of a hazardous waste disposal facility. CRY has not demonstrated that DER's interpretation of §267.42(b) is clearly erroneous, nor do we find that DER has acted in contravention of the SWMA or the regulations. We, therefore, uphold DER's interpretation of 25 Pa. Code §267.42(b) and find that CRY has failed to meet its burden of demonstrating that DER did not require Mill Service to maintain adequate insurance coverage.

In-Place Closure

CRY contends that it was an abuse of discretion for DER to allow in-place closure of Impoundment No. 5, as opposed to a "clean closure" or removal of the impoundment's contents and transfer thereof to another impoundment or site. CRY argues that DER ignored both Article I, §27 of the Pennsylvania Constitution and the applicable regulations by approving in-place closure for Impoundment No. 5.

Article I, §27 of the Pennsylvania Constitution contains the following mandate to DER:

> **§27. Natural resources and the public estate**
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

The Commonwealth Court in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), *aff'd*, 14 Pa. Cmwlth. 491, 323 A.2d 407 (1974), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976), enunciated the following three-pronged test for determining compliance with Article I, §27:

> 1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> 2. Does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum?
>
> 3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?
>
> 312 A.2d at 94.

It is CRY's contention that DER's approval of the in-place closure plan for Impoundment No. 5 fails under the second and third prongs of the test above. CRY asserts that, in approving an in-place closure for Impoundment No. 5, DER did not attempt to keep the amount of environmental incursion to a minimum and, secondly, that the environmental harm which is likely to result from an in-place closure of Impoundment No. 5 outweighs any benefits to be derived therefrom. CRY contends that in-place closure will result in environmental harm because it allows hazardous waste leachate to continue to be discharged through the liner of the impoundment into waters of the Commonwealth.

In response to CRY's argument, Mill Service points to the corrective and remedial measures which are being implemented in connection with the in-place closure of Impoundment No. 5 and argues that those measures assure both protection of the environment and compliance with Article I, §27.

An important distinction to be made is that this case does not involve a simple analysis of whether environmental incursion has been kept to a minimum or whether environmental harm is outweighed by the benefits to be derived from the proposed action. Unfortunately, we are faced with a situation where environmental harm has already taken place, and any analysis under Article I, §27 must focus on the measures which have been approved by DER to correct or reduce the harm which has already occurred. The issue is not whether the environmental harm which may result from in-place closure is clearly outweighed by the benefits of closing Impoundment No. 5 but, rather, whether in-place closure is a more desirable option than clean closure. Therefore, our analysis in this case for determining compliance with Article

I, §27 is as follows:

1) In weighing the competing benefits and harms posed by each method of closure, does clean closure hold any benefit over in-place closure?

2) If clean closure holds no benefit over in-place closure, does the plan for in-place closure approved by DER attempt to reduce environmental incursion to a minimum?

As to the first question, it is CRY's contention that removal and transfer of the waste from Impoundment No. 5 will result in less environmental harm because it eliminates the source of the groundwater contamination.

However, Mr. Spadaro, the lead engineer in DER's review of the closure plan, testified that removal of the waste from the impoundment would not necessarily result in less groundwater contamination than in-place closure. (F.F. 40) According to Mr. Spadaro, removal of the waste from Impoundment No. 5 could take an estimated eleven years. (F.F. 41) During this period, precipitation would continue to infiltrate the impoundment, and there would be continual leachate generation during the entire process. (F.F. 37, 38) The purpose of placing a cap over an impoundment in an in-place closure is to stop the continued infiltration of precipitation into the impoundment, thus, preventing a constant recharge of liquids into the waste. (F.F. 31) Moreover, even after removal of the waste from Impoundment No. 5, some residual groundwater contamination would continue to exist for an indeterminate amount of time, which Mill Service would be required to address. (F.F. 39) Based on these conditions, Mr. Spadaro determined that clean closure held no benefit over in-place closure. (F.F. 42)

There is also the question of where to move the waste if that option had been chosen. CRY has suggested moving the waste to "another site" or, in

the alternative, transferring the waste to Impoundment No. 6 at the Yukon site. As CRY well knows from an earlier appeal filed by it and the County of Westmoreland at Docket No. 86-513-MJ (Consolidated), in which the appellants objected to DER's issuance of a residual waste permit to Mill Service for Impoundment No. 6, that impoundment is not permitted to accept hazardous waste. Ironically, one of the allegations made by CRY in that appeal was that the liner of Impoundment No. 6 was likely to leak. See Concerned Residents of the Yough, Inc. and County of Westmoreland v. DER, EHB Docket No. 86-513-MJ (Consolidated) (Adjudication issued February 1, 1993.) Thus, we question CRY's sincerity in suggesting that hazardous waste which was disposed in Impoundment No. 5 should be transferred to Impoundment No. 6.

Unfortunately, neither method of closure presents an ideal situation. However, in comparing the two methods of closure, based on the evidence presented, we find that clean closure holds no benefit over in-place closure and that DER did not abuse its discretion in approving the in-place closure of Impoundment No. 5.

The closure plan acknowledges the problem of leachate migrating from Impoundment No. 5 into the groundwater and incorporates measures to reduce the amount of leaching. In order to allow for settling and dewatering of the materials in the impoundment, the closure plan requires a period of stabilization prior to completion of the cap. (F.F. 22(d)) During this stage, which was ongoing at the time of the hearing, the layer of soil covering the impoundment had been placed in the shape of a dome and was compacted to a fairly high degree of intensity so that precipitation flow could be effectively diverted from entering the impoundment. (F.F. 25, 33) After this period of stabilization, the impoundment would be capped to prevent

the continued infiltration of further precipitation so as to avoid further recharge of the wastes inside the impoundment. (F.F. 31)

The closure plan also requires Mill Service to take remedial measures designed to abate the continuing migration of leachate from Impoundment No. 5. Three groundwater pumping wells have been installed in the Pittsburgh Coal Seam mine pool to pump the water to Mill Service's treatment system. (F.F. 29(b)) In addition, a series of collection drains along the outside of the impoundment dike are designed to collect any seepage which may migrate through the dike. The drains then discharge the seepage to the treatment system. (F.F. 29(c)) Finally, the closure plan contains a program to monitor the groundwater-bearing horizons that could potentially be affected by Impoundment No. 5. (F.F. 29(a))

Based on the above, we find that DER recognized the environmental harm which had occurred and which was likely to continue for years to come, and that it took steps to reduce the amount of harm to a minimum by incorporating into the closure plan a series of remedial and preventative measures aimed at eliminating existing groundwater contamination and preventing further pollution.

On this basis, we find that CRY has failed to meet its burden of proving that DER's approval of the closure plan providing for in-place closure of Impoundment No. 5 was a violation of DER's obligations under Article I, §27 of the Pennsylvania Constitution.

CRY also contends that in-place closure was prohibited by the regulations in effect at the time the closure plan was approved. Paragraph 20 of CRY's notice of appeal makes the general claim that "Chapter 75 of the Rules and Regulations of [DER] does not allow inground closure, for a facility

which has no authorization under interim status and no permit." In its post-hearing brief, CRY simply states, "The Department abused its discretion by allowing Mill Service to close its facility, without relocating the waste, for such action is prohibited by the regulations in effect at the time."[7] Without any explanation as to which particular regulation CRY claims was violated by DER's action, CRY launches into a discussion of the case of Fiore v. DER, 1986 EHB 744, which CRY analogizes to the case at hand. That matter came to the Board as a result of an order of the Pennsylvania Supreme Court directing the Board to make a determination as to whether an inspection could be conducted to assess the suitability of Fiore's Phase II Pit, constructed without a permit, for hazardous waste disposal under the SWMA. Fiore's application for a permit for the Phase II Pit had been denied by DER. At issue in that case was the question of which regulations and which statute were applicable to the design of the landfill. The Board reiterated its prior rulings holding that "in the context of reviewing the propriety of a Department permitting action, the regulations which were in effect at the time the Department took its action were applicable." *Id.* at 752-53.

Based on Fiore, argues CRY in its post-hearing brief, the regulations which were in existence at the time that DER approved the closure plan are the applicable regulations under which to scrutinize DER's approval. While we agree with CRY in this conclusion, we fail to see the significance of it since CRY has failed to point to any particular regulation which it claims was violated by DER's approval of the closure plan. Nor are we aware of any

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[7] CRY includes this argument in the section of its post-hearing brief entitled "Proposed Conclusions of Law" rather than in the "Discussion" section of its brief, where it should have been addressed.

provision of the regulations which were in existence at the time in question which would make DER's approval of in-place closure for Impoundment No. 5 illegal.

Nor does the Fiore case provide any additional support, despite CRY's contention that the cases are "incredibly similar". Whereas Fiore involved DER's denial of a permit for the construction and operation of a hazardous waste disposal facility which Fiore subsequently proceeded to construct in the absence of a permit, in the present case, DER has approved the closure of a facility where hazardous waste had been disposed. On page 91 of its brief, CRY contends that Mill Service has been "allowed to engage in conduct forbidden to Fiore [the disposal of hazardous waste in a site for which no hazardous waste disposal permit had been issued.]" If CRY's argument is that Mill Service failed to comply with the then-existing regulations as to the disposal of hazardous waste, that issue is well beyond the scope of this appeal. Moreover, it was DER's determination that Impoundment No. 5 did not meet the design standards for a hazardous waste facility and that hazardous waste was leaching through the impoundment which led to DER's ultimate determination that the impoundment should be closed. (F.F. 10, 47)

For the reasons set forth above, we find that CRY has not met its burden of proving that DER's approval of in-place closure for Impoundment No. 5 violated the applicable regulations which were in existence at the time of the approval of the closure plan.

Discharge of Hazardous Waste to Groundwater

In section 1 of its post-hearing brief, CRY argues that DER abused its discretion and ignored the law by allowing Mill Service, as part of its

closure plan, to continue to allow the discharge of hazardous waste leachate from Impoundment No. 5 into the groundwater.

As CRY correctly points out, Mill Service holds no permit for the discharge of hazardous waste into the groundwater. However, the issue of the migration of hazardous waste leachate from Impoundment No. 5 into the groundwater was a matter which was addressed by the Yukon CO. Pursuant to the Yukon CO, Mill Service has been required to pump and treat water from the Pittsburgh Coal Seam, as well as to monitor the impact of Impoundment No. 5 on the Pittsburgh Coal Seam and the Pittsburgh Limestone. (F.F. 49, 50, 51) The Yukon CO, which was approved by the Commonwealth Court, is not subject to a collateral attack in this appeal. Pennsylvania Human Relations Commission v. Ammon K. Graybill, Jr., Inc. Real Estate, 482 Pa. 143, 393 A.2d 420, 422 (1978); See also, Concerned Residents of the Yough, Inc. and the County of Westmoreland v. DER and Mill Service, Inc., EHB Docket No. 86-513-MJ (Consolidated) (Adjudication issued February 1, 1993). The closure plan continues to require groundwater monitoring, assessment, and treatment by Mill Service, as discussed earlier herein.

Removal or Dewatering of Liquid Wastes

In section G of its post-hearing brief, CRY asserts that DER abused its discretion by allegedly failing to require Mill Service to remove or dewater the free liquids and liquid wastes prior to closure of Impoundment No. 5. Mill Service argues that CRY has waived any right to raise this objection because it did not appear in CRY's notice of appeal.

The only statement in CRY's notice of appeal which may arguably be seen as raising this issue is contained in paragraph number 42 which reads as follows:

> 42. The engineers for the site indicated that the closure could only take place after a summer of evaporative drying, [sic] Appellants do not believe that such evaporative drying occurred, [sic] rather, as late as the summer of 1988 leachate was still impounded on the surface of the No. 5 Impoundment.

It is not clear whether CRY intended this to cover the argument made in section G of its post-hearing brief regarding the dewatering of waste in the impoundment. Nor did CRY file a reply brief addressing this question. However, even if we broadly read paragraph 42 of the notice of appeal as raising this argument,[8] it is without merit for the reasons set forth hereinbelow.

CRY contends that DER violated former §75.264(s)(3)(xxx)(A) containing the following language:

> (A) After eliminating any free liquids by removing liquid waste or solidifying the remaining waste and waste residue, a final layer of cover material compacted to a minimum uniform depth of two (2) feet shall be placed over the entire surface of the surface impoundment.
>
> Former 25 Pa. Code §75.264(s)(3)(xxx)(A)[9]

On the contrary, however, there was ample evidence presented at the hearing regarding what was referred to as the "monitoring period" or "waiting period" during which settlement and dewatering of the materials was occurring. (F.F. 23(d)) This was the stage in which Mill Service had been since October 1989 through the time of the hearing. (F.F. 26) In fact, Mill Service had received from DER an extension to remain in this stage longer than originally

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[8] See Croner, Inc. v. Commonwealth, DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1990).

[9] Renumbered at 25 Pa. Code §264.228(a)(1) on February 9, 1990, effective February 10, 1990. 20 Pa. Bulletin 909.

anticipated in order to ensure that settling would be complete before the final layers of the cap were applied. (F.F. 27, 28) During this stage, the dome-shaped layer of soil covering the impoundment had been compacted so as to divert further precipitation from entering the impoundment. (F.F. 25, 33)

Moreover, as discussed earlier, capping the impoundment will prevent any further recharge of wastes within the impoundment from occurring. (F.F. 31)

We, therefore, find that CRY has failed to support its claim that DER violated former 25 Pa. Code §75.264(s)(3)(xxx)(A) by failing to require the dewatering and solidification of wastes within the impoundment.

Conclusion

In conclusion, we find that CRY has failed to meet its burden of proving that it was an abuse of discretion for DER to issue its order of April 7, 1989 approving the closure plan in question for Impoundment No. 5.

CONCLUSIONS OF LAW

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

2. A third party appealing DER's approval of a closure plan bears the burden of proving that DER abused its discretion or committed an error of law in granting the approval. 25 Pa. Code §21.10(a)

3. Any contentions which are not preserved by a party in its post-hearing brief are deemed to be waived. Lucky Strike, *supra*.

4. CRY has failed to meet its burden of proving that the bond amount required by DER for the closure and post-closure of Impoundment No. 5 is inadequate.

5. Section 505(a) of the SWMA does not require the bond calculation to cover unexpected contingencies or alternate methods of closure. 35 P.S. §6018.505(a).

6. CRY has failed to meet its burden of proving that DER required an inadequate amount of insurance to cover the closure and post-closure of Impoundment No. 5.

7. The closure of Impoundment No. 5 is not subject to the insurance requirements of 25 Pa. Code §267.42(b).

8. DER did not violate Article I, §27 of the Pennsylvania Constitution or the applicable regulations in existence at the time of the closure plan approval by approving the in-place closure of Impoundment No. 5.

9. CRY has failed to meet its burden of proving that DER's approval of the closure plan for Impoundment No. 5 was an abuse of discretion or violation of law.

O R D E R

AND NOW, this 19th day of July, 1993, it is hereby ordered that the appeal of CRY at Docket No. 89-133-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: July 19, 1993

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MIDDLE CREEK BIBLE CONFERENCE, INC.	:	
ROBERT D. CROWLEY AND ELIZABETH L. CROWLEY	:	
	:	
v.	:	**EHB Docket No. 92-246-MR**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 28, 1993**

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR LACK OF JURISDICTION

Robert D. Myers, Member

Synopsis

Where a proposed sewage collection and treatment system extends into two municipalities and both rescind prior approvals of the planning modules, DER's acknowledgment of the rescissions is not an appealable "action." A prior DER decision (regarding the use of new forms and the applicability of new regulations), which also was appealed, is rendered moot by the rescissions since there are no approved planning modules now pending before DER. Both appeals are dismissed.

OPINION

Appellants, Middle Creek Bible Conference, Inc., Robert D. Crowley and Elizabeth L. Crowley, have been trying since 1986 to establish a religious conference and retreat center on a tract of land owned by them in Freedom and Liberty Townships, Adams County. Since the proposed development and its proposed sewage disposal facilities extend into both townships, Appellants

filed planning modules seeking approval of revisions to the Official Sewage Facilities Plans (Act 537 Plans) of the two municipalities. Liberty approved the module late in 1986 and sent it on to DER for review. Freedom, faced with local opposition, refused to act.

As a result of Freedom's inaction, DER disapproved the Liberty planning module on May 2, 1988. Appellants filed an appeal from this action at Board Docket No. 88-221-M. The Board granted summary judgment to DER on October 11, 1989 (1989 EHB 1097), holding that Appellants had waived the 120-day time limit for DER action and that Liberty's planning module could not be approved so long as Freedom refused to act.

Meanwhile, on May 10, 1989, DER had ordered Freedom (pursuant to 25 Pa. Code §71.14) to revise its Act 537 Plan and to consider Appellants' planning module. The time stated in the order was 120 days, but Freedom sought and obtained repeated extensions. Finally, in July 1990 Freedom adopted revisions to its Act 537 Plan and approved Appellants' planning module. Liberty then re-approved it and both modules were in DER's hands by early September 1990.

The regulations governing Act 537 Plans and revisions were substantially revised effective as of June 10, 1989 and the planning module forms were changed early in 1990. As a result DER returned the modules on September 28, 1990 advising that the new module forms and code numbers had to be used. Appellants filed an appeal from this DER letter at Board Docket No. 90-466-MR.

Appellants stated that the appeal was cautionary and they hoped to resolve the matter amicably with DER. Thereafter, the parties requested and received repeated extensions of the discovery and pre-hearing memoranda deadlines in order to pursue settlement discussions. During this time,

Appellants apparently satisfied some of the additional requirements imposed by the new regulations but DER never considered the modules to be complete. During this time, local opposition continued to grow. Then, on April 7, 1992 and May 7, 1992 respectively, Liberty and Freedom took final action on the planning modules by disapproving them. DER acknowledged receipt of the disapproval letters on June 11, 1992.

Appellants filed an appeal from this letter at Board Docket No. 92-246-MR and requested that it and the 1990 appeal be consolidated. The appeals were consolidated on July 16, 1992 at Board Docket No. 92-246-MR.

On March 11, 1993 DER filed a Motion to Dismiss for Lack of Jurisdiction accompanied by a legal memorandum. Appellants filed their Response and memorandum of law on April 12, 1993 (followed by an appendix on May 7, 1993). DER filed a reply memorandum on April 23, 1993 and Appellants filed a reply memorandum on May 7, 1993.

In its Motion DER contends that the Board lacks jurisdiction to entertain the appeals because the letters appealed from do not amount to DER "actions." Appellants argue to the contrary and, in addition, claim that DER's Motion is untimely. This last point is easily disposed of, since jurisdictional questions can be raised at any time: *Roy and Marcia Cummings et al. v. DER*, 1992 EHB 691.

DER correctly points out that the disposition of Appellants' 1992 appeal is governed by our recent decision in *Lobolito, Inc. v. DER et al.*, (Board Docket No. 92-147-E, Adjudication issued April 8, 1993). That appeal, like this one, involved planning modules for proposed sewage facilities encompassing two municipalities. While both modules were being reviewed by DER, one municipality rescinded its prior approval and asked DER to return the module. DER did so and, at the same time, returned the module to the other

municipality on the basis that, by itself, it was inadequate. Appeals were taken by the proposed developer from both letters. The Board held that DER's return of the module to the rescinding municipality was not a DER "action" appealable to this Board. The return of the other module, however, did constitute DER "action", since no rescission had taken place. That appeal, nonetheless, was moot because the planning module covered only a portion of an interrelated sewage collection and disposal system.

Appellants are faced with a situation where, not one, but both municipalities have rescinded prior approvals of the planning modules. On the basis of the analysis employed in *Lobolito*, *supra*, we hold that DER's letter acknowledging receipt of notice of the rescissions is not an appealable "action" of DER.

The DER letter forming the basis of the 1990 appeal may stand on other ground, since it does constitute a DER decision that Appellants were subject to the new regulations and had to use the new forms. Even if we were to find this decision to be an appealable "action," we would be faced with a mootness issue similar to, but more apparent than, that present in *Lobolito*, *supra*. Since both townships have now rescinded their approval of the planning modules, what relief can we give to Appellants with respect to the 1990 appeal? The relief they asked for was a reversal of DER's decision that they were subject to the new regulations and required to use the new forms. Even if we agreed to do all of that, there still would be no planning modules before DER bearing the stamp of approval of the townships.

The 1990 appeal was not moot until the rescissions occurred in 1992. Once that happened both DER and this Board were powerless to act on the previously submitted planning modules. The relief Appellants so desperately cry out for now can be awarded only by a court with equity powers. This Board

has none: *Marinari v. Commonwealth, Dept. of Environmental Resources*, 129 Pa. Cmwlth. 564, 566 A.2d 385 (1989).

ORDER

AND NOW, this 28th day of July, 1993, it is ordered as follows:

1. DER's Motion to Dismiss for lack of Jurisdiction is granted in part and denied in part.

2. The appeal originally docketed at No. 92-246-MR is dismissed for lack of jurisdiction.

3. The appeal originally docketed at No. 90-466-MR is dismissed for mootness.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

EHB Docket No. 92-246-MR

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 28, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

BELTRAMI BROTHERS REAL ESTATE INC., et al. :
:
v. : **EHB Docket No. 89-016-W**
: **(Consolidated Appeal)**
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: July 30, 1993**

OPINION AND ORDER SUR MOTION TO DISMISS FOR LACK OF JURISDICTION

Maxine Woelfling, Chairman

Synopsis

A motion to dismiss for lack of jurisdiction is denied.

Where a memorandum submitted in support of a motion conflicts with the motion itself, the Board deems the motion to control to the extent the two are inconsistent; the purpose of a supporting memorandum is to explain the motion, not to augment it.

Dismissal of an appeal for lack of jurisdiction is inappropriate where multiple issues remain in contention and the Board has jurisdiction over at least some of them.

Where an appellant asserts that an action by the Department "took" its property without just compensation and the alleged taking did not result - directly or indirectly - from the Department exercising its power of eminent domain, the Board has jurisdiction to determine whether the property was taken without just compensation. The Board must necessarily determine that issue to determine whether the Department acted within the scope of its authority.

OPINION

This matter was initiated by the January 19, 1989, filing of a notice of appeal at Docket No. 89-016-W by Beltrami Brothers Real Estate, Inc. (Beltrami) and the January 20, 1989, filing of a notice of appeal at Docket No. 89-018-W by Beltrami Enterprises, Inc. (Beltrami Enterprises) and Booty's Mining Company, Inc. (Booty's Mining) (collectively, the Appellants). Both appeals were filed in response to a December 23, 1988, letter from James R. Grace, the Department's Deputy Secretary for Resources Management, to Beltrami and Booty's Mining informing them that the Department was going to enter onto their land in Kline Township, Schuylkill County, to reclaim an abandoned strip mine that had a dangerous highwall. Both appeals identified the same objections to the letter. The Appellants asserted that they had a substantial economic interest in spoil banks adjacent to the highwall, that the Department's use of the spoil banks to reclaim the site would constitute a taking for which compensation is necessary, and that the proposed action was beyond the scope of the police power delegated to the Department. The Appellants also argued that the proposed action deprived them of due process under the law and that the Department must indemnify them for any damages resulting from the reclamation. The Board consolidated both appeals at Docket No. 89-016-W on January 27, 1989.

In addition to filing appeals with the Board, the Appellants, on May 15, 1992, filed a Petition for Appointment of a Board of Viewers under the Eminent Domain Code, the Act of June 22, 1964, P.L. 84, 26 P.S. §1-101 *et seq.* (Eminent Domain Code), with the Schuylkill County Court of Common Pleas. On the same day, the Appellants filed a petition to stay their action before the Board until the Court of Common Pleas ruled on their claim for compensation under the Eminent Domain Code. The Board granted the stay.

The issue presently before the Board pertains to the Board's authority to decide whether the Department's actions with regard to the Appellants' spoil piles constituted a taking.[1] On July 8, 1992, the Appellants filed a "motion contesting the Board's authority to decide a takings issue and compensation therefore" and a supporting memorandum. In their motion, the Appellants conceded that the Department had the authority to reclaim the highwall, but they asserted that the Department did not have the authority to use the spoils in the reclamation project and that, even if the Department did have the authority to use the spoils, the Department had to pay the Appellants compensation because the Department's use of the spoils amounted to a taking under the Fifth and Fourteenth Amendments of the United States Constitution. The Appellants also argued that the Schuylkill County Court of Common Pleas - not the Board - had jurisdiction over their action because the Eminent Domain Code, which the Appellants assert governs all condemnations of property for public purposes, confers exclusive jurisdiction on the Court of Common Pleas for the county in which the property is located.

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[1] The undisputed facts, which are not necessary to the disposition of this motion, are these. The Kelayres Strip Mine, an abandoned mine, was acquired by Booty's Mining on December 17, 1974 (Stipulation of Facts, ¶ 1). Booty Mining's predecessor-in-interest had deposited spoil banks - piles of culm, silt, rock, coal, and other materials - adjacent to the highwall (Stipulation of Facts, ¶ 1). While the parties dispute the composition and economic value of the piles, Beltrami maintains that it intended to use stone from spoil banks in connection with a quarry it operated nearby (Stipulation of Facts, ¶¶ 1 and 7).

On December 23, 1988, Grace sent Beltrami and Booty's Mining the letter informing them that, pursuant to §16(a)(1) of the Land and Water Conservation and Reclamation Act, the Act of January 19, 1968, P.L. (1967) 996, as amended, 32 P.S. §5101 *et seq.*, §407 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1237, and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, the Department intended to enter the land on which the abandoned mine was located and reclaim it. The reclamation project is currently ongoing, and some of the spoil piles have been used to re-slope the highwall and regrade the strip mine (Stipulation of Facts, ¶ 11). More material from the spoil piles will be used to complete the reclamation (Stipulation of Facts, ¶ 13).

The Department filed an answer and memorandum in opposition on August 12, 1992, in which the Department argued that the Board was the proper forum for the Appellants' action - not the Schuylkill County Court of Common Pleas. According to the Department, the Eminent Domain Code does not require that all takings challenges be made before the Courts of Common Pleas, and the Board has jurisdiction over appeals from Department actions, including those appeals where an appellant asserts a takings claim.

As framed by the Appellants, the motion resembles a motion to dismiss for lack of jurisdiction. In the "relief-requested" portion of the motion, however, the Appellants never asked that the Board dismiss their appeal; they asked only that the Board "permit" them to adjudicate their takings claim before the Schuylkill County Court of Common Pleas.[2] The motion is unusual in two other respects as well. First, although the motion was filed by the Appellants, it asserts that the Board has no jurisdiction over the takings issue the Appellants themselves raised in their notices of appeal. Ordinarily, when an appellant wishes to terminate its appeal, it is withdrawn. Second, the motion and supporting memorandum are inconsistent. The Appellants' memorandum asserts that they do not challenge the Department's authority to reclaim the mine, or even its authority to use the spoils, and that the only outstanding issue is whether the utilization of the spoils in the reclamation projects constitutes a taking and, if so, how much compensation the Appellants deserve (Appellants' memorandum of law pp. 4-7). It is clear from the Appellants' motion, however, that the Appellants are

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[2] On September 10, 1992, the Court of Common Pleas dismissed, without prejudice, the Appellants' Petition for Appointment of a Board of Viewers. In that opinion, and a supplemental opinion issued November 16, 1992, the Court of Common Pleas explained that it dismissed the Appellants' petition because their eminent domain action was not cognizable in that court until the Appellants exhausted their remedy before the Environmental Hearing Board.

contesting the Department's authority to use the spoils at all, not just the Department's authority to use them without compensation. Referring to the legislation the Department claimed authorized the reclamation project, the Appellants asserted in their motion, "The...Acts do not authorize [the Department] to enter upon contiguous land and take private property for use in a reclamation project" (Appellants' motion, ¶ 36).

For the purposes of ruling upon the Appellants' motion, we deem the motion to control in those instances where it conflicts with the supporting memorandum. This approach is consistent with the one we employed in Ernest Barkman et al. v. Department of Environmental Resources, EHB Docket No. 90-412-W (Opinion issued May 21, 1993), where the Board held that, to the extent the two documents were inconsistent, a motion for summary judgment controlled over a memorandum supporting the motion. As we noted in Barkman, "The purpose of the supporting memorandum is simply to explain the motion, not to augment it." Ernest Barkman et al., at p. 8. Although Barkman involved a motion for summary judgment rather than a motion to dismiss, the same rationale applies here.

Turning to the merits of the motion, even if the Board did not have jurisdiction over the takings issue, it would be inappropriate to dismiss the appeal here because it involves more than the takings issue. In addition to maintaining that the Department could not utilize the spoil piles without providing compensation for them, the Appellants assert that the Department exceeded its authority by using the spoils at all. The latter issue is clearly within the purview of this Board, even if the takings claim were within the exclusive jurisdiction of the Schuylkill County Court of Common Pleas.

The Appellants' takings claim is not within that court's jurisdiction, however; it is, as the Schuylkill County Court of Common Pleas

itself concluded, within the jurisdiction of this Board.

The legislature enacted the Eminent Domain Code to provide, with certain exceptions, a "complete and exclusive procedure and law to govern all condemnations of property for public purposes ...." §303 of the Eminent Domain Code. Under the §401 of the Eminent Domain Code, jurisdiction for all condemnation proceedings lies in the Court of Common Pleas for the county in which the property is located.

The Eminent Domain Code does not apply only to those instances where the property alleged to have been taken has been formally condemned. Section 502(e) provides that a condemnee may petition for an appointment of viewers if there has been a "compensable injury" and "no declaration of taking therefor has been filed." The courts refer to injuries of this sort as "*de facto* takings." The designation is an unfortunate one, for the words "*de facto*" suggests that the term applies to all instances where the government effects a "taking" without formally condemning the property. As used by the courts, however, the term "*de facto* taking" refers to a much narrower class of takings. The courts have repeatedly held that a "*de facto* taking" occurs only when the taking is performed by an entity "clothed with the power of eminent domain." See, e.g., Conroy-Prugh Glass Co. v. Commonwealth, 456 Pa. 384, 321 A.2d 598 (1974); McGaffic v. Redevelopment Authority, 120 Pa. Cmwlth. 199, 548 A.2d 653 (1988); and, Appeal of D.R.E. Land Developing, Inc., 149 Pa. Cmwlth. 290, 613 A.2d 96 (1992).

Where an entity has the power of eminent domain, but the alleged taking does not result - directly or indirectly - from the entity's exercise of that power, those injured must seek their recourse by some vehicle other

than the Eminent Domain Code.[3] Thus, the Commonwealth Court has repeatedly held that persons who alleged that their property has been "taken" by changes in the zoning regulations had no recourse under the Code, despite the fact that the local government enacting the regulations had the power of eminent domain. Townships, for instance, have the power of eminent domain.[4] Yet, where property owners assert that township flood plain ordinances restricting the use of their property constitute a taking, the Commonwealth Court has held that their only recourse lies in the Municipalities Planning Code. See, e.g. Gaebel v. Thornburg Township, 8 Pa. Cmwlth. 399, 303 A.2d 57 (1973); Merlin v. Commonwealth, 72 Pa. Cmwlth. 45, 455 A.2d 782 (1983); and Kraiser v. Horsham Township, 72 Pa. Cmwlth. 16, 455 A.2d 782 (1983). The court has employed the same approach with regard to zoning ordinances enacted by counties and boroughs, other entities with the power of eminent domain.[5] See, e.g., Reilly v. Commonwealth, Department of Environmental Resources, 37, Pa. Cmwlth. 608, 391 A.2d 56 (1978) (county zoning ordinance); and Wyoming Borough v. Wyco Realty Co, 64 Pa. Cmwlth. 459, 440 A.2d 696 (1982) (borough zoning ordinance).

The Board has specifically addressed the question of whether takings issues fall within its jurisdiction at least twice before, in Joseph W.

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[3] The Department does have eminent domain power. See, e.g., §17 of the Coal Refuse Disposal Control Act, the Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.101.

[4] See, e.g., §§1901 and 3001 of the First Class Township Code, the Act of June 24, 1931, P.L. 1206, as amended, 53 P.S. §§56901, 58001; and, §§1001-1052 of the Second Class Township Code, the Act of May 1, 1933, P.L. 103, as amended, 53 P.S. §§66001-66052.

[5] See, e.g., §2305(a) of the County Code, the Act of August 9, 1955, P.L. 323, as amended, 16 P.S. §2305(a); §2505 of the Second Class County Code, the Act of July 28, 1953, P.L. 723 as amended, 16 P.S. §5505(a); and, §1501 of the Borough Code, the Act of February 1, 1966, P.L. 1656, as amended, 53 P.S. §46501.

Gosset, Jr. and Lucinda C. Gosset v. DER, 1972 EHB 88, and in Mr. and Mrs. Conrad Mock v. DER, 1992 EHB 537, aff'd, ___ Pa. Cmwlth. ___, 623 A.2d 940 (1993). In Gosset we held that the issue of whether an action fell within the scope of the Department's authority was separable from the issue of whether the action constitutes a taking without adequate compensation. The Board concluded that it could not resolve takings issues because those issues fell within the purview of the Eminent Domain Code:

> Pennsylvania law has recognized the right of a landowner to compensation for property taken for a public purpose by public officials even though no formal declaration of taking has been made. See Griggs v. Allegheny County, 402 Pa. 411, 168 A.2d 123 (1961), reversed on other grounds, 369 U.S. 84 (1962). That right has been preserved in the Eminent Domain Code .... Therefore, Pennsylvania law does make provision for an action whereby Appellants may claim their property has been taken and seek compensation for it. The issue of the right to compensation may be litigated fully in such an action. This fulfills the constitutional requirement of provision for just compensation and the order of November 15, 1971, is not invalid for having failed to award damages or compensation to Appellants. The power to enter the land in response to an emergency is not conditioned on a determination of the right to damages for that entry.
>
> Gosset, 1972 EHB at 97.

But, almost 20 years later, in Mock, the Board held that it did have jurisdiction to consider takings claims. While Mock did not expressly overturn Gosset, the holdings of the two cases are clearly irreconcilable. Referring to the argument that the Eminent Domain Code deprived the Board of jurisdiction to consider takings issues, the Board, in Mock, wrote:

> This argument is persuasive on its face, but ignores appellate court decisions construing the Eminent Domain Code. The seminal case, Gaebel v. Thornbury Township, 8 Pa. Cmwlth. 379, 393 A.2d 57 (1973), held that a claim for *de facto* taking cannot be filed under the Eminent Domain Code

> where the taking involves the exercise of the police power. The property owner must first challenge the constitutionality of that exercise by the means provided by the Legislature. In the case of a zoning ordinance, as was involved there, the challenge must be made through procedures contained in the Municipalities Planning Code ....
>
> The Gaebel decision was followed in a number of subsequent cases, including Reilly v. Commonwealth, Dept. of Environmental Resources, 37 Pa. Cmwlth. 608, 391 A.2d 56 (1978); Kraier v. Horsham Township, 72 Pa. Cmwlth. 16, 455 A.2d 782 (1983); and Merlin v. Commonwealth, 72 Pa. Cmwlth. 45, 455 A.2d 789 (1983). Like the [Municipalities Planning Code] the [Dam Safety and Encroachments Act] represents an exercise of the Commonwealth's police power. Any claim that the exercise of that power by [the Department] amounts to an unconstitutional taking of property must be pursued through the procedures contained in the statute -- appeal to this Board: 32 P.S. §693.24(a). We clearly have the jurisdiction to consider it.

Since the Commonwealth Court affirmed the Board's opinion in Mock and Gosset directly conflicts with Mock, Gosset is no longer of any precedential value.[6]

The Board has the power to resolve issues as to both the procedural and substantive validity of actions by the Department. Charleston Township Municipal Authority v. Department of Environmental Resources, 29 Pa. Cmwlth. 127, 370 A.2d 758 (1977). To determine whether the Department acted within the scope of its authority, the Board must necessarily review any takings

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[6] See, also, the Commonwealth Court's opinion in Machipongo Land and Coal Company v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 624 A.2d 742 (1993) wherein a petition for review of the designation by the Environmental Quality Board of certain lands as unsuitable for mining at 25 Pa. Code §86.130(b)(14) was transferred to the Board under the doctrine of primary jurisdiction. In reaching its determination that the Board was the more appropriate forum to adjudicate petitioner's claim that the regulation effected a taking without just compensation, the Commonwealth Court noted the Board's authority to consider whether a regulatory taking has occurred.

issue raised by an appellant, for an action which might otherwise fall within the Department's authority will fall outside that authority if the action effects a taking without just compensation.

ORDER

AND NOW, this 30th day of July, 1993, it is ordered that the Appellants' motion "contesting the Board's authority to decide a takings issue and compensation therefor" is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: July 30, 1993

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SECRETARY TO THE BOARD

GEORGE C. LAW, GLENN A. WECKEL, LAVERNE R. HAWLEY, t/a/ G.L. & G.W. DEVELOPMENT CO.	:	
v.	:	**EHB Docket No. 93-158-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 30, 1993**

OPINION AND ORDER
SUR APPEAL NUNC PRO TUNC

By Richard S. Ehmann, Member

Synopsis

Where an appeal *nunc pro tunc* is filed with this Board and in response thereto, DER is ordered by this Board to file its response, if any, to the appeal *nunc pro tunc* by a date certain, upon DER's failure to timely respond to this order the appeal will be allowed and DER's untimely response raising questions of this Board's personal jurisdiction over DER ignored.

OPINION

On June 21, 1993, a document captioned Appeal Nunc Pro Tunc was filed with this Board on behalf of George C. Law, Glenn A. Weckel and Laverne R. Hawley t/a/ G.L. & G.W. Development Company (collectively "Law"). The Appeal Nunc Pro Tunc purports to appeal from the Department of Environmental Resources entry of a judgment for civil penalty in the amount of $23,340 against Law, as reflected in a Certified Copy Of Judgment dated April 19, 1993 and transmitted to the Prothonotary of the Common Pleas Court of Mercer County for indexing. This appeal *nunc pro tunc* asserts no notice to Law of the civil

penalty prior to this judgment, first notice of it on May 28, 1993, and sale of Law's leases in 1979 to third parties without any mining of the leased tract by Law. The letter transmitting this appeal to us indicates that this appeal was filed on advice from DER attorney Stuart M. Bliwass. It then asks for immediate action on this appeal because Law's only other option is to immediately petition to open the judgment.

In response to the Appeal Nunc Pro Tunc and on June 28, 1993 we issued DER an Order directing that it file its response, if any, with us by July 19, 1993. On the last business day before this response was due DER orally requested that we "fax" it a copy of this Appeal Nunc Pro Tunc. This was done on the day we received the request.

July 19, 1993 passed without DER filing any response to Law's Appeal Nunc Pro Tunc. On July 20, 1993, the Board received a written response from DER stating it had received our Order of June 28, 1993 on June 30, 1993 and asked us for a copy of this Appeal Nunc Pro Tunc on July 16, 1993. It says the Appeal Nunc Pro Tunc does not show service on DER and that DER has not been served so we lack personal jurisdiction over it. DER then says it is gathering information on this matter's merits from which to reply to the substance of the Appeal Nunc Pro Tunc and asks us to issue a Rule To Show Cause on Law why the appeal should not be dismissed for failing to comply with this Board's rules. See 25 Pa. Code §21.51. Nothing is stated in DER's response which addresses the merits of the Appeal Nunc Pro Tunc.

DER failed to timely respond to our Order of June 28, 1993. The Order gave DER a deadline for doing so and DER's untimely response to our Order offers no reason why a response could not have been timely filed, particularly where DER admits receipt of our Order on June 30, 1993.

Accordingly, we will not consider the merit of DER's untimely response even though the Appeal Nunc Pro Tunc fails to indicate that Law served a copy on DER. See Miller's Disposal and Truck Service v. DER, 1990 EHB 1239.

Turning to Law's Appeal Nunc Pro Tunc, it appears Law filed their Appeal Nunc Pro Tunc with us within thirty days of receipt of Notice of DER's judgment which they claim is their first notice of DER's actions. Law received this Notice on May 28, 1993 and filed with us on June 21, 1993. If this is Law's first notice of DER's actions, as alleged, this is not an appeal *nunc pro tunc* but is a timely skeleton appeal under 25 Pa. Code §21.52(c), Law's only failure on perfection of this appeal apparently being service on DER as required by 25 Pa. Code §21.51(f). However, that omission we deem to be cured by our having provided DER's counsel a copy of this Notice Of Appeal at his request.

Accordingly, we enter the following Order.[1]

ORDER

AND NOW, this 30th day of July, 1993, it is ordered that Law's Appeal Nunc Pro Tunc is allowed as a skeleton appeal pursuant to 25 Pa. Code §21.51(c) and, since counsel for DER already has a copy of Law's Appeal Nunc

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1 DER has made a Motion that we issue Law a Rule To Show Cause why this appeal should not be dismissed for failure to serve DER. In light of 21.52(c), our provision of this document to DER and the peculiar facts in this case, we decline. In doing so, we note DER's argument that we act on its motion, even though it says we lack jurisdiction over it, is incongruent at best. When DER moved that we issue Law a Rule To Show Cause, it ceased being a non-party over whom we lacked jurisdiction (assuming its allegations are valid) and acted as a party. In doing so it waived its jurisdictional argument.

Pro Tunc, the appeal is now perfected. However, in the future, Law is directed to serve a copy of all future filings on counsel for DER. It is further ordered that DER's Motion For Rule To Show Cause is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 30, 1993

cc: **For the Commonwealth, DER:**
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Western Region
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William M. Panella, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

MARTIN L. BEARER t/d/b/a NORTH CAMBRIA FUEL COMPANY	:	
v.	:	**EHB Docket No. 83-091-G**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and THOMAS and TAMMY RIETSCHA, Intervenors	:	**Issued: August 2, 1993**

ADJUDICATION

By the Board

Synopsis

The Board sustains the Department of Environmental Resources' (Department) issuance of an order pursuant to §4.2(f) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(f) (SMCRA), to a surface mine operator to permanently restore the water supplies of seven residences. The Department met its burden of establishing that the water supplies, which were in the vicinity of the operator's mine site, were degraded by his mining activities. Therefore, the Department's order to restore the supplies to a condition "equal to or better than the pre-mining quantity and quality" was not an abuse of discretion.

INTRODUCTION

This appeal was filed on May 9, 1983, in response to the Department's May 5, 1983, order to North Cambria Fuel Company (North Cambria) to replace

seven residential wells in the vicinity of North Cambria's Joiner Strip Mine.

North Cambria filed a petition for supersedeas on the same day it filed its appeal. A short time later, the Board received and granted a petition to intervene filed by Thomas and Tammy Rietscha, who were owners of one of the wells that were the subject of the order. The Rietschas did not participate in the hearings, however, and filed no post-hearing briefs. Consequently, they are deemed to have abandoned their claims. Thus, this adjudication is concerned solely with the evidence and arguments offered by the Department and North Cambria.

A "Consent Adjudication"[1] dated September 15, 1983, was approved by the Board as a settlement of the dispute surrounding North Cambria's petition for supersedeas. In return for North Cambria's agreement to furnish acceptable water supplies to the seven residences pending adjudication of the appeal, the Department agreed to accept a supersedeas of its order. Accordingly, a supersedeas for a period of a year was issued on September 22, 1983. The supersedeas was renewed as necessary during the hearings, and then

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1 The Consent Adjudication included the paragraph:

> 9. Neither this Consent Adjudication, nor any term or condition contained herein, nor any negotiations between the parties, nor any actions by NCF pursuant to this Consent Adjudication shall be deemed to be an admission of liability by NCF of any of the matters determined or concluded by DER in the DER Order, and shall not be deemed to be a waiver of any right or defense of NCF to the DER Order. Neither this Consent Adjudication, nor any actions by NCF in compliance with this Consent Adjudication shall be admissible as evidence against NCF in any legal proceedings for the purpose of establishing the liability of NCF for degradation of the subject water supplies.

The Board has been faithful to this disclaimer clause. Although the Consent Adjudication was the subject of some discussion during the hearings, the Board did not permit the Consent Adjudication or the fact that North Cambria was furnishing water to the seven landowners to be used against North Cambria in any way (see e.g., N.T. 86-100).

at the close of the hearings, by order dated September 27, 1985, was renewed indefinitely pending adjudication of the appeal, but subject to termination for good cause shown. Proceedings in this appeal included fourteen days of hearings over the period November 19, 1984, through September 26, 1985, which produced more than 2,400 pages of testimony and well over 100[2] exhibits. Filing of the parties' post-hearing briefs was completed on May 13, 1986.

Edward Gerjuoy, the Board Member to whom this matter was assigned for primary handling, resigned from the Board prior to having prepared a recommended adjudication. He was retained by the Board as a hearing examiner to prepare a draft adjudication, and his draft adjudication is being issued by the Board after modification.

FINDINGS OF FACT

1. Appellant is Martin L. Bearer, an individual who trades and does business as North Cambria, and who maintains an office and place of business at First National Bank Building, Spangler, Cambria County.

2. Appellee is the Department, the agency of the Commonwealth authorized to administer the provisions of SMCRA, the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. 691.1 *et seq.* ("CSL"), and the rules and regulations adopted thereunder.

3. Intervenors are Thomas J. and Tammy J. Rietscha, who, at the time of the hearing, resided at R.D. 2, Box 103F, Barnesboro.

4. Since August, 1979, North Cambria has conducted a surface mining operation in Pine Township, Indiana County, known variously as the Heilwood

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2 In the text that follows references to the transcript will be denoted by "N.T. ___", the Department's exhibits will be designated as "DER Ex.___" and North Cambria's exhibits will be designated as "NCF Ex.___."

Strip Mine and the Joiner Strip Mine.

5. On May 5, 1983, the Department issued an order to North Cambria which found that the mine had contaminated and degraded water wells serving the residences of the Rietschas, Douglas Watterson, Michael Bugal, Edward Beilchick, Dwight Yarnell, Richard Simo and Merle Lydic (collectively, the "residential water wells") by "decreasing pH, increasing acidity, increasing iron, increasing manganese and increasing sulfate to impermissible levels."

6. The order required North Cambria to provide each of the residences with a temporary replacement water supply within 72 hours and with a permanent replacement water source within 90 days; the quantity and quality of the water in the permanent replacement source was to be "equal to or better than the pre-mining quantity and quality" of the supply being replaced.

7. The residential water wells all are located along Pennsylvania Route 403, to the south-southwest of the mine's southern boundary, at distances ranging from approximately 700 feet to approximately 1,700 feet. (DER Ex.9; NCF Ex. 38; N.T. 269-70)

8. In the vicinity of the residential wells, Route 403 runs approximately from the south-southeast to the north-northwest, so that the eastern side of Route 403 is closer to the mine than its western side. (DER Ex. 9; NCF Ex. 38)

9. The Simo well, the southernmost of the residential wells, is almost due south of and farthest from the southern boundary of the mine; the Beilchick well, the northernmost of the residential wells, is almost due west of and closest to the southern boundary of the mine. (DER Ex. 8; NCF Ex. 28; N.T. 252)

10. Proceeding from south to north along the west side of Route 403,

the residential wells are encountered in the order Simo, Bugal, Watterson and Beilchick. (DER Ex. 8; NCF Ex. 38; N.T. 251-2, 256)

11. Proceeding from south to north along the east side of Route 403, the residential wells are encountered in the order Yarnell, Lydic, and Rietscha, with the Lydic well only about 200 feet distant from the Yarnell well. (DER Ex. 8; NCF Ex. 38; N.T. 262)

12. The Beilchick well is about 1,300 feet north-northwest of the Rietscha well, the nearest to Beilchick of the other six residential wells, which are clustered together; the distance between the Simo well and the Rietscha well, the well on the east side of Route 403 that is farthest from the Simo well, is about 800 feet. (DER Ex. 8; NCF Ex. 38)

13. The Yarnell well is located approximately across Route 403 from the Simo well; the Lydic well is located approximately across the road and about 100 feet from the Bugal well; the Simo well is approximately 400 feet south of the Bugal well and 500 feet south of the Watterson well; and the Rietscha well is across the road from and about 200 feet north of the Watterson well, which, in turn, is about 300 feet northwest of the Lydic well across the road. (DER Ex. 8; NCF Ex. 38)

14. An unnamed tributary of Little Yellow Creek (UT) runs between the residential wells and the southern boundary of the mine, in a direction approximately from northwest to southeast. (DER Ex. 8; NCF Ex. 38; N.T. 503-4, 1135)

15. Mining at the Joiner Strip was accomplished on two distinct areas ("Joiner-North" and Joiner-South"), separated by another unnamed tributary of Little Yellow Creek; this unnamed tributary lies approximately 1,800 feet north of and flows approximately parallel to the UT. (DER Ex. 8, NCF Ex. 38;

N.T. 1135)

16. In the general area of the mine there are four distinct coal seams, the Lower Kittanning ("LK") and the three benches of the Middle Kittanning ("MK"); in order of increasing elevation above sea level, the Middle Kittanning benches, each of which lies above the LK, are called the first, second and third benches ("MK1", "MK2" and MK3"). (NCF Ex. 39)

17. Each of the four coal seams was extracted in some portions of the Joiner Strip. (NCF Ex. 38)

18. Groundwater flows in at least two distinguishable aquifers in the general vicinity of the Joiner Strip. (N.T. 380, 1126, 1130-31)

19. The lower of these two aquifers ("Lower Regional Aquifer" or "LRA") flows just beneath the LK seam, and is believed to extend over a quite large region. (N.T. 380, 425-6, 1126)

20. The upper of these two aquifers ("Upper Regional Aquifer" or "URA") flows between the top of the LK seam and the bottom of the MK3 seam, with most of its flow probably located between the top of the MK1 and the bottom of the MK2 seam; the URA does not extend over as large a region as does the LRA, and the volume of groundwater flow in the URA, measured in gallons per minute ("gpm"), is considerably less than in the URA. (N.T. 380-1, 1130-37; NCF Ex. 39; DER Ex. 19)

21. On October 3, 1975, the well at the Simo residence was drilled to a depth of 80 feet below the surface, which made the elevation of the well bottom 1,667.5 feet above sea level (from which all elevations henceforth will be measured). The elevation of the LK seam at this point is approximately 1,635 feet. On June 27, 1981, the well was deepened to an elevation of 1,654.5 feet and on October 6, 1983, it was surged and cleaned. (NCF Ex. 60-1)

22. The well at the Bugal residence was originally drilled in 1975 to a depth of 105 feet, corresponding to a bottom elevation of 1,649.3 feet. The elevation of the LK seam at this point is approximately 1,645 feet. On July 3, 1981, the well was deepened to an elevation of 1,644.3 feet and sometime between September 22, 1983, and October 11, 1983, the well was surged and cleaned. (NCF Ex. 60-2)

23. The Watterson well was originally drilled in November, 1974, to a depth of 90 feet, corresponding to a bottom elevation of 1,664.1 feet. The elevation of the LK seam at this point is approximately 1,665 feet. On July 6, 1981, the well was deepened to an elevation of 1,646.1 feet, and on March 4, 1984, the lower portion of the well was plugged, so that the effective elevation of the well bottom was raised to 1,679.1 feet. (NCF Ex. 60-3)

24. The well at the Beilchick residence was originally drilled in the 1960's, to a depth of 157 feet, corresponding to a bottom elevation of 1,648.3 feet. The elevation of the LK seam at this point is approximately 1,710 feet. On September 29, 1983, the well was surged and cleaned. (NCF Ex. 60-4)

25. The Yarnell well was originally drilled in 1974 to a depth of 76 feet, corresponding to a bottom elevation of 1,670.1 feet. The elevation of the LK seam at this point is approximately 1,634 feet. On June 29, 1981, the well was deepened to an elevation of 1,606.1 feet. On October 5, 1983, the well was surged and cleaned, and on March 19, 1984, the lower portion of the well was plugged, so that the effective elevation of the well bottom was raised to 1,656.1 feet. (NCF Ex. 60-5)

26. The well at the Lydic residence was originally drilled in 1974 to a depth of 75 feet, corresponding to a bottom elevation of 1,675.1 feet. The elevation of the LK seam at this point is approximately 1,640 feet. On

October 4, 1983, the well was surged and cleaned. (NCF Ex. 60-6)

27. The Rietscha well was originally drilled some time before 1978 to a depth of 125 feet, corresponding to a bottom elevation of 1,625.6 feet. The elevation of the LK seam at this point is approximately 1,670 feet. On September 26, 1983, this well was abandoned, and since then the Rietscha residence has been served by another well identified as Monitoring Well (MW)-1. (NCF Ex. 60-7)

28. MW-1, lies about 400 feet southeast of the Rietscha home, at a point only about 200 feet east-northeast of the Lydic property. MW-1 was originally drilled on November 25, 1981, to a depth of 130 feet, corresponding to a bottom elevation of 1,606 feet. The elevation of the LK seam at the location of MW-1 is approximately 1,643 feet. On February 20, 1984, the lower portion of MW-1 was plugged, so that the effective elevation of the well bottom was raised to 1,661.1 feet. (NCF Ex. 38) N.T. 276-7

29. At all times the Simo and Lydic wells have been receiving their water from the URA. (N.T. 1142)

30. Before July 3, 1981, the Bugal well was served by the URA. Since then the Bugal well has been receiving water from both the URA and the LRA; the relative contributions from the two aquifers to the well after July 3, 1981 are unknown. (N.T. 531-4, 1861-4)

31. Before July 6, 1981, the Watterson well was receiving its water predominantly from the URA. From July 6, 1981, to March 4, 1984, this well was served by the LRA alone. Since March 4, 1984, the URA has been the sole supplier of water to this well. (N.T. 288, 1128-1132)

32. At all times the LRA has been the source of water for the Beilchick well. (N.T. 1128)

33. Before June 29, 1981, the Yarnell well was served by the URA. Between June 29, 1981, and March 19, 1984, the LRA was the source of water for this well. After March 19, 1984, the URA again became the sole source for the well. (N.T. 1128, 1142)

34. The Rietscha well drew its water from the LRA (N.T. 1128, 1130). MW-1, which has served the Rietschas since September 26, 1983, originally drew its water from the LRA, but since February 20, 1984, it has been drawing its water from the URA. (N.T. 1128, 130)

35. Mining began on the northern edge of the Joiner-South area in November, 1979, and proceeded from north to south, with individual cuts advancing from southeast to northwest; in August, 1982, mining began on the Joiner-North area, beginning in the southeast corner and proceeding thereafter in a direction roughly southeast to northwest. (NCF Ex. 38 and 47; N.T. 136-7, 1037-9)

36. For the most part, backfilling was concurrent with mining during the operation, in that the spoil from each newly opened pit generally was used to fill the previously opened pit; backfilling on the Joiner-South area was completed in September-October 1982, and was completed on the Joiner-North area in September, 1983. (NCF Ex. 47; N.T. 162-4, 1032, 1047-8)

37. Herbert Wilson, a professional well driller, drilled the original Watterson, Lydic, Bugal, and Simo wells. (N.T. 949-62)

38. Mr. Wilson made a practice of measuring the iron (Fe) concentrations in the water wells he drilled, using a "field test kit." (N.T. 951)

39. Mr. Wilson found that before mining had begun water from wells in the neighborhood of the mine had been high in Fe, showing concentrations of 5

milligrams per liter (mg/l) and above. (N.T. 951)

40. At the time the Lydic, Bugal and Simo wells were drilled Mr. Wilson measured Fe concentrations of 6, 7 and 8 mg/l respectively. (N.T. 958-9, 963, 998)

41. In 1965, about five years after the Beilchick well was drilled, a water softener was installed because the Fe concentration in the water was 7 mg/l. (N.T. 82, 951-2)

42. Water softeners were installed on the Watterson, Simo, Bugal, Rietscha, and Yarnell wells at the time or shortly after they were drilled. (N.T. 68, 112, 954, 961, 963; NCF Ex. 60-1, 60-2, 60-3, 60-4, 60-5 and 60-7)

43. The Lydic well needed a water softener when it was drilled, but no softener was installed because the Lydics had no money at the time. (N.T. 958-9)

44. As part of its permit application for the Joiner Strip, North Cambria submitted water samples from the Simo, Bugal, Yarnell, Lydic, and Rietscha wells. (DER Ex. 6)

45. The residential well water samples were taken on April 18, 1978. (NCF Ex. 60-1, 60-2, 60-5, 60-6, 60-7 and 62; N.T. 1685-90)

46. The Department denoted the residential water well samples as having been collected "before treatment," i.e., before the inlet to the water softeners in the residences. (N.T. 1845-6; DER Ex. 14-1, 14-2, 14-5, 14-6 and 14-7)

47. North Cambria's collection of water sampling data, embodied in NCF Ex. 60, basically is a reorganization of the Department's tabulations in DER Ex. 14, but there are some substantive differences between the corresponding portions of DER Ex. 14 and NCF Ex. 60. (N.T. 1673-7, 1685-90)

48. In particular, where the Department labeled water sample analyses as "before treatment," North Cambria labeled them as "reported as untreated," and then claimed that some of the analyses--indicated on NCF Ex. 60 by highlighting--actually were "probably after treatment or otherwise suspect." (N.T. 1685-90; NCF Ex. 60-1, 60-2, 60-3, 60-5, 60-6 and 60-7)

49. The April 18, 1978, residential well water samples collected by North Cambria all were highlighted by NCF as "probably after treatment or otherwise suspect." (NCF Exs. 60-1, 60-2, 60-5, 60-6, 60-7)

50. The acidity of each of the April 18, 1978, residential water well samples was zero; the other reported concentrations of water parameters measured[3] were as follows:

Well	pH	Fe	Manganese (Mn)	Sulfate (SO_4)	Conductance(K)
Simo	6.9	0.01	0.07	21	120
Bugal	6.8	0.30	0.11	26	140
Yarnell	6.6	1.40	0.24	19	115
Lydic	6.8	0.40	0.04	20	148
Rietscha	6.4	3.54	0.51	15	100

(NCF Exs. 60-1, 60-2, 60-5, 60-6 and 60-7)

51. The analyses for the Simo well are inconsistent with the Department's "before treatment" characterization because the conductance is too high for the low reported values of Fe and SO_4 concentrations; therefore, there must have been a high sodium concentration in the Simo well water sample of April 18, 1978. (N.T. 1277)

52. Water "softeners" (also "conditioners") operate by replacing Fe and other metallic ions with sodium; the sodium concentration in the Simo

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3 In this and the other tabulations which follow, the analyses of the parameters are expressed in standard units for pH, micromhos per liter (micromhos/l) for conductance, and mg/l for all other parameters.

April 18, 1978, water well sample was not reported. (N.T. 1849)

53. If the Fe concentration in the untreated Simo April 18, 1978, water well sample really had been as low as the .01 mg/l reported, the Simo residence would not have required a water softener. (N.T. 1849)

54. The original North Cambria permit application for mining the Joiner Strip states that the April 18, 1978, Simo and Rietscha water well samples were taken after the outlet from the water softener and the water samples for the Bugal and Yarnell wells were taken before the inlet to the water softeners. (DER Ex. 6, pp. 4a and 4c; DER Ex. 14-1)

55. The reported concentrations of the parameters in the Bugal well are inconsistent with DER's "before treatment" characterization because the K is too high for the low reported values of Fe and SO_4, therefore, just as for the Simo well, there must have been a high sodium concentration in the Bugal water sample of April 18, 1978. (N.T. 1640-1, 1648-50)

56. There was a one week time difference between the date the samples were taken and the date of the analysis report; unless the samples were acidified, the delay could result in the Fe precipitating out almost completely, thereby causing the reported Fe concentrations to be very much less than their actual values when the samples were taken. (N.T. 1693-5, 1850-1)

57. The laboratory analysis sheets do not state when the analyses were performed. (NCF Ex. 62)

58. The laboratory analysis sheets do not state whether or not the samples taken on April 18, 1978, had been acidified. (N.T. 2274-5; NCF Ex. 62)

59. During the period March 21, 1984, to September 11, 1985 (the last reported date of the well water analyses entered into evidence), the analyses

reported for all of the residential wells, except the Rietscha well, for samples taken before the input to any water softeners, fell within the following ranges:

Well	pH	Fe	Mn	So_4	K	Acidity
Simo	6.4-7.0	8.60-9.60	0.60-1.0	40-65	240-270	neg.
Bugal	6.6-7.9	4.20-5.20	0.40-0.6	45-65	270-350	neg.
Yarnell	6.6-7.4	5.50-8.0	0.50-1.0	35-60	300-400	neg.
Lydic	6.8-7.9	1.50-5.0	0.30-0.6	45-65	270-350	neg.
Watterson	6.5-7.0	11.0-15.0	1.0-1.4	50-80	250-300	neg.
Beilchick	6.3-6.7	25.0-35.0	2.7-3.6	170-250	450-550	17-42

(NCF Ex. 60-1 through 60-6)

60. Water sample data for MW-1 is available for February 20, 1984, through April 4, 1984, only. During this period the water analyses parameter ranges, for samples taken before the input to any water softeners, were: pH, 6.6-10.8 (but after February 29, 1984 the pH did not rise above 7.9); Fe, 1.75-4.30 mg/l; Mn, 0.30-1.00 mg/l; SO_4, 24-37 mg/l; K, 250-270 micromhos; and acidity, neg. to zero. (NCF Ex. 60-7)

61. There are no pre-mining water sample analyses for either the Beilchick or the Watterson wells. (NCF Ex. 60-3, 60-4, 60-12 and 60-13)

62. The April 18, 1978, analyses of the Bugal, Yarnell, and Lydic wells represent the pre-mining quality of these wells.

63. During the period March 14 through July 15, 1983, the water in each of the seven residential wells was sampled regularly, before the input to any water softeners. (NCF Ex. 60-1 through 60-7)

64. The water analyses parameter ranges for the water samples were:

Well	pH	Fe	Mn	SO_4	K	Acidity
Simo	4.0-5.8	0.57-15.0	0.09-0.82	5-62	240-385	28-79
Bugal	6.4-6.9	1.45-5.4	0.40-0.51	24-54	267-364	neg.to 0
Watterson	5.7-6.2	39.14-122.0	3.40-16.6	175-875	538-1470	56-352
Beilchick	5.7-6.4	25.08-48.0	4.10-4.75	216-314	566-690	31-113

Yarnell	5.6-5.9	0.89-16.23	0.09-1.31	25-51	315-471	neg.to 36
Lydic	5.9-6.9	2.59-8.89	0.45-0.79	33-105	265-375	neg.to 52
Rietscha	4.5-6.1	163.97-470.0	12.79-83.0	225-3200	1585-3870	42.6-1202

(NCF Ex. 60-1 through 60-7)

65. The earliest reported water analyses for the Beilchick well were on September 4, 1980, October 30, 1980, and February 5, 1981, at a location before the water reached the softener. In each case the acidity was zero, and the values of the other parameters sampled were:

Date	pH	Fe	Mn	SO_4	K
September 4, 1980	6.7	1.61	0.73	15	not reported
October 30, 1980	7.4	0.55	0.80	30	120
February 5, 1981	6.6	0.28	0.01	20	not reported

(NCF Ex. 60-4)

66. The earliest untreated pre-mining water quality analysis reported for the Rietscha well is a sample taken January 28, 1981, when the Rietscha well still was being served by the LRA; the water quality parameters for this analysis were: pH, 6.54; Fe, 5.89 mg/l; Mn, 0.43 mg/l; SO_4, 3.7 mg/l; K, unreported; and acidity, 27.6 mg/l. (NCF Ex. 60-7)

67. The earliest reported water analyses for the Watterson well were taken on January 18, 1981, and April 2, 1981, at a location before the water reached the softener; the K was unreported, and the values of the other parameters for these samples were:

Date	pH	Fe	Mn	SO_4	Acidity
January 28, 1981	6.5	16.40	1.36	25.3	17.7
March 2, 1981	6.3	7.40	0.95	15.0	0

(NCF Ex. 60-3)

68. When the Watterson well next was analyzed, on March 14, 1983, the well already had been deepened so as to be served entirely by the LRA.

69. The ranges within which the pre-mining untreated water quality for the Simo, Beilchick and Watterson wells lie are:

Well	pH	Fe	Mn	SO_4	K	Acidity
Simo	6.6-6.8	0.30-1.4	0.04-0.24	19-26	115-148	0
Beilchick	6.6-7.4	0.28-1.61	0.01-0.80	15-30	120	0
Watterson	6.54-6.8	0.30-5.89	0.04-0.43	3.7-26	115-148	0-27.6

70. Four analyses of all the residential wells, except the Rietschas', were performed during the approximate period August 14, 1985, to September 11, 1985, at intervals of about a week. (NCF Ex. 60, esp. 60-1 through 60-6)

71. For these analyses, the acidity was always negative, except for the Beilchick well, where its range was 9-24 mg/l; the values of the other water quality parameters fell into the following ranges:

Well	pH	Fe	Mn	SO_4	K
Simo	6.5-7.1	8.70-8.90	0.60-0.80	39-45	240-260
Bugal	7.2-7.9	4.10-4.30	0.30-0.40	47-51	290-300
Yarnell	6.4-7.4	7.00-7.70	0.70-0.80	35-46	400-430
Lydic	7.4-7.8	1.80-2.80	0.30-0.6	45-69	290-300
Watterson	6.5-7.2	12.0-14.0	0.9-1.2	51-88	240-360
Beilchick	5.9-6.6	29.0-31.0	2.7-3.3	190-200	450-490

(NCF Ex. 60-1 through 60-6)

72. For the Yarnell well, the lower concentration limits of 0.89 mg/l and 0.09 mg/l for Fe and Mn, respectively, were anomalously low and were attained on only March 14, 1983; excluding these anomalously low concentrations, the Yarnell Fe and Mn concentration ranges were 11.31-16.23 mg/l and 0.73-1.31 mg/l, respectively. (NCF Ex. 60-5)

73. For the Simo well, the lower concentration limits of 0.57 mg/l and 0.09 mg/l for Fe and Mn, respectively, were anomalously low and were attained on only March 17, 1983; excluding these anomalously low concentrations, the Simo Fe and Mn concentration ranges were 7.30-15.00 mg/l

and 0.64-0.82 mg/l, respectively. (NCF Ex. 60-1)

74. Water that has been contaminated by acid mine drainage ("AMD") characteristically manifests a decreased pH, increased acidity and K, and increased concentrations of SO_4, Fe, and Mn. (N.T. 245-260, 1719-20)

75. In the vicinity of the mine, the LK seam varies in thickness from 0.5 feet to 2.4 feet. (DER Ex. 6, Drill Log for Monitoring Well #6; NCF Ex. 29, p. 53)

76. Mr. Dale Henigan, the first superintendent on the Joiner Strip, was responsible for the first few months of mining on the site. (N.T. 1011)

77. In December, 1979, David Harold Bearer replaced Mr. Henigan as superintendent and remained superintendent until the mining was completed. (N.T. 1010-11)

78. The area on the east side of the permitted site was like soupy clay and anywhere from 18 to 30 feet thick. (N.T. 1013-1106)

79. During mining North Cambria encountered a substantial amount of water along the eastern portion of the Joiner-South area, estimated by Mr. Bearer to be flowing into the mine at a rate of about 100 gpm; while this amount of water is not unheard of, it is larger than usual. The area where this water was encountered is hatched on NCF Ex. 38. (N.T. 184, 1017-18, 1034, 1066-7; NCF Ex. 38)

80. Once the overburden on top of the LK seam had been removed, the water apparently was forced up through the LK seam by hydraulic pressure, typically in places where the LK seam had been penetrated, fractured or otherwise weakened by blasting operations; the flow rate was approximately 100 gpm. (N.T. 1016, 1034, 1090-1)

81. The water was pumped into ponds, treated, and then discharged,

almost always in conformity with pertinent effluent limitations. (N.T. 1018-19)

82. Muck was encountered on both the Joiner-South and the Joiner-North areas. (N.T. 1013-14, 1093)

83. Water also was encountered on the southeast portion of the Joiner-North area, apparently via the same mechanism as in the Joiner-South area. (N.T. 1040-1; NCF Ex. 38)

84. The water that was encountered in the southeast portion of the Joiner-North area was so polluted that even after treatment and retention in treatment ponds, it did not meet the applicable effluent limitations and, therefore, could not be discharged. (N.T. 1048-50)

85. Eventually, the polluted water from the Joiner-North area drained from the treatment ponds back into the pit and into the spoil. (N.T. 1048-50)

86. On November 13, 1982, a sample of the polluted water in the ponds was analyzed; even after treatment with soda ash, the quality of the treated water was pH, 4.5; acidity, 432.39 mg/l; Fe, 178.56 mg/l; and Mn, 35.93 mg/l. (NCF Ex. 25; N.T. 1041-43)

87. The Wattersons first experienced a problem with their well water in January, 1981. (N.T. 112)

88. Although the Watterson's problem primarily was a loss of water, there were also some problems with water quality. (N.T. 112-13, 122-126)

89. In March, 1983, the Wattersons experienced very serious water quality problems, including malodorous and discolored water that produced pronounced staining of their laundry. (N.T. 113, 127-8)

90. Even as late as November, 1984, when Mrs. Watterson testified at these hearings, the Wattersons still were encountering malodorous and

discolored water. (N.T. 115)

91. The Wattersons first moved into their residence in May, 1978. (N.T. 111)

92. The Simos have occupied their residence since 1976. (N.T. 66-67)

93. The Simos first experienced a problem with the water supplied by their well in May, 1981; the problem was a complete loss of water. (N.T. 70)

94. The Simos experienced water quality problems, including a great deal of staining of their clothes and dishes, in 1983-84. (N.T. 71-2)

95. Mr. Beilchick has been living at his present address since 1960. (N.T. 81)

96. Mr. Beilchick first experienced a problem with the water supplied by his well in 1981, when the quantity of water supplied by the well dropped very substantially. (N.T. 83-4)

97. In 1983, Mr. Beilchick experienced water quality problems; the water was discolored, malodorous, and stained the laundry. (N.T. 83-85)

98. MW-10 is located in the backfill on the Joiner-South area, about 200 feet north of the southern boundary of that area and about an equal distance east of the western boundary of the Joiner-South area. (NCF Ex. 38; N.T. 296-8)

99. MW-10 was drilled on August 3, 1983, to a depth of 48 feet. corresponding to a bottom elevation of 1,691.45 feet; the elevation of the LK seam at this point also is 1,691.45 feet, so that MW-10 samples the water in the backfill down to about the level of the pit floor. (N.T. 296-8; NCF Ex. 60-9(h))

100. MW-12 is located in the backfill on the Joiner-South area, at a point very close to the southeast corner of that area. MW-12 is located in

the portion of the Joiner-South area where NCF encountered a substantial amount of water during mining. (NCF Ex. 38; N.T. 299)

101. MW-12 was drilled on August 6, 1983, to a depth of about 20 feet, corresponding to a bottom elevation of 1,701.1 feet. The elevation of the LK seam at this point is 1,665 feet, so that MW-12 samples the water in the backfill down to a point somewhere above the pit floor. (NCF Ex. 60-9(j); N.T. 299)

102. MW-6 is located at most 100 feet north of the northern boundary of the Joiner-North area. (NCF Ex. 38)

103. MW-6 was drilled on May 18, 1983, to a depth of 140 feet, corresponding to a bottom elevation of 1,667.59; the elevation of the LK seam at that point is 1,732.09 feet, so that MW-6 is served by the LRA. (N.T. 292-3; NCF Ex. 38)

104. MW-7 is located about 300 feet east of the southeastern corner of the Joiner-South area. (N.T. 295; NCF Ex. 38)

105. MW-7 was drilled on May 20, 1983, to a depth of 40 feet, corresponding to a bottom elevation of 1,685.3 feet; the MW-7 well is served by the URA. (N.T. 295; NCF Ex. 38 and 60-9(f))

106. MW-9 is located about 200 feet due east of MW-7. (N.T. 295-6; NCF Ex. 38)

107. MW-9 was drilled on May 23, 1983, to a depth of 85 feet, corresponding to a bottom elevation of 1,649.62 feet; MW-9 is served by the LRA. (N.T. 296, 1275-6, 1480-81; DER Ex. 18; NCF Ex. 38 and 60-9(g))

108. The first water quality analyses of MW-6, MW-7 and MW-9, were performed on July 12, 1983, after which analyses were suspended until October 19, 1983. From October 19, 1983, on, each of these wells was sampled at

approximately monthly intervals, until August 29, 1985, the last reported water quality analysis. (NCF Ex. 60-9(e), (f), (g))

109. The first water quality analyses of MW-10 and MW-12 were performed on August 25, 1983, after which analyses were suspended until November 18, 1983. From November 18, 1983, on, each of these wells was sampled at approximately monthly intervals, until August 29, 1983, the last reported water quality analysis. (NCF Ex. 60-9(h), (j))

110. During the period from about November 22, 1983, to August 29, 1985, the only common period of analyses for MW-6, MW-7, MW-9, MW-10, and MW-12, the ranges of the parameters analyzed were:

Well	pH	Fe	Mn	SO_4	K	Acidity
MW-6	6.4-7.4	6.30-27.0	0.67-3.40	29-120	175-400	neg.to 0
MW-7	6.9-7.6	5.00-7.10	0.40-2.20	1.0-74	240-320	neg.to 0
MW-9	6.5-7.9	1.19-7.10	0.30-0.70	23-120	250-321	neg.to 0
MW-10	4.4-6.4	100-340	21.0-71.0	470-2400	980-2800	44-623
MW-12	4.4-6.7	12.96-120	12.7-65.0	233-960	435-1499	71-246

111. During the period March 21, 1984, to September 11, 1985, the Simo, Bugal, Lydic, Watterson and Yarnell wells manifested zero or negative acidity on all but a few rare occasions; the maximum measured acidity for any of these five residential wells during this period was 85 mg/l, for the Bugal well. (NCF Ex. 60-1, 60-2, 60-3, 60-5, 60-6)

112. During the same period the range of acidities for the Beilchick well was negative to 110 mg/l. (NCF Ex. 60-4)

113. The direction of flow of the LRA, as determined by Mr. Noll, is from the northeast to the southwest, along a line making an angle of about thirty degrees with a due east-west line. (N.T. 1208-9; NCF Ex. 38)

114. This LRA flow direction was determined from a piezometric surface constructed from measurements on three piezometers. (N.T. 1209-13)

115. A piezometer is a well that is constructed to sample only a single aquifer. (N.T. 1210)

116. The pressures in the aquifer beneath the ground are modeled by the constructed piezometric surface, which then can be used to infer contour lines of equal aquifer pressure, as well as to compute the pressure gradients in the aquifer. (N.T. 1213-1218)

117. A deep mine refuse pile is located approximately one to one-and-one-half miles to the northeast of the Joiner mine. (N.T. 1222-5, 1476)

118. The elevation of the LK seam at the Joiner mine is about 250 feet higher than the elevation of the LK seam at the coal refuse pile. (N.T. 1741, 1777)

119. Surface discharges of water flowing from the refuse pile are strongly polluted by AMD. (N.T. 1724-27; NCF Ex. 55, 57)

120. No evidence was presented that water in the refuse pile could penetrate through the various subsurface strata below the pile so as to reach the LRA flowing beneath the LK seam.

121. MW-10, whose bottom reaches the depth of the LK seam, is located at a point where NCF mined the LK seam. (NCF Ex. 38)

122. There was no evidence offered that shows wells located southwest of the coal refuse pile at points roughly halfway between the coal refuse pile and the Joiner site were degraded.

123. The Connie Wright well is located about 400 feet north of the northern boundary of the site and about 300 feet northeast of MW-6. (NCF Ex. 38)

124. The Connie Wright well is served by the LRA. (N.T. 552)

125. Water from the Connie Wright well was analyzed on March 27, 1981,

and October 27, 1982, and then approximately monthly from January 6, 1983, to October 13, 1983. (NCF Ex. 49)

126. During the period January 6, 1983, to October 27, 1983, the ranges of the water analyses parameters for the Connie Wright well were: pH, 6.2-6.8; Fe, 3.28-17.18 mg/l; Mn, 0.57-0.80 mg/l; SO_4, 45-185 mg/l; and acidity, 0-6 mg/l. (NCF Ex. 49)

127. AMD is formed when sulfur compounds in the mined coal seams and/or overburden oxidize to form SO_4; iron pyrite, Fe_2, is regarded as the most important source of the AMD-producing sulfur. (N.T. 729-30, 752-3, 815-9, 834-5, 860-61, 1966-71, 2264-5; DER Ex. 51)

128. Andrew A. Sobek, who testified as an expert witness for North Cambria, performed an overburden study intended to determine "if there was sufficient soluble material in the Joiner strip spoil to cause pollution of the ground water of the magnitude reported in neighboring residential wells." (NCF Ex. 29, p. 4; N.T. 1899)

129. Mr. Sobek expected to receive a Ph.D. in agronomy and soil science from West Virginia University in 1985, and is highly qualified to perform overburden analysis. He has been the principal investigator for a project entitled "Pre-Mine Prediction of Acid Drainage Potential," and is author or coauthor of over 40 publications, many of which (e.g. the 1978 EPA report, "Field and Laboratory Methods Applicable to Overburden and Minesoils") are directly concerned with the subject of the study that was introduced into evidence as NCF Ex. 29. (N.T. 1886-97; NCF Ex. 28)

130. The Sobek study was based on laboratory analyses of core samples from three drill holes at three different locations in the vicinity of the mine site; Mr. Sobek decided on the locations of the drill holes, and the core

samples were obtained under Mr. Noll's supervision by Earthtech, the engineering consulting firm that employs Mr. Noll. (N.T. 1904-6; NCF Ex. 20)

131. The drill holes, which are designated respectively as CH-1, CH-2 and CH-3 on NCF Ex. 38, have the following locations: CH-1 is on the northern boundary of the Joiner-North area, about 100 feet west of MW-6; CH-2 is on the western boundary of the Joiner-South area, at a point about 600 feet south of the northern boundary of the Joiner-South area; and CH-3 is on the east side of Pa. Route 403, at a point about 800 feet north of the Rietscha well and about 300 feet southwest of the southern boundary of the Joiner-South area. The approximate distances of these drill holes from MW-1 are: CH-1, 2,100 feet; CH-2, 1,100 feet; and CH-3, 600 feet. (N.T. 2042-3; NCF Ex. 38)

132. None of the three drill holes was located directly in the backfill. (N.T. 1909-1911)

133. Mr. Sobek conducted three types of tests on his core samples: (i) acid-base accounting ("ABA"), (ii) soxhlet leaching studies, and (iii) humidity cell leaching studies. (N.T. 1914)

134. Each core sample revealed the presence of varied rock strata in the overburden. (NCF Ex. 29, Tables B-1 to B-3)

135. For each core sample, the ABA involved chemical analyses of each of the strata in that core sample; for each stratum these chemical analyses yielded two numbers, the neutralization potential ("NP") and the potential acidity ("PA"). (N.T. 753-4, 1915-16, 1919-22, 1926-31; NCF Ex. 29a; DER Ex. 13)

136. Each of the NP and PA is expressed in tons of calcium carbonate ($CaCO_3$) per 1,000 tons of the material under study. (N.T. 1926-29; NCF Ex. 29a; DER Ex. 13)

137. The PA represents the amount of $CaCO_3$ that would be required to neutralize any acid discharge ascribable to sulfates that 1,000 tons of the material might be expected to produce; the PA is computed merely by multiplying the measured amount of sulfur in the material by an appropriate factor. (N.T. 1929)

138. The NP represents the mass of $CaCO_3$ that would have the same ability to neutralize acid as 1,000 tons of the material; the NP can be negative, in which event, regardless of any sulfur content (which already has been taken account of in the PA), the material actually would be incapable of neutralizing any acid without the addition of $CaCO_3$. (N.T. 1929-31)

139. The largest NP measured by Mr. Sobek, 31.39, was in a stratum just above the MK-3 coal seam in drill hole CH-3. (NCF Ex. 29a)

140. For each stratum in each core sample, Mr. Sobek subtracted the PA from the NP to determine the neutralization excess (also sometimes termed the net alkalinity) for that stratum. (N.T. 1930-32; NCF Ex. 29a; DER Ex. 13)

141. Then, for each core sample, Mr. Sobek computed a weighted sum of the net alkalinities for the individual strata in that core sample, thereby determining for each core sample a single figure of merit termed the "Net for Section." (N.T. 1932-2; NCF Ex. 29, p.4; NCF 29a)

142. For each core sample, Mr. Sobek also computed a differently weighted sum of the net alkalinities for the individual strata in that core sample, thereby determining for each core sample another figure of merit termed the "Net for Section mined by dragline." (N.T. 1932-35; NCF Ex. 29, p.7, NCF Ex. 29a)

143. The Net for Section figure of merit includes all strata except the strata containing mined coal; these excluded strata would not have been

returned to the backfill, and, therefore, according to Mr. Sobek, should not be included in any ABA that purports to represent the potential of the Joiner backfill for producing AMD. (N.T. 1933)

144. The Net for Section mined by dragline figure of merit also excludes all strata containing mined coal, but in addition excludes all strata above the MK2 seam, including the MK3 seam whose sulfur content is comparatively high because, again according to Mr. Sobek, these strata were placed into the backfill at elevations too high to be reached by the water accumulating in the pit; thus, Mr. Sobek believes these exclusions are necessary if the ABA is to realistically represent the potential of the Joiner backfill for producing AMD, as the mining and backfilling actually were carried out. (N.T. 1933-5; NCF Ex. 29a)

145. The Net for Section in units of tons $CaCO_3$ equivalent per 1,000 tons material was +174.18 for CH-1; -19.99 for CH-2; and +205.04 for CH-3. (NCF Ex. 29a)

146. In the same units, the Net for Section mined by dragline figure of merit was +325.84 CH-1; +139.07 for CH-2; and +63.13 for CH-3. (NCF Ex. 29a)

147. In Mr. Sobek's soxhlet leaching studies, pure water was permitted to leach continuously through a fixed mass of material taken from a stratum or combination of strata; water quality parameters of substances leached out of the material, e.g., pH, acidity, Fe, then were plotted as a function of leaching time. (N.T. 1938-59; NCF Ex. 29, Appendices A and C)

148. Mr. Sobek developed the soxhlet testing procedure and has had papers on the technique published in refereed journals. (N.T. 1941)

149. For each of the three core samples, the soxhlet procedure was

applied to numerous individual strata and combinations of strata. (NCF Ex., 29, Appendices A and C)

150. Humidity cell leaching studies are designed to reproduce in the laboratory, at conveniently rapid rates, the oxidation processes that are believed to be responsible for AMD, but that usually occur too slowly in nature to be conveniently studied. (N.T. 1966-71)

151. The oxidation processes believed to be responsible for AMD require the presence of water, air, and even special bacteria; the humidity cell leaching studies circulate water and air through the material being studied, after seeding it with these special bacteria. (N.T. 1969-71; DER Ex. 51)

152. The humidity cell leaching studies, like the soxhlet leaching studies, plotted, as a function of time, water quality parameters of substances leached out of numerous individual strata and combinations of strata. (N.T. 1971-6; NCF Ex. 29, Appendices A and D)

153. In the humidity cell leaching studies of combinations of strata, the various strata were arranged in columns that were intended to duplicate the placement of those strata in the backfill. (N.T. 1976-1985; NCF Ex. 29b)

154. Mr. Sobek based his constructions of the strata combination columns as well as his computations of the Net for Section mined by dragline on information received from Mr. Noll about the placement of strata in the backfill, supplemented by transcripts of Mr. Noll's and Mr. Bearer's testimony on that subject. (N.T. 1912-14, 1976-7; NCF Ex. 39, 40)

155. ABA is not an absolute indicator of what will happen in the field. (N.T. 1917)

156. It is possible to have an ABA that shows a potential for acid

production and not have acid produced in the field, but it also is possible to get acid production in the field even though the ABA indicates no potential for acid production. (N.T. 1917-8)

157. A fizz test of a rock sample is performed by applying hydrochloric acid at some predetermined concentration to the sample and then recording the intensity of "fizzing," i.e., of escaping gas effervescence induced by the acid. (N.T. 774-5, 1923-5)

158. Excluding the coal seams that were mined, every single stratum, in all three of the core samples obtained by Mr. Sobek, had a zero fizz rating, meaning that no fizzing was detectable. (N.T. 774-5, 1925; NCF Ex. 29a)

159. Although Mr. Sobek's soxhlet studies showed there was not enough soluble material in the core samples to contaminate the Joiner mine backfill, the residential water well or the LRA, because the soxhlet test does not include oxidation of the material under study, it does not predict whether that material actually can produce AMD. (N.T. 1965-6)

160. Although Mr. Sobek was of the opinion that the Joiner site is not producing AMD, is not polluting the LRA, and has not polluted the residential water wells, his opinion was based solely on comparisons of his test data with the reported water quality analyses of the various residential monitoring wells and involved no assumptions about whether groundwater actually was flowing to the residential wells from the site. (N.T. 1933-2003)

161. Mr. Sobek did not know of any reports, other than two of his own, that claim to have successfully correlated soxhlet leaching studies with AMD measurements in the field. (N.T. 2132)

162. In actuality, Mr. Sobek's two reports did not compare the soxhlet

results with field studies; rather, the soxhlet results were compared with mathematical models for predicting the dissolution of minerals in the overburden. (N.T. 2132-3)

163. Although the soxhlet results may correctly measure the amount of soluble salts present in the overburden, the concentrations measured by Mr. Sobek are determined by the amount of water in which he dissolved those salts; thus, since the amount of water employed by Mr. Sobek was quite unrelated to backfill conditions, the final concentration of, e.g. Mn, in Mr. Sobek's soxhlet need not represent the Mn concentration that would be expected in the backfill if the water in the backfill is flushing Mn out of the overburden. (N.T. 2085-2101)

164. Comparing Sobek's humidity cell leaching concentrations with the concentrations to be expected in the backfill runs up against the same kind of difficulty as with the soxhlet leaching studies because the amount of water employed by Mr. Sobek is unrelated to backfill conditions and the concentrations Mr. Sobek measures need not represent expected backfill concentrations, even if one accepts Mr. Sobek's assumption that the humidity cell leaching study is duplicating the oxidation processes producing AMD in the field. (N.T. 2208-14)

165. There have been no demonstrations of correlations between concentrations determined from humidity cell leaching studies and concentrations in the field, whether from leaching studies involving single strata or from studies with combinations of strata intended to better duplicate actual field conditions. (N.T. 2323-4, 2354)

166. Although Mr. Sobek performed a study, not yet released by the U.S. Bureau of Mines, which demonstrated good correlations between actual

field AMD concentrations and overburden analysis predictions, nevertheless, the major conclusion of this study probably will be, in Mr. Sobek's own words, "that a combination of tests are recommended to evaluate different portions of the acid generation problem and neutralization problem." (N.T. 2246-7)

167. In some circumstances the ABA alone permits prediction, within a reasonable degree of scientific certainty, of whether AMD will be produced at a specific site. (N.T. 2340-1)

168. It's unlikely that an ABA based solely on the data from Mr. Sobek's three core samples could permit a reliable prediction of whether the Joiner site would produce AMD. (N.T. 2341)

169. The data produced from Mr. Sobek's ABA analysis did not demonstrate the site has sufficient neutralizing materials to be certain AMD could not be produced. (N.T. 2318-23, 2336-8)

170. Total sulfur values and fizz ratings are important factors to be considered when drawing conclusions from ABA data. (N.T. 753-4)

171. The fact that none of the strata in Mr. Sobek's three drill holes exhibited a detectable fizz, taken together with the magnitudes of the NPs for those strata, implies that there is no stratum on the site with significant potential for producing alkalinity. (N.T. 774-8)

172. The Joiner site should be regarded as having relatively high sulfur in some strata combined with little potential for producing alkalinity. (N.T. 856-7)

173. In 1981 North Cambria submitted a mining permit application for a site southwest of the Joiner site; at its closest point this site, known as the Clawson site, is about 800 feet distant from the southwest boundary of the Joiner site. (DER Ex. 12; NCF Ex. 38)

174. Accompanying this application was an ABA overburden analysis of core samples obtained at two drill holes on the Clawson site. The distances of these Clawson drill holes from the nearest point on the Joiner site are 1,100 and 1,350 feet respectively; the distances of these holes from MW-10 are 1,275 feet and 1,550 feet, respectively. (N.T. 896-9; NCF Ex. 38)

175. The Clawson ABA analysis is relevant to the Joiner site and, taken together with the Sobek ABA of the Joiner site, shows that the Joiner site is capable of producing AMD. (N.T. 745-9)

176. The AMD in the highly polluted water encountered on the Joiner North area probably was not originally present in the LRA, but was created only after that water had come in contact with North Cambria's mining activities. (N.T. 887-91)

177. At the time of the hearing, Roger Hornberger was a Hydrogeologist III within the Department's Bureau of Mining and Reclamation. In the past, Mr. Hornberger reviewed all overburden analyses submitted with surface mining permit applications; at the time of the hearing, Mr. Hornberger functioned more as an advisor to DER on the subject of overburden analysis. He has a B.S. in landscape architecture from Pennsylvania State University, and, except for final submission of his thesis, has completed all requirements for an M.S. from Pennsylvania State University in geology, with emphasis on stratigraphy and hydrogeology. He has authored various pertinent research reports and papers. (N.T. 700-712)

178. There was no testimony as to whether or not the Lydic well had suffered a loss of water in 1981.

179. There was no testimony as to whether or not the Rietscha well suffered a loss of water at about the same time as the Beilchick well did in

1981.

180. The UT flows in a channel whose surface elevation is lower than the original surface elevation of the Joiner site, as well as of the land area wherein the residential wells are located. (NCF Ex. 38 and 40)

181. The MK2 and MK3 coal seams intersect the land surface crop near and on each side of the UT. (N.T. 1136-7; NCF Ex. 38)

182. The MK1 and LK coal seams do not crop anywhere near the Joiner site or the land area wherein the residential wells are located. (N.T. 1137; NCF Ex. 38)

183. The MK1 seam runs underneath the bed of the UT. (NCF Ex. 38-40)

184. The drill log for MW-9, indicates that a flow exceeding 5 gpm was encountered at an elevation between the bottom of the MK1 seam and the top of the LK seam. (DER Ex.18)

185. At a point on the UT termed SW-11, located at most 100 feet from the point where the UT flows into Little Yellow Creek, the elevation of the UT stream surface is 1,710 feet. (NCF Ex. 38)

186. Neither the elevation of the MK1 seam at the Simo well, nor the elevations of the LK and MK1 seams at SW-11, were directly entered into evidence.

187. In the general vicinity of the Joiner site, including the locations of the residential wells and the mouth of the UT, the contour lines on NCF Ex. 38 showing the elevation of the LK seam are quite smooth; in the vicinity of the mouth of the UT, the LK seam slopes to the southeast, at a rate approximately equal to one foot of slope per 22 feet of distance along the horizontal. (NCF Ex. 38)

188. SW-11 is about 100 feet southeast of the LK seam 1,650 foot

contour line. (NCF Ex. 38)

189. By extrapolation, therefore, the elevation of the LK seam at the point SW-11 is about 1,645 feet.

190. Contour lines showing the elevation of the LK seam also are drawn on DER Ex. 8; these contour lines also are very smooth in the general vicinity of the Joiner site.

191. The LK seam contour lines on DER Ex. 8 do not appear to be identical with the LK seam contour lines on NCF Ex. 38; in particular, the location of the point SW-11 on DER Ex. 8 appears to be about 100 feet southeast of the LK seam 1,660 foot contour line, not the 1,650 feet contour line indicated on NCF Ex. 38. (DER Ex. 8, NCF Ex. 38)

192. On DER Ex. 8 the slope of the LK seam in the vicinity of the mouth of the UT also is to the southeast, but now at a rate approximately equal to one foot of slope per 27 feet of horizontal distance.

193. Therefore, the elevation of the LK seam at SW-11 that one infers from DER Ex. 8 is 1,656 feet, not the 1,645 feet elevation inferred from NCF Ex. 38.

194. For the six logs of the drillings through the MK1 seam to the LK seam, the difference in elevation between the top of the LK seam and the bottom of the MK1 seam ranges from a minimum of 23.5 feet (MW-5) to a maximum of 28.0 feet (CH-2). (DER Ex. 6 and 18; NCF Ex. 29)

195. NCF Ex. 41 shows the relative elevations of the various coal seams at various drill holes (DH) along a line identified as "Stratigraphic Line 2" on NCF Ex. 38. (N.T. 1186-9, 1663)

196. MW-1 and DH 24 lie on the southernmost portion of Stratigraphic Line 2; the point SW-11 lies close to Stratigraphic Line 2, and about halfway

between the locations of MW-1 and DH-24. (NCF Ex. 38)

197. The difference in elevation between the top of the LK seam and the bottom of the MK1 seam is about 23 feet at DH-24 and about 31 feet at MW-1. (NCF Ex. 41)

198. The thickness of the MK1 seam is at most three feet at MW-1 and is about one foot at DH-24. (NCF Ex. 41)

199. The difference in elevation between the top of the MK1 seam and the bottom of the MK2 seam is at most 23 feet at MW-1 and about 18 feet at DH-24. (NCF Ex. 41)

200. MW-11 is located in the backfill on the Joiner-South area, right next to MW-10. (N.T. 298; NCF Ex. 60-9(i)

201. MW-11 was drilled on August 3, 1983, to a depth of 80 feet, corresponding to a bottom elevation of 1,659.56 feet. The elevation of the LK seam at this point is 1,691.56 feet, so that MW-11 is served by the LRA. (N.T. 298-9; NCF Ex. 60-9(j))

202. The static water level in MW-10 regularly is about two feet higher than that in MW-12. (NCF Ex. 34)

203. A rapid loss of ground water at some point in the LRA aquifer can deplete the aquifer locally and cause a pressure head diminution. (N.T. 1475)

204. The chemical reaction primarily responsible for AMD, namely the oxidation of FeS_2, produces SO_4 and Fe ions in concentrations whose ratio always equals 3.44 at the moment these ions are produced. (NCF Ex. 63 at p.15)

205. Although the ratio of the SO_4 and Fe concentrations in AMD at the point where these ions are produced always equals 3.44, it is virtually impossible to predict this ratio with any certainty after the mine water

leaves the site. (Kefford affidavit)

206. However high the concentration of SO_4 in a sample of AMD-polluted ground water may be, dilution of the sample by unpolluted water always is capable of reducing the SO_4 concentration to a value less than 100 mg/l. (N.T. 2267)

207. The Department's expert Timothy Kania testified that the direction of flow of the LRA in the vicinity of the Joiner site is from the northeast to the southwest, along a direction making an angle of about 45 degrees with a due east-west line. (N.T. 376, 386-7, 448-51; DER Ex. 8; NCF Ex. 38)

208. Mr. Kania would not say that his LRA flow direction line was accurate to better than $\pm$35 degrees on either side of that line. (N.T. 445-8)

209. Mr. Kania has been employed by the Department since September, 1983 as a hydrogeologist I. At the time he first visited the site, in March, 1982, he still was a hydrogeologist trainee. He has a B.S. in Earth Sciences from Pennsylvania State University, and has taken a number of courses in geology and hydrogeology. (N.T. 29-31, 218)

210. Although the LRA flow direction favored by Mr. Kania is not as strongly "uphill" as the LRA flow direction favored by Mr. Noll, nevertheless, Mr. Kania's favored flow direction would require the LRA ground water to flow upwards against gravity, or (at the very least) parallel to the horizontal rather than downhill; for a LRA flow direction 35 degrees towards the northwest of Mr. Kania's favored flow direction, the LRA flow would have to be strongly uphill. (N.T. 675-81; NCF Ex. 38)

211. Although a sufficient pressure head can drive an aquifer flow uphill, Mr. Kania offered no reasons for believing that such pressure heads

exist in the LRA aquifer.

212. Mr. Kania drew lines on DER Ex. 8 indicating that the flow in the URA aquifer in the vicinity of the Joiner Site is approximately southward in areas to the west of the Joiner mine, but is more nearly from northeast to southwest in areas to the east of the Joiner mine. (N.T. 386-7; DER Ex. 8)

213. Nevertheless, Mr. Kania testified that at the Beilchick well, which is located to the west of the Joiner-South area, the URA is flowing to the east with a component to the south. (N.T. 384-6)

214. Mr. Kania's reasons for selecting the URA flow directions included examinations of the "stratigraphy, lithology, structure and topography," as well as of joints (fracture fissures in the aquifer through which water can flow). (N.T. 354-380; DER Ex. 17)

215. In determining his preferred aquifer flow directions, Mr. Kania also relied on water quality analyses for the various monitoring wells in the vicinity of the site, including MW-7, MW-9, MW-10, MW-11 and MW-12. (N.T. 381-4)

DISCUSSION

Before turning to other issues in this appeal, we will first address certain interlocutory rulings made during the course of this proceeding and the burden of proof.

Four of the residential water supplies that are the subject of the order had been the subject of a previous Department order to North Cambria, issued on June 15, 1981. The 1981 order, which never was appealed, included the finding:

> (c) As of January, 1981, the above-referenced mining operation [the Joiner Strip Mine that was the subject of the later 1983 order] diminished the rate of recharge of domestic water wells,

> causing a water loss at the residences of Mr. and Mrs. Douglas Watterson, Mr. and Mrs. Michael Bugal, Mr. and Mrs. Richard Simo, and Mr. and Mrs. Dwight Yarnell located in Pine Township, Indiana County, Pennsylvania.

The 1981 order, like the 1983 order, required North Cambria to furnish the affected residences with a permanent replacement water source. On July 18, 1985, during the hearings, the Board issued an opinion and order ruling that because North Cambria never had appealed the 1981 order, its findings had been established for the purposes of this appeal. Martin L. Bearer d/b/a North Cambria Fuel Company, 1985 EHB 559 (hereinafter "NCF I"). We affirm that ruling here.

On August 13, 1982, the Federal Office of Surface Mining ("OSM") issued an adjudication on the merits of North Cambria's appeal of an OSM civil penalty assessment; the penalty was assessed because North Cambria had not obeyed an order to replace the water supply of Mr. and Mrs. Watterson. The OSM adjudication overturned the penalty assessment, asserting that the OSM had not met its burden of showing that deterioration of the Watterson well during 1980-81 had been caused by North Cambria's mining of the Joiner Strip Mine. During the instant hearings North Cambria argued that the doctrine of issue preclusion required the Board to adopt the OSM adjudication and to find that North Cambria's mining was not causing degradation of the wells that are the subject of this appeal. This argument was rejected in NCF I for reasons, *inter alia*, that the issues surrounding the Department's 1983 order were wholly different from the issues dealt with in the OSM adjudication.

North Cambria's post-hearing brief has challenged the interlocutory rulings of NCF I with respect to the 1981 order, but not with respect to the OSM decision. Any North Cambria challenges to the OSM decision rulings of

NCF I have been waived, therefore. Equipment Finance, Inc. v. Toth, 476 A.2d 1366, 328 Pa. Super. 255 (1984); Magnum Minerals v. DER, 1988 EHB 867 at 891. Nevertheless, the Board fully affirms for the purposes of this adjudication, all rulings of NCF I.

The issue before us is whether the Department's May 5, 1983, order, was an abuse of the Department's discretion or an arbitrary exercies of its duties or functions. Warren Sand and Gravel v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Magnum Minerals, *supra*. An arbitrary exercise by the Department of its duties or functions would be an abuse of its discretion as well, so that, as we have done in numerous past adjudications, we will use the simple phrase "abuse of discretion" to denote our complete scope of review. Commonwealth of Pa. Game Commission v. DER, 1985 EHB 1 at 8; Old Home Manor v. DER, 1986 EHB 1248 at 1280; Magnum Minerals, *supra*, at 891.

The party bearing the burden of proof must show by a preponderance of the evidence that the Department has/has not abused its discretion. The assignment of the burden of proof in proceedings before the Board is set forth in 25 Pa. Code §21.101. In general, 25 Pa. Code §21.101(b)(3) assigns the burden to the Department where it orders a party to undertake affirmative action to abate pollution, as is the case here.

However, the Department, citing Hawk Contracting Inc. and Adam Eidemiller, Inc. v. DER, 1981 EHB 150, contends that it does not bear the burden of proof here because of 25 Pa. Code §21.101(d), which provides that:

> (d) Where the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
>
> (1) that some degree of pollution or environmental damage is taking place, or is

> likely to take place, even if it is not established to the degree that a *prima facie* case is made that a law or regulation is being violated; and
>
> (2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

In support of this argument, the Department asserts that it has been established that there is environmental damage in that each of the seven residential wells has been degraded. It further argues that North Cambria, the party alleged to be responsible for this environmental damage, is in possession or should be in possession of the facts relating to the environmental damage, since it is able to describe the mining and backfilling sequences, as well as other events which may have occurred during mining.

While it is true that it has been established that some degree of environmental damage has taken place, the crucial question in deciding which party should bear the burden of proof here is whether North Cambria is or should be in possession of the facts relating to this environmental damage. And, to this end, Hepburnia Coal Co. v. DER, 1986 EHB 563, is most analogous to this appeal.

Hepburnia involved a mining company's appeal of a Department order to treat an admittedly polluted discharge several hundred feet from a previously mined site. The Department's expert theorized that the required hydrologic connection between the mining site and the discharge was provided by running along a "fracture zone" in the mining site. The Department then argued that under §21.101(d)(2) the burden of proof should have been shifted to the mining company because whether fracture zones actually were present on the site must have been, or, at the very least, should have been, ascertained by the company

during mining. The mining company countered with the argument that the Department, through discovery, had access to the same facts as the company, so that the company could not be said to be any more in possession of the facts than the Department. Although the Board rejected Hepburnia's argument that discovery was the relevant time for determining when a party was in possession of facts relating to environmental damage, the Board also rejected the Department's argument that Hepburnia was or should have been in possession of the relevant facts, for there was no evidence indicating that mine operators routinely made observations about fracture zones during the course of mining.

Here, there was lengthy and detailed testimony about the mining operation by David Harold Bearer, the superintendent of the Joiner Strip site, concerning, e.g., the backfilling procedures employed and the large volume of water encountered which on the Joiner-North area was very highly polluted. But, despite the parties' reliance on this testimony, we will not place the burden of proof on North Cambria because we do not place any particular significance on Mr. Bearer's testimony. Therefore, it would be fundamentally unfair to place the burden of proof on North Cambria on the basis of facts to which the Board pays no heed.

SECTION 4.2 OF SMCRA

In instances where a surface mine operator has contaminated a private water supply as a result of surface mining, §4.2 of SMCRA, 52 P.S. §1396.4b, authorizes the Department to issue an order to the operator directing it "to restore or replace the affected water supply with an alternate source of water

adequate in ... quality for the purposes served by the supply."[4] To meet its burden of proof in this appeal, the Department must establish that there has been contamination of the residential wells as a result of North Cambria's mining operations on the Joiner strip.

The least difficult part of this burden is establishing that there has been a degradation[5] of the water quality in the residential wells during and/or after North Cambria's mining operations. This is accomplished by a comparison of water quality monitoring results for the relevant period in time. The more difficult part of the burden is to prove that North Cambria's mining activities resulted in the degradation. To do so, the Department must present evidence relating to the proximity of the residential wells to the Joiner Strip; the relative elevations of the residential wells and the coal seams mined; groundwater flow; the quality of water encountered during mining and its similarity to the degraded water in the residential wells; and water quality in other wells in the same aquifers. The degradation also must not be attributable to some action on the part of the residential well owner or some condition in the residential well having no relationship to the mining. Kerry Coal Company v. DER, 1990 EHB 226.

A. Degradation of the Residential Wells

Before we may even compare the pre- and post-mining water quality in the residential wells, several threshold controversies regarding the sampling results must be resolved.

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4 This section of SMCRA was amended by the Act of December 18, 1992, P.L. ___, No. 173, which became effective on February 16, 1993.

5 For purposes of this adjudication the terms "contamination" and "degradation" will be used interchangeably.

The only direct evidence of pre-mining water quality is contained in analyses of well water samples taken April 18, 1978. North Cambria has challenged the results of these analyses on various grounds. The Department argues that these challenges are "equitably estopped" because the water samples were taken by North Cambria and submitted to the Department as part of North Cambria's application for a permit to mine the Joiner Strip. The first page of the permit application includes a declaration under oath by North Cambria that the statements in the application "are true and correct to the best of my (North Cambria's) knowledge and belief." (DER Ex. 6) The Department argues that, in view of this declaration, it justifiably relied on those analyses, and that, therefore, North Cambria should not now be allowed to challenge them, even though their results are damaging to North Cambria's appeal.

The application of the doctrine of equitable estoppel in favor of a party requires that the party justifiably rely upon some representation of the other party, resulting in a detrimental change in position, Melvin D. Reiner v. DER, 1982 EHB 183 at 206. The latter element is not present here, for the Board cannot fathom how either the Department or the residential well owners, such as the Rietschas, could have been prejudiced by the fact that, assuming that North Cambria should prevail on its challenges to the analyses, the pre-mining water quality was worse than North Cambria reported in its permit application.[6] Nor was there any change in position; the Department does not contend that it would have refused to grant the mining permit if North Cambria

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6 Moreover, reporting in the permit application that the residential wells had better pre-mining water quality than was the case would be to North Cambria's disadvantage in a situation such as this where there is a claim that North Cambria contaminated the residential wells.

had reported different analyses. As a result, we reject the Department's argument that North Cambria is equitably estopped from challenging the results of the pre-mining samples of the residential wells.

The second controversy which must be resolved relates to the pre-mining water quality of the Simo, Bugal, Lydic, Yarnell, and Rietscha residential wells. The parties have disputed whether the April 18, 1978, samples (Finding of Fact 50) were taken before the water softener inlets, if any, on the residential wells. The laboratory analyses performed by Strand Laboratories do not indicate whether the samples were treated (taken after the water softener) or untreated (taken before the water softener inlet). The Department has characterized all of the samples as untreated, while North Cambria has characterized certain of the samples as treated and certain as untreated. We will address each of the contested samples.

North Cambria's expert, Mr. Noll, asserts that the sample from the Simo well cannot be characterized as untreated because the value for K is too high in relation to the values for Fe and SO_4. This is so because a water softener replaces Fe and other metallic ions in the water with sodium. Noll's opinion is buttressed by that of Timothy Bergstresser, Director of Laboratory Operations for Geochemical Testing, who was qualified as an expert in the field of chemistry, and is consistent with the fact that there was a water softener at the Simo residence. Moreover, North Cambria's original permit application for the Joiner Strip labeled the Simo results as having been from treated water. Thus, there is no justification for the Department's characterization of the Simo well results as untreated.

The conclusions we have reached relating to the Bugal and Lydic wells are related. Initially, Mr. Noll asserted that the sample results for these

two wells were inconsistent with the Department's "before treatment" characterization because the reported Ks for the wells were too high in relation to the reported concentrations for Fe and SO_4. Upon learning that the Lydic residence had a water softener when the April, 1978, samples were taken, Mr. Noll withdrew his opinion that the Lydic sample was treated. But, he continued to adhere to his conclusion that the Bugal sample was treated. In our opinion, the results for the Bugal and Lydic wells are so similar that they are virtually indistinguishable for the purpose of ascertaining whether the samples were treated or untreated. Thus, we conclude that the Bugal and Lydic analyses were of untreated samples.

Regarding the Rietscha sample, Mr. Kania characterized it as untreated, and Mr. Noll did not dispute this characterization. However, North Cambria's permit application denoted the Rietscha sample as treated. Since there is no explanation of how Mr. Kania reached his conclusion, we will accept the characterization in North Cambria's permit application and conclude that the Rietscha sample was treated.

Finally, as to the Yarnell well, Mr. Kania characterized it as untreated, Mr. Noll agreed with the characterization, and North Cambria's permit application noted it as untreated. Thus, we find that the sample of the Yarnell well was untreated.

1. Pre-Mining Water Quality

Our determinations whether the results in Finding of Fact 50 were taken from treated or untreated residential well samples leads to a conclusion that there is pre-mining water quality data for only the wells where the samples were untreated - the Bugal, Lydic and Yarnell wells. But, North Cambria has also challenged the accuracy of the results of the sampling. The

samples which were analyzed were taken on April 18, 1978, while the laboratory report of the analyses was dated April 25, 1978. North Cambria's experts, Noll and Bergstresser, assume there was a week between the sampling and the analyses and assert that this delay could have caused any Fe to precipitate out almost completely, thereby causing the Fe results to be much less than the actual value when the samples were taken.

Once again, the values reported in North Cambria's permit application and the testimony of its expert witnesses are at odds. And, once again, North Cambria has not carried its burden of convincing the Board that the values reported in the permit application are unreliable. The laboratory reports do not indicate when the analyses were performed; the date of the report appears to be the date it was typed. There is no notation whether the samples were acidified, and, if they had been acidified, there would have been no Fe precipitation problem. Although Mr. Bergstresser testified that acidification was not customary at the time, there is no concrete evidence on the record relating to acidification. Furthermore, there is a wide variation of Fe concentrations (0.01 to 3.54 mg/l) in the April 18, 1978, samplings which is inconsistent with nearly complete precipitation of Fe out of the samples. Therefore, North Cambria's challenges to the reliability of the sample results for the Bugal, Yarnell, and Lydic wells must be turned aside.

This leaves us with the task of determining the pre-mining water quality of the Simo and Rietscha wells, for which we have treated water samples prior to mining, and the Beilchick and Watterson wells, for which we have no pre-mining water quality data.

Prior to mining, the Simo well drew its water from the URA, the same aquifer that the Bugal, Yarnell, and Lydic wells drew their water. These four

wells are in close proximity to each other (Finding of Fact 12). The water quality parameters for the Bugal, Yarnell, and Lydic wells are also fairly close. As a result, it is logical to conclude that the pre-mining water quality of the Simo well was within the range found in the Bugal, Yarnell, and Lydic wells.

There are no pre-mining water quality samples, either treated or untreated, for the Beilchick well, and it has always been served by the LRA. As a result, we cannot infer its quality from the other wells. There are samples from September 4, and October 30, 1980, and February 5, 1981 (Finding of Fact 65); even as late as February 5, 1981, there had been no significant deterioration in water quality.[7] Therefore, we conclude that the water quality results from the sampling on these three dates represent the pre-mining water quality of the Beilchick well.

We cannot infer the pre-mining water quality of the Rietscha well from that of the Bugal, Yarnell, and Lydic wells, for the Rietscha well was served by the LRA. There is a January 28, 1981, sample of untreated water from the Rietscha well, a time when it was still being served by the LRA (Finding of Fact 66). The next untreated water sample from the LRA is March 14, 1983, by which time the water quality had greatly deteriorated (Finding of Fact 64). The Rietscha well is closest to the Beilchick well, and both wells were served by the LRA during 1978 to 1981. Because the Beilchick well water quality did not significantly deteriorate in this time, we infer the same for

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7 North Cambria does not dispute these results.

the Rietscha well[8] and conclude that the January 28, 1981, sample is representative of pre-mining water quality.

This leaves us with the Watterson well. The earliest samples for the Watterson well were taken on January 28, and April 2, 1981, at a time when the well was receiving its water predominantly from the URA. By the time of the next sampling - March 14, 1983, the Watterson well was being served entirely by the LRA. We cannot infer the pre-mining water quality of the Watterson well from the earliest samples of the well for several reasons. It was not served by a single aquifer. And, when compared with the pre-mining quality assigned to the other six wells, regardless of the aquifer supplying them, the quality of the Watterson well was appreciably worse. Our inability to draw this inference is bolstered by Mrs. Watterson's testimony in this proceeding and in the OSM proceeding that she was already experiencing water quality problems in January, 1981 (Finding of Fact 88).

We will, however, infer the pre-mining water quality of the Watterson well on the basis of the aquifers it was drawing from and its proximity to other wells for which we have pre-mining water quality data. We conclude that its pre-mining water quality was within the range of results reported for the Simo well, which was served by the URA, and the Rietscha well which was served entirely by the LRA.

Summarizing, the pre-mining water quality for the Bugal, Yarnell, and

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8 This inference is bolstered by comparison of the untreated January 28, 1981, parameters (Finding of Fact 66) with the treated April 18, 1978, parameters (Finding of Fact 50). Except for Fe and acidity, the water quality of the treated pre-mining and untreated post-mining samples are similar. Moreover, the 3.54 mg/l Fe concentration in the treated Rietscha sample is consistent with the supposition that the even larger 5.89 mg/l Fe concentration in the untreated Rietscha well is representative of the pre-mining water quality.

Lydic wells is set forth in Finding of Fact 50; that of the Rietscha well is set forth in Finding of Fact 66; and that of the Simo, Watterson, and Beilchick wells is set forth in Finding of Fact 69.

2. Post-Mining Water Quality

By March, 1983, several of the residential wells were modified to, *inter alia*, increase the depth or alter the aquifer serving them (Finding of Fact 21). Since the modified wells still served the same residences, we will not treat them separately for purposes of our discussions. It is apparent from a comparison of the sampling results for the period March 14 to July 15, 1983 (Finding of Fact 64) with the sampling results representing pre-mining water quality for each of the wells that there was a significant deterioration of water quality in all the residential wells. We will address each of the groups of wells.

The Bugal, Yarnell and Lydic Wells By July 1983, there had been (a) significant increases in Fe and Mn concentrations for the Bugal well; (b) significant lowering of the pH, coupled with occasional marked increases in Fe and Mn, in the Yarnell well; (c) occasional significant increases in acidity for the Yarnell and Lydic wells; and (d) occasional significant reductions in pH, along with persistent increases in Fe and Mn concentrations in the Lydic well. While the pre-mining Fe concentration in the Bugal well met drinking water standards,[9] the entire range of Fe concentrations reported for March

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9 The Department's drinking water standards, which are set forth at 25 Pa. Code §109.202 and incorporate, by reference, 40 CFR §143.3, include these limits:

pH - 6.5 to 8.5
Fe - less than 0.3 mg/l
Mn - less than 0.05 mg/l
SO_4 - less than 250 mg/l

through July, 1983, was outside of the drinking water standard. Similarly, the post-mining concentrations of Fe and Mn in the Lydic well exceeded drinking water standards by approximately 10 to 20 times, while the pre-mining concentration of Fe was barely above the drinking water standard and the Mn concentration was within the drinking water standard. As for the Yarnell well, the entire range of reported pH values was below the acceptable range.

The Rietscha Well The pre-mining concentrations of Fe and Mn did not meet drinking water standards, but the post-mining concentrations were even less satisfactory, exceeding the pre-mining concentrations by factors of 30 to 100. The pre-mining pH was within drinking water standards, but the range of pH values post-mining were not. The pre-mining SO_4 concentration in the Rietscha well was 3.7 mg/l, well within drinking water standards, while the post-mining SO_4 concentration ranged as high as 3200 mg/l, or over 10 times the drinking water standard. And, the acidity concentration post-mining was above the pre-mining level and was 50 times higher at one point.

The Simo, Beilchick, and Watterson Wells For all of these wells, the entire range of pH values pre-mining was within drinking water standards, while the entire range of pH values post-mining was below drinking water standards. The Watterson and Beilchick wells had post-mining acidities and SO_4 concentrations that were much higher than the pre-mining concentrations. And, although the pre-mining ranges of concentrations of Fe and Mn were not satisfactory from the standpoint of drinking water standards, they were far more satisfactory than the post-mining ranges.[10]

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10 The lower ends of the pre-mining ranges for Fe and Mn were within drinking water standards. The lower ends of the post-mining ranges for Mn
footnote continued

Water Quality Subsequent to Issuance of the Order It is evident from the foregoing discussion that as of May 5, 1983, the date of issuance of the Department's order, the quality of the water in the seven residential wells had been degraded from its quality before the commencement of mining. Because our hearings are *de novo*, and, in light of North Cambria's contentions regarding the permanency of the degradation and the effect of natural processes in the aquifers, we will examine evidence relating to water quality conditions in the residential wells after the issuance of the order.

North Cambria concedes that the LRA and any residential wells it serves have suffered a more or less permanent deterioration of water quality (North Cambria's post-hearing brief, pp. 43, 105). Thus, North Cambria concedes that the Beilchick well has been degraded. As for the Simo, Bugal, Watterson, Yarnell, and Lydic wells, which were, with the exception of the Watterson well, originally (i.e. pre-mining) entirely served by the URA, North Cambria argues that there has been only a temporary decline in water quality and, that even if the decline is permanent, it cannot be ascribed to North Cambria's mining. Therefore, we will analyze water quality analyses of samples taken from the five wells on a generally weekly basis from March 14, 1983, to September 11, 1985, two weeks prior to the close of the hearings on the merits.

The Yarnell and Watterson Wells Although served by the URA prior to mining, the Yarnell well was deepened on June 29, 1981, so that it was served only by the LRA. The lower portion of the well was plugged on March 19, 1984,

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continued footnote
exceeded drinking water standards by 1.8, 8.2 and 6.8 times for the Simo, Beilchick, and Watterson wells, respectively.

so that the URA became its source (Findings of Fact 25, 33). The Watterson well was also deepened on July 6, 1981, to be served by the LRA. The lower portion of the Watterson well was also plugged in March, 1984, so that it was solely served by the URA (Findings of Fact 23, 31). Therefore, we will not scrutinize the water quality data for the period when these wells were served by the LRA (May, 1983 to March, 1984).

It cannot be denied that the quality of the Yarnell and Watterson wells improved over the interval of May 5, 1983, to September 11, 1985. But, despite the improvement, neither well had been restored to its pre-mining water quality. Comparing the pre-mining untreated water quality analyses for the Yarnell (Finding of Fact 50) and Watterson (Finding of Fact 69) wells to those for the period March, 1984, to September, 1985 (Findings of Fact 59, 71) confirms this. For the Yarnell well, the Fe and Mn concentrations for 1984-1985 exceed the pre-mining concentrations by factors of 5 and 3, respectively. For the Watterson well, the 1984-1985 Fe and Mn concentrations exceed any pre-mining values by factors of at least 2. While the Watterson well pre-mining analyses met drinking water standards in the lower range of the results, the lower limits of the corresponding ranges in August and September, 1985, exceeded the drinking water standards by factors of 40 and 18, respectively. Only the acidity of the Watterson well was worse pre-mining than in September, 1985.

The Simo, Bugal, and Lydic Wells The Lydic well has not been modified since the commencement of mining, and the Simo and Bugal wells were last modified on June 27, 1981, and July 3, 1981 (Findings of Fact 21 and 22). Although the wells were surged and cleaned on various dates between September 22 and October 11, 1983, no operations were performed on the wells after

October 11, 1983 (Finding of Fact 21). While we can scrutinize water quality data for the wells from the period of October 11, 1983 to September 11, 1985, we will confine our analyses to the same 18 month period as the sampling for the Yarnell and Watterson wells.

Like the Yarnell and Watterson wells, the water quality in the Simo, Bugal, and Lydic wells was stabilized by September, 1985, and the representative quality was that set forth in Finding of Fact 71. Although the water quality had improved over this interval, it was in no way comparable to the pre-mining water quality for these three wells (Finding of Fact 50 for the Lydic and Bugal wells and Finding of Fact 69 for the Simo well). For example, the Fe concentration of the Bugal well was 0.3 mg/l pre-mining, but ranged from 4.1 to 4.3 mg/l in September, 1985. Similarly, the Lydic well pre-mining Fe concentration of 0.4 mg/l had risen to 1.8 to 2.8 mg/l in September, 1985, while the Simo pre-mining range of Fe concentrations of 0.3 to 1.4 mg/l was now in the range of 8.7 to 8.9 mg/l.

The analysis of the water quality data for the wells served by the URA establishes a lasting degradation in quality in the period between 1981 and September, 1985. North Cambria has ascribed this degradation to natural processes in the URA, but has presented no credible evidence to sustain its burden of proving this affirmative defense. Therefore, we conclude that the Simo, Bugal, Watterson, Yarnell, and Lydic URA wells, as well as the Beilchick LRA well were degraded both at the time of issuance of the Department's order and at the time the hearings on the merits concluded.

We also conclude that the degradation exhibited by the wells in 1983 and 1985 is characteristic of that caused by AMD - it exhibits a decrease in pH, an increase in acidity, and increases in SO_4 and metals such as Fe and Mn.

B. Was the Degradation of the Residential Wells Caused by North Cambria's Mining Activities?

Having determined that the residential wells had been degraded in quality, we now turn to the issue of whether North Cambria's mining activities were responsible for the degradation. In doing so, we will consider the factors considered in the Kerry Coal adjudication.

North Cambria elicited a great deal of testimony regarding whether the overburden on the Joiner site was capable of producing AMD, and the Department attempted to rebut it. That, however, is not the sole issue here - the issue is whether North Cambria's mining activities resulted in an accumulation of AMD on the site which, in turn, moved offsite to degrade the residential wells. Put in more practical terms, even if the overburden disturbed by North Cambria could not produce AMD, North Cambria may have affected previous mine workings which did generate AMD that moved off-site to degrade the residential wells. Thus, merely analyzing the ability of the overburden to produce AMD does not produce a conclusive resolution of the issue.

It is incontrovertible that AMD has accumulated on the Joiner site and that the water in the backfill is severely polluted. These conclusions are reached through a comparison of the water quality analyses for the on-site (MW-10 and MW-12) and off-site (MW-6, MW-7, and MW-9) monitoring wells and the residential wells.

There is a period for which water quality analyses for all five monitoring wells are available: November 22, 1983 to August 29, 1985 (Finding of Fact 110). The ranges of Mn concentrations in MW-10 and MW-12 were 21 to 71 mg/l and 12.7 to 65 mg/l, respectively, while the corresponding Mn ranges

in MW-6, MW-7, and MW-9 were 0.67 to 3.4 mg/l, 0.4 to 2.2 mg/l and 0.3 to 0.7 mg/l, respectively greater than the Mn concentrations in the residential wells for the period of March 21, 1984 to September 11, 1985. Acidity concentrations for the wells during this period also show the same pattern: acidity ranges were 44 to 623 mg/l and 71 to 246 mg/l for MW-10 and MW-12, respectively, while MW-6, MW-7, and MW-9 exhibited zero or negative acidity. The maximum acidity measured in the residential wells in this period was 85 mg/l in the Bugal well, while the range of the Beilchick well was negative to 110 mg/l acidity (Findings of Fact 111 and 112). Thus, several years after backfilling was completed on the Joiner-South area in October, 1982, the water on the Joiner-South area was more acidic and more polluted in a manner characteristic of AMD than the groundwater offsite, whether in the monitoring wells or the residential wells.

The Department makes the simple argument, based on circumstantial evidence, that if AMD has accumulated on the Joiner site, it is as a result of North Cambria's mining. North Cambria presents the alternate theories that the site if incapable of producing AMD and that any AMD on the Joiner site was generated off-site and was moving through the Joiner site. We will examine each of these arguments, beginning with the overburden analysis arguments.

1. Overburden Analyses

Studies of the overburden on the Joiner site, with the intent of determining "if there was sufficient soluble material in the Joiner strip spoil to cause pollution of the groundwater of the magnitude reported in neighboring residential wells," were performed by NCF's expert witness Andrew Sobek. In essence, Mr. Sobek's conclusion was that the Joiner mine backfill was incapable of producing AMD at all, much less the severe AMD actually found

in the backfill. Mr. Sobek based this conclusion on three distinct types of overburden analyses: (i) an acid-base accounting ("ABA"), (ii) a soxhlet leaching study, and (iii) a humidity cell leaching study. Each of these analyses was performed on core samples from three drill holes at three different locations close to the site, but not directly in the backfill, i.e., each of these three holes was drilled in unmined ground. For each of these locations, the ABA and the humidity cell leaching studies included analyses of strata combinations that purportedly duplicated the actual placement of overburden strata in the backfill. Mr. Sobek's knowledge about the placement of overburden strata in the backfill was based on information received from North Cambria's expert Dennis Noll, supplemented by Mr. Bearer's and Mr. Noll's testimony on that subject. Mr. Sobek's conclusion that the Joiner mine backfill was incapable of producing anything like the severe AMD observed rested strongly on his humidity cell leaching studies on these strata combinations.

The Department has attacked Mr. Sobek's analyses and his conclusions. These attacks extend to each of the three different core samples Mr. Sobek studied, and to each of the three types of overburden analyses he performed on those samples. Basically, the Department objects to the soxhlet and humidity cell leaching studies on the grounds that results of such studies have not been shown to be reliable predictors of AMD production in the field.

On the other hand, the Department does not dispute ABA overburden analysis' usefulness in predicting AMD potentials, but disagrees with Mr. Sobek's conclusions that the results of the ABA analysis indicate that the Joiner site does not have a significant potential for producing AMD. In particular, the Department insists that North Cambria's evidence concerning

the positioning of the strata in the backfill (NCF Ex. 39 and 40) is unreliable and misleading, and, therefore, the Board should not pay heed to Mr. Sobek's Net for Section figure of merit or his humidity cell leaching studies on combinations of strata, as neither reflects the actual likelihood that water in the backfill will reach sulfur-containing strata that have high potential for producing AMD.

Under Pennsylvania law, the applicable test for the admissibility of scientific evidence is the so-called Frye test, first enunciated in Frye v. United States, 293 F.1013 (D.C. Cir. 1923). See L. Packel and A.B. Poulin, "Pennsylvania Evidence", §708 (1987); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981). The Board has applied the Frye test in its decisions.[11] See, e.g. Hepburnia Coal Company v. DER, 1986 EHB 563. Under the Frye test, for a qualified expert's testimony on a particular scientific technique's validity to be given any credence, it must be established that the technique enjoys general acceptability within the scientific community. Hepburnia Coal Company, 1986 EHB at 593-4. The evidence indicates that Mr. Sobek is the only member of the relevant scientific community who accepts the utility of the soxhlet and humidity cell leaching tests for predicting the likelihood that overburden will produce AMD. Under Pennsylvania law, therefore, conclusions by Mr. Sobek about the Joiner site's potential for producing AMD that relied on his soxhlet and humidity cell leaching tests should not have been admitted into evidence, as the Department's counsel maintained during the hearing

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11 While we recognize that the Frye test may well be out-dated and is difficult to meet in many circumstances, the Board is bound by applicable precedent. We note that the United States Supreme Court has recently re-interpreted the Frye test, but how its decision will apply in Pennsylvania remains to be decided by the Pennsylvania Courts.

concerning the soxhlet tests at least (N.T. 1942-3, 1959-60). In the alternative, under the Frye test such conclusions--having been admitted into evidence--will be given no weight by the Board.

Even if we were not to apply the Frye test, Mr. Sobek's conclusions would still be entitled to little weight.

Although Mr. Sobek never rested his opinion that the Joiner site is not producing AMD on his ABA results alone, he did make clear his belief that this opinion was consistent with his ABA results. The Department's Mr. Hornberger was of the contrary opinion. In particular, Mr. Hornberger, relying heavily on the fact that none of the strata in Mr. Sobek's three drill holes exhibited a detectable fizz test, believes the Joiner site has little potential for producing alkalinity. Similar disputes between Mr. Hornberger and appellants' experts about the proper interpretation of ABA results have confronted the Board on previous occasions. Magnum Minerals v. DER, 1988 EHB 867; Sanner Brothers Coal Co. v. DER, 1987 EHB 202. In both these cases the Board, relying on Mr. Hornberger's extensive experience on the subject of ABA (Finding of Fact 176) agreed with the Department's contention that, in the absence of fizzing, the measured NPs of the various strata, though non-negative and therefore implying some acid neutralizing capability, were insufficiently positive to justify any conclusion that AMD would not be produced. In Magnum the Board even stated, as a conclusion of law, that "In the absence of fizzing, an NP of less than 100 was not a reliable indicator of potential alkalinity on this site." The largest NP found by Mr. Sobek in his Joiner site strata was 31.39, in a CH-3 drill hole stratum (Finding of Fact 139). On the precedent of Magnum, therefore, we would have to conclude that Sobek's ABA does not support Sobek's opinion that the Joiner site is not

producing AMD (Finding of Fact 169).[12]

2. AMD Accumulation on the Joiner Site

North Cambria argues that the AMD accumulated in the backfill on the Joiner site is from the LRA, which has been carrying very badly polluted water to the residential wells and the on-site monitoring wells for an extended period of time, beginning in late fall, 1982. In support of this theory, North Cambria cites the fact that Mr. Bearer encountered extremely polluted water during North Cambria's mining of the Joiner-North area (Finding of Fact 84). North Cambria argues that this highly polluted water must have come from the LRA because it gushed up in large quantities through the LK seam it was attempting to mine. The source of the LRA pollution, according to North Cambria, is a deep mine coal refuse pile approximately one to one and one-half miles northeast of the Joiner mine.

North Cambria has not presented a shred of evidence that the coal refuse pile northeast of the Joiner mine is polluting the LRA. No evidence was presented that water in the coal refuse pile, which is highly polluted (Finding of Fact 119), was penetrating the subsurface strata below the coal refuse pile and reaching the LRA. Even assuming *arguendo* that the LRA has been polluted in the vicinity of the coal refuse pile, North Cambria has offered no convincing evidence that this polluted water has been reaching the Joiner site backfill where the AMD accumulation is observed. The LRA flows

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12 Unlike the experts who opposed Mr. Hornberger in Magnum and in Sanner, Mr. Sobek is at least as qualified as Mr. Hornberger in the field of overburden analysis. In particular, Mr. Sobek has had more higher education, has published more extensively and has carried out more research on overburden analysis than has Mr. Hornberger. However, there is nothing on the record which would call into question our reliance on the fizz test as an indicator of potential alkalinity.

just beneath the LK seam (Finding of Fact 19). The elevation of the LK seam at the Joiner mine is about 250 feet higher than the elevation of the LK seam at the coal refuse pile (Finding of Fact 119). How water lying just below the LK seam at the coal refuse pile could manage to climb the 250 feet needed to arrive at the Joiner site was not explained by North Cambria, beyond assertions by its expert Mr. Noll of the sort that the climb "is within the realms of geology and hydrology" and could be produced by the pressure head from a postulated (but otherwise wholly unsubstantiated) 250 feet water column somewhere to the east of the refuse pile (N.T. 1745-1750, 1777, 1781). We are inclined to agree that the highly polluted water Mr. Bearer observed pushing up through the LK seam did come from the LRA, but water quality analyses like Finding of Fact 86 do not reveal whether the observed AMD was originally present in the LRA or was created only after the LRA groundwater began to push through the LK coal seam Mr. Bearer was mining. North Cambria has given us no reason to find other than the AMD on the Joiner-North was created only after the sampled water was forced out of the LRA.

Moreover, even assuming *arguendo* that polluted LRA groundwater from the coal refuse pile can reach the Joiner mine, North Cambria has not presented water quality analyses to support its thesis that this LRA groundwater has been the source of the AMD accumulation at the site. For example, North Cambria offered no water quality analyses evidencing the degradation of LRA-served wells located southwest of the coal refuse pile at points roughly halfway between the coal refuse pile and the Joiner site. Water quality analyses were presented evidencing the degradation of two wells that receive their water from the LRA and which, though lying north of the site, could be said to be between the site and the coal refuse pile; both

these wells are so close to the site, however, that the possibility of their having been polluted by the Joiner site itself cannot be ruled out. These wells are the Connie Wright well (Findings of Fact 123 and 124) and the MW-6 monitoring well (Findings of Fact 102 and 103), whose distances from the north boundary of the site are about 400 and 100 feet, respectively. The water quality parameter ranges for the Connie Wright well during the period January 6, 1983 to October 13, 1983 (the latest data available) do show degradation by AMD, especially with regard to Fe and Mn (Finding of Fact 126) but, comparing the Connie Wright well monitoring results with the MW-10 and MW-12 ranges (Finding of Fact 110), it is apparent that the AMD in the Connie Wright well always has been far less concentrated than the AMD in the backfill, even though the time periods of the monitoring do not overlap. We already have seen that during the period from about November 22, 1983 to August 29, 1985 the AMD in MW-6 also has been far less concentrated than in the backfill. North Cambria has offered no credible mechanism whereby the LRA pollution plume arising at the coal refuse pile could pollute the groundwater in the backfill to a far greater extent than in the Connie Wright and MW-6 wells just north of the site. And, North Cambria's postulated pollution plume is equally difficult to reconcile with the fact that the backfill monitoring wells MW-10 and MW-12 are so much more polluted than MW-9, which is only about 500 feet east of the site and also is served by the LRA (Finding of Fact 107).[13]

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13 The Board has no explanation for the discrepancy, noted in Finding of Fact 107, between the LK seam contour lines in North Cambria Ex. 38 and the depth of the LK seam at MW-9 quoted in North Cambria Ex. 60-9(g). Neither party appears to have noticed this discrepancy, which could be due to a variety of causes, e.g., an erroneous assumption about the surface elevation at MW-9 or careless drawing of the LK contour lines. Irrespective of this footnote continued

As a result of both the overburden analyses and the evidence relating to accumulation of AMD in the backfill, we conclude that the Department has met its burden of establishing that the accumulation of AMD on the Joiner site was caused by North Cambria's mining activities. This leads us to the next part of our discussion.

3. Were the Residential Wells Degraded as a Result of North Cambria's Mining Activities?

We already have affirmed our NCF I ruling that, for the purposes of this appeal, the findings of the Department's unappealed June 25, 1981, order to North Cambria are established. In other words, finding (c) of that June 25, 1981, order has established that "as of January, 1981," North Cambria's Joiner Strip mining operations caused a water loss in the Watterson, Bugal, Simo and Yarnell wells. A reasonable inference from this established fact is that before January, 1981, the paths by which water reached these residential wells ran through all or part of the Joiner mine. Before January, 1981, the Watterson, Bugal, Simo, and Yarnell wells were being served by the URA, although a substantial contribution to the Watterson well from the LRA cannot be ruled out (Findings of Fact 29-31, 33). We know that the mining penetrated through the strata in which the URA flows; indeed the mining penetrated well below the URA, to depths so close to the strata in which the LRA flows that

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continued footnote
discrepancy, the Department now seems to believe that MW-9 may be served by the URA, although this belief was not expressed during the hearings. If MW-9 is served by the URA, then of course the fact that MW-10 and MW-12 are so much more polluted than MW-9 would not bear on the validity of North Cambria's postulated LRA pollution plume. It still is the case, however, that North Cambria has offered no credible mechanism whereby the pollution plume could pollute the groundwater in the backfill to a far greater extent than in the Connie Wright and MW-6 wells.

LRA water apparently could be forced up through the as yet unmined LK seam by hydraulic pressure (Finding of Fact 80). We conclude that, in and of itself, the unappealed June 25, 1981, order has established the existence of a hydrogeologic connection whereby polluted water in the backfill flowed to the Simo, Bugal, Watterson, and Yarnell wells when they were served by the URA.

The Lydic well has always been served by the URA, but there was no testimony that it had suffered a water loss in 1981. But, it is only about 200 feet north of the Yarnell well, 300 feet southeast of the Watterson well, and only 100 feet across the road from the Bugal well (Findings of Fact 11 and 13). In light of this close proximity to, and clustering with, the other URA wells for which a hydrogeologic connection with the backfill has been established and the absence of any contrary evidence, we also conclude that there is a hydrogeologic connection between the backfill and the Lydic well.

This leaves the Beilchick and Rietscha wells, which were served by the LRA prior to January, 1981. Consequently, we cannot draw any inferences from the other residential wells served by URA. However, Mr. Beilchick testified that in 1981, for the first time in over twenty years, he experienced a very substantial loss of water from his well (Findings of Fact 95 and 96). We also know from Mr. Bearer's own testimony that during the period November, 1979 to August, 1982 North Cambria's mining on the Joiner South area surely affected and probably significantly diminished the flow of LRA groundwater through the site (Findings of Fact 35, 79 and 80). Based on these facts, we conclude that North Cambria's mining activities also must have caused the loss of water in the Beilchick well, thereby providing the hydrologic connection whereby polluted water in the backfill could flow to the Beilchick well via the LRA. In the case of the Rietscha well, there is no

evidence concerning whether it suffered a water loss at about the same time as the Beilchick LRA well. Because the 1300 feet between the Rietscha well and the Beilchick well, the Rietscha's single neighboring LRA well before June 29, 1981, is considerably greater than the distance between the Lydic URA well and its four neighboring URA wells, we are reluctant to deduce a hydrologic connection between the Rietscha well and the backfill based solely on the existence of the unappealed June 25, 1981, order.

Even if we were to ignore the issue preclusion effect of the unappealed June, 1981 order, as North Cambria urges us to do, we would have still reached the same conclusion based on the following analysis.

Some residential wells served by <u>each</u> aquifer suffered two very different sorts of degradation during the interval between about April, 1978 and July, 1983, namely: (a) a serious loss of water <u>quantity</u> and (b) a serious deterioration of water <u>quality</u>, of the type typically associated with AMD pollution. In particular, the evidence establishes that these two sorts of degradation were suffered by the Simo well (always served by the URA), by the Beilchick well (always served by the LRA) and by the Watterson well (which in January, 1981, when the Wattersons first experienced water problems, probably was served predominantly by the URA, but which in July, 1983 was being served solely by the LRA). Regardless of the June 25, 1981, order, the most obvious, and the sole reasonable explanation of these conditions in the Simo, Beilchick and Watterson wells is the existence of a hydrologic connection between the Joiner site and these three wells, whereby polluted water in the backfill can flow to the wells along the URA and/or the LRA and whose interruption by North Cambria's mining operations caused the water losses observed in 1981. Certainly, North Cambria has offered no evidence of either an alternative

reasonable explanation, or any arguments rendering this explanation unreasonable.

For example, North Cambria contends that water cannot flow via the URA from the mine site to the residential wells because such water necessarily will discharge into the unnamed tributary of Little Yellow Creek ("the UT") (see Finding of Fact 14). This contention is not borne out by the evidence, however. Since the MK1 and LK coal seams do not crop anywhere near the Joiner site or the land area where the residential wells are located (Finding of Fact 182), those seams necessarily lie beneath all land surfaces in the vicinity of the Joiner site and the residential wells, including the bed of the UT. Thus, the North Cambria contention is not sustainable without evidence that there is no significant URA flow at elevations below the elevation of the UT bed. No such evidence was presented. We know from Finding of Fact 20 that most of the URA flow probably is located between the top of the MK1 seam and the bottom of the MK2 seam; there was no evidence that an insignificant portion of this flow is located below the elevation of the UT bed. To this not necessarily insignificant URA flow below the UT bed but above the top of the MK1 seam must be added the URA flow between the bottom of the MK1 seam and the top of the LK seam. There also was no evidence that this latter URA flow necessarily is insignificant; rather there was evidence that this flow can be substantial (Finding of Fact 184).

Moreover, at a point on the UT termed SW-11, located at most 100 feet from the point where the UT flows into Little Yellow Creek, it is very unlikely that the elevation of the bottom of the MK1 seam is less than 23 feet below the elevation of the surface of the UT. The thickness of the MK1 seam is unlikely to be much more than three feet at SW-11 (Findings of Fact 196 and

198) and, although there was absolutely no evidence about the depth of the UT, we are willing to hazard that the UT is not deeper than 5 feet at SW-11. Therefore, we conclude that at SW-11 there is a thickness of at least 15 feet between the bottom of the UT bed and the top of the MK1 seam (Findings of Fact 196 and 199); in the neighbornood of SW-11, this 15 feet thickness almost certainly is more than half the total thickness of the aquifer lying between the bottom of the MK-2 seam and the top of the MK1 seam. Thus, we determine that even if we assume, *arguendo*, there is insignificant URA flow beneath the bottom of the MK1, there is room for very appreciable URA flow beneath the UT stream bed (at least in the portion of the UT near its mouth).

North Cambria also contends that the backfill could not have caused degradation of the residential wells served by the LRA before at least January, 1984, long after those wells actually had been degraded. In order to make such a finding we would have to conclude that at the time of issuance of the 1983 order residential wells served by the LRA had been degraded by a mechanism other than flow of polluted water from the backfill. This conclusion rests on a thesis advanced by Mr. Noll, North Cambria's expert, which he summarized in NCF Ex. 47. He asserts that polluted backfill water could not have entered any portion of the LRA until such time as the pressure head in the backfill water exceeded the LRA pressure head; this time did not occur until January, 1984. Mr. Noll further estimated that once polluted water started to flow into the LRA from the backfill, it still would take at least 80 days for that water to reach the nearest residential well, about 800 feet distant from the Joiner site.

While the Department has raised numerous objections to Mr. Noll's testimony and the relevance of NCF Ex. 47, we find it unnecessary to address

these objections, for we believe that Mr. Noll's testimony has an obvious fatal flaw.

In effect, Mr. Noll assumed that during the entire period between about June, 1982 to August 1983, when, according to Mr. Noll, (N.T. 1172-1175, 1179-1180, and 1464-1465) the backfill was being filled with LRA water forced through the weakened pit floor in the Joiner-South hatched area on NCF Ex. 38, the LRA pressure head in this hatched area varied only slightly with position. If, during this period, the LRA head had been much lower in one portion of the hatched area than in another portion, then, on Mr. Noll's own thesis, polluted backfill water could have pushed down into the LRA in some portions of the hatched area, even though in other portions (where the LRA pressure head exceeded the pressure head of the water in the backfill) the LRA had continued to push up into the backfill. Furthermore, if such a significant variation of LRA pressure head with position had occurred at any time in the interval between June, 1982 and January, 1983, then, even on Mr. Noll's own estimate that polluted groundwater requires 80 days to flow along the LRA aquifer from the mine site to the residential wells, there would have been ample time for this groundwater to degrade the wells being served by the LRA in May, 1983.

Thus, in order to establish its contention that backfill water could not have polluted the residential wells being served by the LRA before May, 1983, North Cambria must, at the very least, convince us that the LRA pressure head in the hatched area probably does not vary appreciably with position while the LRA water is filling the backfill. But we must conclude that if the backfill really was filled only after about June, 1982 by the mechanism Mr. Noll proposes, namely LRA water being pushed up into the backfill through the weakened pit floor, then it is quite possible that during this process the

actual pressure heads at different points in the backfill were inconsistent with Mr. Noll's assumption. Mr. Noll's picture of the process by which the Joiner-South backfill was filled with LRA water appears to be akin to the process by which an empty swimming pool would fill after holes are punched in an aqueduct lying on the floor of the pool. It probably is not unreasonable to analogize the unconsolidated backfill to a swimming pool, but the LRA aquifer is not at all analogous to an aqueduct. In particular, an aqueduct, wherein water flows without impediment, can furnish an essentially unlimited supply of water at high pressure all along its length. In the LRA aquifer, on the other hand, water flows only with great difficulty, at a maximum velocity of only 10 feet/day according to Mr. Noll's own estimate (N.T. 1192-1197, 1594-1604); correspondingly, a rapid loss of water at some point in the aquifer can deplete the aquifer locally and cause a pressure head diminution, as Mr. Noll himself was aware (Finding of Fact 202).

Consequently, as the LRA flow from outside the site encounters the extensive Joiner-South hatched area on NCF Ex. 38, one expects that the presumably nearly uniformly horizontal LRA aquifer flow arriving at the hatched area will be greatly distorted, so as to flow preferentially upwards through the fractured and otherwise weakened upper layer of the aquifer, with consequent diminution of aquifer flow in portions of the hatched area that are distant from the portion first encountered by the LRA ground water. On this expectation, the LRA pressure head at the fracture points in the distant portions of the hatched area may well be much less than the LRA pressure head at the fracture points in the portion first encountered by the LRA flow. Another way to put it is that for the same reason a dammed river without a spillway eventually will rise so as to flow over the near side of the dam and

down its distant side to the former downstream river bed. Thus, it would not be surprising to find preferentially downwards flow from the backfill into the aquifer in distant portions of the hatched area, even though there is preferentially upwards flow from the aquifer into the backfill in the nearer portions first encountered by the LRA. In other words, the LRA pressure head in the hatched area may well vary appreciably with position while the backfill is being filled with LRA water via the mechanism Mr. Noll favors.

As in our earlier discussion of North Cambria's contention that URA groundwater from the mine will be intercepted, we do not wish to attach much credence to this just-stated conclusion, which is not directly supported by any opinion testimony of the Department's experts and which rests on expectations about the aquifer flow that cannot be considered reliable without elaborate hydrogeologic modeling calculations. But, again as discussed earlier, we must take note that an analysis of the implications of Mr. Noll's picture of the process whereby LRA water fills the backfill volume, performed by us as fairly as we could, has led to a conclusion which fails to support an assumption that crucially underlies the North Cambria contention under present examination. Since North Cambria itself has not presented any arguments in support of the assumption, we cannot but rule that North Cambria has not met its burden of establishing its contention that polluted backfill water could not have reached the residential wells served by the LRA in time to produce the degradation of those wells.

Admittedly, the conclusion that North Cambria's mining activities caused the degradation of the residential wells rests very largely on purely circumstantial evidence, especially if we do not rely on the June 25, 1981, order to establish the existence of a hydrologic connection between the

polluted water in the backfill and the residential wells. Certainly, the Department has offered no direct evidence of such a hydrologic connection, nor has the Department submitted any arguments which might have directly established that polluted water could reach the residential wells from the backfill in time to produce the degradation in the residential wells. Nor, indeed, has the Department presented any convincing evidence, other than the circumstantial evidence that the residential wells have been degraded, in support of the proposition that the groundwater flows from the Joiner site to the residential wells, in either the URA or the LRA aquifers.

In fact, for the following reasons we have totally discounted the Department's testimony about the flow directions in both the LRA and URA aquifers. Although Mr. Noll's belief that the LRA is carrying a pollution plume from the northeast to the southwest (Finding of Fact 113) is justly criticized in the Department's brief on the grounds that this flow direction requires the LRA water to flow uphill, the LRA flow direction favored by the Department's expert Mr. Kania involves much the same difficulty (see Findings of Fact 206, 207, 209 and 210). As for the flow in the URA, examination of Mr. Kania's testimony in this regard (Findings of Fact 261-264), suggests that he could have found justification for just about any URA flow direction he chose; moreover, his final choice of URA flow direction apparently was based on somewhat circular reasoning, in that this choice (Finding of Fact 214) was influenced by his knowledge of the very same monitoring well data his choice was supposed to explain. In addition, Mr. Kania is a relatively inexperienced hydrogeologist (Finding of Fact 208).

On the other hand, the Department doesn't have to offer direct evidence of a hydrogeologic connection between the Joiner site and the

residential wells, nor does DER have to produce convincing hydrogeologic evidence that ground water actually can flow from the site to the residential wells along the URA and LRA. The Department's only essential burden on the causation issue is to convince us that, based on all the evidence, it is more probable than not that North Cambria's mining activities resulted in the degradation of the residential wells. For this purpose, circumstantial evidence is no less acceptable than direct evidence. In the instant case, moreover, the proposition that there exists a hydrologic connection whereby polluted water has flowed from the Joiner site to the residential wells is quite plausible and appears to be the only reasonable explanation of the circumstantial evidence.

Furthermore, because the circumstantial facts involve two different sorts of water quality deterioration (loss of water quantity and loss of water quality) occurring at two different times (in 1981 and in 1983) in seven wells served by two different aquifers, any alternative explanation of those facts apparently requires the coincidental (and therefore inherently implausible) simultaneous truth of several quite independent propositions. For instance, even if we had been convinced of North Cambria's contention that the URA groundwater from the mine would be intercepted by the UT, we still would require an explanation (other than causation by North Cambria's mining activities) of the fact that wells served by the LRA have been degraded; if we had been convinced that the degradation of the URA wells should be ascribed to natural processes, then we still would have to be convinced there is an alternative explanation (other than causation by North Cambria) for the degradation of the LRA wells. If we had received some satisfactory (wholly unrelated to North Cambria) explanation of the 1981 losses of water quantity

in both aquifers, we still would need a similar explanation of the 1983 degradation of water quality in the two aquifers. The medieval rule of logical economy known as Ockham's razor,[14] to the effect that a plurality of explanations should not be assumed without necessity, remains a valid principle of decision to this day.

It may be instructive also to contrast the facts in the instant appeal with the facts in two appeals we have cited earlier, wherein we refused to infer a hydrologic connection between polluted water and a nearby mine site from the mere circumstance that the water had been polluted. Stahlman, *supra*, involved a single affected residential water supply; in sustaining an appeal from DER's order to restore the water supply, we held that the proposition that the appellant mine operator had caused the degradation of the water supply was improbable and had reasonable alternatives. In Hepburnia, *supra*, we concluded that the facts made it unlikely that ground water from the mine source could account for the Fe concentrations in a single discharge the appellant mine operator had been ordered to treat. The contrasts between these Stahlman and Hepburnia facts and the circumstances of the instant appeal are apparent. Under these instant circumstances, even without reliance on DER's June 25, 1981, order, we have been convinced that more probably than not North Cambria's mining activities caused the degradation of the residential wells.

CONCLUSION

Since we have concluded that North Cambria degraded each of the residential wells that are the subject of this appeal, it was not an abuse of

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[14] See "Ockham, William of," Enc. Britannica Macropaedia (15th ed. 1976), vol. 13 at 505. Ockham lived in the 14th century.

the Department's discretion for it to order North Cambria to provide both temporary and permanent replacement water sources for each of the wells. The only remaining issue is what criteria must be met by the replacement sources. Section 4.2(f) of SMCRA merely requires that the replacement source be "adequate in quantity and quality for the purposes served by the supply." The language in the order requires North Cambria to provide a replacement source "equal to or better than the pre-mining quantity and quality" of the supplies being replaced.

Accurate pre-mining water quality analyses are available for the Bugal, Yarnell, and Lydic wells (Finding of Fact 62). While no such analyses of the Beilchick, Rietscha, Simo, and Watterson wells were available, we have made what we believe to be reasonable extrapolations of the pre-mining water quality of these four wells (Findings of Fact 66 and 69). We will hold the water quality represented in these findings to be the criteria to be met in the replacement sources that North Cambria must provide to these residences.[15]

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proving by a preponderance of the evidence that its order to North Cambria to replace the seven residential

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15 The Department contends that, because of the absence of accurate pre-mining samples, the replacement sources for the Beilchick and Watterson wells should meet drinking water standards "or any available empirical data which is more stringent than drinking water standards." (DER post-hearing brief, pp. 83-86). We need not decide this question in light of our findings concerning pre-mining water quality of the Simo, Watterson, Rietscha, and Beilchick wells and the language of the Department's order.

water supplies was not an abuse of discretion.

3. The rulings of Martin L. Bearer d/b/a North Cambria Fuel Company v. DER, 1985 EHB 559, are affirmed.

4. Under 25 Pa. Code §21.101(d)(2) the burden of proof will not be placed on an appellant contesting a Department order where the facts relied upon by the Department to invoke the rule are not significant to the Board's adjudication.

5. North Cambria was not equitably estopped from challenging assertions in its original permit application as erroneous; such challenges are to be treated as an affirmative defense for which North Cambria bore the burden of establishing.

6. North Cambria did not meet its burden of establishing that the April 18, 1978, water quality analyses in its permit application were erroneous and unreliable.

7. The Department has met its burden of showing that AMD accumulated on the Joiner site as a result of North Cambria's mining activities.

8. The Department met its burden of establishing a hydrologic connection between the Joiner site and the residential wells by which AMD degraded the quality of the residential wells.

9. North Cambria's mining activities degraded the seven residential wells.

10. North Cambria must provide the seven residences permanent replacement sources reflecting the pre-mining water quality of the seven residential wells.

O R D E R

AND NOW, this 2nd day of August, 1993, it is ordered that:

1) The supersedeas in this matter is dissolved; and

2) North Cambria's appeal is dismissed consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Members Richard S. Ehmann and Joseph N. Mack did not participate in this decision.

DATED: August 2, 1993

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NICK GROMICKO	:	
	:	
v.	:	EHB Docket No. 93-102-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 2, 1993

OPINION AND ORDER SUR
MOTION FOR JUDGMENT ON THE PLEADINGS/MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

Where an Appellant fails to specify any grounds for appeal in his Notice Of Appeal from DER's license denial letter and subsequently fails to set them forth after notice of this deficiency from this Board, a DER Motion For Judgment On The Pleadings/Motion To Dismiss on this omission must be granted.

OPINION

By letter dated March 24, 1993, DER wrote to Nick Gromicko ("Gromicko") of Sunn, Gromicko and Assoc., Corp. denying Gromicko's application "for radon laboratory analysis, individual certification". On April 20, 1993 we received a Notice Of Appeal from Gromicko that had attached to it a letter stating: "1. I object to the denial of my Radon Laboratory Individual Certification". The Notice Of Appeal and attachments specified no grounds for this objection.

In response to this Notice Of Appeal, this Board issued an Order dated April 30, 1993 stating that Gromicko had failed to perfect his appeal by

failing to supply the information required in 25 Pa. Code §21.51 and ordering Gromicko to send the Board his telephone number, objections to DER's actions and proof of service of a copy of the Notice Of Appeal on DER. This Order further indicated that a failure to provide this information might result in dismissal of the appeal pursuant to 25 Pa. Code §21.52(c).

On May 10, 1993, the Board received a letter from Gromicko thanking us for our letter of April 30 (the aforesaid Order) and stating: "I have included the information you requested". Included with Gromicko's letter was proof of service on DER and Gromicko's phone number. Nothing in the letter specified what his objections to DER's denial letter were or any basis for them.

Thereafter, counsel for DER entered his appearance and on June 3, 1993 filed DER's Motion For Judgment On The Pleadings/Motion To Dismiss. It sets forth the facts outlined above, points out that Gromicko has failed to set forth grounds on which this Board can grant him relief and concludes that where there is no factual dispute and DER is entitled to judgment as a matter of law, the Board is to grant DER judgment on these pleadings, so we should dismiss Gromicko's appeal.

By letter dated June 7, 1993, we advised Gromicko that he should respond to DER's Motion by June 18, 1993. By letter dated June 12, 1993 and filed with us on June 17th, Gromicko admits he cured two of the three deficiencies but states he failed to realize that the rest of his response was insufficient to cure the last deficiency. The letter then says he lacks the resources to match legal wits with DER but would like the chance to show the Board that DER was at error in denying his application, so that DER's decision can be reversed. His letter closes by saying a more detailed response will be

forthcoming. It fails to specify any of his reasons for his objection to DER's license denial letter or any reason they were not specified earlier. On June 28, 1993, we received a two page letter from Gromicko. It outlines his experience and out-of-state licensure in the radon field and claims that based thereon DER erred in denying his license due to his lack of education or professional work experience. However, this letter fails to offer any explanation for why this information was not provided earlier.

DER's Brief in support of its Motion argues first that Gromicko's failure to comply with this Board's Order was sufficient reason standing alone for dismissal of this appeal, citing Melvin J. Hoffer v. DER, 1991 EHB 682. It also asserts that Gromicko's omissions are a ground to grant this motion under Pa.R.C.P. 1034, citing Beardell v. Eastern Wayne School District, 91 Pa. Cmwlth. 348, 496 A.2d 1373 (1985). DER reasons that Gromicko had to at least specify his arguments in his Notice Of Appeal, even if he later fleshed them out in a Pre-Hearing Memorandum, because arguments not raised in a Notice Of Appeal are waived, citing Shipman Sanitation Service v. DER, 1991 EHB 61. Moreover, DER says this is not unjust here because Gromicko was told to specify particular objections to DER's letter on the Board's Notice Of Appeal form, and was again advised to do so by our April 30, 1993 Order, but has failed to do so.

This Board has repeatedly written on the dangers to an appellant of an appellant representing himself as opposed to retaining counsel to make sure his legal i's are dotted and t's crossed. While the attorneys who regularly appear before us have seen these opinions, it is obvious that *pro se*

appellants do not. Because *pro se* appellants do not read and heed these opinions, they continue to file defective appeals which fall victim to challenges such as that raised here.[1]

Gromicko's letter of June 12, 1993 admits he failed to cure his omission of a statement of grounds for appeal in his initial Notice Of Appeal. Thus we are faced with an appeal which fails to state any grounds on which we can grant Gromicko the relief he seeks. Where no grounds for relief are stated in an appellant's pleadings (here, his Notice of Appeal), a Motion For Judgment On The Pleadings must be sustained. Grand Central Sanitary Landfill, Inc. v. DER, 1992 EHB 1510.

Were Gromicko represented by counsel, we might readily agree with DER's assertion that there is no injustice in dismissal of this appeal. Gromicko promptly tried to cure the three defects and did cure two of them. Moreover, casting the formal legal positions raised on DER's behalf aside, we cannot believe that DER's staff would believe they received justice if, in their own private lives, they were treated in the fashion DER seeks here. However, DER is correct that Gromicko was twice told in writing to list his reasons for objecting and failed to do so. This Board can do no more than tell appellants to correct their omissions and give them an opportunity to do

---

1 Insofar as members of the bar view themselves as having obligations as members of this profession to provide legal assistance to those financially unable to retain legal counsel and attempt to provide legal services to persons in this situation needing such help through programs such as the Allegheny County Bar Association's Project Challenge, they are to be highly commended. The members of this profession appearing regularly before this Board might do well to take a page from Project Challenge's Book to address the provision of legal services to *pro se* appellants before this Board. Certainly, such an effort would not be viewed unfavorably by this Board, not to mention those appellants so served, and would produce more decisions by this Board on the merits of challenges to DER's action, as opposed to the result compelled here.

so. Where such an opportunity is not taken and the law on the issue is clear, we have no option but to follow that law and grant DER's Motion.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 2nd day of August, 1993, it is ordered that DER's Motion For Judgment On The Pleadings/Motion To Dismiss is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

* Chairman Maxine Woelfling concurs in the result only.

DATED: August 2, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
Nick Gromicko
Gibsonia, PA

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
3rd FLOOR — MARKET STREET STATE OFFICE BUILDING
[illegible]

M. DIANE SMITH
SECRETARY TO THE BOARD

GERALD C. GRIMAUD et al.	:	
	:	
v.	:	EHB Docket No. 91-510-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 4, 1993
and STONE HEDGE SEWER COMPANY, Permittee	:	

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Where an appeal from issuance of a Water Quality Management Permit raises issues related to a previously-issued NPDES Permit, summary judgment will be entered against the Appellants. When the appeal challenges DER's policy of issuing both a NPDES Permit and a Water Quality Management Permit for a single project but fails to allege sufficient facts to show how this is harmful to Appellants despite sound reasons to support the policy, summary judgment will be entered against the Appellants.

OPINION

This appeal, filed on November 22, 1991, was taken from the issuance by the Department of Environmental Resources (DER) of National Pollutant Discharge Elimination System (NPDES) Permit No. PA-0062375 and of Water Quality Management (WQM) Permit No. 6690402. Both permits were issued to

Stone Hedge Sewer Company (Permittee) and relate to a sewage treatment facility for the Stone Hedge Development and Golf Course in Tunkhannock Township, Wyoming County. Appellants are individual residents of the area.

On November 6, 1992 we issued an Opinion and Order (1992 EHB 1516) quashing the appeal as to the NPDES Permit as untimely and denying Appellants' Petition to Appeal *Nunc Pro Tunc* from the issuance of that Permit. This decision is now on appeal to Commonwealth Court at No. 2618 C.D. 1992.

The appeal of the WQM Permit is still before us. On February 16, 1993, Permittee filed a Stipulation of the Parties (with an attached affidavit), a Motion for Summary Judgment and a Memorandum of Law. DER indicated its support of the Motion on April 2, 1993. Appellants filed their Response and Memorandum of Law opposing the Motion on April 13, 1993.

Permittee's Motion is premised on the Stipulation of the Parties wherein Appellants concede that the treatment plant authorized by the WQM Permit is capable of meeting the effluent limitations stated in the NPDES Permit if the plant is operated in the manner required by both Permits. Appellants concede further that their appeal only challenges (1) the two-permit system employed by DER; (2) the effluent limitations; (3) the monitoring, checking, testing or evaluation of compliance with the effluent limitations; and (4) the discharge point.

Permittee asserts that the three last issues relate solely to the NPDES Permit and are totally unrelated to the WQM Permit. Therefore, summary judgment on these issues should be entered for Permittee. Appellants' argument is the same as that rejected in our prior Opinion and Order and must be rejected here also: *Fuller v. Department of Environmental Resources*, _____

Pa. Cmwlth. _____, 599 A.2d 248 (1991). There are no genuine issues of material fact and Permittee, the moving party, is entitled to judgment on these three issues as a matter of law.

Appellants' challenge to DER's use of a two-permit system (whereby an applicant must first secure a NPDES Permit and then proceed to obtain a WQM Permit rather than combining the two into one) is cognizable in their appeal from the WQM Permit. Their challenge, however, is based on general allegations of prejudice with little specificity. "One Project should entail One Permit/DER Action." "DER Splitting Technique is Prejudicial." "To the extent DER has separated into two or more permitting procedures/actions...when ruling on a single sewage treatment plant, point of discharge and housing development, there has been a breakdown in DER's operation." These are typical of the allegations.

The only attempt to flesh out these generalities is the following:

- the NPDES Permit approval typically is taken without much public notice;
- This favors the developer over the environment and the downstream riparian landowners too busy to read the *Pennsylvania Bulletin*;
- allowing all issues to be litigated in an appeal from issuance of the last permit is more equitable, more consistent with public policy, and more consistent with the intent of the environmental laws and constitutional provisions.

The initial premise is faulty. As we noted in our prior Opinion and Order, Pennsylvania's regulations for administering the NPDES program require public notice of the application to be given by publication in the *Pennsylvania Bulletin* and by posting near the entrance to the premises and nearby places. A copy of the notice is to be mailed to any person requesting

it, and persons desiring to receive such notices on a routine basis may request to be placed on a mailing list for that purpose. Public comments may be submitted and a public hearing may be requested: 25 Pa. Code §92.61.

Appellants do not contend that these requirements were not met in this case. Therefore, we cannot agree that the permit was issued "without much public notice." If the public notice provisions of 25 Pa. Code §92.61 favor the developer (and, we are certain developers would take strong issue with the premise), it is only because riparian landowners do not exercise the necessary vigilance. The law may compel the giving of notice; it cannot compel the reading of it.

Finally, the public notice given with respect to NPDES Permits is much more elaborate than that given with respect to WQM Permits. The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, pursuant to which WQM Permits are issued, has no public notice requirement where sewage rather than industrial waste is involved. While DER generally publishes notices in the *Pennsylvania Bulletin*, it makes no attempt to follow the procedures applicable to NPDES Permits. Thus, if riparian landowners miss notice of the NPDES Permit they likely will miss notice of the WQM Permit also.

There are sound reasons for the two-permit approach. First of all, it is clearly contemplated by §§202 and 207 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.202 and 691.207. In addition, the processing of the NPDES Permit requires DER to consider the amount and components of the effluent, the existing water quality of the receiving stream and the capacity of the stream to absorb the proposed discharge without unlawful degradation. After considering these factors DER then must establish discharge parameters for each regulated constituent

(affidavit of Paul Swerdon attached to Stipulation of the Parties). Only after these parameters and related monitoring requirements are set can engineers proceed to design treatment facilities to satisfy them. Approval of these facilities by DER takes the form of the WQM Permit.

With sound reasons to support it and in the absence of any showing by Appellants that they have been prejudiced by it, we conclude that DER was justified in requiring both a NPDES Permit and a WQM Permit for Permittee's proposed sewage treatment facilities. Again, there are no genuine issues of material fact and Permittee is entitled to judgment as a matter of law on this issue.

ORDER

AND NOW, this 4th day of August, 1993, it is ordered as follows:

1. Permittee's Motion for Summary Judgment is granted.

2. Summary judgment is entered for Permittee on the issues raised by Appellants in their appeal from issuance of Water Quality Management Permit No. 6690402 and the appeal is dismissed as to this Permit.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 91-510-MR

RICHARD S. EHMANN
Administrative Law Judge
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JOSEPH N. MACK
Administrative Law Judge
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DATED: August 4, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

DELAWARE VALLEY SCRAP COMPANY, INC. AND JACK SNYDER	:	
v.	:	**EHB Docket No. 89-183-W**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 5, 1993

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

By Maxine Woelfling, Chairman

Synopsis

Two appeals of an order, a permit denial, and a civil penalty assessment issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act) are dismissed. Objections to the Department of Environmental Resources' (Department) issuance of an order are waived where they are not raised in appellant's post-hearing brief. The Department is justified in denying a permit under the Solid Waste Management Act where the Department demonstrated that the permit applicant had engaged in unlawful conduct under the Act and it was not evident from the application that the unlawful conduct had been corrected. A civil penalty assessment of $19,500 is not an abuse of discretion where: the person assessed the penalty engaged in 15 violations of the Solid Waste Management Act pertaining to the processing of municipal or solid waste; he knew of the permit requirement under the Act at the time he

committed the violations; approximately 40-50 tons of waste, including some food waste, were processed daily; and, the Act authorizes penalties of up to $25,000 per violation. Even if the particular method the Department employs to calculate a civil penalty assessment is incorrect, the Board will sustain the civil penalty where the amount of the penalty actually assessed would have been reasonable had the Department performed the calculation correctly.

With regard to the privilege against self-incrimination, a lawyer can invoke the privilege on behalf of a client who is a witness, and a witness does not waive the privilege simply because he fails to invoke it during direct examination.

The Board will not reopen the record for the Department to present evidence of violations occurring after the hearing because those violations are irrelevant in reviewing the propriety of a civil penalty assessed on the basis of earlier violations and there is already sufficient evidence on the record for the Board to sustain the Department's order and permit denial.

INTRODUCTION

This matter was initiated with the June 29, 1989, filing of notices of appeal by Delaware Valley Scrap Company, Inc. (Delaware Valley Scrap) and by Jack Snyder (Snyder), the president of Delaware Valley Scrap.[1] Delaware Valley Scrap is a Pennsylvania corporation and operates a baler and car crusher at a facility in Bristol Township, Bucks County. Snyder and Delaware Valley Scrap (collectively, the Appellants) seek review of the Department's

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[1] Snyder and Delaware Valley Scrap filed separate notices of appeal. Snyder's appeal, originally docketed at 89-621-W, was consolidated with the Delaware Valley Scrap appeal at Docket No. 89-183-W by order of the Board on February 8, 1990.

May 31, 1989, order, civil penalty assessment, and denial of Delaware Valley Scrap's permit application to construct and operate a municipal waste processing facility.

The Department's actions pertained to a baler and a car crusher Delaware Valley Scrap operated on its premises. The Department's order, issued pursuant to the Solid Waste Management Act and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code), asserted that Delaware Valley Scrap had violated §§301, 307, 316, 401, 402, and 611 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law); §§201(a), 501(a), and 610(1), (2), and (4) of the Solid Waste Management Act; and 25 Pa. Code §271.101. According to the order, the Clean Streams Law violations arose from the fact that Delaware Valley Scrap allowed oil from crushed cars to leak into the ground near the crusher, contaminating the soil, threatening to pollute the groundwater, and constituting a public nuisance. With regard to the other violations, the order asserted that they arose from the fact that Delaware Valley Scrap stored waste materials on the ground and baled them. The order directed Delaware Valley Scrap to stop processing solid waste in the baler, to remove and dispose of the municipal waste at the facility, and to stop operating the car crusher until the Department determined that no oil was escaping into the soil. It also required that Delaware Valley Scrap submit a hydrogeological study detailing the extent and consequences of any soil and groundwater contamination from the facility and the measures necessary to remedy it, and required Delaware Valley Scrap to implement those measures after the Department approved them.

The permit denial identified three reasons why the Department denied the permit application: (1) Delaware Valley Scrap's compliance history showed

it did not intend to comply with the Solid Waste Management Act, the Clean Streams Law or the Department's regulations; (2) Delaware Valley Scrap failed to remedy the contamination caused by the crusher; and, (3) the permit application did not contain a completed consent-to-entry form.

The $19,500 civil penalty assessment, meanwhile, was imposed because Delaware Valley Scrap was storing waste on the surface of the ground and was using its baler as a solid waste processing facility, both in violation of the Solid Waste Management Act.

The Board conducted a hearing on the merits on September 12 and 13, 1990. The Department submitted its post-hearing brief on November 7, 1990, and the Appellants responded with their brief on December 12, 1990. Any issues not raised in the post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

The Department raised a number of issues in its post-hearing brief. According to the Department, the Board erred when it allowed Snyder to refuse to answer one of the Department's questions on cross-examination after Snyder's attorney invoked the privilege against self-incrimination on Snyder's behalf. The Department contended that the propriety of the order is no longer in dispute because the Appellants stipulated that the soil and water contamination at the site merited the environmental evaluation and remedial action required by the order.

With regard to its action on the permit application, the Department maintained that the denial was appropriate for two reasons: (1) §§503(c) and 503(d) of the Solid Waste Management Act authorize the Department to deny permit applications where the applicant is in violation of the Solid Waste Management Act or the Clean Streams Law; and, (2) the lease agreement between the landowners and Delaware Valley Scrap could not substitute for the

consent-to-entry form required as part of the permit application. With regard to the civil penalty assessment, the Department argued that it was authorized by §605 of the Solid Waste Management Act and that the amount of the penalty levied against Delaware Valley Scrap was reasonable in light of the severity and willfulness of the alleged violations. Finally, the Department requested that the Board reopen the record so that the Department could present evidence that Delaware Valley Scrap resumed its baling operation several weeks after the close of the hearing.[2]

The Appellants did not address the order at all in their post-hearing brief, so they have waived any objections they might have had to that aspect of the Department's action. They did counter the Department's other arguments, however. According to the Appellants' post-hearing brief, the Board acted properly when it ruled that Snyder was protected by the privilege against self-incrimination. The Appellants also argued that the Department's denial of the permit application was inappropriate because the lease was a satisfactory substitute for the consent-to-entry form; because the Appellants never violated the Clean Streams Law; and because, even if Delaware Valley Scrap had engaged in activities which are unlawful under the Solid Waste Management Act without a permit, those violations should not be held against the Appellants where they had applied for a permit earlier--before engaging in those activities--and the Department abused its discretion by denying that permit. With regard to the civil penalty assessment, finally, the Appellants maintained that the amount of the penalty was excessive because the Department

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[2] The Appellants never responded to the Department's request to reopen the record. Their failure to do so, however, may well be the result of the bizarre location in the post-hearing brief the Department chose to make its request: in the proposed findings of fact. In any event, we denied the Department's request for reasons explicated later in this opinion.

should have considered more than just the severity and willfulness of the alleged violations and because the willfulness involved in the violations was, by the Department's own admission, low.

The record consists of a transcript of 180 pages and 30 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellants are Delaware Valley Scrap, a Pennsylvania corporation with its principal place of business at Beaver Dam Road, Bristol Township, Bucks County, and Jack Snyder, the president of Delaware Valley Scrap. (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

2. Appellee is the Department, the agency with the authority to administer and enforce the Solid Waste Management Act and the Clean Streams Law and the rules and regulations adopted thereunder and §1917-A of the Administrative Code.

3. On January 14, 1988, in an effort to secure a permit for a baling operation it conducted on the premises, Delaware Valley Scrap submitted an application for a solid waste management permit to operate a municipal waste processing facility. (N.T. 10; Ex. D-1)[3]

4. The Department denied the permit application on October 4, 1988, a decision which was never appealed. (N.T. 13-14, 21; Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

5. Robert Fulton, a waste management specialist for the Department's Bureau of Waste Management, conducted inspections of Delaware Valley Scrap's

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[3] Exhibits from Delaware Valley Scrap are designated as "Ex. D-___," those from Snyder as "Ex. S-___," and those from the Department as "Ex. C-___." The notes of testimony, meanwhile, are referred to as "N.T. ___."

facility on November 10, 1988, December 5, 1988, and January 17, 1989. (N.T. 115, 128)

6. On December 20, 1988--between Fulton's December 5, 1988, inspection and his January 17, 1989, inspection--Delaware Valley Scrap submitted a second application for a solid waste management permit to operate a municipal waste processing facility. (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

7. On May 31, 1989, the Department issued an order, a permit denial, and a civil penalty assessment to Delaware Valley Scrap. (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

8. The order asserted that, on the three days of Fulton's inspections, Delaware Valley Scrap had violated §§301, 307, 316, 401, 402, and 611 of the Clean Streams Law; §§201(a), 501(a), and 610(1), (2), and (4) of the Solid Waste Management Act; and 25 Pa. Code §271.101. (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

9. The order directed Delaware Valley Scrap to stop processing solid waste in the baler, to remove and dispose of the municipal waste at the facility, and to stop operating the car crusher until the Department determined that no oil was escaping into the soil. (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

10. The Department denied the second permit application because, according to the Department, Delaware Valley Scrap failed to comply with the Solid Waste Management Act, the Clean Streams Law, and the Department's regulations; because Delaware Valley Scrap failed to remedy the contamination caused by its car crusher; and, because the permit application did not contain a completed consent-to-entry form. (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

11. The civil penalty was assessed as a result of Delaware Valley Scrap's unpermitted storage of waste, its unpermitted operation of a solid waste processing facility, and its failure to comply with a Department order. (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal)

12. Delaware Valley Scrap accepted waste materials from a variety of stores, industrial plants, and private residences. (N.T. 54-55)

13. Some of the materials were source-separated, others were not. (N.T. 54-55)

14. The materials were piled near the baler and consisted of wood and metal products, cardboard, paper, plastic, and food waste. (N.T. 54-55, 121-122, 138; Ex. C-1-j)

15. Delaware Valley Scrap had poured a concrete pad to keep waste from touching the surface of the ground, but the materials were piled in such a way that the concrete was totally obscured and it was impossible to tell whether the materials only lay upon the pad or whether some had overspread it and rested on the ground itself. (N.T. 134)

16. "Pickers" sorted the waste by hand, separating the various classes of recyclable products from those materials destined for disposal. (N.T. 122)

17. The aluminum products and certain other recyclables were baled, as was the material destined for disposal. (N.T. 49, 122)

18. Approximately 70% of the bales consisted of recyclable materials. (N.T. 49)

19. The non-recyclable materials--approximately 40 to 50 tons per day--were eventually sent to a landfill for disposal. (N.T. 55)

20. The conditions at the site were essentially the same on all three days of inspections. (N.T. 121)

21. Snyder conceded that a Department inspector informed him in the spring of 1987 that the baling operation required a permit. (N.T. 30-32)

22. The Appellants stipulated that baling operations continued at the facility until just weeks before the hearing. (N.T. 7)

23. It is not evident from the permit application that the Appellants had stopped using the baler to bale waste materials by the time of the permit denial. (Ex. D-1)

24. John Minihan, a compliance specialist with the Bureau of Waste Management, calculated the amount of the civil penalty on behalf of the Department. (N.T. 78, 90)

25. To perform the calculation, Minihan used a "civil penalty worksheet," a form drawn up by the Bureau. (N.T. 93-94)

26. Minihan left much of the worksheet blank when calculating Delaware Valley Scrap's penalty. (Ex. D-5)

27. Under the section entitled "Mandatory Penalty," Minihan put an "x" in the box in front of the first category and circled the box in front of the fifth. (Ex. D-5)

28. The first category read, "Operating without permit or in excess of final permitted elevations (municipal)--minimum $5,000/1/2 acre. ___ acres;" Minihan did not fill in an amount in the blank before "acres." (Ex. D-5)

29. The fifth category read, "Cessation/failure to comply with Department Order--minimum $1,000/day ___ days;" in the blank before "days," Minihan filled in the number "3." (Ex. D-5)

30. The bottom of the worksheet contained the following table (figures written in by Minihan are in **bold**):

	Violation No. 11-10-88	Violation No. 12-5-88	Violation No. 1-17-89
[I] DEGREE OF SEVERITY Severe ($12,500 - $25,000) Moderate ($ 5,000 - $12,500) Low ($ 1,000 - $ 5,000) Water Quality Chart	**1,500**	**1,500**	**1,500**
[II] COSTS INCURRED BY COMMONWEALTH			
[III] SAVINGS TO VIOLATOR			
[IV] DEGREE OF WILLFULNESS Willful ($12,500 - $25,000) Wreckless [sic] ($ 5,000 - $12,500) Negligent ($ 500 - $ 5,000) Accidental (none)	**5,000**	**5,000**	**5,000**
[V] PROMPTNESS OF REPORTING INCIDENT ($500 - $2,500)			
[VI] SUBTOTAL			
[VII] PAST HISTORY OF VIOLATIONS SUBTOTAL x .05 x VIOLATIONS (5 years)			

31. A third section of the worksheet, the "penalty action" section, was left entirely blank, including the entry for the total penalty (Ex. D-5).

32. When ascertaining the severity of the violations, Minihan considered the size of Delaware Valley Scrap's processing operation, the composition of the waste being processed, and the actual and potential threat that the operation posed to the environment (N.T. 91-92).

33. According to Minihan, the threat to the environment arose out of the fact that the waste consisted of various components, that it was exposed to the elements, and that there did not appear to be anything separating the waste from the surface of the ground (N.T. 91-92).

34. When ascertaining the willfulness of the violations, Minihan considered the fact that Delaware Valley Scrap realized it required a permit yet continued to process waste without one (N.T. 92).

DISCUSSION

Under 25 Pa. Code §21.101(c)(1), the Appellants bear the burden of proof with respect to the permit denial and must prove by a preponderance of evidence that the Department's denial of the permit application was arbitrary, capricious, contrary to law or a manifest abuse of discretion. Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Furthermore, the Appellants must prove that they are clearly entitled to the permit before the Board will order the Department to issue it. Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

The Department argued that the Appellants also bear the burden of proof with respect to the civil penalty assessment, by virtue of 25 Pa. Code §21.101(d). We, however, disagree. Section 21.101(d), by its terms, applies only to orders issued by the Department.[4] While the civil penalty assessment is contained within the Department's order, nonetheless 25 Pa.

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[4] Section 21.101(d) provides:

> When the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
>
> (1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a *prima facie* is made that a law or regulation is being violated; and
>
> (2) that the party alleged to be responsible for the environmental damage will be presumed to have possession, or the duty to have possession, of facts relating to the quantum and nature of such damage.
>
> 25 Pa. Code §21.101(d) (emphasis added)

Code §21.101(b)(1) governs the burden of proof in appeals of civil penalty assessments, see *e.g.* Brandywine Recyclers, Inc. v. DER, EHB Docket No. 91-124-E (Adjudication issued May 13, 1993), and §21.101(b)(1) places that burden squarely on the Department.

Before turning our attention to the permit denial and the civil penalty assessment, we must first address two preliminary questions: whether the Board should reopen the record so the Department can present evidence that Delaware Valley Scrap resumed its baling operation several weeks after the close of the hearing; and, whether the Board erred when it ruled that Snyder could refuse to answer one of the questions put to him by the Department because he had a privilege not to incriminate himself.

We need not reopen the record for the Department to present evidence that Delaware Valley Scrap resumed its baling operations after the close of the hearing. Requests to reopen the record for the purpose of introducing new evidence after a hearing has been closed but before an adjudication has been issued are governed by 1 Pa. Code §35.231(a) of the General Rules of Administrative Procedure. Spang & Co. v. Department of Environmental Resources, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991). Under that provision, petitions to reopen must "set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing." All that the Department's post-hearing brief said regarding the petition to reopen, however, was, "The Commonwealth requests that the Board reopen the record herein so that the Commonwealth may present evidence that [Delaware Valley Scrap] reopened the transfer operation several weeks after the hearings in this appeal" (The Department's post-hearing brief, p.7).

Even assuming the Department's request fulfilled the criteria set forth at 1 Pa. Code §35.231, we need not reopen the record here. While evidence of post-hearing violations would tend to support the Department's issuance of the order and permit denial, there is already, for reasons set forth later in this opinion, sufficient evidence on the record to sustain both actions. With regard to the civil penalty assessment, any violations after the hearing are irrelevant. The civil penalty here was assessed on the basis of violations alleged to have occurred on November 10, 1988, December 5, 1988, and January 17, 1989. Whether there have been violations since that time is immaterial for purposes of determining whether a "reasonable fit" exists between the violations on November 10, 1988, December 5, 1988, and January 17, 1989, and the civil penalty the Department assessed.

Nor did the Board err when it ruled that Snyder could refuse to answer one of the questions put to him by the Department on cross-examination because he had a privilege not to incriminate himself. The privilege was invoked during the course of the Department's cross-examination regarding Snyder's authority at the facility:

> **[Counsel for the Department]:** [Y]ou observed the conditions and what was physically going on day by day during the period 1987 to date?
>
> **[Snyder]:** I do, yes.
>
> **[Counsel for the Department]:** And your authority over the operation was such that you said subject to whatever disputes you might have over contract and so forth, but if you said, "let's stop taking in stuff for the processing facility unless and until we get a permit," your word would have stood, correct, you had the authority to make that decision?
>
> **[Snyder]:** That's correct.
>
> **[Counsel for the Department]:** But that didn't happen until about a week or so ago, right? You

> didn't stop, you didn't direct the processing operation to stop?
>
> **[Counsel for the Appellants]:** I am going to direct him not to answer that question because under the Code, there are certain criminal sanctions which may be applied to certain activities and I think he may be incriminating himself, so I am directing him not to answer.
>
> (N.T. 59)

Snyder himself never expressly invoked the privilege. He did not, however, answer the Department's question or otherwise indicate that he disagreed with the advice of his attorney regarding the privilege. While the Department argued that Snyder had either waived the privilege or failed to properly invoke it, the Board recognized the privilege and did not compel Snyder to answer (N.T. 61).

In its post-hearing brief, the Department maintained that the Board erred in its ruling because counsel for a witness cannot invoke the privilege on behalf of his client, the client must do so himself. The Department also argued that, once a witness starts to testify, he cannot invoke the privilege upon cross-examination. We find neither argument persuasive.

Both the U.S. Constitution and the Pennsylvania Constitution afford witnesses a privilege against self-incrimination. The Fifth Amendment of the U.S. Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. The Supreme Court has held that this provision applies to the states, Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 (1964); and protects a witness from being compelled to give incriminating answers in civil, as well as criminal proceedings. Re Gault, 387 U.S. 1, 87 S. Ct. 1428 (1967). Article I, §9, of the Pennsylvania Constitution also confers upon witnesses a privilege not to give evidence against themselves in a criminal proceeding. Like the privilege under the U.S. Constitution, it has

been held to extend to civil proceedings where a witness is asked to give testimony which might incriminate him in future criminal proceedings. Esterline v. Esterline, 181 Super. Ct. 532, 124 A.2d 133 (1956). The privilege in the Pennsylvania Constitution does not enlarge upon the self-incrimination protections afforded by the Fifth Amendment to the U.S. Constitution. Commonwealth v. Moss, 233 Pa. Super. 541, 334 A.2d 777 (1975). "For the court to properly overrule the claim of privilege," moreover, "it must be perfectly clear from a careful consideration of all the circumstances, that the witness is mistaken in the apprehension of self-incrimination and the answers cannot possibly have such tendency." Commonwealth v. Carrera, 424 Pa. 551, 554, 227 A.2d 627, 629 (1967) (emphasis in original).

While the Pennsylvania courts have not addressed the particular issue of whether an attorney can effectively invoke the privilege of self-incrimination on behalf of a client who is a witness, they have held that an attorney may call a witness' attention to the privilege and advise him not to answer. See *e.g.* Evans v. Metropolitan Life Ins. Co., 294 Pa. 406, 144 A. 294 (1928). The only question here, therefore, is whether a client-witness, after being advised of the privilege before the open tribunal, is presumed to have invoked the privilege or whether some affirmative act or statement from the client-witness himself is required as well. The former of the two approaches is the better one. In the words of one commentator, requiring the client to undertake affirmative action himself is "unnecessary and undesirable [:] When a lawyer, acting under authorization of the client and on behalf of the client, invokes the client's privilege, there is nothing to be gained by requiring the client to invoke the privilege himself." McCormick on Evidence, 4th ed., §120.

The Department is no more successful with regard to its other challenge to the Board's rulings. Citing Rogers v. United States, 340 U.S. 367 (1951), the Department argued that, once a witness starts to testify, he cannot invoke the privilege on cross-examination. Rogers does not, however, stand for the proposition the Department suggests. Rogers testified before a grand jury that she had been Treasurer of the Communist Party and had, at one time, possessed its records and membership lists. When asked to name the person she gave these materials to, Rogers refused to answer. Affirming a sentence for contempt, the Supreme Court found that in light of her prior testimony, Rogers could not decline to answer the question on Fifth Amendment self-incrimination grounds. Under the well-accepted rule, explained the Court, a witness who has voluntarily revealed self-incriminating facts without invoking the privilege cannot invoke it to avoid further disclosure of the details of the incriminating information. *Id.* at 373. Rogers is inapposite here because Snyder revealed no self-incriminating facts before he asserted the privilege.

A witness in a civil proceeding does not waive the privilege simply by taking the stand and testifying. He may claim the privilege only after he has taken the stand and has been asked an incriminating question. Commonwealth v. Cavanaugh, 159 Pa. Super 113, 46 A.2d 579 (1946). He may, therefore, assert the privilege even after he has started to testify. A witness, moreover, does not waive the privilege simply because he fails to invoke it upon direct examination. Even in criminal cases, where the rights of the accused are accorded special deference, it has been held that a witness for the prosecution can invoke the privilege upon cross-examination without having

his direct testimony stricken. See *e.g.*, State v. Roma, 199 Conn. 110, 505 A.2d 717 (1986). Therefore, we reject the Department's arguments and affirm the presiding Board Member's ruling on this issue.

Turning to the issue of the Department's action on the permit application, we find that the denial was justified.

The Department maintained that it had the authority to deny Delaware Valley Scrap's permit application for two reasons: Delaware Valley Scrap had engaged in unlawful conduct under the Solid Waste Management Act and the Clean Streams Law, and Delaware Valley Scrap's permit application did not contain a completed copy of the Department's official consent-to-entry form. While the Appellants argued that Delaware Valley Scrap did not violate the Clean Streams Law, they did not contend that Delaware Valley Scrap did not violate the Solid Waste Management Act. Instead, the Appellants argued that, even if Delaware Valley Scrap violated the Solid Waste Management Act, the Department abused its discretion by denying the permit application, thereby rendering the violations of the act "moot." The Appellants also contend that the lease agreement they submitted with the permit application was an adequate substitute for the consent-to-entry form required by the Department.

We need not address the issues of whether the lease agreement fulfilled the Department's consent-to-entry requirement or whether Delaware Valley Scrap violated the Clean Streams Law, for the Department was justified in denying the permit application on the basis of the alleged Solid Waste Management Act violations alone.

Delaware Valley Scrap accepted waste materials from a variety of stores, industrial plants, and private residences (N.T. 54-55). Some of the materials were source-separated, others were not (N.T. 54-55). They were piled near the baler and consisted of wood and metal products, cardboard,

paper, plastic, and food waste (N.T. 54-55, 121-122, 138; Ex. C-1-j). Delaware Valley Scrap had poured a concrete pad to keep waste from touching the surface of the ground, but the materials were piled in such a way that the concrete was totally obscured and it was impossible to tell whether the materials only lay upon the pad or whether some had overspread it and rested upon the ground itself (N.T. 134). "Pickers" sorted the waste by hand, separating the various classes of recyclable products from the materials destined for disposal (N.T. 122). The aluminum and certain other recyclables were baled, as was some of the material destined for disposal (N.T. 122). Approximately 70% of the bales consisted of recyclable materials (N.T. 49). The non-recyclable materials--approximately 40 to 50 tons per day--were eventually sent to a landfill for disposal (N.T. 55).

The conditions at the site were essentially the same on all three days of inspections (N.T. 121).

Snyder conceded that a Department inspector informed him in the spring of 1987 that the baling operation required a permit (N.T. 30-32). He submitted a permit application on January 14, 1988 (N.T. 10; Ex. D-1). The Department denied the permit application, however--a decision which was never appealed (N.T. 13-14, 24). A second permit application, the denial of which Delaware Valley Scrap and Snyder challenge in the instant appeal, was submitted on December 20, 1988 (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal). Although that permit was denied, the Appellants stipulated that baling operations continued at the facility until just weeks before the hearing (N.T. 7).

In its order, the Department asserted that, on November 10, 1988, December 5, 1988, and January 17, 1989, the Appellants violated §§201(a), 501(a), and 610(1), (2), and (4) of the Solid Waste Management Act, and 25

Pa. Code §271.101 (Delaware Valley Scrap's Notice of Appeal and Snyder's Notice of Appeal). Section 201(a) of the Solid Waste Management Act and 25 Pa. Code §271.101 prohibit persons from operating a municipal waste processing facility without a permit. Sections 501(a) and 610(2) and (4) of the Solid Waste Management Act make it unlawful to operate a solid waste processing facility without a permit. And §610(1) of the Act prohibits the dumping or depositing of solid waste on the surface of the ground without a permit.

The materials piled near the baler constituted "municipal waste" and "solid waste" within the meaning of those terms under the Solid Waste Management Act. Section 103 of the Solid Waste Mangement Act defines "municipal waste" to include "[a]ny ... material . .. resulting from operation of residential, municipal, commercial or institutional establishments...." The waste Delaware Valley Scrap piled near its baler was, by virtue of its origin, municipal waste, but it was also solid waste, since the definition of "solid waste" in §103 expressly includes municipal waste.

Delaware Valley Scrap violated §§201(a), 501(a), and 610(2) and (4) of the Act, as well as 25 Pa. Code §271.101, because it "processed" the waste at its facility. One "processes" waste under the Act if he employs "any method or technology used for the purpose of reducing the volume or bulk of municipal waste." 35 P.S. 6018.103. Therefore, the baler processed municipal waste. The Delaware Valley Scrap premises is a "facility" within the meaning of the Act because that term encompasses "[a]ll land, structures, and other appurtenances or improvements where municipal waste processing takes place." 35 P.S. 6018.103.

The Appellants also failed to establish that they did not violate §610(1) of the Solid Waste Management Act, which prohibits the dumping or depositing of solid waste directly on the ground. The only evidence adduced

regarding the alleged §610(1) violations was the testimony of Robert Fulton and John Minihan, both of whom testified that they could not tell whether all of the waste rested on the concrete pad (N.T. 95, 134). Because the Appellants bear the burden of proof with respect to the permit application, they had to establish that the waste was, in fact, confined to the pad. Because they failed to do so, it is appropriate to consider the §610(1) violations when determining whether the Department abused its discretion by denying Delaware Valley Scrap a permit.

In light of the violations of §§201(a), 501(a), and 610(1), (2), and (4) of the Act and 25 Pa. Code §271.101, the Department was justified in denying Delaware Valley Scrap's permit application. Under §610(9) of the Act, it is unlawful to violate any provisions of the Act or any of the Department's regulations. Section 503(d) of the Act, meanwhile, provides: "Any person ... [who] has engaged in unlawful conduct as defined in this act ... shall be denied any permit or license required under this act unless the permit or license application demonstrates to the satisfaction of the Department that the unlawful conduct has been corrected." Because it is not evident from the permit application that the Appellants had stopped using the baler to process municipal and solid waste, the Appellants failed to establish that the unlawful conduct had been corrected here (Ex. D-1).

The $19,500 civil penalty the Department assessed is more problematic than the permit denial. The penalty was based solely on the activity surrounding Delaware Valley Scrap's baling operation; it did not pertain to the oil contamination alleged to have resulted from the car crusher (N.T. 95). John Minihan, a compliance specialist with the Bureau of Waste Management,

calculated the amount of the civil penalty on behalf of the Department. (N.T. 78, 90) To do so, he used a "civil penalty worksheet," a form drawn up by the Bureau (N.T. 93-94).

The Department's method of calculating the civil penalties and the legal arguments it cites to support its figures are troublesome for a number of reasons. The civil penalties worksheet, for instance, is rife with pitfalls. One provision in the "Mandatory Penalty" portion of the worksheet seems to apply to any facility which requires a permit under the Act yet operates without one: the worksheet imposes a $5,000/half-acre minimum penalty for "operating without a permit..." (Ex. D-5). The Department's regulations, however, authorize the $5,000/half-acre minimum civil penalty only for municipal waste landfills operating without a permit. 25 Pa. Code §271.413(b). Where, as here, the Department attempts to apply that minimum penalty to a facility which is not a municipal waste landfill, the Department acts outside the scope of its authority.

The penalty calculation table in the worksheet is also suspect. Section 605 of the Solid Waste Management Act provides that the maximum penalty that the Department can assess per violation is $25,000, yet it is possible to generate penalties higher than that using the calculation table. If, for instance, a violation is very severe and entirely willful, the penalty assessed using the calculation table could equal, or even exceed, $50,000.

Even if the calculation table itself were adequate, the Department's calculation of the penalty here would still be flawed. As noted earlier, the Department's order alleges that on each of three days there were violations of §§201(a), 501(a), and 610(1), (2), and (4) of the Solid Waste Management Act

and 25 Pa. Code §271.101. While this amounts to six violations on each day, the Department calculated the civil penalty as if only one violation occurred on each day.

Finally, the Department is incorrect when it asserts that 25 Pa. Code §271.413(g) imposes a $2,000 per violation per day minimum penalty for each violation at issue in this appeal because the civil penalty assessment pertained to non-compliance with a previous Department order and was issued at the same time as a cessation order. First, 25 Pa. Code §271.413(g) imposes a penalty of $1,000--not $2,000, as the Department argues. Second, §271.413(g) does not even apply here. While there were, during the course of the hearing, allusions to a previous Department order to Delaware Valley Scrap, the Department never established that it issued a previous order to Delaware Valley Scrap or what that order pertained to.

Nor does 25 Pa. Code §271.413(g) authorize the Department to impose the $1,000 per violation per day minimum penalty simply because the Department issued an order at the same time it assessed the penalty. Section 271.413(g) provides:

> If a violation is included as a basis for an administrative order requiring cessation of solid waste management operations, or for another abatement order, and if the violation has not been abated within the abatement period set in the order, a minimum civil penalty of at least $1,000 shall be assessed for each day <u>during which the failure continues</u>.
>
> (emphasis added)

It is not apparent from the face of the regulation whether, when the regulation refers to "the failure" continuing, it refers to a failure to comply with the regulations or a failure to comply with the order. If it refers to a failure to comply with the regulations, then the Department could

assess the $1,000 penalty for repeated violations of the same provision, even if they occur before the order was issued. If, however, the language refers to a failure to comply with an order only if they occur after the order was issued, then the $1,000 penalty is not appropriate here. The history of the regulation sheds no light on which of the two alternatives was intended. The second of the two constructions--that the language in the regulation imposes the $1,000 minimum penalty only for violations which occur after the Department issues the order pertaining to them--is more reasonable. This construction provides an additional incentive for a violator to comply with the Department order yet would still explain why the regulation referred to "the failure" as opposed to "the violation" Because §271.413(g) does not authorize imposing the minimum penalty where the violations occurred before the order was issued, that penalty is inappropriate here.

In light of the foregoing, the Department's calculation of the civil penalty assessment was seriously flawed. In conducting our review of a civil penalty assessment, we look to see whether there is a "reasonable fit" between the violations and the amount of the penalty. Brandywine Recyclers, Inc. v. DER, EHB Docket No. 91-124-E (Adjudication issued May 13, 1993). Even if the particular method the Department used to calculate a civil penalty was incorrect, therefore, the Board will sustain that civil penalty where the amount of the penalty actually assessed would have been reasonable had the Department performed the calculation correctly.

In light of the violations of the Solid Waste Management Act the Department has established, the civil penalty the Department assessed against the Appellants, $19,500, was more than justified.

For purposes of the civil penalty assessment, the Department established all of the violations of the Solid Waste Management Act except for

those pertaining to §610(1). While the evidence presented at the hearing was inconclusive on the question of whether all the waste piled near the baler lay on the concrete pad or whether some lay directly on the surface of the ground, the Department adduced no evidence showing that some waste lay on the ground and the Appellants adduced no evidence showing that all of the waste was confined to the pad. Whether the Appellants or the Department prevailed on the §610 violations, therefore, depends upon who has the burden of proof. The burden rested on the Appellants for purposes of the permit denial, so we treated the §610 violations as established when ruling upon that aspect of the Department's action. But, for purposes of the civil penalty assessment, the burden rests on the Department. The Department could not prevail simply because the Appellants failed to demonstrate that all of the waste lay on the pad. Because it bore the burden of proof, the Department had to go one step further; it had to affirmatively demonstrate that some of the waste lay directly on the surface of the ground. The Department failed to do so here. The only evidence adduced pertaining to the §610 violations was testimony that it was unclear whether all the solid waste at the site rested on a concrete pad or whether the waste had overspread the pad, leaving some resting on the ground itself.

We will consider all of the other violations, however. Whether the Appellants or the Department bear the burden of proof, the evidence adduced at the hearing, discussed earlier with regard to the permit denial, establishes that the Appellants violated §§201(a), 501(a), and 610(2) and (4) of the Solid Waste Management Act and 25 Pa. Code §271.101 on each of the three days at issue.

The only remaining question is whether the $19,500 civil penalty is justified on the basis of these 15 violations. We find that it is. According

to the Department's regulations governing municipal waste management, the amount of a civil penalty assessment is based upon the seriousness of the violation; the costs expended by the Commonwealth; the costs the operator avoided; the willfulness of the violation; the number of previous violations which were the subject of a prior adjudication, agreement, consent order, or decree and which became final in the last five years; and "other relevant factors." 25 Pa. Code §271.412(b). The Department adduced evidence with respect to only two of the above criteria: the seriousness and the willfulness of the violations. The regulations do not provide particular factors to look to when determining the willfulness of a violation, but they do provide specific factors to consider when evaluating a violation's seriousness, including the injury to natural resources, the cost of restoration, the threat--actual or potential--to public health or safety, property damage, interference with property rights, and "other relevant factors." 25 Pa. Code §271.412(b)(1).

Because there were 15 violations, the Department's $19,500 civil penalty assessment would be justified if a penalty of at least $1,300 was merited for each of the individual violations. That amount or more was an appropriate penalty for each of the violations here. The Appellants knew of the permit requirement for the baling operation. Snyder had been informed of it earlier by a Department inspector and Snyder had submitted the first permit application for the baler before the violations at issue here. Furthermore, 40 or 50 tons of waste were processed daily, including some food waste. In light of the willfulness of the violations, the composition of the waste, the volume processed daily, and the fact that the Act authorizes penalties of up to $25,000 per violation, $1,300 per violation is not unreasonably high.

CONCLUSIONS OF LAW

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

2. A party appealing the denial of a permit by the Department bears the burden of proving by a preponderance of the evidence that the Department abused its discretion. 25 Pa. Code §21.101(c)(1).

3. The Department bears the burden of proof when it issues a civil penalty assessment. 25 Pa. Code §21.101(b)(1).

4. The Board will not reopen the record for the Department to present evidence of violations occurring after the hearing because those violations are irrelevant in reviewing the propriety of a civil penalty assessed on the basis of earlier violations, and there is already sufficient evidence on the record for the Board to sustain the Department's order and permit denial.

5. A lawyer can invoke the privilege against self-incrimination on behalf of a client who is a witness.

6. A witness does not waive the privilege against self-incrimination simply because he fails to invoke the privilege during direct examination.

7. The Appellants waived any objections they may have had to the Department's order by not including them in their post-hearing memorandum.

8. The materials Delaware Valley Scrap baled and piled near its baler constituted municipal waste.

9. It is unlawful to violate any provision of the Solid Waste Management Act or any of the Department's regulations. §610(9) of the Solid Waste Management Act, 35 P.S. §6018.610(9).

10. It is unlawful for persons to operate a municipal waste processing facility without a permit from the Department. §201(a) of the Solid Waste Management Act, 35 P.S. §6018.201(a), and 25 Pa. Code §271.101.

11. It is unlawful to operate a solid waste processing facility without a permit from the Department. §§501(a) and 610(2) and (4) of the Solid Waste Management Act, 35 P.S. §§6018.501(a), 6018.610(2) and 6018.610(4).

12. One "processes" waste if he employs any method or technology to reduce the volume or bulk of the waste. §103 of the Solid Waste Management Act, 35 P.S. §6018.103.

13. The Appellants "processed" waste when they baled it.

14. Dumping or depositing solid waste on the surface of the ground is prohibited without a permit. §610(1) of the Solid Waste Management Act, 35 P.S. §6018.610(1).

15. The Appellants failed to establish that none of the waste piled near the baler was dumped or deposited directly on the surface of the ground.

16. Where a person has engaged in unlawful conduct under the Solid Waste Management Act, the Department is authorized by §503(d) of the Solid Waste Management Act to deny any permit required under the Act unless that person's permit application demonstrates that the unlawful conduct has been corrected. 35 P.S. §6018.503(d).

17. The Appellants failed to demonstrate in their permit application that the unlawful conduct had been corrected.

18. In conducting its review of a civil penalty assessment, the Board looks to see whether there is a "reasonable fit" between the violations and the amount of the penalty. Brandywine Recyclers, Inc. v. DER, EHB Docket No. 91-124-E (Adjudication issued May 13, 1993).

19. Each violation of the Solid Waste Management Act and the regulations thereunder is treated as a separate offense for purposes of calculating civil penalties. §605 of the Solid Waste Management Act, 35 P.S. §6018.605.

20. The Department failed to demonstrate that the Appellants dumped or deposited solid waste on the surface of the ground; it did, however, establish that the other 15 violations occurred.

21. In light of the willfulness of the violations, the composition of the waste, the volume processed daily, and the fact that the Act authorizes penalties of up to $25,000 per violation, the $19,500 civil penalty here is not an abuse of discretion.

O R D E R

AND NOW, this 5th day of August, 1993, it is ordered that the Department's May 31, 1989, order, civil penalty assessment, and denial of Delaware Valley Scrap's permit application are sustained and the appeals of Delaware Valley Scrap and Jack Snyder are dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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DATED: August 5, 1993

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GANZER SAND & GRAVEL, INC.	:	
	:	
v.	:	EHB Docket No. 89-585-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 5, 1993

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

Where the Department revokes a solid waste permit on the basis of delinquent bond payments, but then fails to make this argument in its post-hearing brief, this issue is deemed to be abandoned. The Department may base its case on new grounds contained in its pre-hearing memorandum and amended pre-hearing memorandum even though these were not contained in the letter of revocation where there is no undue prejudice to the Appellant.

The Department may act pursuant to §503(e)(4) of the Solid Waste Management Act, 35 P.S. §6018.503(e), to revoke a solid waste permit for the proposed construction of a landfill where it demonstrates that the proposed design or operation of the landfill is not sufficient to prevent environmental harm from occurring. In the present case, however, the Department has not met its burden of proving that the proposed landfill will result in environmental harm, and, therefore, the permit is reinstated.

BACKGROUND

On November 1, 1982, Ganzer was issued Permit No. 300795 ("the Permit") for the construction and operation of a residual waste landfill in Greene Township, Erie County. Condition 17 of the permit required Ganzer to execute an initial collateral bond in the amount of $200,000 and, thereafter, to provide annual year-end bond payments in the amount of $15,000 per year.

On July 12, 1989, the Department sent Ganzer a "Notice of Deficiency" which stated that the Department's records indicated that Ganzer was delinquent in two of its collateral bond payments, for a total deficiency of $30,000. The notice advised Ganzer that "[f]ailure to provide the required bonding amount may result in an enforcement action being initiated against the...subject site."

By letter dated November 2, 1989, the Department notified Ganzer that its permit had been revoked pursuant to §§503(e) and 505 of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, at §§6018.503(e) and 505,[1] because of Ganzer's failure to provide collateral bond payments as required by Condition 17 of its permit and the Department's notice of July 12, 1989.

On December 1, 1989, Ganzer filed the present appeal, arguing that it was an abuse of discretion for the Department to revoke the permit, first, because the bond deficiency was subsequently corrected and, secondly, because the landfill had not begun operation and, therefore, posed no environmental

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[1] Section 503(e) of the SWMA states that any permit granted by the Department pursuant to that act is revocable at any time the Department determines that the facility is being operated in violation of any terms or conditions of the permit. 35 P.S. §6018.503(e). Section 505 of the SWMA requires the filing of a bond or bonds by operators of landfills. 35 P.S. §6018.505.

harm against which the bond could be called to indemnify.[2] Ganzer also argued that the Notice of Deficiency which was sent by the Department on July 12, 1989 did not clearly state that the permit would be revoked if the deficiency were not corrected. Finally, Ganzer argued that the landfill could not have been "operat[ing] in violation of any terms or conditions of the permit" under §503(e) of the SWMA because it had not yet been constructed.

On April 6, 1990, the Board received from Greene Township a petition to intervene in the proceeding. The petition was denied in an Opinion and Order issued on June 13, 1990. Ganzer Sand & Gravel, Inc. v. DER, 1990 EHB 625.

Pre-hearing memoranda were filed by Ganzer on March 20, 1990 and the Department on July 26, 1990. In its pre-hearing memorandum, the Department raised not only the issue of the bond deficiency but also a new matter. The Department argued that, based on new information which was not available to it at the time the permit was approved, it had determined that the landfill design would not protect against groundwater contamination.

On November 6, 1990, Ganzer filed a Motion to Limit Issues and to Strike the Department's Pre-Hearing Memorandum, in which it sought to strike the new matter raised in the Department's pre-hearing memorandum regarding the design of the landfill. The Department filed objections to the motion on November 30, 1990. Prior to any ruling on the motion by the Board, the parties filed a Joint Stipulation in which Ganzer withdrew the Motion to Limit Issues or to Strike the Department's Pre-Hearing Memorandum.

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[2] At the time of the permit revocation, construction of the landfill had not begun.

On February 21, 1991, Ganzer filed a Motion for Summary Judgment, which was denied on March 20, 1991 for failure to comply with the technical requirements of Pa. R.C.P. 1035(b). This was followed by a Motion for Partial Summary Judgment filed by Ganzer on April 26, 1991. In its motion, Ganzer argued that the Department was barred by the doctrines of *res judicata* and collateral estoppel from challenging the design of the landfill since the Department had successfully defended the landfill's design in earlier litigation brought by the Pennsylvania Game Commission. (See PA Game Commission v. DER and Ganzer Sand & Gravel, Inc., aff'd. 1985 EHB 1, Commonwealth, PA Game Commission v. Commonwealth, DER, aff'd. 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), Commonwealth, PA Game Commission v. Commonwealth, DER, aff'd. 521 Pa. 121, 555 A.2d 812 (1989)). The Department responded to the motion by filing a Brief in Opposition on or about May 29, 1991. Ganzer's motion was denied in an Opinion and Order issued on June 13, 1991. Ganzer Sand & Gravel, Inc. v. DER, 1991 EHB 957.

Ganzer and the Department filed Amended Pre-Hearing Memoranda on October 28, 1991 and November 8, 1991, respectively. The Department again added new grounds in support of the permit revocation. It claimed that the permit application had incorrectly stated that the operation would not affect a wetland or area of endangered plant species.

A hearing on the merits was held on November 12 through 14, 1991. Post-hearing briefs were filed by the Department on April 13, 1992 and Ganzer on May 28, 1992. The Department's brief did not address the issue of the delinquent bond payments but focused entirely on the question of whether the landfill posed a threat to the environment.

After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The appellant is Ganzer Sand & Gravel, Inc., a Pennsylvania corporation having a business office at 2412 Saltsman Road, Erie, Pennsylvania 16510. (Stip. 1)[3]

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency of the Commonwealth charged with the duty and authority to administer and enforce the SWMA; §1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated thereunder.

Permit Application

3. On or about April 30, 1980 Ganzer submitted Phase I of a permit application to construct and operate a residual waste landfill in Greene Township, Erie County, Pennsylvania. (Stip. 3; Jt. Ex. 1)

4. The landfill site borders LeBoeuf Creek on the east and north, State Game Land No. 218 on the north, and agricultural lands on the west and south. (Jt. Ex. 5)

5. At the time this permit was issued in 1982, the Department distinguished between two types of landfills: lined sites that collect leachate, and sites that depend on soil beneath the waste to renovate the

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[3] The following designations are used to refer to the sources of the findings of fact stated herein: "Stip. ___" refers to a stipulated fact in the parties' Joint Stipulation of Facts and Exhibits filed on October 22, 1991; "Jt. Ex. ___" refers to a joint exhibit submitted to the Board by Ganzer and the Department; "Comm. Ex. ___" refers to an exhibit submitted by the Department at the hearing; and "Ganzer Ex. ___" refers to an exhibit submitted by Ganzer at the hearing. "T. ___" refers to a page in the transcript.

leachate produced by the landfill before it enters the environment, known as natural renovation sites. (T. 14)

6. The Ganzer landfill was designed to be a natural renovation landfill. (T. 14)

7. The permit application provided that the landfill would accept 53,000 cubic yards per year of industrial waste generated by the Hammermill Paper Company ("Hammermill") plant located in Erie, Pennsylvania. (Stip. 4; Jt. Ex. 1)

8. The permit application represented that the Hammermill waste would be composed primarily of flyash, with some smaller quantities of clarifier sludge, Saveall, lime cake, bark, scrap lumber, grit and bark from flume pit, wood chips, cinders, pulp spills, pulp, logs, debris, wet broke and waste paper. (Jt. Ex. 3)

9. According to the design plans for the landfill, the renovative base of the landfill would vary in thickness and be located immediately above the seasonal high ground water table. The renovative base has a minimum thickness of forty inches and an average thickness of 13.44 feet. (Jt. Ex. 5; T. 135-136, 333)

10. On September 22, 1980, Ganzer submitted an Environmental Evaluation of the landfill site, known as a Module 9. (Jt. Ex. 2; Stip. 5)

11. The Module 9 submitted by Ganzer states that the proposed project is not located within a wetland. (T. 27; Jt. Ex. 2)

12. The Module 9 submitted by Ganzer also states that the proposed project is not located within an area which is a habitat of a rare,

threatened, or endangered species of plant or animal protected by the Federal Endangered Species Act of 1973 or recognized by the Pennsylvania Game Commission or Pennsylvania Fish Commission. (T. 27; Jt. Ex. 2)

13. Ganzer proposed to operate the landfill for twenty years. (Jt. Ex. 14)

Waste to Soil Ratio

14. At the time of the Department's review of Ganzer's permit application, residual waste landfills which treated leachate by natural renovation were required to have a base with a waste to soil ratio of one to one. (T. 14)

15. However, if the Department determined that the landfill would be accepting waste that did not adversely affect the environment, it could be designed as though it were accepting construction or demolition waste with a base having a waste to soil ratio of two to one. (T. 8, 15)

16. Because there was disagreement between the Department and Ganzer as to whether the Hammermill waste to be accepted by Ganzer had a potential for adversely affecting the environment, the parties agreed to conduct sampling of the waste so that an analysis of the leachate could be performed. (T. 9)

17. On August 12, 1981, the Department and Ganzer obtained samples of various wastes at the Hammermill plant to be used for the leachate analysis. (Stip. 8)

18. On December 17, 1981, Ganzer submitted the results of its leachate analysis to the Department. (Jt. Ex. 6)

19. On February 2, 1982, representatives of Ganzer and Hammermill met with Peter Duncan, then Secretary of the Department; James Snyder,

Director of the Department's Bureau of Waste Management; and Dwight Worley, then Chief of Operations of the Bureau of Waste Management. (Stip. 9)

20. At the February 2, 1982 meeting, Mr. Duncan decided that the Department would authorize construction of the Ganzer landfill with a waste to soil ratio of two to one. (Stip. 10)

21. This decision was made because the Hammermill residual waste to be disposed in the landfill was evaluated as having similar chemical characteristics as Class III demolition waste. (T. 10, 16)

22. Joint Exhibit 7 is a letter from Peter Duncan to William Kelly, a representative of Ganzer. The letter memorializes the February 2, 1982 meeting and reiterates the Department's decision to accept a two to one waste to soil base ratio for the Ganzer landfill. (T. 10)

23. Mr. Duncan's letter states that the basis for allowing the two to one ratio was the Department's reliance on the leachate analysis. (Jt. Ex. 7; T. 10-11)

Design of the Landfill

24. The proposed Ganzer landfill was designed by the firm of Richard A. Deiss and Associates. (T. 381)

25. Richard Deiss is a registered professional engineer and surveyor. (T. 376, 379) Mr. Deiss acted as Ganzer's engineer with regard to the preparation of its permit application. (T. 349)

26. The Ganzer landfill was designed to be a renovative base landfill in which layers of waste, not exceeding eight feet in depth, were to be placed over a base of attenuating soil. (T. 393-394)

27. In between each layer of waste would be placed a one-foot layer of intermediate soil. (T. 394)

28. In addition, any areas outside the immediate working area would be covered with soil. (T. 394)

29. The design of the landfill includes terraces on the outslopes of the site, aimed at retarding run-off onto the adjacent state gamelands. (T. 535-563, 542)

30. In the course of preparing the Ganzer permit application, Mr. Deiss calculated what he anticipated would be the rate of leachate generation at the Ganzer site. (T. 395, 398)

31. Mr. Deiss based his calculations on what is referred to as the "water balance method". (T. 395, 398)

32. The water balance method is a model for predicting leachate generation based on actual field findings and historic conditions on site. (T. 395, 396)

33. The factors which Mr. Deiss considered in employing the water balance method were as follows: the amount of rainfall per month, the number of days of sunlight, temperature, and the latitude of the site. Mr. Deiss examined records over a forty-year period to gather this information. (T. 396, 397)

Issuance of Permit No. 300795 to Ganzer

34. On November 1, 1982, the Department issued Solid Waste Permit No. 300795 to Ganzer authorizing the construction of a residual waste landfill in accordance with the documents submitted as part of the permit application. (Jt. Ex. 11)

35. The permit provided that it was subject to revocation for any violation of law or for failure to comply in whole or in part with any permit condition. (Jt. Ex. 11)

36. Condition 24 of the permit stated that failure to comply with the terms or conditions of the permit would be grounds for revocation or suspension of the permit. (Jt. Ex. 11)

37. Paragraph 11 of the permit required that each section of the renovation base be tested for conformance with the applicable rules and regulations and approved by the Department prior to deposition of waste into a particular section. (T. 62-63)

38. Paragraph 4 of Ganzer's permit required the submission of groundwater monitoring reports. (T. 62)

39. Between December 13 and 18, 1988, Ganzer installed three monitoring wells at the site of the proposed landfill. (Stip. 18)

40. Other than installation of the monitoring wells, Ganzer did not commence construction of the landfill. (Stip. 20)

41. The permit contains no expiration date. (T. 23)

Lowville No. 3 Landfill

42. Sometime after the issuance of Ganzer's permit, Hammermill applied for and received a permit to operate a disposal facility, known as Lowville No. 3 ("Lowville"), located approximately three miles from the Ganzer site. (T. 17)

43. Unlike the proposed Ganzer facility, Lowville is a lined site which collects leachate for off-site treatment at a sewage treatment plant. (T. 393)

44. Richard Deiss, who designed the proposed Ganzer facility, also was the designer of Lowville. (T. 381)

45. Lowville collects the very same wastes which were proposed to go to the Ganzer facility. (T. 17)

46. Over a course of years, the Department sampled leachate being generated at the Lowville site. (T. 17)

47. The characteristics of the leachate being generated at Lowville were different than that which the Department had projected for the leachate to be produced at the Ganzer facility. (T. 17)

48. The rate of production of leachate at Lowville is not a constant rate. (T. 398)

Revocation of Ganzer Permit

49. Anthony Talak, a Regional Engineer with the Department's Bureau of Waste Management, was the engineer in the Department who had reviewed Ganzer's permit application and who also was involved in the permit revocation. (T. 6, 7)

50. Mr. Talak determined that a more informed decision could be made about the characteristics of the leachate generated by the Hammermill waste based on actual samples of leachate produced at Lowville, as opposed to the Department's earlier projections which were based on laboratory analyses of waste samples from Hammermill. (T. 17-18)

51. In order to evaluate the potential impact of the Hammermill waste leachate on the underlying soil, Mr. Talak and his staff collected the following information: the chemical characteristics of the leachate generated at the Lowville site, the rate of flow of the leachate generated at the Lowville site, and the ability of the soil at the Ganzer site to renovate the leachate. (T. 18, 20-21)

52. The Department revoked Ganzer's permit on November 2, 1989. (Jt. Ex. 24)

53. The sole basis stated in the Department's letter of revocation was Ganzer's failure to make timely bond payments required by Condition 17 of the permit. (Jt. Ex. 24)

54. Mr. Talak testified that the permit revocation was based, in part, on the Department's determination that the design which had been approved for the Ganzer landfill posed a threat of future harm to the environment. (T. 68)

55. Mr. Talak had no knowledge of any adverse environmental impacts at the Ganzer site. (T. 56)

56. The Department's decision to revoke the permit dealt not with past violations at the site, but with potential future violations. (T. 56)

57. Revocation of the permit was not the only means of eliminating the Department's concern regarding the design of the landfill and the potential for environmental harm; the same result could have been achieved by means of suspension of the permit or modification of the terms of the permit. (T. 68)

58. Mr. Talak admitted that if Ganzer were to design a landfill which utilized a liner rather than a renovative soil base, that would eliminate the Department's concerns regarding renovation and the soil borrow areas' interference with wetlands. Mr. Talak did not know what effect the design might have with respect to endangered plant species. (T. 57)

59. In addition, paragraph 20 of the permit authorized the Department to take such remedial measures as might be necessary to prevent pollution to the waters of the Commonwealth. (T. 64-65) Mr. Talak agreed that this could include ordering Ganzer to cease depositing waste or disturbing borrow areas for soil. (T. 65)

Ion Exchange Study

60. Richard Marttala was employed as an environmental chemist with the Department at the time of the hearing. (T. 104)

61. Mr. Marttala holds a Bachelor of Science degree in biology and a Master of Science degree in plant science. His undergraduate and post-graduate work included courses in chemistry. (T. 100-102)

62. As an environmental chemist with the Department, Mr. Marttala was responsible for conducting various chemical analyses, including waste analysis. (T. 104)

63. Mr. Marttala conducted an ion exchange study for the Department concerning the Ganzer site prior to the Department's decision to revoke Ganzer's permit. (T. 21, 115, 119-120)

64. An ion is a positively or negatively charged atom. (T. 114)

65. A positively-charged ion is a cation. (T. 116) A negatively-charged ion is an anion. (T. 116)

66. Ion exchange is the interchange of ions between a fluid and a solid material. (T. 116)

67. In the ion exchange study conducted by the Department, the solid which was involved was soil and the fluid was leachate. (T. 116-117)

68. Leachate contains both positively and negatively charged ions. (T. 114)

69. Soil principally contains negatively charged ions. (T. 116, 119)

70. Mr. Marttala's calculations focused solely on the exchange of cations. (T. 115)

71. In cation exchange, cations in the leachate are absorbed by negatively charged sites in the soil. This renovative function of the soil removes contaminates from the leachate. (T. 20, 116)

72. The cation exchange capacity of soil is finite. (T. 20, 49)

73. However, the cation generation capacity of a given volume of waste also is finite. (T. 49) In other words, a given volume of waste has a finite number of cations that need to be attentuated in the soil. (T. 49)

74. Mr. Marttala did not calculate the number of free ions which would be contained in the leachate generated by a given volume of Hammermill waste. (T. 418) Rather, his calculations assumed that all of the parameters found in the laboratory analysis of the Hammermill waste leachate would be in a free ionic state. (T. 430)

75. If a parameter is not in a free ionic state, it will not deplete any of the cation exchange capacity of the soil through which it passes. (T. 430)

76. Mr. Marttala's ion exchange study relied on two sets of calculations: (a) calculation of the cation load of leachate which would be generated at the Ganzer site, and (b) calculation of the cation exchange capacity of the renovative soil at the Ganzer site. Based on this, the Department calculated what it determined to be the renovative capacity of the soil to be used in the Ganzer landfill. (T. 21-22)

Cation Load of Leachate

77. The Department sampled leachate from the Lowville site on at least fourteen occasions from February 25, 1986 through March 13, 1991. (Ganzer Ex. 1-A)

78. The samples of leachate which the Department obtained from Lowville were "grab samples" as opposed to "composite samples". (T. 183)

79. A "grab sample" is collected randomly at any one time. (T. 183, 439) With "composite sampling" several samples are taken over a certain period of time, and those individual portions are then put together to form one sample. (T. 183, 439-440)

80 The Department used analyses of the leachate samples from Lowville to calculate the approximate cation load of the leachate which would be generated from the waste authorized for disposal at the Ganzer site. (T. 121-125)

81. Mr. Marttala, who performed the cation load calculation, found four principal cation contaminants in the leachate: calcium, magnesium,[4] sodium, and iron. (T. 121, 124; Comm. Ex. 10)

82. Mr. Marttala calculated, in milligrams per liter (mg/l), the mean concentration of each of the four principal cations found in the leachate. (T. 123; Comm. Ex. 10)

83. Mr. Marttala converted the mean concentrations into milliequivalents per liter. This was accomplished by multiplying the concentration by the sum of the valence divided by gram molecular weight (GMW). (T. 124; Comm. Ex. 10)

84. The valence represents the combining power of one element with another. (T. 118)

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[4] Although Mr. Marttala's testimony on page 124 of the transcript refers to this as "manganese", we find this to be either a transcription error or an incorrect statement by Mr. Marttala since Comm. Ex. 10, which contains Mr. Marttala's calculations, refers to this as "Mg", which is the symbol for "magnesium". See Websters New Collegiate Dictionary (9th ed. 1989)

85. The gram molecular weight is the molecular weight of an element in grams. (T. 118)

86. A soil's cation exchange capacity is normally measured in terms of milliequivalents per liter. (T. 117)

87. Mr. Marttala added the mean concentrations of each of the four principal cations found in the leachate expressed in milliequivalents per liter (meq/l) for a total of 91.16 meq/l. This represents the concentration of cations in the Lowville leachate. This number was also used by Mr. Marttala to represent the cation concentration of the leachate which would be generated at the Ganzer site. (T. 125; Comm. Ex. 10)

88. On some of the fourteen samples taken between February 25, 1986 through March 13, 1991, no value is reported for a certain parameter either because no test was performed for that particular parameter on that occasion or because that particular parameter was not present at a detectable level on that sampling date. (T. 175)

89. Of the four principal cations found by Mr. Marttala to be present in the Lowville leachate, no value is reported for iron on two sampling dates. (Ganzer Ex. 1-A) On at least one of those dates, no value was reported because iron was not present in a detectable amount. (T. 175)

90. If a parameter was not present in a detectable amount, Mr. Marttala excluded it in calculating the mean concentration of the parameter rather than assigning a value of zero for it. (T. 175-176)

Leachate Flow Rate

91. In calculating the rate at which leachate would be produced at the Ganzer site, Mr. Marttala relied on data submitted to the Department over

a period of four years which contained the average daily rate of flow of leachate at Lowville measured in gallons per acre per day. (T. 133)

92. The flow rate data was converted into liters per acre per day (l/day). (T. 134)

93. Based on this data, Mr. Marttala calculated the average daily rate of flow of leachate at Lowville to be 8,599.90 l/day. (Comm. Ex. 12)

Cation Generation

94. Mr. Marttala multiplied 8,599.90 l/day, representing daily leachate flow rate at Lowville, with 91.16 meq/l, representing the cation load of the Lowville leachate, to arrive at a value of 783,966.89 meq/day. (T. 217; Comm. Ex. 12) This value represented Mr. Marttala's calculation of the flow rate of cations per acre per day which could be expected at the Ganzer site. (T. 217; Comm. Ex. 12)

95. Mr. Marttala's calculation of the cation load to be generated at the Ganzer site was based on two integral assumptions: first, that the rate of flow of leachate at the Ganzer landfill would be the same as that at Lowville and, second, that the quality of the leachate generated at the Ganzer landfill would be the same as that generated at Lowville. (T. 156-157)

96. Mr. Marttala did not believe that the design differences between the proposed Ganzer landfill and the Lowville landfill would cause there to be a difference in the amount of leachate flow generated by each, but did not investigate whether, in fact, the design differences could change the rate of flow. (T. 145)

Differences Between Ganzer and Lowville Which May Affect Rate of Leachate Flow

97. At the Lowville site, the entire lined area is open, exposing the waste to precipitation, until final elevation is reached and the cover soil is placed. (T. 394)

98. At the Ganzer operation, there would be the continual placement of layers of intermediate cover soil every eight feet as the landfill progressed. The only area where waste would be exposed to precipitation would be the working area where soil cover had not yet been placed. (T. 394-395)

99. Although the terrace design of the landfill site will slow the movement of runoff, the placement of intermediate layers of compacted cover soil in the landfill will decrease the amount of rainfall to be diverted from coming into contact with the waste. (T. 400-401, 535-536) The Ganzer landfill was specifically designed to limit precipitation from entering the landfill. (T. 400-401)

100. Leachate generation is a function of precipitation. (T. 527)

101. Restricting the amount of precipitation coming into contact with the waste is likely to reduce the volume of leachate generation. (T. 395)

102. The areas of compacted soil cover which would be used in the Ganzer design are less permeable than the layers of waste and will slow the rate at which leachate passes through the landfill. (T. 399-400)

Cation Exchange Capacity of the Soil

103. Soil samples from multiple locations on the Ganzer site were collected by Departmental regional soil scientist, John Guth. (T. 77, 79, 81, 82) These sampling locations, or "borrow areas", are shown on maps marked

Comm. Ex. 6 and 7. (T. 78-80) The borrow areas consist of both undisturbed areas as well as overburden piles adjacent to the gravel pit operation. (T. 80, 504; Comm. Ex. 6, 7)

104. In his capacity as regional soil scientist, Mr. Guth had responsibility for reviewing permit applications for landfills and waste activities that involved the use of soil. (T. 75)

105. Mr. Guth holds a bachelor's degree in environmental resource management, with a minor in soil science. (T. 76)

106. Mr. Guth dug into the soil approximately 2-1/2 to 3 feet to obtain the samples. (T. 85) In general, soils at the Ganzer site will have a higher exchange capacity at the surface than that further in depth. (T. 503)

107. Mr. Guth's soil samples were sent to the Department's laboratory for analysis of their cation exchange capacity ("CEC"). (T. 77, 82)

108. The laboratory reports of the samples taken by Mr. Guth, showing the CEC of the soil from each borrow area, were marked and admitted as Comm. Ex. 5B. (T. 77, 99-100)

109. A total CEC for the combined soil was calculated by Mr. Marttala. (T. 127)

110. Mr. Marttala first determined the weighted CEC for each borrow area, which is the volume of soil divided by one thousand times the actual CEC. This number was then divided again by one thousand. (T. 127)

111. Mr. Marttala then added the weighted CEC's for each borrow area for a total weighted CEC of 15.30. (T. 127; Comm. Ex. 11)

112. Next, Mr. Marttala calculated the weight of one acre of soil one foot in depth. (T. 128-129) He determined this figure to be 1,680,682

kilograms (kg). (Comm. Ex. 11) In arriving at this figure, Mr. Marttala did not weigh any of the soil samples taken from the Ganzer site. Rather, he based his calculations on information from reference manuals regarding average soil densities. (T. 128, 169)

113. Mr. Marttala admitted that soil densities can vary, and that the references he relied on did not take into account that compaction might occur at the Ganzer site. (T. 169)

114. Finally, Mr. Marttala multiplied the total weighted CEC per 100 grams (15.30 meq/100g) by the weight of one acre of soil one foot deep (1,680,682 kg). He then multiplied that by a conversion factor of 1000 g/kg in order to convert the calculation to one measured in milliequivalents. (T. 129, 132; Comm. Ex. 11)

115. Mr. Marttala arrived at a figure of 257,144,346 meq, which represents his calculation of the total available CEC of one acre of soil measuring one foot in depth at the Ganzer site. (T. 130, 132; Comm. Ex. 11)

Attenuative Life of Soil Base

116. Once the attenuative life of the soil is exhausted, leachate will pass through the soil unattenuated. (T. 136)

117. Using the cation exchange capacity, cation load, and leachate flow rate that he had calculated, Mr. Marttala calculated what he determined would be the attenuative life of the landfill. (T. 134-135)

118. The average depth of renovative soil base for the landfill is 13.44 feet. (T. 135, 136)

119. Using the cation exchange capacity equation set forth above, Mr. Marttala calculated the cation exchange capacity of 13.44 feet of soil to be 3,456,020,010 meq. (T. 136; Comm. Ex. 12)

120. Mr. Marttala then divided this figure by the cation load of the Hammermill leachate (783,966.89 meq/day) to arrive at a figure of 4,408, representing the number of days of renovative capacity of the soil. (T. 136; Ex. C-12) This converts to 12.08 years. (Comm. Ex. 12)

121. The narrowest depth of renovative base indicated in the design of the landfill is 3.30 feet. (T. 137) Again using the aforesaid equation, Mr. Marttala calculated the renovative capacity of 3.30 feet of soil to be 2.96 years. (T. 138)

122. Mr. Marttala's laboratory calculations of the cation exchange capacity of various depths of soil assume uniform exposure of the soil to the leachate. (T. 140) Under actual field conditions, the cation exchange capacity will depend upon available pore space. (T. 139)

123. The percentage of pore space can be calculated by dividing the bulk density of the soil by the density of the individual particles of which the soil is composed and then multiplying that figure by 100. (T. 139; Comm. Ex. 13)

124. As bulk density decreases, porosity increases. (T. 140)

125. Mr. Marttala arrived at the life expectancy of the Ganzer landfill by multiplying the total available cation exchange capacity of the soil by the pore space, and dividing that by the cation load of the leachate. (T. 140-141)

126. Mr. Marttala calculated that the life expectancy of the landfill ranged from 5.76 years at average soil depth to 1.21 years at areas with the least amount of soil depth. (T. 141; Comm. Ex. 13)

127. In calculating the life expectancy of the Ganzer landfill, Mr. Marttala did not take into account the attenuative effect of the intermediate soils; he considered only the renovative base. (T. 164-165)

128. Attenuation would also occur with the intermediate soils, and this would increase the attenuative ability of the landfill. (T. 432, 541)

129. Mr. Marttala had no field data to support his conclusion that leachate would continue to be generated at the Ganzer site at the same strength over a period of time. (T. 197)

130. In performing his calculations of the attenuative life of the soil base at the landfill, Mr. Marttala did not take into account the volume of waste which could permissibly be deposited over the soil base at its various thicknesses. (T. 165, 167)

Other Processes Involved in Attenuation

131. Ion exchange is only one part of the attenuation process. (T. 428, 429) At least three other processes are involved in attenuation, including a physical process, a biological process, and a chemical reaction known as adsorption. (T. 422-425)

132. In the physical process, as leachate reaches the attenuating soil, the soil filters and strains particles in the leachate which are larger than pore spaces in the soil. (T. 422-423)

133. In the biological process, organic materials in the waste are broken down by bacterial action. (T. 423-424)

134. Adsorption involves the adherence of ions and compounds to the surface area of the attenuating soil. (T. 425)

135. The aforesaid attenuation processes will occur in addition to ion exchange and regardless of the cation exchange capacity of the soil.

(T. 428-429) All of the processes of attenuation are interrelated. (T. 426, 428)

136. Mr. Deiss considered the processes of attenuation other than ion exchange to be "significant" attenuative processes. (T. 429)

Wetland Delineation

137. Gordon Buckley is employed by the Department as a wetlands biologist for Western Pennsylvania. (T. 250)

138. Mr. Buckley holds a Bachelor of Science degree in biology and has completed several courses and seminars dealing with wetlands. (T. 247, 248) Mr. Buckley also received field instruction for six months from the Army Corps of Engineers on wetlands delineation. (T. 250)

139. At the time of the hearing, Mr. Buckley had performed verifications of 300 to 400 wetlands and approximately 25 to 30 full-scale wetlands delineations. (T. 250-251)

140. Wetlands consist of an area containing wetland hydrology, in which water saturates the soil for a certain duration, changing the soils' characteristics and promoting the development of plants which grow in saturated conditions. (T. 253)

141. Wetlands are identified by three parameters: hydrology, hydric soils, and hydrophytic vegetation, which are plants adapted for growing in saturated or anaerobic conditions. (T. 255, 256, 257) Under normal conditions, all three parameters must be met in order for an area to constitute a wetland. (T. 255, 263)

142. According to Mr. Buckley, the plants are dynamic communities; that is, they can move, disappear, and reappear. The hydrology also is dynamic; certain times of the year it is not evident. (T. 257)

143. Wetlands serve various functions, including the following: wildlife habitat, groundwater recharge, pollution filters, flood water retention, and siltation reduction. (T. 253-254)

144. Mr. Buckley conducted a wetlands assessment at the Ganzer site on five days between May 9, 1991 and June 13, 1991. (T. 258; Comm. Ex. 14)

145. Mr. Buckley conducted sampling of eighteen areas on the Ganzer site and reviewed existing field data. (T. 266, 272)

146. Mr. Buckley began his sampling by digging a hole in the soil at least 18 inches deep. (T. 255) Because his sampling took place during a drought season, he looked for signs of past hydrology, such as an indication that there had been reduced anaerobic conditions in the soil for an extended period of time. (T. 255-256)

147. The first step in delineating a wetland is to determine the limit of the area containing hydric soil. (T. 257-258, 259, 264)

148. The next step is to determine the presence of wetlands vegetation. (T. 257, 259)

149. Mr. Buckley found the three wetlands indicators to be present at some, but not all, of the locations he sampled. (Comm. Ex. 14; T. 263, 265-266, 275)

150. Mr. Buckley determined the wetlands which he delineated at the Ganzer site to be hydrologically connected, flowing on a west to east pattern toward an unnamed tributary of LeBouef Creek, which flows north into State Gamelands 218. (T. 269)

151. No part of the proposed disposal area lies within the area designated as wetlands by Mr. Buckley. (T. 275; Comm. Ex. 15C)

152. Whenever Mr. Buckley determined the boundary of a wetland at a certain location, he marked it with a flag. (T. 268)

153. Joel Fair and Anthony Talak conducted a survey of the flags placed on the site by Mr. Buckley. (T. 309, 330)

154. Mr. Fair conducted the first two days of the survey, which covered the northern part of the site. (T. 310) Mr. Talak then completed the survey. (T. 309, 330)

155. Mr. Fair used both his and Mr. Talak's field notes to sketch the outline of the wetlands onto a map. Mr. Fair's drawing was admitted at the hearing as Comm. Ex. 15C. (T. 268, 269, 310, 311, 315, 319)

156. Mr. Fair is employed as a Sanitary Engineer by the Department. (T. 308) He had been employed in this capacity for three and one-half years. (T. 308)

157. Mr. Fair is not a registered surveyor. (T. 312) Only a small portion of his work as a Sanitary Engineer involves surveying. (T. 313-314) He completed one course in surveying in 1989. (T. 313, 314)

158. At the time of the hearing, Mr. Fair had surveyed a total of five sites. (T. 314) The survey of the Ganzer site was his first survey for the purpose of delineating a wetland. (T. 314)

159. Mr. Talak completed two surveying courses and received training in the use of surveying equipment. (T. 328) Mr. Talak is not a registered surveyor. (T. 329) At the time of the hearing, he had conducted two surveying courses for Department personnel. (T. 328)

160. At the time of the hearing, Mr. Talak had performed approximately 15 surveys for the Department in the course of six or seven

years. (T. 328, 329) The Ganzer site was the first wetlands delineation survey he had performed. (T. 329)

161. Neither Mr. Fair nor Mr. Talak completed a closure of their survey. (T. 325, 341)

162. Closure is a routine part of a survey and is necessary to ensure the survey's accuracy. It involves closing around the surveyed points and checking it mathmatically to end up at the starting point of the survey. (T. 443, 444) By closing a survey, one picks up errors which may have occurred within the survey, such as with angle readings and distance readings. (T. 443)

163. Comm. Ex. 15B is an overlay which depicts, *inter alia*, the soil borrow areas for the landfill. (T. 316; Comm. Ex. 15B)

164. When Comm. Ex. 15B, showing the soil borrow areas, is placed over Comm. Ex. 15C, depicting the wetlands area, some of the soil borrow areas fall within the perimeter of the wetlands area. (Comm. Ex. 15B and 15C)

165. Mr. Fair did no surveying to establish the boundary lines of the soil borrow areas. (T. 317) These lines were based on information obtained from documents accompanying the permit application. (T. 316-317)

Endangered Plant Species

166. James Bissell is a plant taxonomist. He holds a Bachelor of Science degree in plant ecology and a Master of Science degree in range ecology, and is employed as the Coordinator of Natural Areas for the Cleveland Museum of Natural History. (T. 278, 279, 280, 285)

167. In his position with the museum, Mr. Bissell has performed work for the Bureau of Forestry since 1985 in identifying rare plant species in Pennsylvania. (T. 283-284)

168. Mr. Bissell inspected the Ganzer site on July 17, 1991. (T. 287; Comm. Ex. 17)

169. During this inspection, he found three varieties of endangered species of plants existing on the Ganzer property. (T. 288-289; Comm. Ex. 17) A species of plant is listed as endangered when there are only one to five occurrences of that species in the state. (T. 291, 295)

170. Mr. Bissell relied on Mr. Buckley's map and a topographic map to guide him in locating the boundary line of the Ganzer property. (T. 300)

171. All of the endangered plant species observed by Mr. Bissell were located near the Ganzer property line. (T. 299)

172. None of the endangered species of plants were found within the proposed disposal area. (T. 301; Comm. Ex. 15C and 15C)

173. Comm. Ex. 15D depicts the approximate location of the endangered plant species found by Mr. Bissell. It does not depict surveyed areas. (Comm. Ex. 15D; T. 301, 326)[5]

174. The areas on Comm. Ex. 15D depicting the approximate location of the plant species were drawn by Joel Fair based on notations made by Mr. Buckley, who accompanied Mr. Bissell on his site view. (T. 288, 301, 326)

175. Plant species are dynamic communities which can change, disappear, and reappear. (T. 298)

DISCUSSION

The Department bears the burden of proving that its revocation of Ganzer's permit was not an abuse of discretion or violation of law. 25 Pa. Code §21.101(b)(2); Armond Wazelle v. DER, 1983 EHB 576. Ganzer has the

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[5] Page 301 of the transcript incorrectly refers to this exhibit as "Commonwealth Exhibit 15B"; this should read "15D".

burden of proof with respect to any affirmative defenses it asserts. 25 Pa. Code §21.101(a).

Before turning to a discussion of whether the Department has met its burden of proof, we must first examine the issues which are before us in this appeal. In doing so, we note that this matter has changed significantly since the filing of the appeal.

The basis for the Department's revocation of Ganzer's permit which was set forth in its letter of revocation of November 2, 1989 was Ganzer's failure to provide timely bond payments as required by Condition 17 of its permit. Although there appears to be no dispute that Ganzer was, in fact, delinquent in its bond payments in violation of Condition 17 of its permit, the Department did not address this matter in its post-hearing brief.[6] Although the Board does exercise *de novo* review over Department actions,[7] we have consistently held that a party who fails to preserve an issue in its post-hearing brief abandons that issue. Fairview Mining Company v. DER, 1992 EHB 1210; Willowbrook Mining Company v. DER, 1992 EHB 303; Pennsylvania-American Water Company v. DER, 1992 EHB 124; Laurel Ridge Coal, Inc. v. DER, 1990 EHB 486; Lucky Strike Coal Co. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). Because the Department failed to raise any argument in its post-hearing brief regarding Ganzer's delinquent bond payments, it is deemed to have abandoned that issue. The Department's post-hearing brief

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[6] Although the Department made proposed findings of fact regarding the failure to submit timely bond payments, no arguments were raised regarding this matter.

[7] See, Warren Sand & Gravel Co. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 203, 341 A.2d 556 (1975).

focuses entirely on the question of whether environmental harm is likely to result if the landfill is constructed and whether Ganzer's permit application contained inaccurate or incorrect information regarding the landfill's impact on a wetland and endangered plant species.

This leads us to the question of whether the Department may base its case on grounds which were not stated in its letter of revocation as a basis for revoking the permit, but which were later raised in its pre-hearing memorandum and an amendment thereto. This matter has been addressed by the Board previously in Melvin D. Reiner v. DER, 1982 EHB 183, and Orville Richter d/b/a Richter Trucking Co. v. DER, 1984 EHB 43, both dealing with bond forfeitures.

In Melvin D. Reiner, the appellant complained that the case presented by the Department at the merits hearing was not based on the alleged violations contained in its forfeiture letter. The Board, however, found that the Department's pre-hearing memorandum, filed three months before the hearing, gave the appellant adequate notice of the alleged violations the Department intended to prove at the hearing to support its forfeiture of the appellant's bonds, despite the fact that the Department had alleged different violations in its forfeiture letter. Based on this finding the Board determined that the appellant's constitutional right to due notice had not been violated.

Orville Richter involved a similar set of facts. In that case, the Department's letter of forfeiture referred merely to prior "Notices of Violation", which included a notification to the appellant that he was mining in the visual corridor of a river designated for study as a Wild and Scenic River. When the Department filed its pre-hearing memorandum, it alleged a

total of fourteen violations at the appellant's sites, none of which included the visual corridor issue. The appellant's pre-hearing memorandum, which was filed on the same day as the Department's, concentrated almost entirely on the visual corridor issue and did not address the fourteen violations newly alleged by the Department. Nevertheless, the Board determined that because the Department's pre-hearing memorandum, filed eight months before the hearing, clearly stated the allegations on which the Department was relying, it was sufficient to put the appellant on notice of the violations which the Department would attempt to prove at the hearing.

In the present case, Ganzer appears to have been at least somewhat aware that the Department questioned the safety of the proposed design of the landfill when it filed its appeal, as is evidenced by paragraph 10 of its notice of appeal which reads as follows:

> "...this Honorable Board has determined, after extensive hearing, that the operation of the landfill as proposed and permitted would NOT adversely affect the environment. This determination was subsequently affirmed on the merits by both the Commonwealth Court and the Supreme Court of Pennsylvania, after a consideration of the record by each." (Citations omitted).

Moreover, Ganzer voiced no objection to the new arguments raised by the Department in its pre-hearing memorandum. Although Ganzer did file a Motion to Limit Issues or to Strike the Department's Pre-Hearing Memorandum on the basis that it contained new grounds for the revocation which were not stated in the November 2, 1989 letter, Ganzer subsequently withdrew this motion. Finally, Ganzer's post-hearing brief responds to all of the new grounds raised by the Department with respect to the question of environmental safety. This includes the two new grounds raised by the Department in its amended

pre-hearing memorandum filed just four days before the start of the hearing. Because Ganzer has not objected to these issues nor alleged that it received inadequate notice that the Department intended to rely on these issues, they shall be addressed herein.

Therefore, we find that the Department is not precluded from relying on the aforesaid arguments even though they were not provided as a basis for the revocation of Ganzer's permit in the Department's November 2, 1989 letter of revocation.

In reaching this conclusion, however, we do not wish to say that the Department is free, at any time during a proceeding, to raise new grounds as the basis for its action. In particular, we strongly discourage a practice in which the Department provides one reason when it takes an action and then propounds an entirely different reason for it after an appeal has been filed. If, during the course of a proceeding, the Department becomes aware of additional bases for a particular action, it is always free to raise them through an amendment to its earlier action. However, we highly discourage the method employed in the present case, in which the Department has, without any explanation, completely abandoned the reason given for the permit revocation in the first place and has, instead, based its case upon an entirely new theory, which evolved throughout the course of this proceeding. It is only because we have clearly determined that Ganzer will suffer no undue prejudice

as a result of the Department's action that we will allow the Department to abandon its original basis for the revocation and to rely on new grounds in support thereof.[8]

Impact on Wetlands and Endangered Plant Species

We shall first consider the Department's allegation that Ganzer's permit application provided incomplete or inaccurate information with respect to whether the proposed project would impact a wetland or endangered plant species. The method by which the Department gathers this information is through an applicant's completion of a Module 9, which is part of the permit application process. The Module 9 submitted by Ganzer on September 22, 1980 stated that the proposed landfill project was not located within a wetland or an area which is a habitat of rare, threatened, or endangered plant species. (F.F. 11, 12)

At the hearing, the Department presented the testimony of Gordon Buckley, a wetland biologist employed by the Department, and James Bissell, a plant taxonomist, both of whom visited the Ganzer site in 1991. Mr. Buckley spent five days at the Ganzer site in 1991 for the purpose of identifying and delineating wetlands. Although Mr. Buckley did identify the presence of wetlands at the Ganzer site, none lay within the perimeter of the disposal area of the proposed landfill. (F.F. 151) Mr. Bissell visited the Ganzer site on July 17, 1991. During this visit, he observed three varieties of

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[8] All parties appearing before this Board in the future should be aware of this Board's condemnation of eleventh hour amendments to pre-hearing memoranda especially the type of amendment which adds new grounds for a party's position.

endangered plant species growing on the site near its property line. Again, none of these were found within the disposal area of the proposed landfill. (F.F. 172)

The Department, however, argues that even though the actual disposal area of the landfill does not fall within a wetland or area of endangered plant species, the soil borrow locations, or locations from which the renovative soil is to be taken to construct the landfill, do affect these areas. The Department introduced a set of maps and overlays (Comm. Ex. 15A-15D) at the hearing which indicate that a portion of the soil borrow areas fall within the area of a wetland or an endangered plant species. However, there are two problems with the Department's argument.

First, the Department failed to establish the reliability of its maps. A survey of the area identified by Mr. Buckley as a wetland was performed by Department employees Joel Fair and Anthony Talak based on flags which had been placed by Mr. Buckley. Mr. Fair conducted the first two days of the survey and Mr. Talak completed it. Mr. Fair then translated their field measurements into a map designated as Commonwealth Exhibit 15C. However, neither Mr. Fair nor Mr. Talak are registered surveyors, and surveying comprises only a small portion of their work for the Department. Nor did Mr. Fair or Mr. Talak complete a routine closure of their survey to determine its accuracy. (F.F. 161, 162)

Commonwealth Exhibit 15D represents the areas of endangered plant species found by Mr. Bissell at the Ganzer site. This map was prepared by Mr. Fair based on notations made by Mr. Buckley when he accompanied Mr. Bissell on

his site view. By Mr. Fair's own admission, the map does not attempt to show the exact area where the plan species were found but simply the "general location". (T. 327)

Secondly, and more importantly, Mr. Buckley's and Mr. Bissell's site visits were not conducted until 1991, eleven years after Ganzer submitted its permit application. Without further data, we are unable to say with any certainty that the conditions which existed in 1991 when Mr. Buckley and Mr. Bissell visited the site are identical to those which existed at the time Ganzer applied for its permit. Both Mr. Buckley and Mr. Bissell testified that such conditions do not remain static. Therefore, the fact that Mr. Buckley and Mr. Bissell discovered the existence of wetlands and endangered plant species on the Ganzer site in 1991 fails to prove that Ganzer provided incomplete or false information on these conditions in its permit application in 1980. We, therefore, find that the Department has failed to carry its burden of proving that Ganzer's application provided inaccurate and incomplete information justifying its revocation.

As a further note, the presence of wetlands at the Ganzer site would not automatically prohibit construction of the landfill. As Ganzer points out in its post-hearing brief, the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, does not automatically ban the disturbance of a wetland but, rather, requires a permit before one may do so, 32 P.S. §693.6, and further requires an evaluation by the Department of whether the public benefits outweigh the environmental harm. 25 Pa. Code §105.16. Additionally, the Department appears not to have considered whether Ganzer could have substituted other soils, either on-site or off-site, to meet the renovative requirements of the landfill so as not to

disturb the areas which might encroach on a wetland or habitat of endangered plant species.

Finally, Ganzer raises the argument that if it were to construct a lined facility, as opposed to a renovative base facility, under the residual waste regulations which were proposed at the time of the hearing,[9] the issue of the soil borrow areas disturbing a wetland or endangered plant habitat would be moot. Because we have already determined that the Department failed to carry its burden of proof with respect to the question of whether Ganzer's permit application contained inaccurate information, we need not address this issue. Willowbrook Mining Company v. DER, 1992 EHB 303.

Potential for Environmental Harm

The Department asserts that it had the authority to revoke Ganzer's permit under §503(e) of the SWMA, 35 P.S. §6018.503(e), when it determined that operation of the landfill would result in harm to the environment. Section 503(e) of the SWMA provides that a permit is revocable at any time the Department determines that the facility

> (1) is, or has been, conducted in violation of [the SWMA] or the rules, regulations, [sic] adopted pursuant to the [SWMA];
>
> (2) is creating a public nuisance;
>
> (3) is creating a potential hazard to the public health, safety and welfare;
>
> (4) adversely affects the environment;
>
> (5) is being operated in violation of any terms or conditions of the permit; or

[9] A discussion of the residual waste regulations, which were implemented after this case was heard, appears later in this adjudication.

(6) was operated pursuant to a permit or license that was not granted in accordance with law.

35 P.S. §6018.503(e)[10]

Ganzer argues that because the landfill had not yet been constructed, it could not be determined that it was "being operated" in violation of any of the provisions of the SWMA or the conditions of its permit pursuant to §503(e).[11] As Ganzer points out, the provisions of §503(e), as well as those of §503(c), appear to deal with past or present conditions, rather than future violations.

The Department cites Harman Coal Co. v. Commonwealth, Department of Environmental Resources, 34 Pa. Cmwlth. 610, 384 A.2d 289 (1978), in support of its position. In Harman, the Commonwealth Court affirmed the EHB's finding that a mine drainage permit was properly denied where the evidence indicated there was a high probability that pollution would result from the proposed mining. The Department argues that, just as it would be an abuse of discretion to issue a permit where there is evidence of potential pollution, it follows that if the Department discovers evidence of potential pollution after issuance of the permit, but prior to construction of the facility, the Department has an obligation to reverse its decision and revoke the permit.

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[10] Although not cited by the Department, Section 503(c) of the SWMA provides further authorization for the Department to revoke a permit if it finds that the permittee has failed to comply with any provisions of the SWMA or any other statute dealing with protection of the environment or public health, any rule or regulation of the Department or any permit condition, or if the Department finds that the permittee has shown a lack of ability to comply with the provisions of the statutes, regulations, or permit conditions as indicated by past or continuing violations. 35 P.S. §6018.503(c).

[11] Although this argument was raised by Ganzer primarily with respect to the bond issue, it is also relevant to this discussion.

We are aware of no other case where the Department has revoked a permit, not on the basis of past or present violations, but based solely on the threat of future violations. The only case in which the Board has come close to addressing this issue was Franklin Township Board of Supervisors v. DER ("Franklin Township"), 1992 EHB 266. That case involved the Department's refusal to reissue, and subsequent revocation of, a solid waste permit for a natural renovation landfill, based, in part, on the results of a technical review which showed that natural renovation was no longer a viable landfill design theory and would not protect the groundwater from contamination. The Department had issued a solid waste permit to Landfill Acres, Inc. for the construction of a demolition landfill and a sanitary landfill in Franklin Township, Huntingdon County., Both were designed to be natural renovation landfills. Landfill Acres subsequently sold the property covered by the permit. The only action which had been taken under the permit was the construction of a trench at the site of the sanitary landfill; no disposal activities had ever taken place at either site. When the new owners of the sites, collectively referred to as "Delta", applied for a reissuance of the solid waste permit, pursuant to 25 Pa. Code §75.22(f),[12] it was denied. The Department's denial was based on Delta's unsatisfactory compliance history and violations of a consent order and agreement, as well as the results of the Department's technical review of the application. According to the Department, the technical review revealed the following problems: the application failed to demonstrate there were sufficient renovating soils; the presence of closed depressions within and adjacent to the boundaries of both

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[12] This section was superseded by 25 Pa. Code §271.221. See 18 Pa. B. 1681, 1682 (April 9, 1988).

landfills could result in contamination of waters of the Commonwealth; and the design of the proposed trenches would not prevent leachate from collecting and saturating an area.

In its appeal of the permit denial, Delta argued, *inter alia*, that the Department had no authority to conduct a technical review in the case of a permit reissuance since that was not provided for in the language of §75.22(f). Delta protested that the reissuance process was not the proper vehicle for the Department to re-evaluate its previous issuance of a permit.

The Board concluded, however, that the Department had not abused its discretion in conducting a technical review of the application for reissuance. Noting that the passage of the SWMA and repeal of the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001 *et seq.*, under which the original permit had been issued, had resulted in numerous and substantial changes to the law regulating the disposal of solid waste, the Board found that the Department was justified in exercising its authority under the SWMA to require the submission of information other than that set forth in 25 Pa. Code §75.22(f).

The Board further noted that, since the Department could modify or revoke the permit for the reasons enumerated in §503 of the SWMA, 35 P.S. §6018.503, it would be illogical not to allow the Department to evaluate those very same factors in considering an application for reissuance of a permit. The Board stated, "Certainly, a technical review is required to determine whether a solid waste disposal facility is creating a potential hazard to the public health, safety, and welfare (§503(e)(3) of the SWMA) or is adversely affecting the environment (§503(e)(4) of the SWMA)." 1992 EHB at 290. Having so concluded, the Board then examined the Department's technical reasons for

denial of the application and found that the record supported the Department's conclusions.

The Board then examined whether the Department had met its burden of proof in revoking the permit held by Landfill Acres. Although the Department's revocation of Landfill Acres' permit was premised on the same technical deficiencies as the denial of Delta's application for permit reissuance, the Board found that the revocation was justified on the basis that Landfill Acres no longer held an ownership or operator's interest in the sites and, consequently, had no reason to possess a permit for the sites. In a footnote, however, the Board also noted that the Department had ample grounds to revoke the permit pursuant to §503(e)(4) of the SWMA due to the problems found by the Department in its technical review which established that groundwater contamination would occur at the sites. *Id.* at 299, fn 11.

Like the factual situation in Franklin Township, the present case also deals with the Department's revocation of a permit for a natural renovative landfill on the basis of a technical review conducted after issuance of the permit but prior to any construction of the landfill. Unlike Franklin Township, however, the site in question has not changed ownership, nor was the technical review in the present case undertaken in connection with an application for the issuance or reissuance of a permit, or even the renewal of a permit. Both cases, however, involved a determination by the Department, after issuance of the permits, that environmental harm was likely to occur if the permits were not revoked.

Although the Board in Franklin Township upheld the Department's revocation of Landfill Acres' permit on grounds other than the results of the Department's technical review, it recognized that where the Department can

demonstrate deficiencies in the proposed design and operation of the landfill which will adversely affect the environment, the Department may properly revoke the permit pursuant to §503(e)(4) of the SWMA, 35 P.S. §6018.503(e)(4). Just as it would have been illogical in Franklin Township to find that the Department, in considering whether to reissue a permit, could not evaluate information for which it could subsequently revoke or modify the permit, it would, likewise, be illogical to restrain the Department from revoking a permit until the environmental harm had already occurred. Where DER reevaluated its prior permit issuance decision and concludes it was made in error, it has the legal authority to revoke its previously issued permit.[13]

Having determined that the Department may revoke a permit where it establishes that the permitted operation will adversely affect the environment, we must next examine whether the Department has made such a demonstration with respect to the Ganzer operation. First, however, it is necessary to point out that the regulation of residual waste has undergone a dramatic change since this case was litigated. An extensive regulatory scheme governing the management and disposal of residual waste was promulgated by the Environmental Quality Board and took effect on July 4, 1992. See 25 Pa. B. 3389. These new regulations outline very specific requirements for the design and operation of residual waste landfills.

Operators of residual waste facilities which were permitted prior to adoption of the regulations are required either to apply for a permit modification to bring their facilities into compliance or to close. 25 Pa.

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[13] While the Department may not change its mind as to a permit issuance on whim, a permittee does not acquire rights to continue to pollute if it has received a permit which the Department issued in error.

Code §287.115(a). Those applying for a permit modification must, by July 4, 1994, file a preliminary application describing the differences between the existing permit and the requirements of the new regulations, including, *inter alia*, requirements for a liner system for certain classes of residual waste. 25 Pa. Code §287.115(a) and (b). After receiving notice from the Department with respect to the preliminary application, the operator must file a complete application for a permit modification to correct the differences between the existing permit and the requirements of the regulations. 25 Pa. Code §287.115(d). The application must contain a description of the proposed modifications and a demonstration that the proposed modifications comply with the SWMA, the environmental protection acts, and the residual waste regulations. 25 Pa. Code §287.222(b)(2).

Thus, if Ganzer's permit had not been revoked and it had constructed the landfill, it would be required to apply for a permit modification in order to continue operating its facility. Likewise, if we determine that Ganzer's appeal should be sustained and the permit reinstated, Ganzer would be subject to the requirements of the new regulations, as set forth therein, in constructing and operating its facility. In either case, Ganzer would be in the position of an applicant for a permit modification and would be subject to a technical evaluation by the Department. Under the standards imposed by the new regulations, it is unlikely that Ganzer would still be permitted to construct a renovative soil landfill.[14] Therefore, the Department's chief

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[14] We note, moreover, that Ganzer states on page 69 of its post-hearing brief that "...Ganzer has agreed that it would apply under the Department's proposed residual waste regulations to alter the terms of its permit to provide for a lined site, rather than the currently-permitted renovative soil footnote continued

contention, that a renovative soil landfill would not adequately attenuate leachate generated by the Hammermill waste, may be purely academic at this point.

However, the issue before us is whether the Department, at the time it revoked Ganzer's permit, had sufficient justification for doing so on the basis that the proposed landfill would result in environmental harm. For the reasons set forth below, we find that the Department failed to carry its burden of proof on this issue.

The Department contends that the permit was properly revoked because subsequent data indicated that the landfill would not have been capable of attenuating the leachate produced by the Hammermill waste and would not be capable of preventing groundwater contamination. The Department reached this conclusion based on calculations done by Richard Marttala involving the following three pieces of information: the concentration of contaminants in the Hammermill waste leachate produced at the Lowville landfill, the renovative capacity of the soil to be used in constructing the Ganzer landfill, and the rate at which the leachate would be applied to the soil. Based on this information, Mr. Marttala calculated that the renovative base of the landfill, at its average depth of 13.44 feet, would have the capacity to attenuate leachate for a maximum span of twelve years, and more likely, only 6.64 years. Mr. Marttala further estimated that the renovative soil at its minimum depth would be likely to cease attenuating leachate after 1.7 years, and in no case, for more than three years.

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continued footnote
landfill... For practical reasons, Ganzer does not intend to construct or operate its landfill as previously designed, but has chosen to defend its existing permit so as not to forfeit its position as a rightful solid waste permittee..." (Emphasis in original)

Leachate Flow and Quality

Mr. Marttala's estimates of the life expectancy of the landfill are based on two important assumptions: first, that leachate will be produced at the Ganzer landfill at the same rate as at Lowville and, second, that the make-up of the leachate, in terms of its cation concentration, will be the same. (F.F. 95)

There is little dispute that the make-up of the leachate produced at the two landfills is likely to be very similar since both landfills would be accepting identical waste. Ganzer challenged that Mr. Marttala had no field data showing that a continuing flow of "full strength" leachate would be produced at the Ganzer site over the life expectancy of the landfill, but produced no evidence to dispute this finding. Ganzer also argued that the method employed by the Department to collect leachate samples from Lowville was not representative. The method employed by the Department was grab sampling, where a sample is collected randomly at any one time. Ganzer contends that composite sampling, where individual samples collected over a period of time are compiled into one sample, would have been a more representative measurement of the quality of the leachate generated at Lowville. However, Ganzer has not demonstrated that composite sampling would have provided a more representative measurement in the present case where the Department's sampling took place over a period of five years.

Ganzer did, however, produce evidence to dispute Mr. Marttala's assumption that the same volume of leachate would be produced at both sites. At the hearing, Mr. Marttala testified that he did not believe that the design

differences of the two landfills would affect the amount of leachate produced by each, but did not investigate whether, in fact, the design differences could affect leachate generation.

Engineer Richard Deiss, who designed both Lowville and the proposed Ganzer facility, was admitted as an expert in the design of operational landfills. Mr. Deiss testified that the different designs of the two landfills - Lowville incorporating a liner system and Ganzer utilizing a system of natural renovation - would affect the amount of leachate produced by each. At the Lowville operation, the entire disposal area remains open; any precipitation which falls on the site falls directly on the open area of waste. In contrast, at the Ganzer operation, one foot layers of intermediate compacted cover soil would be placed on top of the waste every eight feet as the landfill progresses. This will deflect at least some precipitation from reaching the waste except for any immediate working area where soil had not yet been placed. According to the Department's Anthony Talak, a Regional Engineer for the Bureau of Waste Management, leachate generation is a function of precipitation. (F.F. 100) Thus, if a smaller amount of precipitation is able to reach the waste at the Ganzer landfill, a lesser volume of leachate will be produced. (F.F. 101) Moreover, even though the terraced design of the landfill will slow the movement of runoff from the site, the layers of compacted soil will serve to divert much of the precipitation from coming into contact with the underlying layers of waste. (F.F. 98,99) The evidence indicates that waste at the Ganzer operation will not be exposed to precipitation to as great a degree as that at Lowville, and that is likely to result in a lower rate of leachate production at the Ganzer site.

Mr. Marttala's calculations also assumed that the travel time of water moving through the Ganzer and Lowville landfills would be the same. According to Mr. Deiss, however, this is not an accurate assumption since layers of compacted soil are less permeable than layers of waste. Deiss' contention was not refuted by the Department. Because they are less permeable, the layers of soil in the Ganzer operation will slow down the travel time of water passing through the landfill. (F.F. 102)

Based on the above, we find the leachate flow data from Lowville to be an inaccurate indicator of the rate at which leachate will be generated at the Ganzer site, and that leachate is likely to be generated at a somewhat lower rate at the Ganzer site. Because Mr. Marttala's calculations depend on the rates of leachate production being equal, this affects the reliability of his ultimate conclusions regarding the lifespan of the landfill.

Cation Exchange Capacity of Soil

Another calculation performed by Mr. Marttala was the cation exchange capacity of the renovative soil, that is, the soil's capacity to absorb cations and, thereby, remove contaminants from the leachate. Soil samples from multiple locations at the Ganzer site were collected by one of the Department's soil scientists, John Guth. Ganzer challenges Mr. Guth's sampling method as not yielding results which are representative of the soil at the site because he dug into the soil only 2-1/2 to 3 feet. Ganzer argues that this would not have yielded a representative sample from the overburden piles where the soil with the higher cation exchange capacity, the topsoil, was on the bottom of the pile. However, if the topsoil contains a higher exchange capacity than soils lower in depth, as Ganzer contends, then the undisturbed areas where Mr. Guth sampled, that is, the areas other than the

overburden piles, actually yielded samples with a higher than average cation exchange capacity. This was admitted by Ganzer's expert, Mr. Deiss, on cross-examination. (T. 504) Overall, we find Mr. Guth's sampling to be representative of the soils at the Ganzer site, and any discrepancies in his sampling method were likely to err in favor of Ganzer by producing soils with a high cation exchange capacity.

The soils collected by Mr. Guth were sent to the Department's laboratory for analysis of their cation exchange capacity. From this, Mr. Marttala calculated a weighted cation exchange capacity for each borrow area of soil. This was done by dividing the volume of soil by 1000 times the actual cation exchange capacity, and then dividing by 1000. He performed this calculation for each soil borrow area and added the results for a total weighted cation exchange capacity.

The next step was to determine the cation exchange capacity of one acre of soil one foot in depth at the Ganzer site. Mr. Marttala arrived at this figure by multiplying the total weighted cation exchange capacity per 100 grams by the weight of one acre of soil one foot deep. However, rather than obtaining the weight of a sample of soil from the Ganzer site which would have been available from Mr. Guth's sampling, Mr. Marttala obtained a figure from a reference manual representing average soil densities. (F.F. 112) By Mr. Marttala's own admission, soil densities can vary, and the references on which he relied did not take into account that compaction might occur at the site. (F.F. 113) Thus, his calculation of the cation exchange capacity of the soil at the Ganzer site does not rely on site specific data.

Attenuative Life of the Landfill

Once the attenuative ability of the soil in a natural renovation landfill is exhausted leachate will pass through the soil unattenuated. (F.F. 116) Mr. Marttala examined the cation load of the Hammermill leachate, the rate of leachate flow expected at the Ganzer site, and the cation exchange capacity of the soil at the Ganzer site to arrive at the attenuative ability of the landfill.[15] From this figure and information on porosity, he calculated the life expectancy of the landfill.

However, in calculating the attenuative ability of the landfill, he considered only the renovative base of the landfill and did not take into account the ability of the intermediate soils to attenuate leachate. Just as soil at the base of the landfill functions to attenuate leachate so do the intermediate layers of soil placed throughout the landfill. (F.F. 128) The Department's Anthony Talak, Regional Engineer for the Bureau of Waste Management's Northwest Regional Office, testified that the Department does not rely upon intermediate cover soil to attenuate waste, but admitted that the intermediate soils do perform this function. (T. 541) The landfill's designer, Richard Deiss, testified that the effect of the intermediate cover soils would be to increase the landfill's attenuative ability as leachate generated from the layers of waste pass through the layers of soil.

Other Attenuative Processes

Finally, in calculating the life expectancy of the Ganzer landfill, Mr. Marttala looked at only one process of attenuation, ion exchange. However, Richard Deiss, the engineer who designed the renovative base landfill

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[15] As discussed in the two previous sections, Mr. Marttala's calculations of the expected leachate flow rate and the cation exchange capacity of the soil at the Ganzer site contain inaccuracies and this, therefore, affects his overall calculations of the attenuative life of the landfill.

proposed by Ganzer, also testified to other processes involved in soil attenuation. These include a physical process of straining and filtering, a biological breakdown of organic materials, and a chemical reaction known as adsorption. In the physical process, as the leachate reaches the attenuating soil, the soil acts to filter and strain particles in the leachate which are larger than the pore spaces in the soil. (F.F. 132) In the biological process, organic materials in the waste are broken down by bacterial action. (F.F. 133) Finally, in the chemical reaction known as adsorption, ions and compounds in the leachate adhere to the surface area of the attenuating soil. (F.F. 134) Each of these processes will occur in addition to the process of ion exchange and will interrelate with ion exchange. In addition, these processes will occur regardless of the cation exchange capacity of the soil. (F.F. 135) Mr. Deiss, who was qualified as an expert to testify on this matter, considered the processes of attenuation other than ion exchange to be "significant" attenuative processes. (F.F. 136)

Mr. Marttala's calculations of the attenuative ability of the soil did not include the role to be played by any process other than ion exchange. Based on the testimony of Mr. Deiss, whom we find to be knowledgeable on this matter, the calculations performed by Mr. Marttala excluded a significant part of the attenuation process.

Conclusion

As noted earlier in this discussion, the Department has the burden of proving by a preponderance of the evidence that the revocation of Ganzer's permit was justified on the basis that operation of the landfill will adversely affect the environment. Specifically, the Department must demonstrate that the design of the landfill, as originally proposed, is not

sufficient to attenuate the leachate which will be generated by operation of the landfill, and that it poses a threat of contamination to groundwater. The standard by which the Department must meet this burden requires that "the evidence of facts and circumstances on which [the Department] relies and the inferences logically deducible therefrom must so preponderate in favor of the basic proposition [it] is seeking to establish as to exclude any equally well-supported belief and any inconsistent proposition." Midway Sewerage Authority v. DER, 1991 EHB 1445, 1476 (quoting Henderson v. National Drug Co., 343 Pa. 601, 23 A.2d 743, 748 (1942).) In reviewing the record, we find that the evidence does not so preponderate in favor of the proposition asserted by the Department so as to exclude any other inconsistent proposition.

As noted throughout the discussion, Mr. Marttala's calculations, from which he estimated the attenuative lifespan of the landfill, were based on certain assumptions which were shown to be based on inadequate or general, rather than site specific, data. In addition, by his own admission, he did not rely on the most representative data in performing certain calculations. Finally, he reviewed only one part of the attenuation process in estimating the attenuative ability of the landfill.

These flaws are sufficient to cast doubt on the ultimate conclusions reached by Mr. Marttala with respect to the attenuative ability of the landfill. Reviewing the evidence as a whole, we find that the Department did not meet its burden of proving that the revocation of Ganzer's permit was warranted.

CONCLUSIONS OF LAW

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

2. In an appeal of a permit revocation, the Department carries the burden of proving that the revocation was not an abuse of discretion and was in accordance with law. 25 Pa. Code §21.101(b)(2)

3. Any issues not preserved in a party's post-hearing brief are deemed to be abandoned. Lucky Strike, *supra*.

4. Where the Department raises new grounds for a permit revocation in its pre-hearing memorandum and amended pre-hearing memorandum which were not contained in the letter of revocation, these issues may be considered so long as there is no undue prejudice to the Appellant. Melvin Reiner, *supra*; Orville Richter, *supra*.

5. The Department failed to meet its burden of proving that Ganzer provided inaccurate or incomplete information on wetlands and endangered plant species in its permit application.

6. The Department may revoke a solid waste permit pursuant to §503(e)(4) of the SWMA, 35 P.S. §6018.503(e)(4), where it demonstrates that the proposed design or operation of the landfill is not sufficient to prevent environmental harm.

7. The Department failed to meet its burden of proving by a preponderance of the evidence that the proposed Ganzer operation will not sufficiently attenuate leachate and prevent groundwater contamination.

O R D E R

AND NOW, this 5th day of August, 1993, having determined that the Department has not met its burden of proof in this matter, it is hereby ordered that the appeal of Ganzer Sand & Gravel, Inc. at EHB Docket No. 89-585-MJ is sustained, and the permit which is the subject of this appeal is reinstated.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

*RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Chairman Maxine Woelfling is recused.

***Board Member Richard S. Ehmann concurs in the result only.**

DATED: August 5, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

DUNKARD CREEK COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 92-439-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 6, 1993**

OPINION IN SUPPORT OF DENIAL
APPLICATION FOR AWARD OF FEES AND EXPENSES
FOR LACK OF JURISDICTION

By: Richard S. Ehmann, Member

Synopsis

An Application For Award Of Fees And Expenses submitted by Dunkard Creek Coal, Inc., ("Dunkard") should be denied when Dunkard fails to submit a copy of its Application to DER within thirty days of the entry of our Opinion granting summary judgment in its favor as required by Section 3(b) of the Costs Act.

OPINION

In September of 1992, Dunkard appealed from an administrative order issued to it by the Department of Environmental Resources ("DER"). DER's order concluded that Dunkard's coal mining had caused acid mine drainage at a private domestic water well, a spring, and an impoundment near Dunkard's mine sites. The order required interim treatment followed by abatement or permanent treatment of the spring and impoundment discharges and an interim replacement water supply, then a final replacement supply or treatment. Thereafter, DER issued Dunkard a series of three compliance orders directing

compliance with various paragraphs of the administrative order and Dunkard appealed each of them. All four of these appeals were consolidated at this docket number.

Dunkard filed a Motion For Summary Judgment as to the consolidated appeals in December of 1992, arguing that the doctrine of *res judicata* applies by virtue of this Board's Order in Dunkard Creek Coal, Inc. v. DER, EHB Docket No. 90-308-E, dated March 29, 1991, and precludes relitigating Dunkard's responsibility for these three discharges.[1] Of course, DER opposed Dunkard's Motion. By our Opinion and Order dated April 21, 1993, this Board granted Dunkard's Motion and sustained its appeals from DER's Orders. We will not repeat the reasoning of that opinion in full here, but refer the reader to that opinion.

On May 21, 1993, Dunkard filed its Application For Award Of Fees And Expenses, which seeks an order from this Board directing that DER pay Dunkard $11,659.56 as the amount equal to its attorneys fees and expert witness fees incurred in successfully defending itself in the instant appeal. Dunkard seeks payment of these fees under authority of the Act of December 13, 1982, P.L. 1127, No. 257, as amended, 71 P.S. §2031 *et seq.*, commonly and hereinafter referred to as the Costs Act.

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[1] In the prior consolidated appeals, Dunkard had contended it was not responsible for these discharges. DER failed to file a Pre-Hearing Memorandum as ordered by the Board, and we issued a Rule To Show Cause on DER why sanctions should not be imposed on it for such a failure. DER filed neither a response to that Rule nor its Pre-Hearing Memorandum. Accordingly, since DER bore the burden of proof in those appeals on this issue, we indicated that barring DER from presenting a case-in-chief was equivalent to sustaining those appeals and simply sustained those appeals.

Pursuant to our Order of May 25, 1993, DER was given until June 7, 1993 to file its response to Dunkard's application. On June 7, 1993 DER's Answer To Application For Award Of Fees and Expenses was filed.

In this Answer, DER asserts a number of grounds for rejection of this application. On a jurisdictional basis, DER argues that Dunkard failed to comply with Section 3(b) of the Costs Act, 71 P.S. §2033(b), as to timely application for these fees by failing to serve DER a copy of this application within thirty days as statutorily required. This appears to be a question of first impression.[2] Because this Board is evenly divided on the merits of this preliminary jurisdictional issue, the Board has prepared two separate opinions as to this issue which reflect these divergent conclusions thereon.[3] We adopt this approach to facilitate appellate resolution of this issue and with the recognition that a remand to address the remaining issues will be required unless the Commonwealth Court should sustain DER's position.

Failure To Timely Serve DER

According to Archie Joyner v. Commonwealth, DER, et al., ___ Pa. Cmwlth. ____, 619 A.2d 406 (1992), the burden is on Dunkard to present sufficiently detailed information to prove to us its right to the costs and fees award it seeks. We read Joyner to require Dunkard to show us we have jurisdiction over this appeal and to require rejection of its application where this showing is not made. As Dunkard has failed to convince a majority

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2 Our research reveals only about a dozen decisions interpreting the Costs Act by the Commonwealth Court, none of which addresses this issue. None of our prior opinions addressing the Costs Act covers this issue.

3 Since September of 1992, a vacancy has existed on this five member Board and this situation has, in turn, produced this even split amongst the remaining Board Members.

of this Board that we have jurisdiction, the Board Members signing this opinion believe the application must be rejected.

Section 3(b) provides in relevant part:

> A party seeking an award of fees and expenses shall submit an application for such award to the adjudicative officer and a copy to the Commonwealth agency within 30 days after the final disposition of the adversary adjudication. (Emphasis added.)

Factually, it is obvious our Order granting summary judgment to Dunkard was issued on April 21, 1993, and there can be no dispute that under this subsection Dunkard had only until May 21, 1993 to make its Application. Dunkard did file its Application with this Board by Friday, May 21, 1993. However, DER did not receive a copy of Dunkard's Application until the following Monday, which was May 24, 1993. It is this failure to get a copy of the Application into DER's hands until after the thirty days had expired that forms the basis for DER's contention.

The language of this subsection clearly places the thirty day period after the references to both the filing with the adjudicative officer and the provision of a copy to the Commonwealth agency. It does not provide that the adjudicative officer shall receive the Application within thirty days, with the Commonwealth Agency being sent a copy within some other time frame such as after the adjudicative officer dockets the original. It also does not state that the thirty day period only applies to the submission to be made to the adjudicative officer. Further DER's argument is conceptually supported both by the rules of practice and procedure before administrative agencies and the Pennsylvania Rules Of Civil Procedure. 1 Pa. Code §31.11 does not authorize a party to consider a pleading as filed as of the date of its deposit in the mail. Rather this rule explicitly mandates that the date of receipt by the

office of DER is determinative. Pa.R.C.P. 205.1, dealing with filings with the prothonotary, sheriff or other offices of the courts, also addresses this issue stating: "A paper sent by mail shall not be deemed filed until received by the appropriate offices." See Century National Bank & Trust Co. v. Gillen, 368 Pa.Super. 443, 534 A.2d 518 (1987).

Finally, 4 Pa. Code §2.13 of the regulations promulgated under the Costs Act is the only Costs Act regulation even indirectly on point. It merely states that the Application must be submitted to the adjudicative officer within thirty days and fails to address whether the same thirty day time frame applies to the agency's copy. All that Section 2.13 says is that the agency's copy is to be sent directly to the agency's chief counsel. Thus, this regulation is of no help in addressing this issue.

According to 1 Pa. C.S. §1504, whenever a remedy is provided by statute, the directions of the statute are to be strictly construed. Moreover, in John Nagle, et al. v. Pennsylvania Insurance Department, 46 Pa. Cmwlth. 621, 406 A.2d 1229 (1979), aff'd in part, reversed in part on other grounds, 499 Pa. 139, 452 A.2d 230 (1982), the Commonwealth Court has instructed that strict compliance with statutorily prescribed procedures is particularly cogent within the context of proceedings before a quasi-judicial administrative agency. This Board is such an agency according to Section 3(a) of The Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7513(a). Thus, it would appear that we are required to find submission by Dunkard to both DER and this Board must occur within thirty days. Indeed, considering the statutory timetable for receiving this application, allowing DER the opportunity to respond to it, holding any hearings thereon necessitated by DER's reply and issuing a written decision on the

Application's merit by the Board *en banc*, a strong case is made for saying the legislature wanted to insure that DER received its copy of the Application within this thirty days. Finally, even use of a layman's definition of the statute's "submit" suggests the conclusion that submitting a copy of Dunkard's application to DER requires a presentation of the application to DER rather than the mere mailing of it to DER (for arrival at some unknown point in the future). See Webster's New World Dictionary, Second College Edition, p. 1418 (1984).

Of course, a conclusion that DER must also have received a copy of t he application within this time frame means that we can not act favorably on this Application because its untimeliness divests us of legislative authority to consider its merits. Since Dunkard has prevailed on the merits, the temptation to interpret the thirty day language as only applying to the copy filed with this Board clearly exists. However, as the Commonwealth Court instructed us in Big B Mining Company v. Department of Environmental Resources, 142 Pa. Cmwlth. 215, 597 A.2d 202 (1991), where the words of an Act "are clear and free from all ambiguity, the letter of it may not be disregarded in the pretext of pursuing its spirit 1 Pa. C.S. §1921(b)". The legislature did not provide *carte blanche* to any prevailing party (not a Commonwealth agency) to recover fees and costs under the Costs Act from the losing Commonwealth agency. Only certain types of prevailing parties may recover costs and fees under the Costs Act, and, then, only to a limited degree and only if they seek them in a specified fashion. Accordingly, we conclude that the Legislature intended to require submission of the prevailing

party's application to this Board and DER within thirty days under Section 3(b). Where such timely submissions do not occur, we cannot ignore this untimeliness and pass on the merits of Dunkard's Application.

Having come to this conclusion, we restate that we believe we lack the jurisdiction to address the merits of Dunkard's Application or the challenges thereto. Instead, we would enter an Order denying Dunkard's Application.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 6, 1993

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

DUNKARD CREEK COAL, INC.	:	**EHB Docket No. 92-439-E**
	:	**(Consolidated Docket)**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 6, 1993**

OPINION IN SUPPORT OF
EXERCISING JURISDICTION OVER
APPLICATION FOR AWARD OF FEES AND EXPENSES

By Maxine Woelfling, Chairman

Synopsis

The Board should proceed to adjudicate the merits of an application for award of attorneys fees and costs under the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 *et seq.*, commonly referred to as the Costs Act, despite the applicant's failure to timely submit a copy of the application to the Department of Environmental Resources (Department). The requirement in §3(b) of the Costs Act to submit a copy of the application to the agency which initiated the adversary adjudication is a service requirement and not a jurisdictional pre-requisite.

OPINION

This opinion adopts the procedural history and statement of the facts set forth in the opinion in support of denying the application for lack of jurisdiction. However, we do not agree with its conclusion that the Board is deprived of jurisdiction to determine the merits of Dunkard Creek Coal, Inc.'s

(Dunkard Creek) application for attorneys fees and costs because of Dunkard Creek's failure to submit a copy of its application to the Department within 30 days of our opinion sustaining Dunkard Creek's appeals.

Where the Commonwealth Court, and this Board, have held that the Board has no jurisdiction over appeals where the notice of appeal is not timely filed with the Board, see, *e.g.*, Joseph Rostosky v. Department of Environmental Resources, 142 Pa. Cmwlth. 215, 597 A.2d 202 (1991), and David W. Palmer v. DER and York County Solid Waste Authority, EHB Docket No. 92-466-W (opinion issued April 8, 1993), the Board's rules expressly state that timely filing of a notice of appeal is required for the Board to have jurisdiction.[1] There is no such jurisdictional language in the Costs Act or its implementing regulations.

Moreover, the language in §3(b) of the Costs Act that

> A party seeking an award of fees and expenses shall submit an application for such award to the adjudicative officer and a copy to the Commonwealth agency within 30 days after the final disposition of the adversary adjudication

differentiates between the adjudicatory tribunal (the adjudicative officer) and the Commonwealth party-litigant (Commonwealth agency). As a result, submission of a copy of the application to the Commonwealth agency must be interpreted as a service requirement and not a jurisdictional pre-requisite. The reason for this is obvious. The tribunal (adjudicative officer), and not the party-litigant, renders the decision on the application for fees and

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[1] Section 21.52(a) of the Board's rules, 25 Pa. Code §21.52(a), provides, in pertinent part:

> Except as specifically provided in §21.53 of this title (relating to appeal *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days.

costs. While a party-litigant should, in fairness, be put on notice of an opposing party's request for relief and be given an opportunity to respond, if appropriate, the failure to effect timely service can be initially addressed through means less drastic than dismissal of the underlying claim.

Furthermore, even if timely submission to the Department is a jurisdictional requirement, Dunkard Creek did timely submit its application to the Department. As discussed in the preceding paragraph, the requirement to submit a copy of the fee application to the Commonwealth agency is a service requirement. The regulations governing the submission of fee applications at 4 Pa. Code §2.1 *et seq.* neither apply to actions taken by the Department (4 Pa. Code §2.9) nor do they set forth procedures for adjudicating the application. Therefore, the Board's rules of practice and procedure and, to the extent they are not superseded by the Board's rules, the General Rules of Administrative Practice and Procedure must apply. For purposes of determining whether documents are timely served on other parties, the date the document is deposited in the mail is controlling. 25 Pa. Code §21.33 and 1 Pa. Code §33.34.

The opinion in support of denying the application correctly notes that Dunkard Creek had to submit a copy of its application to the Department by May 21, 1993, since it had 30 days to submit its application and the Board issued its order granting summary judgment to Dunkard Creek on April 21, 1993. Dunkard Creek did, however, submit the document to the Department within the required time. The certificate of service on Dunkard Creek's application indicates that the document was mailed to the Department on May 20, 1993, and that date--not the date the document was actually received by the Department--is controlling for purposes of determining whether service upon the Department was timely.

In light of the foregoing, we believe the Board has jurisdiction to address the merits of Dunkard Creek's application.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 6, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

DUNKARD CREEK COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 92-439-E (Consolidated)**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

ORDER

AND NOW, this 6th day of August, 1993, it is ordered that Dunkard Creek Coal, Inc.'s Application For Award Of Attorneys Fees and Costs under the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2031 *et seq.*, is denied for failure of Dunkard Creek to convince a majority of this Board that this Board has jurisdiction over this application.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 6, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

ALPEN PROPERTIES CORPORATION	:	
	:	
v.	:	**EHB Docket No. 90-414-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 16, 1993**

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

By Richard S. Ehmann, Member

Synopsis

A person acquiring title to real estate does not become liable for Solid Waste Management Act ("SWMA") violations existing thereon by virtue of acquiring title or taking steps to limit access to the property, but, when the property owner ceases a passive role with regard to these violational conditions and assumes an active role with regard thereto, it becomes responsible to abate these violations in accordance with requirements of the SWMA. Where drums of chemicals sit on a site for over a year after a new owner takes title to the site, there is no presumption of disposal of these drums under Section 103 of the SWMA, if the drums' existence predates acquisition of title to site and the new owner initiates no action with regard to these drums because this new owner never began the storage of the drums from which a statutory disposal presumption may arise. Where time frames for compliance with a DER order are challenged and DER's evidence shows only that these are the standard compliance time frames for similar orders issued in

this portion of the state, it fails to show it properly exercised its discretion as to these time frames by considering the circumstances surrounding these particular violations. Accordingly, the Board may exercise its discretion and modify these deadlines.

BACKGROUND

This appeal was commenced by Alpen Properties Corporation ("Alpen") on October 1, 1990. Alpen's Notice Of Appeal challenges a Compliance Order dated August 29, 1990 (received by Alpen on September 4, 1990) and issued by the Department of Environmental Resources ("DER"). The first page of DER's Order contains printed materials indicating that it was issued pursuant to Section 610 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.610, ("CSL"), Section 602 of the Solid Waste Management Act the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.602 (the "SWMA"), and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Section 1917-A"). DER's Order asserts Alpen has violated sections 301, 302, 401 and 610 of the SWMA (35 P.S. §§6018.301, 5018.302, 6018.401 and 6018.610) and 25 Pa. Code §§75.38(a) and 75.261, *et seq.*, in Alpen's storing and disposal of residual and hazardous wastes. It directs Alpen to contract with a DER-approved company to sample and analyze the waste material, submit reports of the sample results to DER, submit a plan for proper waste disposal, and, after DER approves of the plan, implement it (thereafter providing receipts or manifests showing proper implementation).

Alpen's Notice Of Appeal says Alpen purchased the property and found the wastes left in the building. It says it did not purchase any wastes left in the building and did not store any wastes at the site. Moreover, the appeal asserts Alpen has contracted to have the debris in the building cleaned up. It alleges it is in the process of cleaning up these substances but the Order's time constraints are too oppressive and the terms far too restrictive to permit economical compliance with the order and placement of the building back into the rental market. Alpen's Notice Of Appeal also alleges the Order does not comply with the applicable statutes and regulations.

On March 20, 1991, Alpen filed its Pre-Hearing Memorandum and DER's Pre-Hearing Memorandum was filed with us on April 22, 1992. Because of his backlog of appeals ready for merits hearings, the Board Member to whom this appeal was assigned did not schedule a merits hearing on it before he resigned in September of 1992.

On September 17, 1992, this appeal was reassigned to Board Member Richard S. Ehmann and scheduled for a merits hearing on March 8, 9, and 10 of 1993. After completion of the merits hearing on March 10, 1993[1] the parties timely filed their post-hearing briefs.

The hearing's transcript is 191 pages long and there were 8 exhibits admitted into the record. After a thorough review of the entire record, the Board makes the following findings of fact.

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1 The transcript mistakenly dates the hearing as occurring on March 3, 1993.

FINDINGS OF FACT

1. The Appellant is Alpen, which is a New York Corporation. (Stip.)[2]

2. The Appellee is DER, the agency with the authority to administer and enforce the SWMA, the CSL, Section 1917-A, and the rules and regulations promulgated thereunder. (Stip.)

3. Abraham Tabib is president of Alpen. (T-167-168)[3]

4. On August 10, 1989, Alpen purchased the property at 801 North Meadow Street in Allentown, Pennsylvania from Seco Mills, Inc., Lehigh Dyeing and Finishing, Inc. and Fabknit Mills, Inc. ("Grantors"). Alpen's purchase of this property was pursuant to an order of the United States Bankruptcy Court for the Southern District of New York in the Chapter 11 bankruptcy proceeding of its Grantors. (Exh. S-1, S-2)

5. The Court Order of May 15, 1989 directed the Grantors' bankruptcy trustee to convey this property to Alpen and specified that the deed was to contain no warranties or representations. (Exh. S-1; T-189)

6. The deed conveying this property to Alpen conveyed no personal property in this building and Alpen purchased none from Grantors. The personal property (machinery, etc.) in the building on the real estate sold to

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[2] References to Stip. are references to the parties' Joint Stipulation pursuant to Pre-Hearing Order No. 2, which contains factual stipulations. It is Board Exhibit 1 in the record.

[3] T-___ is a reference to a citation in the merits hearing's transcript while C-__ or S-__ are references to exhibits admitted into the record. The S-__ exhibits were admitted by stipulation of the parties. (T-17).

Alpen was purchased by another party who was given a set period of time by the Bankruptcy Court in which to remove same. (T-168)

7. The property Alpen purchased includes a two-story commercial building consisting of a basement and ground floor which had previously been used as a fabric dyeing and finishing plant. (T-37, 41, 121)

8. The building's upper floor is wooden; its roof had numerous holes in it, so a portion of this floor is water logged. The electricity to the building was turned off when DER first visited it. (T-37)

9. Alpen proposes to fix the building up, clean it out and rent it. (T-168; Stip.)

10. To this end, Alpen has hired contractors to clean out this structure and improve it. (Stip.)

11. In August of 1990, DER was contacted by Joseph Andrews ("Andrews") of A&A Construction. Andrews was in the process of providing cleanup services at Alpen's building and in the course of it became aware of the large number of drums located in the building, the contents of which were unknown. (T-35-36)

12. On August 14, 1990, Gerald Olenick ("Olenick"), a DER solid waste inspector, inspected Alpen's building in response to Andrews' telephone call and met Andrews. (T-36)

13. Olenick's inspection revealed an estimated 200 drums of various sizes in several locations in the building's upper floor, some of which were sitting in standing water. Of the fiber drums he saw, some had deteriorated to the point they had spilled their contents on the floor. (T-37, 38, 40)

14. At Alpen's building numerous drums were also located on various outside loading docks. Some of these drums were full, and some were partially full with rags stuck in the openings. Some of the drums were empty. Many of the drums in the building and on the loading dock were exposed to the elements. (T-38-39)

15. Olenick could not make an accurate count of the drums at the property during his initial inspection because they were haphazardly piled. He learned later, however, that he had not seen still another area of the building with numerous drums in it. (T-40)

16. While some of the drums observed by Olenick were labeled (Clip Chain Cleaner and Aqua Ammonia), most were not. (T-40-41) From the condition of the drums he saw, Olenick recognized that they had been at the site for a long period of time though he could not say how long. (T-111)

17. At the time of Olenick's August 14, 1990 inspection, the building was not secure, as the windows were not boarded up, the front door was open, the surrounding fence had a hole in it, and fence gates could be forced open. (T-43, 44)

18. On August 22, 1990, DER sent two members of its Emergency Response Team to Alpen's building to assist local fire fighters in dealing with a 35 gallon drum found to be burning at the building site. (S-4)

19. DER and the Fire Department decided the best way to put out the fire was to smother it with sand, and they did so. (T-57, 132; S-4)

20. Subsequently, the white powder in the drum which was burning was identified as a hazardous waste known as sodium hydrosulfite. (T-54; S-4) As

a result, after the fire was extinguished the drum was repacked and shipped off site by DER for disposal as a hazardous waste. (T-56; S-3)

21. On August 23, 1990, two other drums were observed inside Alpen's building which appeared to be similar to the drum which burned and one of them was labeled as containing flammable solids. (T-163)

22. A further review of the labels on some of the drums at Alpen's building on August 23, 1990 showed labels indicating drums containing lubricating oils, oxidizers, flammable solids, caustics, corrosives and one drum of perchloroethylene. (T-149, 159) Some of materials identified on these drum labels are incompatible with each other and others would be harmful if a person came in contact with them. (T-159)

23. If the materials in the drums are those shown on the drum label and were used materials, some of them would be classified as hazardous wastes under Pennsylvania's hazardous waste regulations. (T-160-161)

24. The drums observed by DER's site inspections through August 24, 1990 in Alpen's building were not stored in compliance with DER's regulations, in that incompatible materials were not segregated from each other, there was no diking around the drum storage areas, some barrels were unlabeled as to content, they were exposed to the elements and the barrels were not properly stacked with adequate aisle space. (T-64-65)

25. In January of 1991 Olenick revisited Alpen's building. Olenick revisited the Alpen building because of a call from Gary Hoskins of BES Environmental. Hoskins was doing a bid appraisal on the work necessary to comply with DER's order. Hoskins was under the impression that there were

fewer drums on the site than he previously had seen there. He'd expected closer to 200 drums but he did not find that many and asked if Olenick would come down and go through the building with him and Alpen's Tabib. (T-68-69) In this inspection Olenick noticed that the group of 5 gallon pails, previously observed in one room of the building, had disappeared as had a number of fiber drums from loading dock No. 4 (T-69, 84), though DER had not been notified by Alpen of any removal of solid waste from the site (T-69-70). In fact, when questioned during that inspection Tabib said none of these materials had been removed from Alpen's building. (T-84)

26. DER does not have any evidence or make any assertion that Alpen generated the drummed materials or that it brought them to this site. (T-91)

27. Alpen had no permits issued by DER authorizing Alpen to store or dispose of solid wastes on this property. (T-48)

28. As a result of the fire and DER's inspections of Alpen's property on August 14, August 23, and August 24, 1990, DER issued the August 29, 1990 Order to Alpen which Alpen has appealed. (T-46, 56, 60-61, 96)

29. DER's decision to issue this Order to Alpen was based on Alpen's ownership of the property, conditions at the site and Alpen's exercise of control over the site by locking the entrances. (T-61)

30. Olenick, on behalf of DER, advised Alpen that usable materials on this property could be reused or sold and did not have to be disposed of by Alpen. He also advised Alpen its disposal of paper, cardboard, rags and similar wastes were not covered by DER's order. (T-85-86)

31. Tabib admitted that for during the year between the acquisition of the property and the drum fire Alpen was attempting to sell these materials to other dye houses. (T-187)

32. After DER issued its Order, Alpen talked with various potential environmental contractors about bringing Alpen into compliance with DER's Order (T-63) and ultimately hired Environmental Products and Sciences, Inc. ("EPS") (Stip.)

33. In 1992, EPS provided DER a Waste Characterization and Description report dated October 10, 1991. (T-71-72; Stip.) This report is Exhibit S-5, and shows the drums at Alpen's building contain quantities of acidic solids, acidic liquids, caustic solids and caustic liquids in addition to other material. Some of the drums' contents are thus "characteristic" hazardous wastes. (S-5)

34. DER's reinspection of the building on September 13, 1990 revealed that the building's doors were locked, most of the windows were locked up, the rear gate was better secured and DER's inspector could not gain access to the site. (T-67) Thus, the site security conditions were much improved over site security conditions at the time of the first inspection. (T-43-44)

35. The time for compliance contained in DER's August 29, 1990 order to Alpen was the standard time frame placed in similar orders issued from the DER regional office which issued the order to Alpen. (T-62)

36. DER offered no evidence to show that in placing the time frame in its August 29, 1990 order to Alpen it gave consideration to the factual

circumstances in this matter, as opposed to inserting a standard time for compliance without regard to the facts.

37. Alpen did not request an extension from DER of the time frame contained in DER's August 29, 1990 order. (N.T. 63-64)

38. Alpen offered no evidence of a more reasonable time frame.

DISCUSSION

Although Alpen has made efforts to comply with DER's Order (T-185), the Order has not been complied with in full at this time. Thus we must adjudicate the merit in DER's issuing it to Alpen.

It is clear that where DER issues an Order it bears the burden of proof with regard thereto. 25 Pa. Code §21.101(b)(3).

DER asserts that Alpen is a person within the definition of person found at 35 P.S. §6018.103 and the parties stipulated that this is so in their Joint Stipulation which is Board Exhibit 1. It next argues that the drums and their contents are solid waste under the definition of solid waste in the SWMA and are either hazardous solid wastes or residual solid wastes as defined therein. Next, DER asserts that the drums of solid wastes were unlawfully stored or disposed of on this site by Alpen because Alpen lacked permits for storage or disposal at this site, and there is a statutory presumption of disposal by Alpen at this site since this solid waste sat at this site for over one year, and even if the drums were not disposed of, they were clearly stored there. DER says the evidence of the contents of the drums being spilled out on the ground and Alpen's lack of permits proves disposal of the solid waste. It also asserts the method by which the drums were stored

proves numerous violations of DER's regulations with regard to solid waste storage.

Under these circumstances DER concludes by asserting its order was not an abuse of discretion and the compliance time frames are reasonable because they are what is standard in DER orders.[4]

In response, Alpen argues the personal property in the building which it bought belonged to others, and that Alpen never operated the dye house and did not own its contents. Alpen asserts it did not exercise control or ownership of the materials in its building. Alpen argues it found a big mess in its building which included what its brief terms "debris" and "garbage", but it did not know it had hazardous or environmentally dangerous materials present when it hired contractors to clean out and improve the building. Alpen next points to its cooperation with DER (not disputed by DER) and its actions to comply with this Order during the appeal's pendency. It argues it did not fail to store the drums properly and that there is no evidence showing Alpen is liable based on ownership, a failure to dispose of or store the solid waste properly subsequent to purchase or that it was improperly stored when Alpen was exercising ownership and control over this real property. Alpen argues DER's Emergency Compliance Order was unnecessary and that since it

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[4] In its Reply Brief, DER attempts to bootstrap its initial arguments by citations to Starr v. DER, 1991 EHB 494, and Booher v. DER, 1991 EHB 987, and argument that the burden shifts to Alpen as to proof of no disposal. As DER's counsel was told at the hearing in this appeal, this rehashing of arguments raised in the initial post-hearing brief (or raising of arguments which should have appeared in that initial brief) is inappropriate in a post-hearing reply brief (T-190) because that is not the purpose of a reply brief. Thus, this portion of DER's reply brief will not be considered by this Board.

neither stored nor disposed of solid waste at this site, it needed no permits. Finally, Alpen says the thirty day compliance period in DER's order was not proven reasonable under the circumstances.

The parties were directed by the Board to address the impact of Lawrence Blumenthal v. DER, 1990 EHB 187 on this appeal in their Briefs. As to Blumenthal, DER asserts that it and Commonwealth, DER v. O'Hara Sanitation, Co., 128 Pa. Cmwlth. 47, 562 A.2d 973 (1989), are distinguishable because Alpen's president was sophisticated in regards to purchasing real estate, the drums were readily apparent, as was the building's deteriorated condition, so Alpen should have seen what it was buying. Moreover, DER asserts that Alpen asserted control over the materials at the site by allowing its contractors to sell materials found there, by cleaning up the site and by securing the site from unauthorized access. In turn, Alpen asserts Blumenthal and O'Hara are applicable and Alpen never took any affirmative steps to exert control over the solid waste; it only told its contractors they could sell anything they could sell for their own profit if they wished to do so.

In Blumenthal, a Petition For Supersedeas was granted to the appellant in regard to a DER administrative order where DER had issued its order under authority of the SWMA to Blumenthal, solely, based on Blumenthal's ownership of the land where the violations existed. The Petition was granted because the SWMA does not authorize DER to issue Orders holding a person liable to clean up a site solely on the basis of his ownership of property. We affirm that position in this adjudication just as Commonwealth Court did in O'Hara. Nothing in the SWMA allows DER to impose liability for these drums

solely on Alpen's ownership of this site. This is also not an appeal where DER made any attempt to prove Alpen liable under the CSL as a landowner. Landowners may be held liable to clean up pollution under the CSL based solely on their ownership of the site. See Paul F. and Madeline Kerrigan v. DER, EHB Docket No. 90-188-MR (Adjudication issued April 8, 1993). While DER's order was issued in part under authority of the CSL, its Post-Hearing Brief makes no argument for liability under this statute and thus DER is deemed to have abandoned such an argument. Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, DER, 119 Pa. Cmwlth 440, 547 A.2d 447 (1988). The same is true as to the assertion of a public nuisance under Section 1917-A. It too appears in DER's order but DER offered no proof to support this contention and failed to pursue it in its Post-Hearing Brief as well. [5]

DER's *caveat emptor* argument does not change this conclusion. DER asserts that the drums were clearly visible on the property when Alpen bought it, that Alpen purchased the property via a deed containing no warranties and that Alpen has sophistication in real estate purchasing. To all of which we reply: So what! *Caveat emptor* does not apply to violations of the SWMA. Even if Alpen was extremely sophisticated in real estate purchasing, the drums filled the entire site and Alpen bought the land via a quit claim deed knowing drums were present, liability cannot be imposed on Alpen under the SWMA by DER

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[5] The quality of the parties' Post-Hearing Briefs in this matter left much to be desired. They failed to adequately address the issues before us.

based on acquisition of title to the real estate. Liability for violation of the SWMA based solely on land ownership must await legislative amendment of this statute.

Thus, DER is left with the contention that Alpen is liable under the SWMA based on Alpen's property ownership and its exercise of control over these drums and their contents. We reject this DER theory of liability as well, to the extent it is based on property ownership and exercise of control through the locking of gates and doors and the boarding up of windows. A property owner may lock gates or doors to his plant or board up broken windows without incurring liability under this Act. All such conduct shows is Alpen's dominion over the realty which it owns and its desire to exclude third parties therefrom. It does not address the drums and their contents. To be sure DER could not inspect these drums when the gates and doors are locked, but there was no access to the site by children, vandals or others, either. Such Alpen conduct is nothing more than a spin-off of control of the realty and not evidence of dominion and control over the drums and their contents.

DER also argues that because these drummed materials sat on Alpen's property for a long period, there is a presumption of disposal by Alpen under Section 103 of the SWMA. (35 P.S. §6018.103). In defining "storage", the legislature has inserted the following language:

> It is presumed that the containment of any waste in excess of one year constitutes disposal. This presumption can be overcome by clear and convincing evidence to the contrary.

The facts in this appeal show Alpen acquired this parcel of land and the building by deed dated August 10, 1989. It purchased no title to the personal property or the trash at this site and there is no evidence showing it brought the pails or the metal and fiber drums on the site. Nevertheless, the drums were on the site by virtue of their abandonment there by other parties when Alpen took title thereto. These drums remained at the site over one year thereafter (at least until August 29, 1990, when DER issued its order.) By itself, this evidence shows us nothing as to Alpen's liability. However, during direct examination of Alpen's president by Alpen's counsel the following exchange occurred:

> Q. Mr. Tabib, from the date that you purchased the building on August 15th, 1989, and you then went to the building and discovered the barrels, as you testified, you said you directed Mr., what's his name, Jason (sic) Andrews to gather them to try and resell, were you trying to store them or were you trying to get rid of them?
>
> A. No. I tried to make everything the legal way. I didn't give him any permit to move them, not in the legal way. After the fire, I told him, don't touch, you're out of the case.
>
> Q. I'm not talking about after the fire.
>
> A. Before the fire?
>
> Q. During the year leading up to the fire, weren't you trying to have them resold to another dye house?
>
> A. Before the fire, yes.
>
> Q. You weren't trying to store them. Your objective wasn't to keep them on the property; was it?

A. Do you think that I'm a dummy? I'm an investor.[6]

Alpen's attempt to sell these drummed materials in this period, either on its own or through its contractors, requires us to conclude Alpen was asserting both ownership of and control over these drums and their contents. Alpen's attempts to sell these previously abandoned materials is simply inconsistent with any suggestion that it did not own them and was not controlling them. Moreover, sales of these materials to another dye house requires no knowledge in the seller of what is for sale. Once Alpen adopted this position *vis à vis* the drums and their contents, its obligations as to storage in conformance with the SWMA began. If Alpen had not adopted this active role with regard to removal of the drums and had remained solely as a passive landowner, our conclusion would be different. Volitional acts of this type by a property owner like Alpen move that owner from beneath Blumenthal's protection.[7] In effect Alpen cannot have it both ways.

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6 This quoted material appears in the transcript during Alpen's case-in-chief. Prior to presenting its case-in-chief and at the close of DER's case-in-chief, Alpen's counsel had moved to have Alpen's appeal sustained because DER had failed to make a *prima facie* case. (T-165) Since granting such a motion requires the action of this entire Board, the sitting Board Member indicated he could not grant the motion on his own and offered Alpen the right to raise this argument in its Post-Hearing Brief when the entire Board could pass on it. (T-166) Alpen then called its witnesses but in its Post-Hearing Brief failed to reraise this issue. A party is deemed to abandon all issues not raised in its Post-Hearing Brief, so we deem Alpen to have abandoned this Motion. See Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

7 DER's philosophical approach ("landownership equals liability") to this statute's interpretation is ill-conceived because it discourages the redevelopment and reuse of urban industrial and commercial facilities, thus encouraging the construction of new facilities only on "green fields". Nothing in the statute remotely suggests such an intent by the legislature.

Even if Alpen had not acted as set forth above in the period prior to DER's becoming involved with this property, we would nevertheless have sustained DER's Order. Alpen's hiring of contractors which it directed to clean up and improve the property, coupled with the disappearance from the site of some of the drums and buckets while its contractors were at work thereon, evidences Alpen's control over these drums and their contents.

Alpen bought the old Lehigh Dye and Finishing, Inc. facility with only one idea in mind. It wanted to clean the property up, repair it and rent it out. This means the paper, cardboard, junked cars, rags and trash all had to be removed and disposed of properly. It also means the rotting cardboard drums and the metal drums whether empty, partially full, refilled or unopened had to be gathered together and disposed of or at least collected, (and thus stored) in a common location. Alpen hired contractors to undertake this salvage/clean up operation for it. It was one of them who notified DER of the situation at the site involving the drums. While these contractors were working at cleaning up the building so it could be rented out by Alpen, a barrel of hazardous materials caught fire; thereafter the 5 gallon pails disappeared, as did a number of fiber drums. The evidence shows these "disappearances" were occurring, not in relation to activities undertaken by Alpen to comply with DER's Order, but in relation to its building clean out activities because Alpen was still soliciting bids from contractors for the Order compliance work.

Because this is so, under this theory of liability it is no later than the period when site clean up began (no later than August 1990), when

Alpen, through its contractors, began controlling the drums and pails of material i.e., cleaning them up, that it assumed responsibility to store and dispose of these materials in accordance with the provisions of the SWMA. It is true that on Alpen's behalf Tabib told the contractors to do lawfully whatever they would do in cleaning out the property, but such a statement by itself is insufficient to keep Alpen from becoming liable for how these drums and their contents were handled on its behalf. This is especially so since in January of 1991, during a DER inspection, Tabib told DER no solid waste had been removed from the property (T-70, 84) despite the discovery of the disappearance of the pails and fiber drums. (T-69, 84) In moving from the passive role to the active role in this regard too, Alpen assumed liability for these materials under the SWMA.

With regard to any of these materials that were residual wastes, Section 302 of the SWMA (35 P.S. §6018.302) requires a person storing residual wastes to do so in accordance with its permit and the rules and regulations. It also makes it unlawful for a storer of residual wastes to store wastes in a fashion which endangers the public or the environment. With regard to any portion of these materials which were hazardous wastes, and some were hazardous according to Exhibit S-5, their storage is governed by Section 401 of the SWMA (35 P.S. §6018.401). Section 401 prohibits storage contrary to the rules and regulations. It goes on to require persons who operate hazardous waste storage facilities to first obtain a DER permit for that facility. The parties agree Alpen had no permit to store any wastes at this site and there is no evidence of operation as a waste storage facility in

conformance with the rules and regulations for waste storage. The drums at Alpen's building were stacked in places where they were exposed to the elements; some stood in water pools on the floor. (T-39) Fiber drums had rotted to the point they split and spilled their contents on the floor. The barrels or drums and the pails were stacked haphazardly and one caught fire. With this evidence before us, while DER failed to cite us a violation of a specific residual or hazardous waste regulation, we cannot conclude proper storage in accordance with DER's regulations occurred. This is particularly true since DER's staff testified that Alpen's storage methods violated DER's regulations in many respects. (T-64) Alpen's storage of these materials was thus not in accord with the statutory or regulatory requirements.

Alpen's arguments over a lack of evidence to support the Order fails because this Board is not limited to the evidence before DER at the time it issued its Order on August 29, 1990. Since this Board conducts a *de novo* review of DER's actions we may consider evidence acquired after DER issued this Order. Willowbrook Mining Company v. DER, 1992 EHB 303. Thus, the evidence that this Board considers includes DER's January 1991 inspection, the invoice for the disposal of the barrel which caught fire, DER's testimony about subsequent events and the EPS report (Exh. S-5) which Alpen's consultant gave to DER and, which details the hazardous and residual wastes in these drums. This evidence establishes that it was reasonable to require waste characterization and as a result thereof different methods of disposal (a

plan) as to the hazardous versus the residual wastes.[8] The incidents in 1991 after DER's Order was issued involving the disappearance of the 5 gallon containers and the fiber drums from the property, coupled with Tabib's representation that no solid waste had left the site gave further support to the reasonableness of requiring a plan to handle disposal of all of these drummed materials. The third portion of DER's order merely requires adherence to any DER approved plan for the disposal of these materials. Having established the need for waste characterization/differentiation and a plan for the lawful removal and disposal of these wastes, DER has also established the need to have this plan followed by Alpen with proof thereof submitted to DER.[9]

Clearly, we must also reject Alpen's argument that it needs no permits to dispose of or store wastes at its property. Insofar as Alpen is storing or disposing of hazardous wastes at the site, Section 401 of the SWMA mandates that Alpen possess a permit for hazardous waste storage and disposal operations. Additionally, Section 301(a) of the SWMA mandates permits for all residual waste disposal operations. Moreover, once Alpen began storage of

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8 As DER's Olenick properly advised Alpen, DER's order applied not to the trash and debris but only to the chemicals in the drums. In turn, this opinion does not address the need for this order *vis à vis* disposal of that material but confines itself to the chemicals in the drums and pails and the drums and pails themselves.

9 As an aside, Alpen asserts that DER's Order to it was not introduced into the record. This is not so. It was attached to the copy of EPS's report which was admitted into the record as Exhibit S-5. Moreover, it was attached to Alpen's own Notice Of Appeal which is obviously of record or we would have had no reason to hold a hearing or prepare this Adjudication.

these drums, the time clock as to the presumption of disposal thereof provided in Section 103's definition of "storage", i.e., storage for over a year is presumed to be disposal, began to tick. Thus, though we need not address this issue to sustain DER's Order, in 1993 Alpen may need to overcome the presumption of disposal or secure a permit for the disposal of any residual wastes also.

Lastly, Alpen challenges the time frames within DER's Order as being unreasonable. DER's only evidence on this point is testimony from Olenick that the time frames in the Order were standard for orders in this regional office of DER (T-62) and DER received no request to extend them from Alpen. (T-63-64) DER issued this Order as an emergency Compliance Order because it perceived a threat to the residents of the area and wanted Alpen's activities stopped immediately. Based on the evidence shown to have been in DER's possession when it issued this order, we conclude DER's proof of any immediate threat to area residents was minimal at best.[10] Unlabeled drums, easy access to the site, and one drum catching fire (and being extinguished) does not make for much of an emergency where DER concludes the hazard from the fire is not significant enough to warrant evacuation of area residents (T-137-138) and site access was reduced within a month of the order's issuance. On DER's

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10 The evidence offered this Board to support DER's Order contained many significant gaps but we are unable to determine whether this was because the evidence did not exist or because DER failed to present it at the hearing.

September 13, 1990 inspection it could not gain access to the site (T-66-67), and even as early as August 24, 1990 the front door of the building was locked. (T-47)

DER offered us inadequate evidence that the order's time frames were reasonable. Just because the order's time frames are the same as standard time frames placed in orders issued in this portion of Pennsylvania does not make them reasonable. Compliance time frames must be established based on the facts of a particular case. Time frames cannot be set on the theory that "one size fits all". Indeed, a one-size-fits-all theory produces time frames which are too short or too long in every situation except the standard situation itself--if one exists. Thus, as to these time limitations, DER did abuse its discretion. Unfortunately Alpen offered no testimony as to what would be a more reasonable time frame.

We can see no virtue to remanding this Order to DER to fix new time limits. Alpen has failed to offer one shred of evidence as to what a reasonable time frame for compliance with this Order might be. Moreover, we issue this Adjudication almost three years after DER issued this Order. We find that Alpen could have easily complied with this order in a timely fashion if given six months to do so. This time frame would have allowed Alpen sixty days to have these drums sampled and the samples analyzed while still providing four months to arrange the waste disposal. It serves no purpose to try to determine today if it could have done so more promptly in 1990, since even this time period has long since expired. We point out for Alpen, however, that the filing of an appeal does not act as an automatic supersedeas

of DER's Order as implied in its brief and we were not asked by Alpen to supersede this Order. See Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d).

Based upon this analysis of the matter before us, we make the following conclusions of law and enter the following Order.

CONCLUSIONS OF LAW

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

2. As this is an appeal from DER's issuance of an administrative order to Alpen, DER bears the burden of proof in regards to its actions.

3. Alpen is a person as defined in the SWMA, 35 P.S. §6018.103.

4. A person may not be held liable for violations of the SWMA solely on the basis of ownership of the land where the violation occurred.

5. The fact of a landowner's securing its real property by locking doors and fences and boarding up windows and limiting third party access thereto is insufficient standing alone to create liability for the landowner under the SWMA for violations thereof occurring on the property, where the violations predate the acquisition of title to the real estate and there is no suggestion the current owner brought the wastes to the site.

6. A party is deemed to abandon all legal arguments not raised in its Post-Hearing Brief. Lucky Strike Coal, *supra*.

7. A real estate buyer's sophistication as to real estate sales and purchases and the visibility of the SWMA violations on the property it purchases does not create liability in the purchaser for violations of the

SWMA on the purchased property under a theory of *caveat emptor*, even where the deed conveying title to the property contains no warranties.

8. Where drums of various chemicals sit on real property for over a year after title to the property is acquired, there is still no presumption of disposal as to the new property owner under Section 103 of the SWMA, 35 P.S. §6018.103, if these drums' existence on the property predates its acquisition of the site and the new owner has taken no actions to exert control over these drums or to affect them in any fashion, because this new owner never began the storage of these drums from which the disposal presumption arises.

9. When the new property owner attempts to sell the drumed materials to third parties or hires contractors to clean out the building where the drums are situated and repair it so that the owner may rent the space to others, and during this period drums and other containers disappear from the site, and a drum of chemicals catches fire, the property owner has moved from a passive to an active role as to these materials and liability for their proper storage and ultimate disposal attaches under the SWMA.

10. Section 401 of the SWMA requires a person who would store or dispose of hazardous waste to obtain a permit from DER for these activities prior to undertaking them.

11. Section 302 of the SWMA requires a person who would operate a residual waste disposal site to obtain a permit therefor, prior to undertaking operation of the site.

12. In reviewing DER's decision to issue its administrative order to Alpen, this Board conducts *de novo* review of the DER action and is not limited

during the conducting of the *de novo* review to the evidence before DER at the time it acted but may consider evidence generated subsequent thereto.

13. There is sufficient evidence to support DER's issuance of its SWMA administrative order to Alpen.

14. Where DER's only evidence to support the compliance time frames set forth in its order is that these are the time frames routinely placed in such orders issued in this portion of Pennsylvania, DER fails to prove the time frames are reasonable under the circumstances in this appeal, so a challenge to their reasonableness must be sustained as there is no evidence that these time frames were established based on this appeal's individual circumstances.

15. Where DER abuses its discretion in setting a compliance time-table in its administrative order, this Board may substitute its discretion for that of DER as to this time table and modify same.

ORDER

AND NOW, this 16th day of August, 1993, it is ordered that the appeal of Alpen is dismissed.

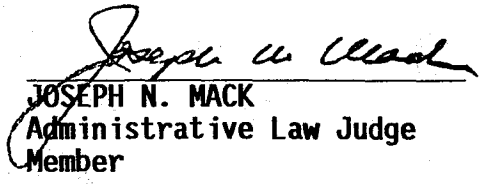
ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 16, 1993

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Northeast Region
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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES E. FULKROAD d/b/a	:	
JAMES FULKROAD DISPOSAL	:	
and JAMES E. and MILDRED I. FULKROAD	:	
	:	
v.	:	**EHB Docket No. 91-141-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 24, 1993**

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of an order issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, (SWMA), is dismissed. The Department of Environmental Resources' (Department) issuance of the order to the appellants was not an abuse of discretion where the appellants admitted to dumping solid waste without a permit. The remedial measures in the order were not an abuse of discretion where they were necessary to prevent an environmental harm.

INTRODUCTION

This matter was initiated with the April 9, 1991, filing of a notice of appeal by James E. Fulkroad d/b/a James Fulkroad Disposal and James E. and Mildred I. Fulkroad (collectively, the Fulkroads) seeking review of a March 12, 1991, order from the Department. The order, issued pursuant to the SWMA and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code), alleged that the Fulkroads

dumped solid waste without a permit contrary to §201(a) of the SWMA and 25 Pa. Code §§271.101(a) and 273.201(a).

A hearing on the merits was held before Chairman Maxine Woelfling on June 29, 1992. The Department filed its post-hearing brief on August 17, 1992, and the Fulkroads filed their post-hearing brief on September 18, 1992.[1]

The central issue raised by the parties was whether the Department's order was an abuse of discretion in that it required the excavation and proper disposal of the wastes illegally deposited rather than allowing the wastes to remain in place with, *inter alia*, groundwater monitoring and gas venting.

The record in this matter consists of a transcript of 118 pages and ten exhibits.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellants are James E. Fulkroad, d/b/a James Fulkroad Disposal and James E. and Mildred I. Fulkroad, individuals who, at the time of the issuance of the order in question, owned and resided at R.D. #1, Box 386, Millersburg, Upper Paxton Township, Dauphin County (Notice of Appeal).

2. Appellee Department is the agency charged with the duty to administer and enforce the provisions of the SWMA, the rules and regulations promulgated thereunder, and §1917-A of the Administrative Code.

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[1] On July 28, 1993, the Department advised the Board of the Third Circuit Court of Appeals' decision in Pozsgai v. United States, ___ F.2d ___, 1993 WL 221527 (3rd Cir., June 25, 1993), arguing that an order to remove waste is not an abuse of discretion when a violator willfully and knowingly violates the law. The Fulkroads responded to the Department's letter on August 9, 1993, asserting that the decision is not germane to our disposition of the Fulkroads' appeal. For reasons which will become obvious later in this adjudication, we agree with the Fulkroads.

3. Mr. and Mrs. Fulkroad own a 41.88 acre tract of land situated along Landfill Road, Upper Paxton Township, otherwise identified as Dauphin County Tax Parcel No. 65-026-009 (Stip. No. 1).[2]

4. From 1989 to March, 1991, Mr. and Mrs. Fulkroad operated a sole proprietorship known as James E. Fulkroad Disposal (hereinafter referred to as "the Company"). The Company engaged in the collection, transportation and disposal of municipal waste from various residential and commercial customers (Stip. No. 3; N.T. 41).

5. The Company served several hundred customers (N.T.41).

6. The Company disposed of some of the waste which it collected at a permitted disposal facility (i.e. the City of Harrisburg's Steam Generating Solid Waste Incinerator) (Stip. No. 4; N.T. 41).

7. During a period from about November, 1989, to sometime prior to March, 1991, the Company sometimes deposited waste at an approximately one-acre site on a portion of the parcel of land owned by Mr. and Mrs. Fulkroad (Stip. No. 5; N.T. 54).

8. The Company brought in four to five tons of waste at a time twice a week (N.T. 41, 106).

9. A portion of this parcel of land owned by Mr. and Mrs. Fulkroad is the site of a former landfill which had been in operation from the 1930's or 1940's until sometime in the 1970's (Stip. No. 2).

10. The portion of the site which is a former landfill is approximately 30-35 acres (N.T. 54, 101).

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[2] References to the transcript of the hearing on the merits are denoted by "N.T. ___." The Department's exhibits are referred to as "Ex. C-__." The Fulkroads' exhibits are referred to as "Ex. A-__." References to the stipulations from Stipulations Pursuant to Pre-Hearing No. 2 are labeled as "Stip. No. __."

11. At sometime prior to March 8, 1991, Anthony L. Rathfon, a Solid Waste Specialist with the Department, visited the Fulkroad property in response to an anonymous telephone call. Mr. Rathfon met with Mr. Fulkroad and informed him that, if the Company was depositing waste at the site, such disposal must cease since the Company did not have a permit to dispose of solid waste on the property (Stip. No. 6; N.T. 11).

12. Mr. Rathfon inspected the property and found clean fill material (N.T. 12-13).

13. Mr. Fulkroad told Mr. Rathfon that waste from customers went to the Harrisburg incinerator (N.T. 13).

14. On October 10, 1990, after receiving another anonymous telephone call, Mr. Rathfon again visited the Fulkroad property at which time he saw evidence of trash/debris on top of the ground in the area of the one-acre site. Mr. Rathfon did not speak with Mr. Fulkroad on this visit (N.T. 13-14).

15. On February 12, 1991, after a third anonymous call, Mr. Rathfon visited the Fulkroad property and attempted to inspect the area of the one-acre site (N.T. 14-16).

16. Mr. Fulkroad refused Mr. Rathfon permission to inspect this area, contending that there was no reason to see the area as it was strictly firewood; that he did not have any insurance to cover any injury Mr. Rathfon might sustain; and that he had no time to walk with Mr. Rathfon (N.T. 16-17).

17. Mr. Rathfon left the Fulkroad property and went to an adjacent property where he saw an area on the Fulkroad property about one-acre in size which had been excavated, with the soil stockpiled and trash partially covered (N.T. 17-18; Ex. C-5).

18. On February 14, 1991, the Department issued a Notice of Violation advising Mr. Fulkroad that he was operating an unpermitted municipal waste disposal facility (Ex. C-6).

19. On March 8, 1991, a meeting to discuss the Notice of Violation was held at the Department's Harrisburg Regional Office. During the meeting, Mr. Fulkroad stated he ceased dumping waste on his property and agreed to excavate the site in order for the Department to determine the amount of waste present (N.T. 20-22; Ex. C-6).

20. As a result of the March 12, 1991, excavation of the site, the Department determined that municipal waste had been deposited over a one-acre area approximately seven to eight feet in depth (N.T. 23).

21. On March 12, 1991, the Department ordered the Fulkroads to cease the unlawful dumping of municipal waste, to remove the waste, and to dispose of it at a permitted waste disposal facility (N.T. 23-28; Ex. C-7; Stip. No. 8).

22. Although the March 12, 1991, order refers to "the Fulkroad property," the order was intended by the Department and understood by the Fulkroads to apply only to the one-acre parcel of land (Stip. No. 9).

23. Mr. and Mrs. Fulkroad engaged the services of a surveyor and an engineer to study the disposal site (Stip. No. 10).

24. Thomas Templeton, a civil engineer, prepared a topographic plan of the site, estimated the volume of waste at the site, developed an alternative closure plan and estimated costs for the removal and disposal of the waste to comply with the order (Stip. No. 10; N.T. 61-63).

25. Mr. Templeton is not an expert in hydrogeology, municipal waste landfill design or construction, or groundwater contamination. He is not familiar with regulatory requirements for design of a municipal waste

landfill, although he is aware that a landfill must have a double liner and a leachate collection system (N.T. 76).

26. Michael Nawrocki, an engineer/hydrogeologist, who was familiar with hydrology and hydrogeology and who had performed some landfill work in Pennsylvania, assisted Mr. Templeton on mitigation measures for the disposal area (N.T. 85).

27. On August 13, 1991, a second excavation of the site was performed. Mr. Rathfon, Mr. Templeton, Mr. Nawrocki and the surveyors were present for the digging of backhoe test pits to determine the depth and area/extent of the solid waste (N.T. 24, 86).

28. The disposal area remained at approximately one acre, while the depth was now determined to be ten to twelve feet (N.T. 24, 86).

29. There was a considerable discrepancy between the estimates of the amount of waste material at the site. Mr. Templeton and Mr. Nawrocki estimated 17,378 tons of waste material, while Mr. Fulkroad has variously stated approximately 300 to 400 tons and approximately 600 tons (N.T. 81, 108, 109; Ex. A-4).

30. Mr. Templeton and Mr. Nawrocki estimated that it would cost $883,471 to comply with the order, with the cost broken down as follows:

Excavation and Stockpiling Overburden	4,563 C.Y.[3]	@	$ 1.90/C.Y. =	$ 8,670
Excavation and Transporting Waste Material	10,861 C.Y.	@	12.00/C.Y. =	130,332
Permitted Landfill Acceptance of Waste Material	17,378 Tons	@	41.20/Ton =	715,974
Revegetation of Disturbed Area	10,000 S.Y.[4]	@	0.47/S.Y. =	4,700

(N.T. 70, 81; Ex. A-4)

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3 Cubic yards.

4 Square yards.

31. Mr. Rathfon, who frequently deals with weights and volumes of soil and waste, estimated the excavated material to consist of 70% solid waste and 30% soil (N.T. 25, 109).

32. Further assuming a volume/weight ratio of three cubic yards per ton of solid waste and 1.5 cubic yards per ton of soil and using Mr. Fulkroad's estimate that 600 tons of solid waste were deposited on the site, Rathfon concluded that 1,114 tons of material would have to be removed and disposed at a permitted landfill (N.T. 113).

33. Accepting the estimates of the Fulkroads' consultants for excavation and stockpiling overburden; backfilling with suitable on-site material; and revegetating the disturbed area, but applying the per unit costs for excavation ($12.00 per cubic yard) and transport and disposal ($41.20 per ton) to 2,571 cubic yards and 1,114 tons of material, respectively, Rathfon concluded the cost of compliance would be $113,974 (N.T. 113; Ex. A-4).

34. The Fulkroads submitted an alternative "closure in place" proposal to the Department on October 8, 1991. This submission proposed the following: 1) removing the covering ground layer, 2) compacting the underlying material, 3) replacing and regrading the ground cover, 4) constructing diversion ditches, 5) reseeding the cover, 6) installing three, 14 foot groundwater monitoring wells, 7) installing a methane gas ventilation system, and 8) erecting permanent boundary markers (Stip. No. 10; N.T. 72-76, 84-95; Ex. A-5, 7).

35. The "closure in place" proposal did not include a liner or leachate collection system (N.T. 78, 97).

36. The "closure in place" proposal would not completely prevent water from entering the site and, thus, there is potential for contamination (N.T. 97).

DISCUSSION

In this appeal of the Department's order to the Fulkroads to cease their alleged illegal disposal of municipal waste and to remove and properly dispose of the illegally disposed of waste, the burden of proof rests with the Department to show by a preponderance of the evidence that its order was not an abuse of discretion. 25 Pa. Code §21.101(b)(3).

In order to establish by a preponderance of the evidence that its order was not an abuse of discretion, the Department must provide the Board with such proof as to lead the Board to conclude that it is more probable than not that the Fulkroads violated the SWMA and that the remedial measures prescribed in the order are reasonable and appropriate. Gordon and Janet Back v. DER, 1991 EHB 1667, 1676; South Hills Health System v. Com. Dept. of Public Welfare, 98 Pa. Cmwlth. 183, 510 A.2d 934 (1986). Based on the evidence presented, we conclude that the Department satisfied its burden of proof.

Because it is undisputed that the Fulkroads unlawfully dumped solid waste at a one-acre site on their property (Stip. No. 5), the Department was authorized by §602 of the SWMA to issue an order to the Fulkroads to cease the illegal dumping of municipal waste. Our only task is to determine whether the Department's directive to the Fulkroads to remove the waste and dispose of it at a permitted site was an abuse of discretion.

The Fulkroads contend that the Department abused its discretion in that the remedy of removal of the waste is unreasonable. More specifically, the Fulkroads argue the reasonableness of a Department order depends on the consideration of the cost of the removal of all the waste in relation to the potential environmental benefit, the availability of alternative remedial measures, and the Fulkroads' financial ability to comply with the order. The Department, on the other hand, contends that the cost of compliance, as well

as the ability of the violator to comply, are irrelevant and that it is not required to balance the costs of various abatement techniques with their potential benefits.

The Board has held that the Department must consider the economic effects of its discretionary actions when it may choose from other alternatives to obtain compliance with the environmental laws, Einsig v. Pennsylvania Mines Corp. 69 Pa. Cmwlth. 351, 452 A.2d 558 (1982); East Pennsboro Township v. DER, 18 Pa. Cmwlth. 58, 334 A.2d 798 (1975); Sechan Limestone Industries, Inc. v. DER, *et al.*, 1986 EHB 134; and Armond Wazelle v. DER, 1985 EHB 207. However, if none of the alternatives is reasonably likely to achieve the desired environmental result, then the Department must take the necessary action, regardless of the economic effects, as its primary responsibility is the protection of the environment and public health. Sechan Limestone Industries, Inc. v. DER, *et al.*, 1986 EHB 134, 166-167.

Here, the Department found the Fulkroads' alternative proposed "closure in place" plan to be unacceptable, as it would not be equally environmentally protective and, based on our analysis of the evidence, we agree with that assessment. The plan calls for removing the covering ground layer, compacting the underlying material, replacing and regrading the ground cover, constructing diversion ditches, and reseeding. It also proposes the installation of three, 14 foot groundwater monitoring wells, and a methane gas ventilation system (Stip. No. 10; N.T. 72-76, 84-95; Ex. A-5-7). It does not include the requisite liner and leachate collection system (N.T. 78, 97). The major problem with the Fulkroads' plan is that it will not prevent groundwater contamination. While the regrading and compacting are intended to reduce the amount of water percolating through the waste, they do not eliminate any water from running through the waste (N.T. 97), and, therefore, will not prevent the

formation of leachate. Moreover, although monitoring wells are proposed, there are no provisions to address any contamination they may detect. Given the evidence that the Fulkroads' proposed alternative is not reasonably likely to prevent environmental harm, but rather likely to contribute to it, the Department did not have to consider the cost of remedial measures in fashioning its order. Consequently, the Department's order to remove and properly dispose of the illegally disposed waste was not an abuse of discretion.[5]

The Board must also reject the Fulkroads' argument that the Department had to consider their financial ability to comply with the order. It is long-settled law in Pennsylvania that the financial ability of a violator to comply with a Department order is not relevant to whether the Department's order was an abuse of discretion. The appropriate time to raise this issue is when the Department seeks to enforce its order. Ramey Borough v. Com., DER, 15 Pa. Cmwlth. 601, 327 A.2d 647 (1974), aff'd 466 Pa. 45, 351 A.2d 613 (1976).

CONCLUSION OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that violations of the SWMA were committed and the remedial measures set forth in its order were proper and were not an abuse of discretion.

---

5 The merits of in-place closure versus off-site removal and disposal were recently addressed by the Board in Concerned Residents of the Yough (CRY), Inc. v. DER and Mill Service, Inc. EHB Docket No. 89-133-MJ (Adjudication issued July 19, 1993). There, the Board concluded, based on extensive evidence, that in-place closure would be less environmentally harmful than off-site removal. We have no such evidence here.

3. The Fulkroads violated §201(a) of the SWMA, and 25 Pa. Code §§271.101(a) and 273.201(a) by dumping municipal waste on their property from approximately November, 1989 to sometime prior to March, 1991, without a permit.

4. The Department must consider economic effects of its discretionary actions when there are viable alternatives with which to obtain compliance with the Commonwealth's environmental laws.

5. The only proposed alternative remedy, a closure in-place plan proposed by the Fulkroads, is not reasonably likely to prevent environmental harm.

6. The remedial measures set forth in the order were not an abuse of discretion.

7. The Fulkroads' financial ability to comply with the Department's order is irrelevant in an appeal of the order.

8. The Department sustained its burden of proving that the order was not an abuse of discretion.

ORDER

AND NOW, this 24th day of August, 1993, it is ordered that the Department's order is sustained and the Fulkroads' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 24, 1993

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

JAMES F. WUNDER	:	
	:	
v.	:	EHB Docket No. 91-404-MR
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	: :	Issued: August 24, 1993

OPINION AND ORDER
SUR
DISMISSING APPEAL AS MOOT

Robert D. Myers, Member

Synopsis

An appeal challenging DER's denial of a private request to order revisions to an Official Sewage Facilities Plan is moot when DER grants the request and issues the order, even though the municipality has filed an appeal challenging DER's order.

OPINION

This appeal was begun on September 30, 1991 by James F. Wunder (Appellant) seeking review of the refusal by the Department of Environmental Resources (DER) to order Milford Township, Bucks County, to revise its Official Sewage Facilities Plan in accordance with 25 Pa. Code §71.14. On January 22, 1993 the Board issued an Opinion and Order granting judgment on the pleadings to Appellant, remanding the matter to DER for review on the merits and directing DER to make a final decision by March 23, 1993.

We have now been advised that on April 15, 1993 DER ordered Milford Township to revise its Official Sewage Facilities Plan so as to provide

adequate sewage facilities for Appellant's property. Based on this information we issued a Rule to Show Cause on July 1, 1993 directing Appellant to show cause why the appeal should not be dismissed as moot. Appellant filed his response on July 12, 1993 and DER filed a reply on July 26, 1993.

Appellant argues that the appeal is not moot because Milford Township filed an appeal with this Board at Docket No. 93-138-MR challenging DER's April 15, 1993 order. Therefore, the subject matter underlying Appellant's appeal is still in issue.

An appeal becomes moot when an event occurs which deprives the Board of the ability to provide effective relief: *Robert L. Snyder et al. v. DER*, 1989 EHB 591. When that occurs, there is no relief that the Board can give an appellant: *Roy Magarigal, Jr. v. DER*, 1992 EHB 455. Whether these principles apply here depends upon the relief requested in Appellant's Notice of Appeal. Our perusal of that document satisfies us that Appellant sought only a reversal of DER's decision to deny Appellant's request to order Milford Township to revise its Official Sewage Facilities Plan.

We did not grant that relief entirely in our prior Opinion and Order, but remanded the matter to DER for review on the merits. After completing its review, DER granted Appellant's request and issued the order to Milford Township. Clearly, Appellant has now obtained all that he sought in this appeal and there is nothing more we can do for him in this regard. The appeal is moot.

The fact that Milford Township has appealed DER's order does not change this result. That appeal challenges a DER action that, while related, is totally separate and distinct from the action challenged by Appellant. Besides, Appellant can protect his interests by requesting to intervene in the Milford Township appeal.

ORDER

AND NOW, this 24th day of August, 1993, it is ordered that, since this appeal is now moot, the docket is closed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 24, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

DAVID C. PALMER	:	
	:	
v.	:	**EHB Docket No. 92-466-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 25, 1993
and YORK COUNTY SOLID WASTE AND REFUSE	:	
AUTHORITY, Permittee	:	

OPINION AND ORDER
SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis:

The Board is without jurisdiction to review a challenge to the renewal of a solid waste permit where the Department of Environmental Resources (Department) has not taken final action on the renewal application.

OPINION

The procedural history of this matter is set forth in detail in the Board's April 8, 1993, opinion granting the York County Solid Waste and Refuse Authority's (Authority) motion to dismiss David C. Palmer's appeal of air quality and solid waste management permits issued in 1987. Palmer's appeal also made reference to the Authority's application to renew Solid Waste Permit No. 400561, but the Authority's motion did not seek dismissal of the appeal as it related to the renewal.

Thereafter, on April 22, 1993, the Authority filed a motion to dismiss Palmer's appeal as it related to the solid waste permit renewal. The

Authority asserted that because the Department, as evidenced by the affidavit of Francis B. Fair, the Regional Solid Waste Program Manager for the Southcentral Region, had not taken any final action with regard to the solid waste permit renewal application, there was no appealable action for the Board to review. Consequently, the Board was without jurisdiction over the remaining portion of Palmer's appeal.

Mr. Palmer did not respond to the Authority's motion.

The Board has jurisdiction to review any decision of the Department which is final and affects personal or property rights, privileges, immunities, duties, liabilities, and obligations. County of Clairon v. DER and Concord Resources Group of Pennsylvania, EHB Docket No. 92-274-W (Opinion issued April 23, 1993). Here, the Department has taken no final action regarding the Authority's application to renew its solid waste permit. There being no appealable action for the Board to review, the remaining portion of Palmer's appeal must be dismissed for lack of jurisdiction. When the Department takes final action on the Authority's permit application, Mr. Palmer will have the opportunity to exercise his appeal rights.

O R D E R

AND NOW, this 25th day of August, 1993, it is ordered that the Authority's motion is granted and the remaining portion of David C. Palmer's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 25, 1993

cc: **DER Bureau of Litigation**
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York, PA
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

VALLEY PEAT AND HUMUS, INC.	:	
	:	
v.	:	**EHB Docket No. 91-158-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 30, 1993**

OPINION AND ORDER SUR
MOTION TO DISMISS FOR LACK
OF JURISDICTION

By Maxine Woelfling, Chairman

Synopsis

An appeal is dismissed for lack of jurisdiction where it is untimely filed. The notice of appeal was filed more than 30 days after an individual with apparent authority to act on appellant's behalf with regard to the permit at issue received notice of the permit's issuance.

OPINION

The procedural history of this matter is set forth in the Board's opinion at 1992 EHB 512 denying the Department's motion to dismiss Valley Peat and Humus, Inc.'s (Valley Peat) appeal as untimely. There, the Board held that it could not grant the Department's motion because it could not be determined when Valley Peat had received notice of the Department's issuance of the permit in question.

The Department has again filed a motion to dismiss Valley Peat's appeal. Alleging that one William A. LaVelle IV had apparent authority to act on behalf of Valley Peat and that he personally received the permit "on or

about February 28, 1991 and definitely prior to March 21, 1991," the Department asserts the appeal was untimely, as it was not filed until after April 20, 1991.[1] Valley Peat responded to the Department's motion on March 16, 1993, arguing that the Department once more had not established when Valley Peat had received notice of the permit's issuance and, therefore, the appeal should proceed to a determination on the merits.

For the Board to have jurisdiction over an appeal, the appeal must be filed with the Board no later than 30 days after the appellant receives notice of the contested Department action. City of Philadelphia Streets Department v. DER, 1992 EHB 730. Here, the issue of when Valley Peat received notice of the Department's issuance of the permit turns upon the scope of Mr. LaVelle's authority to act on behalf of Valley Peat. If we find that he had apparent authority to act on Valley Peat's behalf with regard to the permit, the date he received notice of the issuance of the permit is binding on Valley Peat. Louis Beltrami and Beltrami Enterprises v. DER, 1989 EHB 594.

The transcripts of depositions of Michele Mandarano, president of Valley Peat, and William LaVelle taken by the Department[2] establish LaVelle's authority to act on behalf of Valley Peat. When questioned by counsel for the Department regarding Mr. LaVelle, Ms. Mandarano responded:

> Q. Okay. So four sisters. I notice that what I assume is your brother; is that William LaVelle, Junior?
>
> A. Yes.

---

1 The Department contends that the appeal was late regardless of whether the appeal period was measured from the Board's April 22, 1991, receipt of Valley Peat's request for appeal forms, which the Board treated as a skeleton appeal under 25 Pa. Code §21.52(c), or the Board's May 6, 1991, receipt of a fully perfected appeal from Valley Peat. We agree.

2 And attached as exhibits to its motion to dismiss.

Q. He is your brother?

A. Yes, he is.

Q. I notice he's not listed in here ---

A. No.

Q. --- but my understanding from the people at Pottsville was that during the permitting process that your brother, I guess, was the contact person, is that right?

A. He was down there picking up the permit and meeting with the officials. I was incapable at that time. I was expecting.

Q. Okay. So basically Bill was your --- your brother, Bill, was your representative then?

A. Yes, and he did have permission to pick up the permit.

(Mandarano deposition, p. 8, l. 13-25 and p. 9, l. 1-5, emphasis added)

That authority was confirmed in Mr. LaVelle's deposition testimony:

Q. My understanding from discussing this with your sister, Ms. Mandarano, who is the president of Valley Peat and Humus, is that the expectation was that you would be foreman or running the job; is that correct?

A. That's correct.

Q. What was your involvement as far as the issuance of the permit?

A. I basically run job site projects for the company. They're on a part-time basis being that the company doesn't have the revenue to pay a full-time person. I was asked by my sister if I would be interested in running the job down there as far as overseeing on the job, loading trucks, you know, hiring people and so forth and so on.

Q. And in that capacity or in the suggested capacity, did you have any involvement or any actual consideration of the permit by the Department? Or consideration for permit application, I should say?

A. I worked with the --- as a representative for the company as far as details and gathering information with our engineering contractor that works for Valley Peat and Humus.

Q. So it's correct --- would it be correct to say then that you were the contact person for Valley Peat and Humus; is that an accurate statement?

A. To a degree, yes. I couldn't make ultimate decisions and so forth without checking with Michele Mandarano first.

(LaVelle deposition, p. 9, l. 1-25 and p. 10, l. 1-4, emphasis added)

and, later in the deposition:

Q. And again just to make sure it's clear on the record, your sister led me to understand during her deposition that you were, in fact, her representative as far as dealing with the Department on the permit?

A. Yes. If there was a decision to be made I would go back to her and she would make the decision if there were any changes to be made or anything. I have authority on the job site to handle equipment, employees, so forth and so on. But as far as a legal decision or a company decision, that was made by her. They all are.

Q. Okay. I understand that. But let's just say that someone had a question about something that was in the permit, it would have been likely that they called you then ---

A. Yes.

Q. --- and asked you?

A. Yes.

Q. And then if it was something that you had to talk to your sister or talk to your consultant about you would do that but you were basically the contact person for the Department?

A. That's correct.

Q. And --- I'm sorry. Go ahead.

A. No. I know the special conditions were not discussed with her when I picked them up. That was kind of a last minute, you know, input from the Department, here's what you want --- if you want a permit, you have to agree to these, so I agreed to them, took the permit back.

Q. Okay. And you were authorized by her to pick up the permit; is that right?

A. I was authorized to pick up the permit, yes.

(LaVelle deposition, p. 32, l. 22-25, p. 33 and p. 34, l. 1-3, emphasis added)

It is evident from the deposition testimony of both Ms. Mandarano and Mr. LaVelle that Mr. LaVelle had authority to act on behalf of Valley Peat with regard to the permit.

When Mr. LaVelle received notice of the permit's issuance is somewhat more difficult to ascertain from the deposition transcript. It is clear that Mr. LaVelle personally went to the Pottsville District Mining Office to pick up the permit - the date he did so is another matter:

A. Well, I believe looking at this that the permit --- from the date on the coverletter of the permit it says the 28th, I would believe that it was either the 28th or shortly after that. Not before that I don't believe.

Q. But you came down and received the permit, is that what you're saying?

A. Yes. Somewhere in that time. Somewhere after the 28th or on the 28th, whichever.

Q. But your recollection is that if it wasn't on the 28th it would have been sometime within a week's span of that; is that correct?

A. Sometime shortly after that, yes.

Q. And I'm just trying to --- a week is a little amorphous, so you would say sometime

within five working days after that; does that sound correct?

A. I don't know exactly how many days. It was shortly after that. Two, three days, five working days, I'm not sure. I know Mr. Hornberger was busy and could not sign the permit. He did say it was ready, okay, but he was not available to sign it which he had to be and that there were some special conditions that had to be considered before the permit would be issued.

Q. Okay. Let's briefly talk about those now. So after this conversation, you --- sometime within your testimony as sometime within a week, approximately within a week of date of the 25th or the 28th is when you came down and had the meeting with Mr. Hornberger.

A. Sometime around the 28th it was, yes. Like I said I don't have an exact date.

(LaVelle deposition, p. 23 and p. 24, l. 1-5)

Further in the deposition he testified:

Q. And just to be clear, the day that you came down and this discussion was had between you and Mr. Hornberger regarding these various permit conditions, was that also the day that you were given the permit?

A. Yes, it was. Yes, it was. Because I believe I waited a little while until the paperwork was put together and I took it with me.

Q. Just to make sure that we're clear on the record here. You came down to discuss the special conditions and the various other things, that discussion was held, there was a little paperwork or organization that had to be done by the Department, you waited for that and then on that same day you were given the permit; is that correct?

A. That's correct.

Q. Now, you've testified before, correct me if I'm wrong, you testified in this deposition that you can't recall whether February 28, 1991, was the exact day that you were down here?

A. Was the exact day that I picked up the permit?

Q. Right.

A. Right.

Q. But it's your testimony also that it would have February --- that sometime on or right around February 28 is when you came down, the discussion was held and you received the permit from the Department?

A. Yes. The reason I come up with that is because the coverletter is dated to that.

Q. Right.

A. That's the only thing that would tell me that it was around February 28th because I assumed when I picked up the permit it was dated currently.

(LaVelle deposition, p. 26, l. 3-25, p. 27, l. 1-9)

Thus, Mr. LaVelle's deposition testimony establishes that he received the permit sometime on or after February 28, 1991, the date on the permit. That, in and of itself does not give us sufficient information to determine the timeliness of the appeal.

However, the outside limits of when LaVelle received notice are established in further deposition testimony regarding an inspection of the site on March 21, 1991, during which Valley Peat was notified it was in violation of the permit's requirement to post a sign on the job:

Q. Would you agree that this inspection report though indicates that by March 21, 1991, that there was, in fact, a permit issued?

A. I would say yes. Yes, it was. <u>Because I know we had to get a sign for the job, okay, according to the permit requirements. The permit, I assume, was issued by that date definitely because we had to have a sign on.</u>

(LaVelle deposition, p. 29, l. 21-25 and p. 30, l. 1-2, emphasis added)

And finally,

> Q. And would your recollection be that it was issued closer to the 28th of February as opposed to the 21st of March?
>
> A. Yes. Closer to the 28th. Like I say, I assume the permit was issued right around that date it was issued --- that I picked it up.
>
> Q. I understand what you're assuming. I just want to try to get things as clear as possible here for the record. So you can't recall whether February 28th was the exact date that you picked the permit up?
>
> A. I assume it was. It was on there when I picked it up.
>
> Q. But you can't recall that's exactly when it was?
>
> A. No.
>
> Q. But you're --- I'm sorry. Go ahead.
>
> A. No, I cannot.
>
> Q. Okay. But your recollection is that it was some time very close to that date?
>
> A. If not on that date, right.
>
> (LaVelle deposition, p. 30, l. 16-25, p. 31, l. 1-10, emphasis added)

Mr. LaVelle admits that Valley Peat received the permit sometime prior to March 21, 1991, because the requirement to post a sign on the permitted area was a condition in the permit. So, Valley Peat received notice of the permit's issuance - through Mr. LaVelle's picking up the permit - sometime between February 28, 1991, the date of the permit's issuance and prior to

March 21, 1991, the date the Department inspected the permitted area.[3]

In order for the Board to have jurisdiction over this appeal, Valley Peat's appeal would have had to have been filed on April 1, 1991, at the earliest,[4] or April 19, 1991, at the latest. Valley Peat's skeleton appeal was not filed until April 22, 1991, three days after the appeal period, as measured from March 20, 1991, the latest possible date of notice, had expired. Consequently, we are without jurisdiction over this appeal.

ORDER

AND NOW, this 30th day of August, 1993, it is ordered that the Department's motion is granted and the appeal of Valley Peat is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

---

3 We are at a loss to understand why an affidavit from Mr. Hornberger or a member of his staff responsible for permitting was not provided to the Board. Surely such an affidavit could have provided the Board information relating to Mr. LaVelle's receipt of the permit and could have avoided this tortuous recitation of deposition testimony which was necessitated as a result of the Department's failure to cite specific portions of the depositions in its motion and supporting memorandum.

4 March 30, 1991, was a Saturday, so the next business day for filing purposes was April 1, 1991.

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 30, 1993

cc: **Bureau of Litigation, DER:**
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For the Commonwealth, DER:
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Central Region
For Appellant:
Michele Mandarano, President
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jm

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M. DIANE SMITH
SECRETARY TO THE BOARD

GEMSTAR CORPORATION	:	
	:	
V.	:	**EHB Docket No. 89-193-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 2, 1993**

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

By Robert D. Myers, Member

Synopsis

DER issued a permit, under the Solid Waste Management Act, for a tire shredding facility with the provision that shredded tires are not to be stored for longer than one week in the shredded pile storage area. The Board finds that the Appellant waived the only issue in its appeal, objecting to that provision, by not filing its post-hearing brief.

Procedural History

On July 6, 1989 Thomas Fausto, as President of Gemstar Corporation (Appellant), filed a Notice of Appeal seeking review of a provision set forth in Solid Waste Permit No. 301184 issued by the Department of Environmental Resources (DER) on June 14, 1989. The Permit, issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA), involved the operation of a tire processing facility on a tract of land leased from Sklodowski Brothers, Inc. (Ski Brothers, Inc.), an auto salvage operation, in Springfield Township, Bucks County. On January

22, 1990 the Board stayed all the proceedings before it pending a Commonwealth Court ruling on *Ski Brothers, Inc. v. Springfield Township Zoning Hearing Board*, _____ Pa.Cmwlth. _____, 574 A.2d 1201.[1]

A hearing was held in Harrisburg on August 4, 1992 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented evidence in support of their positions. Gemstar, the party having the burden of proof, did not file its post-hearing brief even after the Board granted it seven extensions;[2] DER filed its post-hearing brief on May 28, 1993.

The record consists of the pleadings, a hearing transcript of 144 pages and 17 exhibits. After a full and complete review of the record we make the following:

---

[1] On December 12, 1986, the zoning officer of Springfield Township issued a Cease and Desist Order against Gemstar, Inc. and Ski Brothers, Inc. regarding transportation and storage of tires at the site of Ski Brothers' junkyard. Gemstar and Ski Brothers appealed to the Zoning Hearing Board which, on July 6, 1987, held that the appellants had acquired a limited vested right to chop tires as an incidental function of a junkyard/auto salvage yard, but imposed conditions for health and safety reasons. Subsequently, on October 11, 1989 the Court of Common Pleas, Bucks County, affirmed the Board's decision on the Cease and Desist Order and reversed the terms and conditions attached to the order. On March 9, 1990 the Commonwealth Court of Pennsylvania affirmed the decision by ruling Gemstar's accumulation of tires for storing and processing constitutes a natural expansion of a nonconforming use and that Gemstar had acquired a vested right to utilize its property for tire stamping and for the storage of waste tires (Stip. No. 3). (See footnote 3)

In September 1991, Gemstar and Springfield Township entered into a settlement agreement in which the township acknowledged Gemstar's right to process tires in accordance with the permit. (Stip. No. 3)

[2] Extensions were granted October 16, 1992, October 21, 1992, November 6, 1992, November 20, 1992, December 17, 1992, January 20, 1993, and February 18, 1993.

FINDINGS OF FACT

1. Gemstar (Appellant) is a corporation with a business address of R.D. #1, Coopersburg (Bucks County), PA 18036 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and the agency charged with the duty to administer and enforce the provisions of the SWMA and the rules and regulations adopted pursuant to said statute.

3. Gemstar leases approximately five acres of property in Springfield Township, Bucks County, from Ski Brothers which owns approximately a forty-five acre tract. Ski Brothers has operated a junkyard on the property for more than 45 years (Stip. No. 2).[3]

4. Gemstar operated for approximately six months ending in December 1986. Gemstar ceased operations as a result of a Cease and Desist order issued by Springfield Township (Stip. No. 3).

5. Gemstar, which was not operating at the time of the hearing and which had not operated for approximately five years before that, engaged in the business of accepting and processing waste tires (Stip. No. 1).

6. Gemstar applied for a permit from DER in October 1987 (Stip. No. 4).

7. On June 14, 1989 DER issued to Gemstar Solid Waste Permit No. 301184 for installation and operation of a tire shredder unit for the shredding of tires (Stip. No. 4; N.T. 21; Ex. A-1).

8. Paragraph 9 of the Permit states that, "Shredded tires are not to be stored for longer than one week in the shredded pile storage area" (Permit).

---

[3] References to the stipulations from Pre-Hearing Stipulation are labeled as "Stip. No. _____."

9. Gemstar filed a Notice of Appeal objecting to Paragraph 9 of the Permit (Notice of Appeal).

10. A hearing on the appeal was held on August 4, 1992.

11. Gemstar failed to file its post-hearing brief after seven extensions.

12. On May 6, 1993 the Board issued an Order directing that, since Gemstar had failed to file its post-hearing brief, it was deemed to have waived its right to file such a brief.

DISCUSSION

Gemstar has the burden of proof: 25 Pa. Code §21.101(a). To carry its burden Gemstar must prove by a preponderance of the evidence that Paragraph No. 9 of the Permit was an abuse of the Department's discretion: 25 Pa. Code §21.101. Our review of the matter is limited, however, to those issues raised by Appellant in its post-hearing brief. Any issues not raised in post-hearing briefs are deemed waived. *Lucky Strike Coal Co. and Louis J. Beltrami v. DER*, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988); *Delaware Valley Scrap Company, Inc. and Jack Snyder v. DER*, EHB Docket 89-183-W (Adjudication August 5, 1993).

Since Gemstar did not file a post-hearing brief, it waived the only issue raised in its appeal - Paragraph 9 of the Permit. Accordingly, there are no issues for the Board to adjudicate.

CONCLUSIONS OF LAW

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

2. Gemstar has the burden of proving by a preponderance of the evidence that Paragraph 9 of the Permit was arbitrary and an abuse of DER's discretion.

3. Gemstar failed to file its post-hearing brief.

4. Gemstar waived the issue related to Paragraph No. 9.

ORDER

AND NOW, this 2nd day of September, 1993, it is ordered that Gemstar's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 2, 1993

cc: **Bureau of Litigation**
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Harrisburg, PA
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Southeast Region
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M. DIANE SMITH
SECRETARY TO THE BOARD

GREENBRIAR ASSOCIATES	:	
	:	
v.	:	**EHB Docket No. 90-185-MR**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 2, 1993**

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

By Robert D. Myers, Member

Syllabus:

These six consolidated appeals challenge enforcement actions taken by DER against a surface miner of coal. The Board finds that the evidence supports DER's contentions and that each of the enforcement actions was taken to correct violations of SMCRA, the CSL and the regulations. The Board concludes that DER's actions were lawful and appropriate exercises of discretion. It sustains, *inter alia*, the suspension of the permit and the forfeiture of the bonds by dismissing all of the appeals.

Procedural History

This proceeding involves the following six consolidated appeals filed by Greenbriar Associates:

90-185-MR: Notice of Appeal filed May 7, 1990 from Compliance Order (C.O.) 904029 issued by the Department of Environmental Resources (DER) on April 3, 1990.

90-243-MR: Notice of Appeal filed June 14, 1990 from C.O. 904044AE issued by DER on April 30, 1990, consolidated at 90-185-MR on March 21, 1991.

90-334-MR: Notice of Appeal filed August 7, 1990 from Suspension Order on Surface Mining Permit No. 17783113 issued by DER on July 7, 1990, consolidated at 90-185-MR on March 21, 1991.

90-415-MR: Notice of Appeal filed October 3, 1990 from C.O. 904080AE issued by DER on September 5, 1990, consolidated at 90-185-MR on March 21, 1991.

90-581-MR: Notice of Appeal filed December 28, 1990 from C.O. 904116AE issued by DER on November 29, 1990, consolidated at 90-185-MR on March 21, 1991.

91-074-MR: Notice of Appeal filed February 24, 1991 from a Bond Forfeiture letter issued by DER on January 16, 1991, consolidated at 90-185-MR on March 21, 1991.

All of these appeals relate to Appellant's Kofsky and Sutow #1 mine in Beccaria Township, Clearfield County, operated under Surface Mining Permit No. 17783113.

A hearing on the consolidated appeals was scheduled to begin on February 25, 1992 but was cancelled at the request of Appellant. A hearing scheduled to commence on August 18, 1992 was cancelled at the request of DER. A hearing scheduled to commence on September 1, 1992 was cancelled at the request of Appellant because of injuries suffered in an automobile accident by Richard M. Heberling (Appellant's chief executive officer) and, especially, Heberling's wife. On February 9, 1993 the Board issued yet another Notice of Hearing, setting the dates of April 27, 28 and 29, 1993. On April 12, 1993

Appellant requested a continuance because of Mrs. Heberling's condition. Because of the long delay in bringing these appeals to hearing, the Board denied the continuance on April 13, 1993.

Appellant filed nothing with the Board in response to Pre-Hearing Order No. 2 and was not in attendance when the hearing opened in Harrisburg at 10:00 a.m., April 27, 1993, before Administrative Law Judge Robert D. Myers, a Member of the Board. Judge Myers recessed the hearing for 15 minutes to see if some representative of Appellant would appear. During that interval a Board employee telephoned Appellant's office, asked to speak to Mr. Heberling and was told that he was not there. Upon being informed that he was expected at a hearing before the Board in Harrisburg, the person answering the call responded that Mr. Heberling's whereabouts were unknown.

Judge Myers reconvened the hearing and, since the burden of proof was on DER, directed DER to present evidence in support of its actions. DER, represented by legal counsel, proceeded to call and examine three witnesses. When DER rested at 12:40 p.m., there still was no representative of Appellant at the hearing. Accordingly, Judge Myers closed the record and adjourned the hearing.

The record consists of the pleadings, a hearing transcript of 100 pages and 20 exhibits.

After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant is engaged in the surface mining of coal and has a business address at R.D. 1, Box 248, Woodland, PA 16881 (Notices of Appeal).

2. DER is an administrative department of the Commonwealth of

Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*; 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 rules and regulations adopted pursuant to said statutes.

3. Appellant operated a surface coal mine, known as the Kofsky and Sutow #1 mine (Site) in Beccaria Township, Clearfield County, under Surface Mining Permit No. 17783113 (Permit) (Exhibit C-7).

4. On September 20, 1989 DER issued C.O. 894143, citing Appellant for mining beyond the boundaries of the Permit, ordering a cessation of operations and corrective action, (N.T. 45-48; Exhibit C-1C).

5. On November 2, 1989 DER issued C.O. 894148AE citing Appellant for failure to comply with C.O. 894143, ordering a cessation of operations and corrective action (N.T. 50-52; Exhibit C-1D).

6. Appellant did not contest these C.O.s by timely appeals to this Board. The appeals filed at Board Docket No. 90-004-MR were dismissed as untimely and a petition to appeal *nunc pro tunc* was denied in an Opinion and Order issued October 2, 1991 (1991 EHB 1638).

7. On April 24, 29 and 30, 1990 DER inspectors observed Appellant continuing to conduct mining operations at the Site despite the outstanding cessation orders (N.T. 88-90; Exhibit C-3).

8. As a result of these inspections, DER issued on April 30, 1990 C.O. 904044AE, citing Appellant for failure to comply with C.O.s 894143 and

894148AE, ordering a cessation of operations and corrective action. This C.O. became the basis for Appellant's appeal at Board Docket No. 90-243-MR, as noted in the Procedural History (N.T. 90-91; Exhibit C-1B).

9. On February 8, 1990 DER inspectors visited the Site and took water samples of discharge points and nearby streams. These samples showed that acid mine drainage (AMD) was being discharged at several points on the Site into an unnamed tributary (N.T. 53-57, 81-88; Exhibits C-2B and C-2C).

10. As a result of this inspection, DER issued on April 3, 1990 C.O. 904029, citing Appellant for discharges violating effluent limits and ordering proper treatment. This C.O. became the basis for Appellant's appeal at Board Docket No. 90-185-MR, as noted in the Procedural History (N.T. 88; Exhibit C-2A).

11. On April 30, 1990 DER sent to Appellant a notice of intent to suspend the Permit, providing Appellant with an opportunity to request a conference. Appellant made no request (Exhibit C-3B).

12. Because of Appellant's continuing violations and failure to take corrective action, DER sent a letter to Appellant on July 6, 1990, suspending the Permit, ordering a cessation of operations and the commencement of reclamation, and providing notice of intent to forfeit the bonds. This letter became the basis for Appellant's appeal at Board Docket No. 90-334-MR, as noted in the Procedural History (N.T. 59-60; Exhibit C-3B).

13. On September 4, 1990 DER inspectors visited the Site and determined the following:

(a) backfilling was not complete as required by the letter of July 6, 1990;

(b) a haul road and two ponds had been constructed within 100 feet of the unnamed tributary;

(c) a gravity drain for pit water was still in existence;

(d) adequate erosion and sedimentation controls were not in place; and

(e) a coal stockpile was being maintained on an unbonded area (N.T. 93-98; Exhibits C-4B and C-7A).

14. As a result of this inspection, DER issued on September 5, 1990 C.O. 904080AE, citing Appellant for the above violations and ordering corrective action. This C.O. became the basis for Appellant's appeal at Board Docket No. 90-415-MR, as noted in the Procedural History (N.T. 93-94; Exhibit C-4A).

15. Because of Appellant's continuing violations and failure to take corrective action, DER sent a letter to Appellant on October 23, 1990, detailing all of the outstanding violations and notifying Appellant that the bonds would be forfeited unless corrective action was taken within thirty days (N.T. 60-61; Exhibit C-6A)

16. Appellant made no response to this letter and took no corrective action (N.T. 61-62).

17. On November 28, 1990 DER inspectors visited the Site and determined the following:

(a) Appellant had not complied with C.O.s 894143, 894148AE, 904044AE and 904080AE and with the letter of July 6, 1990;

(b) backfilling equipment had been removed;

(c) adequate treatment facilities had not been constructed;

(d) backfilling had not been graded to approximate original contour;

(e) topsoil had not been adequately redistributed; and

(f) an adequate vegetative cover had not been established

(N.T. 62-27)

18. As a result of this inspection, DER issued on November 29, 1990 C.O. 904116AE, citing Appellant for the above violations and ordering corrective action. This C.O. became the basis for Appellant's appeal at Board Docket No. 90-581-MR, as noted in the procedural history (N.T. 62-63; Exhibit C-5D).

19. Because of Appellant's continuing violations and failure to take corrective action, DER sent a letter to Appellant on January 16, 1991, detailing all of the outstanding violations and forfeiting the following bonds:

Type of Bond	Authorized Acreage	Amount	Bond Number	Surety Company or Type of Collateral
Surety	13.66	$31,460	170-497G1199	Travelers Indemnity Company
Collateral	3.1	$ 7,100	GA1	Letter of Credit
Collateral	2	$ 6,000	GA2	Letter of Credit

This letter became the basis for Appellant's appeal at Board Docket No. 91-074-MR, as noted in the Procedural History (N.T. 68-70; Exhibit C-6B).

DISCUSSION

DER has the burden of proof: 25 Pa. Code §21.101(b)(3). To sustain its burden DER must show by a preponderance of the evidence that its actions were lawful and appropriate exercises of discretion: 25 Pa. Code §21.101(a).

The evidence clearly shows that the discharges from Appellant's Site sampled by DER on February 9, 1990 (Findings of Fact Nos. 9 and 10) violated 25 Pa. Code §87.102 which deals with effluent standards. Accordingly, DER has carried the burden of proof with respect to C.O. 904029 and the appeal originally filed at Board Docket No. 90-185-MR.

The appeal originally filed at Board Docket No. 90-243-MR challenged C.O. 904044AE which cited Appellant for continuing to operate in violation of C.O. 894143 and C.O. 894148AE. (Findings of Fact Nos. 7 and 8). As noted above (Finding of Fact No. 6), Appellant did not contest these C.O.s by timely appeals to this Board. As a result, Appellant cannot challenge the violations cited in these C.O.s in a later appeal: *DER v. Wheeling-Pittsburgh Steel*, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), affirmed 473 Pa. 432, 375 A.2d 320 (1977); *Walter Overly Coal Company v. DER*, 1988 EHB 1250 and 1322.[1]

DER's evidence has established that Appellant continued to operate in disregard of the unappealed C.O.s thereby violating §18.6 of SMCRA, 52 P.S. §1396.24 (now renumbered at §1396.18(f)), and §611 of the CSL, 35 P.S. §691.611, both of which pertain to unlawful conduct. Accordingly, DER has carried the burden of proof with respect to C.O. 904044AE and the appeal originally filed at Board Docket No. 90-243-MR.

The suspension of Appellant's Permit formed the basis for the appeal originally filed at Board Docket No. 90-334-MR. Such action is authorized under SMCRA at 52 P.S. §1396.4c when necessary to aid in enforcement. Notice of intention to take such action must be given to the permittee along with notice of a right to an informal hearing on the matter. The evidence shows that DER gave the required notice and that Appellant made no request for a hearing (Finding of Fact No. 11). The evidence also shows that Appellant continued to violate SMCRA, the CSL and the regulations despite the C.O.s previously issued by DER (Finding of Fact No. 12). Suspending the Permit was the next logical enforcement step and cannot be viewed as an abuse of

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[1] The exception involving civil penalty assessments, *Kent Coal Mining Company v. Commonwealth, Dept. of Environmental Resources*, 121 Pa. Cmwlth. 149, 550 A.2d 279 (1988), is not applicable here.

discretion. Accordingly, DER has carried its burden in the appeal originally filed at Board Docket No. 90-334-MR.

C.O. 904080AE, which formed the basis for the appeal originally filed at Board Docket No. 90-415-MR, charges Appellant with five separate violations. The facts relating to these violations are at Finding of Fact No. 13(a) to (e). The first (13(a)) constitutes violations of §18.6 of SMCRA, 52 P.S. §1396.24 (since renumbered), and §611 of the CSL, 35 P.S. §691.611. The second (13(b)) is a violation of 25 Pa. Code §86.102(12) and §87.160(b). The third (13(c)) is a violation of part B of the Permit and of 25 Pa. Code §86.13. The fourth (13(d)) is a violation of 25 Pa. Code §87.106; and the fifth (13(e)) is a violation of 25 Pa. Code §86.143. DER has sustained its burden of proof with respect to C.O. 904080AE and the appeal originally filed at Board Docket No. 90-415-MR.

C.O. 904116AE, which formed the basis for the appeal originally filed at Board Docket No. 90-581-MR, cites six violations. The facts relating to these violations are at Finding of Fact No. 17(a) to (f). The first (17(a)) constitutes violations of §18.6 of SMCRA, 52 P.S. §1396.24 (since renumbered), and §611 of the CSL, 35 P.S. §691.611. The second (17(b)) is a violation of 25 Pa. Code §87.141(d). The third (17(c)) is a violation of 25 Pa. Code §87.107(a) and (b). The fourth (17(d)) is a violation of 25 Pa. Code §87.141(a). The fifth (17(e)) is a violation of 25 Pa. Code §87.99; and the sixth (17(f)) is a violation of 25 Pa. Code §87.155. DER has sustained its burden of proof with respect to C.O. 904116AE and the appeal filed originally at Board Docket No. 90-581-MR.

The appeal filed originally at Board Docket No. 91-074-MR challenged DER's forfeiture of Appellant's bonds. The statutory provision governing bond forfeitures is §4(h) of SMCRA, 52 P.S. §1396.4(h). Regulatory provisions

begin at 25 Pa. Code §86.180. Reading these provisions together, we determine that DER must show that Appellant (1) has failed or refused to comply with the requirements of SMCRA, (2) has violated and continues to violate any terms or conditions of the bonds, or (3) has failed and continues to fail to conduct mining or reclamation in accordance with SMCRA, regulations adopted thereunder or conditions of the Permit.

Our Findings of Fact and the foregoing Discussion establish beyond question that DER has satisfied these three prerequisites. Accordingly, DER was *required* by SMCRA and the regulations to forfeit the bonds. Its doing so cannot be termed an abuse of discretion. Even if DER were not *required* to forfeit the bonds, we would find that Appellant's total disregard of its obligations and defiance of DER's enforcement efforts warranted such action.

CONCLUSIONS OF LAW

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

2. DER has the burden of proof.

3. To sustain its burden, DER must show by a preponderance of the evidence that its actions were lawful and appropriate exercises of discretion.

4. Having failed to file timely appeals from C.O. 894143 and C.O. 894148AE, Appellant cannot challenge the violations cited in those C.O.s in any of the subsequent appeals.

5. DER has sustained its burden of proof with respect to all of the C.O.s, the permit suspension and the forfeiture of the bonds.

ORDER

AND NOW, this 2nd day of September, 1993, it is ordered that the consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 2, 1993

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

QUALITY CONTAINER CORPORATION AND MORTON LIGHTMAN	:	
V.	:	**EHB Docket No. 91-003-MR (consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 10, 1993**

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

By Robert D. Myers, Member

Synopsis

The Board dismisses appeals from Administrative Orders issued by DER with respect to tracts contaminated by Appellants' operations, finding that conditions warranted DER's actions. The Board refuses to rule that Appellants are financially unable to comply with the Administrative Orders because the orders were not challenged on that ground and because Appellants' financial condition is uncertain.

Procedural History

These consolidated appeals were instituted on January 3, 1991 by Quality Container Corporation and Morton Lightman (Appellants), seeking review of two Administrative Orders issued by the Department of Environmental Resources (DER) on December 4, 1990. One of the Orders pertained to a tract of land in the 2200 block of East Ontario Street, Philadelphia, and formed the basis for the appeal filed at Board Docket No. 91-003-MR. The other Order

pertained to a tract of land at 2135 East Ontario Street, Philadelphia, and formed the basis for the appeal filed at Board Docket No. 91-004-MR.

These two appeals, along with an appeal filed at Board Docket No. 91-012-MR by Consolidated Rail Corporation (Conrail), the owner of the tract in the 2200 block of East Ontario Street, were consolidated at Board Docket No. 91-003-MR on June 21, 1991.

Eventually, Conrail and DER reached a settlement and Conrail withdrew the appeal at Board Docket No. 91-012-MR. That docket was unconsolidated and closed on July 28, 1992, leaving the two consolidated appeals of Appellants still pending. These appeals were scheduled for hearing on December 1, 2 and 3, 1992 but were cancelled, at the request of Appellants, because of the absence of Morton Lightman and the unavailability of Appellants' legal counsel, Gary P. Lightman, Esquire, Morton Lightman's son.

Because the parties informed the Board that they were discussing settlement, the Board did not reschedule the hearing until it was advised that a settlement could not be reached. The hearing was re-scheduled for July 27, 28 and 29, 1993 and a Notice of Hearing was sent on April 28, 1993.

By a letter of July 13, 1993, Attorney Lightman informed the Board that he and his father would be available only on July 27, 1993, and believed that the hearing could be completed on that day. On July 22, 1993, Attorney Lightman informed the Board of a sudden change in his father's medical condition, which made it inadvisable for him to travel from Florida to Pennsylvania, and requested a continuance. The medical documents accompanying the request indicated that the travel restrictions would continue for two to four months and, perhaps, longer. On July 27, 1993 the Board issued an Order

denying Appellants' request on the grounds that a hearing had been cancelled previously because of Morton Lightman's unavailability. The Order closed with the following statement:

> While we are mindful that individuals are subject to sickness and infirmity, once they invoke the jurisdiction of the Board, they must be prepared either to prosecute the appeal in reasonable fashion or to withdraw it.

The contents of this Order had been conveyed to all legal counsel orally by telephone on the morning of July 26, 1993. The Board received a facsimile transmission at about 6:30 p.m. that same day from Attorney Lightman advising the Board that his trial in Philadelphia Common Pleas Court had been carried over to July 27 and he would be unable to attend the hearing before the Board. He stated that an associate would appear on Appellants' behalf at 10:00 a.m. but requested that no testimony be taken until his arrival about 2:00 p.m.

When Administrative Law Judge Robert D. Myers, a Member of the Board, met with legal counsel[1] on the morning of July 27, he was informed that the parties had reached a stipulation that would eliminate the need for formal testimony. The stipulation was put on the record when the hearing convened at 10:00 a.m. It covered Appellants' operations at the two tracts, the issuance of the Orders, the failure of Appellants to comply and the current conditions.

The Stipulation did not encompass Appellants' financial abilities to comply with the Orders because DER was unwilling to stipulate to that. As a result, Appellants were permitted to enter into the record certain documents pertaining to Appellants' financial condition for the Board to consider in rendering its Adjudication.

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[1] Norman Matlock, Esquire, for DER and Benjamin Reich, Esquire, Lightman's associate, for Appellants.

As requested by the Board, DER submitted a proposed Order to which Appellants objected and filed a version of their own. The two differ only in connection with the issue involving Appellants' financial condition.

The record consists of the pleadings, a hearing transcript of 10 pages, the financial documents submitted by Appellants and the two proposed Orders. After a full and complete review of the record, we make the following

FINDINGS OF FACT

1. On December 4, 1990, DER properly issued Administrative Orders to Quality Container Corporation, doing business at 2135 East Ontario Street, Philadelphia, PA (Quality) and to Morton Lightman, owner/operator of Quality, pursuant to the Solid Waste Management Act, 35 P.S. §6018.101 *et seq.*, the Cleans Streams Law, 35 P.S. §691.1 *et seq.*, and Section 1917-A of the Administrative Code of 1929 (Stipulation).

2. Quality and Morton Lightman were ordered to abate the public nuisances at the Quality sites, and, inter alia, to:

A. Retain an Environmental Consultant to prepare and submit a work plan for the investigation and remediation of the sites;

B. Submit the work plan to DER within twenty days of receipt of the Administrative Orders;

C. Address certain procedures in the work plans including the identification of waste streams, methods of removal and disposal of waste streams, identification of all transporters and disposal sites, extent of soil and groundwater pollution, evaluation of alternative remediation proposals, a groundwater quality monitoring program, conclusions of the assessment and proposed actions; and

D. Implement the work plan upon approval by DER (Stipulation).

3. Quality and Morton Lightman have failed to comply with the Administrative Orders of December 4, 1990 in that Quality and Morton Lightman have not conducted an assessment of the contamination at the two sites and have not submitted a work plan to DER for the disposal of hazardous wastes released and abandoned on the 2135 East Ontario Street sites (N.T. 3-4, 5-7).

DISCUSSION

The foregoing facts, both stipulated and found, support the violations and the issuance of the Administrative Orders of December 4, 1990. They also establish that Appellants have not complied with the Orders. As a result, DER has satisfied its burden of proof and the appeals must be dismissed.

Appellants' financial ability to comply with the Administrative Orders is irrelevant in determining whether DER abused its discretion: *James E. Fulkroad et al. v. DER*, Board Docket No. 91-141-W, Adjudication issued August 24, 1993. In any event, Appellants did not challenge the Administrative Orders on that ground and did not present sufficient evidence to establish the point.

CONCLUSIONS OF LAW

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

2. DER has the burden of proof.

3. DER has shown by a preponderance of the evidence that the Administrative Orders of December 4, 1990 were lawful and appropriate exercises of DER's discretion.

4. Appellants are legally liable for compliance with the Administrative orders of December 4, 1990.

ORDER

AND NOW, this 10th day of September, 1993, it is ordered as follows:

1. The appeals are dismissed.

2. Quality and Morton Lightman will give to DER and its agents reasonable access to the Quality site at 2135 East Ontario Street, Philadelphia, to assess and/or remediate public nuisances existing on the site.[2]

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

[2] While not ordinarily a part of our orders, the parties have stipulated that this provision be included.

DATED: September 10, 1993

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Southeast Region
For Appellant:
Gary Lightman, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

EMPIRE SANITARY LANDFILL, INC.	:	**EHB Docket No. 92-050-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 10, 1993

OPINION AND ORDER SUR
MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss an appeal as moot and as requiring an advisory opinion is denied.

In an appeal of the denial of a permit application, the Department of Environmental Resources (Department) does not deprive the Board of the power to grant effective relief simply by inviting the applicant to resubmit his application. Resolution of an appeal, meanwhile, does not require an advisory opinion where the appeal involves a justiciable case or controversy.

OPINION

This matter was initiated with the January 29, 1992, filing of a notice of appeal by Empire Sanitary Landfill (Empire) seeking review of the Department's December 27, 1991, denial of Empire's application for a major permit modification (permit application) under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* The application sought authorization for Empire to expand the disposal area of its

municipal waste landfill in the Borough of Taylor and Ransom Township, Lackawanna County. The Department's denial letter identified two main reasons for the Department's decision: (1) the application assumed that the landfill accepted waste at the maximum rate authorized by the permit (5,000 tons per day (TPD)), rather than the actual rate the landfill accepted (approximately 3,027 TPD), and, as a result, the operation plan and other plans submitted as part of the application were inaccurate; and, (2) even were Empire to accept waste at the maximum rate authorized by its permit, it would not exhaust the capacity already authorized before the current permit expired or even within 10 years of the date of the denial letter (Ex. C-A).[1]

Empire's notice of appeal asserted that, by denying the permit application, the Department violated the Solid Waste Management Act, the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*, and multiple provisions of both the Pennsylvania and United States Constitutions. Empire also contended that the Department denied its permit application for reasons other than those set forth in the denial letter.

On February 16, 1993, the Department filed a motion to dismiss along with a supporting memorandum of law. The Department argued that Empire's appeal was rendered moot by a February 2, 1993, letter from the Department informing Empire that the Department would consider Empire's permit application if the application were resubmitted. According to that letter, the Department denied Empire's permit application because more than 10 years' worth of capacity remained under a previous permit at the time the Department reviewed the application. The letter did not address the other reasons the

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[1] "Ex.C-" denotes the Department's exhibits in support of the motion to dismiss.

Department cited when it denied the permit application: the inaccuracies in the plans submitted with the permit application, and the Department's contention that Empire would not exhaust its capacity under its current permit when it expired, even were Empire to accept waste at the maximum rate authorized by its permit. In its motion and memorandum, however, the Department expressly waived both of the latter reasons for the denial. Consequently, the Department argued, the only issue before the Board was whether the Department abused its discretion by denying Empire's permit because more than 10 years' worth of capacity remained under a previous permit at the time of the denial. If the Board considered any of the other issues, according to the Department, the Board's decision would amount to an advisory opinion, which the Board does not have the authority to issue.

On March 9, 1993, Empire filed an answer and memorandum in opposition to the Department's motion to dismiss. Empire maintained that the Department's February 2, 1993, letter did not render its appeal moot because it neither deprived Empire of its stake in the outcome of the appeal nor deprived the Board of the ability to grant effective relief to Empire. According to Empire, it still had a stake in the outcome because the Department's February 2, 1993, letter only withdrew one of the reasons the Department gave for denying the permit application and because Empire is no closer to having the permit now than when it filed its appeal. Empire maintained that the Board still has the power to grant effective relief, meanwhile, because the permit denial was never withdrawn and the Board is empowered to vacate permit denials which are contrary to law or an abuse of discretion, and can even substitute its discretion for that of the Department and grant permits. Furthermore, Empire argues that even if its appeal is moot, it falls within one of the exceptions to the mootness doctrine because the appeal involves issues likely to recur

yet evade review and issues of great public importance. With respect to the Department's assertion that Empire's appeal necessarily calls for an advisory opinion, Empire countered that the Board still had the power to substitute its discretion for that of the Department with regard to the sole remaining reason the Department offered for the permit denial and, therefore, the appeal did not call for an advisory opinion.

A matter before the Board becomes moot when an event occurs during the pendency of the appeal which deprives the Board of the ability to provide effective relief. Carol Rannels v. DER, EHB Docket No. 90-110-W (Opinion issued April 29, 1993). Generally speaking, the Board has no jurisdiction over moot cases, but exceptions to the mootness doctrine exist for instances where the conduct complained of is capable of repetition yet would evade review or where an action involves questions of great public importance. County Council of Erie v. County Executive of County of Erie, 143 Pa. Cmwlth. 571, 600 A.2d 257 (1991).

The Board confronted a situation very similar to the one here in David Petricca v. DER, 1988 EHB 112. In that appeal, the Department moved to dismiss as moot an appeal from the denial of a surface mining permit application because, after the appeal was filed, the Department informed the appellant that it would process a new application if the appellant submitted one. We held in Petricca that the Department's offer to process a new application from the appellant did not render his appeal moot:

> [The Department] denied Petricca's authorization to mine because, it stated, 1) the application contained inadequate information, 2) the site was already covered by existing bonds and an existing permit and 3) failure to accept certain responsibilities. In his notice of appeal, Petricca clearly states that he is appealing the '[r]eturn and denial of [his] application for a surface mining permit.' (emphasis added in Petricca). Clearly the relief being sought by

> Petricca is a determination by this Board that he was entitled to a permit.
>
> The only action [the Department] could have taken which would have rendered its [decision to deny the permit] null and void and which would have afforded Petricca the relief he sought would have been to issue the permit. Its action of informing Petricca that a new application would be considered in no way negates the earlier permit denial. Indeed, when an applicant for a permit appeals a [Department] denial of his application, one can presume that he is seeking a permit, not the right to submit another application. Yet, [the Department's] action is simply telling Petricca that he may now reapply, something he would be entitled to do in any event.
>
> Petricca, 1988 EHB, at 114-115.

The situation here is directly analogous to that in Petricca. While Petricca involved a surface mining permit application and a Department offer to consider a new application--rather than a major permit application under the Solid Waste Management Act and a Department offer to reconsider the permit application it previously denied--Petricca is, nonetheless, controlling. Petricca did not turn on the type of permit application the Department denied or on whether the application the Department offered to process was identical to the one it denied. Instead, it turned on whether, in an appeal of a permit denial, the Department could deprive the Board of the power to grant an appellant effective relief where the Department did something less than issue the permit. The answer in Petricca is unambiguous: "The only action [the Department] could have taken which would have rendered its [decision to deny the permit] null and void and which would have afforded Petricca the relief he sought would have been to issue the permit." 1988 EHB, at 114.

We know of no reason to treat the situation here any differently. Empire's notice of appeal expressly challenged the denial of the permit application and requested that the Board substitute its discretion for that of

the Department and grant Empire the permit. The Department never withdrew the permit denial; it only offered Empire an opportunity to submit its permit application again, something Empire could have done even without the Department's invitation.

Nor do we agree with the Department's assertion that the resolution of this appeal necessarily entails an advisory opinion. There clearly is a justiciable case and controversy here. The Department maintains that its decision to deny the application was justified because Empire had more than 10 years' worth of capacity under a pre-existing permit. In support of this proposition, it submitted a letter from one of Empire's consulting engineers which stated that Empire would exhaust its permitted capacity in 12.45 years (Ex. C-B). The letter, however, was written on September 26, 1990, more than a year before the denial, and the calculations in it were based on the average amount of waste accepted by Empire at that time and on the permitted capacity remaining as of March 31, 1990, more than a year-and-a-half before the denial (Ex. C-B). Neither the Department's motion nor Empire's answer, moreover, actually aver that more than 10 years' worth of capacity remained <u>at the time the application was denied</u>. That issue has yet to be resolved. Even were we to assume, therefore, that a denial would be justified if more than 10 years' worth of capacity remained when the application was denied, Empire could establish that it was entitled to the permit if it shows that less than 10 years' worth of capacity remained and that the Department acted unreasonably when it concluded that more than that amount was left.

O R D E R

AND NOW, this 10th day of September, 1993, it is ordered that:

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

2) The Department shall respond to Empire's motion for summary judgment on or before October 1, 1993; and

3) Empire may file a reply to the Department's response on or before October 21, 1993.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: September 10, 1993

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

CARROLL TOWNSHIP BOARD OF SUPERVISORS	:	
	:	**EHB Docket No. 92-219-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 10, 1993**

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

By Maxine Woelfling, Chairman

Synopsis

A Department of Environmental Resources' (Department) order directing appellants to enact an ordinance prohibiting the issuance of building permits or the granting of final subdivision approval without the requisite planning approval under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act) is sustained. Such an order was authorized by the Sewage Facilities Act and did not impermissibly pre-empt appellants' powers under the Pennsylvania Municipalities Planning Code, the Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101 *et seq.* (Municipalities Planning Code) or constitute a taking. Finally, the order was not an unreasonable response to an isolated incident.

INTRODUCTION

This matter was initiated with the June 16, 1992, filing of a notice of appeal by the Carroll Township Board of Supervisors (Supervisors), seeking review of a May 18, 1992, order from the Department. The order, which was issued pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987,

as amended, 35 P.S. §691.1 *et seq.*, and the Sewage Facilities Act, alleged that the Supervisors had issued an on-site sewage disposal system permit in a subdivision which had not received the requisite sewage facilities planning approval. Among other things, it directed the Supervisors to adopt ordinances which prohibited the issuance of building permits and the granting of final subdivision approvals prior to the Department's approval of sewage facilities plan revisions for the affected subdivision. The Supervisors contended that the Department lacked the authority to issue the order in that it was pre-empted by the Municipalities Planning Code, and that, even assuming the Department's order was not pre-empted, it was an abuse of discretion.

On August 13, 1992, concurrent with the filing of their pre-hearing memorandum, the Supervisors filed a petition for supersedeas. A combined supersedeas/merits hearing was conducted on September 8, 1992, and, on September 22, 1992, an order was issued denying the petition for supersedeas. That order was confirmed in a November 2, 1992, opinion which also denied the Supervisors' request for reconsideration of the order denying the petition for supersedeas.

The Department filed its post-hearing brief on October 16, 1992, asserting that the order was within its authority under the Sewage Facilities Act and not pre-empted by the Municipalities Planning Code. The Supervisors' brief, which was filed on November 16, 1992, disputed the Department's assertions and, in addition, contended that the order would force the Supervisors to enact an illegal ordinance or one which amounted to a taking. Finally, the Supervisors argued that the order was unreasonable in that it was a disproportionate response to an isolated incident.

The record in this matter consists of a transcript of 136 pages and six exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is the Board of Supervisors of Carroll Township, a second class township situate in York County.

2. Appellee is the Department, the agency empowered to administer and enforce the Clean Streams Law, the Sewage Facilities Act, and the rules and regulations promulgated thereunder.

3. Robert P. Feister is a water quality specialist assigned to the water quality program in the Department's South Central Field Office. (N.T. 40)[1]

4. Mr. Feister's responsibilities include monitoring planning modules for subdivisions, as well as the actions of Sewage Enforcement Officers (SEOs). (N.T. 40)

5. Mr. Feister's area of responsibility encompasses Carroll Township (Township). (N.T. 40)

6. Mr. Fiester conducts quarterly reviews of on-site sewage disposal permits issued by SEOs through an examination of five permits randomly pulled from the files for that municipality. (N.T. 41)

7. During such a quarterly review of the Township in March, 1992, Feister discovered that an on-site sewage disposal permit had been issued for a lot in a subdivision which had not received sewage facilities planning approval. (N.T. 42)

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[1] The notes of testimony from the combined supersedeas-merits hearing shall be referred to as "N.T.___," the Supervisors' exhibits as "Ex.A-___," and Board exhibits as "Ex.B-___."

8. The lot in question was located in the Gore subdivision, a plot of land which had received subdivision approval from the Supervisors. (N.T. 42)

9. The Gore subdivision was approved by the Supervisors without sewage facilities planning approval because it was designated "not for development." (N.T. 90)

10. Since 1988 the Supervisors have approved 21 "not for development" subdivisions despite the absence of sewage facilities planning approval. (N.T. 99)

11. The Supervisors believe that requiring sewage facilities planning approval prior to subdivision approval increases the time and expense of subdividing property, particularly in instances where a farmer may wish to subdivide several lots to obtain ready cash or where a parent may wish to subdivide his property for his children. (N.T. 96)

12. When it reviews planning modules for new land development the Department assesses other sewage needs in a municipality. (N.T. 59)

13. Even if a subdivision is not immediately developed, its approval could affect future sewage disposal needs in the municipality. (N.T. 67)

14. Land development without sewage facilities planning approval may result in problems at the time on-lot disposal permits are sought for the lots; in particular, the issues of soils suitability and isolation distances are not addressed until late in the regulatory approval process. (N.T. 65)

15. The Department has a process whereby planning module approval for a subdivision of land is waived if no building or development is proposed for the subdivision. (N.T. 22-23; Ex. A-1)

16. Put another way, no sewage flows will be generated by the subdivision, and, as a result, it will have no present or future sewage disposal needs. (Ex. A-1)

17. The Form B Waiver requires the subdivider/developer to place in the deed for the property that the property has not received sewage facilities planning approval or permits for the collection, conveyance, treatment, or disposal of sewage. (N.T. 22; Ex. A-1)

18. Before a building permit is issued in the Township the lot must have received sewage facilities planning approval and an on-site sewage disposal permit. (N.T. 89, 91; Ex. A-4)

19. The Township SEO did not follow proper procedure in regard to the Gore lot, and the on-site sewage disposal permit was revoked. (N.T. 91-92)

20. Feister also discovered that a commercial building, referred to as the Dodge building, was erected without either a sewage permit or planning module approval. (N.T. 43, 51, 103)

21. A planning module was subsequently approved for the Dodge building. (N.T. 55)

22. The Form B Waiver process would not have applied to either the Gore or the Dodge subdivisions. (N.T. 24-25)

DISCUSSION

At the commencement of the hearing in this matter, the Department urged the Board to place the burden of proof on the Supervisors, contending that such an allocation of the burden of proof was mandated by 25 Pa. Code §71.12(f).[2] The presiding Board Member declined to do so and we affirm that ruling here. Even assuming, for the sake of argument, that the Environmental Quality Board has any authority to prescribe rules of practice and procedure

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[2] The subsection states "In a civil or administrative action taken under this chapter, the municipality shall have the burden to establish that its official plan or proposed revision complies with the requirements of this chapter."

in proceedings before the Board,[3] the regulation is inapplicable, as the issue of whether the Township's official plan or any revisions thereto complies with Chapter 71 is not before the Board. Rather, the issue is the Township's failure to revise its official plan to incorporate a certain type of new land development, a failure which led to the issuance of an order by the Department to take certain corrective actions to bring the municipality's sewage facilities planning process into conformity with the Sewage Facilities Act and relevant regulations. Because of the nature of the challenged action, the Department bears the burden of proof under 25 Pa. Code §21.101(b)(3).

Turning now to the merits of the appeal, our first task is to analyze whether the Department is authorized to issue the order in question. We have no hesitancy in concluding that the Department's powers under the Sewage Facilities Act encompass the order in question.

That authority is two-pronged. The first prong derives from §10(b)(1) of the Sewage Facilities Act, which empowers the Department:

> ...to order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide.

The relevant regulation, 25 Pa. Code §71.51(1), requires a municipality to revise its official plan to accommodate a proposed subdivision, unless the subdivision qualifies for an exception under 25 Pa. Code §71.55. Therefore, if a municipality fails to revise its official plan to incorporate proposed subdivisions, the Department is certainly within its powers to order the municipality to submit plan revisions for the subdivisions.

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[3] While we have substantial doubts regarding the validity of this regulation, the Board need not decide this issue.

The Supervisors, however, contest the necessity for submission of plan revisions where subdivisions occur but no immediate development is anticipated. While the Supervisors' argument has some practical appeal, neither the statute nor the regulations create such a category of development. As was noted in the Board's opinion denying the Supervisors' petition for supersedeas

> The definitions of 'lot' and 'subdivision' in §2 of the Sewage Facilities Act make it clear that the Department's authority to require plan revisions for subdivisions of land extends to any subdivision and not just those where building will soon occur. Neither of these definitions makes any reference to construction or building. The definition of 'lot' refers to a part of a subdivision 'used as a building site or intended to be used for building purposes, whether immediate or future...,' while 'subdivision' refers only to the division of the land into two or more lots. Given such clear definitions, it can hardly be said that the Department could not require a plan revision under the circumstances herein.
>
> Carroll Township Board of Supervisors v. DER
> 1992 EHB 1430, 1433-1434.

Even if the definitions in the Sewage Facilities Act were not clear on their face, we would still defer to the Department's interpretation of the planning requirements, as it is consistent with the policies articulated in the Sewage Facilities Act.

One of the critical policy concerns of the Sewage Facilities Act is to protect the public health, safety, and welfare through proper planning for sewage disposal needs. The primary responsibility for that planning is entrusted to the municipalities by §5 of the statute. Plans must take into account present and future sewage disposal needs so that adequate sewage collection, treatment, and disposal facilities may be designed and constructed.

The classification of subdivisions as "for development" and "not for development" makes it difficult for the municipality to execute its responsibility to plan for future sewage disposal needs. Indeed, it may even lead to a situation where land development could be halted because the municipality had repeatedly deferred planning for sewage needs in a number of "not for development" subdivisions.

The Department also derives its authority to issue the order in question from §10(b)(7) of the Sewage Facilities Act and 25 Pa. Code §72.43(c)(6). These two provisions empower the Department to order a local agency such as the Township to take actions to assure that its permitting program for on-site disposal systems conforms to the requirements of the Sewage Facilities Act, including planning requirements.

Here, the Carroll Township ordinances facilitate avoidance of the planning requirements of the Sewage Facilities Act by, at best, creating confusion and, at worst, condoning disregard for them. Section 105 of the Subdivision and Land Development Ordinance (Ex. B-1) (ordinance) addresses the existence of planning requirements under both the Municipalities Planning Code and the Sewage Facilities Act:

> The Municipalities Planning Code (Act 247) and the Sewage Facilities Act (Act 537) are two separate acts. Approval of plans under either act can be requested first. In addition, plans can be approved under one act, subject to receiving approval under the other act.

Section 502(a) of the ordinance,[4] which relates to the content of

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[4] The previous version of this section was even more explicit regarding the necessity for a planning module for land development: A planning module for land development was not required "if a notation on the plan indicates that building is [sic] not immediate. Before any building is begun, this module must be submitted and approved." (emphasis added)

preliminary plan submissions, provides:

> A Planning Module for New Land Development shall be submitted where public or private sewage disposal is contemplated consistent with Section 105 of the Ordinance. The applicant must receive and address the comments of the York County Planning Commission on the module before submitting it to the Township, per state procedure requirements. If approval of the plan is sought without Planning Module approval, then the plan must state the following or words to that effect:
>
> > 'Township approval of this subdivision plan does not include approval for development. No township permit will be issued for the erection or placement thereon of any building or structure intended for human occupancy (residential or otherwise), nor shall any improvement related to sewerage be installed thereon, unless and until state approval of a New Land Development Planning Module is received.'
>
> (Ex. B-1)
> (emphasis added)

The Township ordinances authorize the very situation the Department is addressing in its orders: allowing subdivisions of land to proceed without the requisite sewage facilities planning approval. While there will always be problems in the administration and enforcement of building permits, as the Supervisors note, the issuance of building permits and on-site sewage disposal system permits in the absence of the necessary sewage facilities planning only becomes easier where there are different types of subdivisions, depending on whether immediate development is intended.

Given Carroll Township's ordinances, the incidents with the Gore and Dodge subdivisions and the approval of a number of "not for development" subdivisions, there were sufficient reasons for the Department to exercise its discretion under §§10(b)(1) and 10(b)(7) of the Sewage Facilities Act to issue the order in question to the Supervisors.

The Supervisors contend that the order was an abuse of discretion because it was a disproportionate response to an isolated infraction which had been corrected when brought to the Supervisors' attention. We do not agree with the Supervisors' assessment of the situation for the reasons set forth in the supersedeas opinion:

> Paragraph D of the order does refer to a single permit in the Gore subdivision, but that reference is preceded by 'includes, but is not necessarily limited to, ...' And, Mr. Feister, a Water Quality Specialist responsible for reviewing the work of municipal sewage enforcement officers, testified regarding another incident involving the Dodge subdivision (N.T. 46-51).
>
> But, most telling is the testimony of Norman H. Shelly, Jr., a Carroll Township Supervisor. He indicated that since 1988, 21 subdivisions 'not for development' were approved without sewage facilities planning approval (N.T. 99-100). Thus, rather than the Gore subdivision being an isolated incident, Carroll Township apparently routinely approves subdivisions without sewage facilities planning approval if the subdivider indicates there will be no immediate development. Under such circumstances, the Department's order is hardly an abuse of discretion.
>
> 1992 EHB at 1435.

Perhaps the Department could have chosen another means to remedy the Supervisors' violations of the Sewage Facilities Act. However, the Board need not speculate on this issue, as our only task here is to determine whether the means chosen was an abuse of discretion. The Sewage Facilities Act authorizes the Department to issue an administrative order under the circumstances we have found herein, so the issuance of that order cannot be characterized as an abuse of discretion.

The Supervisors also contend that the Department's order would force them to enact an ordinance in conflict with the Pennsylvania Municipalities

Planning Code and that the Department was attempting to usurp powers vested in the Supervisors by the General Assembly. The Department is not, as the Supervisors contend, intruding upon the Supervisors' power to regulate land development in the municipality.[5] The Department is exercising its oversight power to assure that the Supervisors properly plan for the sewage disposal needs of their residents, a power entrusted to the Department by the General Assembly. This distinction was recognized by the Commonwealth Court in Community College of Delaware County v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975), which is cited by the Supervisors for the more extreme proposition that planning and zoning are completely separable from sewage disposal planning.

Nor do we regard the Department's order as effecting a taking. The Supervisors cite Board of Supervisors of West Marlborough Township v. Fichter [sic], 129 Pa. Cmwlth 537, 566 A.2d 370 (1989),[6] in support of this argument. The Fiechter case, in the Commonwealth Court's words, involved this issue:

> The issue is whether a municipality has the power to require the dedication of additional right-of-way property along an abutting street as a condition precedent to subdivision approval where a subdivision ordinance mandates the minimum width of all streets within the township.
>
> 566 A.2d 370.

The Commonwealth Court there held that the municipality's action constituted a taking and that neither §503(2)(ii) of the Municipalities Planning Code nor

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[5] It is true that the Department has no authority to regulate land use in a municipality, but it is equally true that land use regulation is not done in a vacuum. Land use regulation and sewage facilities planning must, of necessity, be integrated.

[6] The caption is correctly cited as Board of Supervisors of West Marlborough Township v. Fiechter.

any other section of the statute authorized such action. The Supervisors fail to explain how compliance with the planning requirements of the Sewage Facilities Act prior to the granting of a building permit or final approval under the Township ordinance is analogous to the municipal action overturned by the Commonwealth Court in Fiechter. Here, the law requires the subdivision of land to receive planning approval under the Sewage Facilities Act, whether it be a full-blown planning module under 25 Pa. Code §71.51 or the shortened process under 25 Pa. Code §71.55. Applying for such approval in and of itself does not deprive a property owner of the use of his land.[7] Moreover, to the extent that the Supervisors are asserting a claim that enactment of the ordinance mandated by the Department's order would effect a taking of private property, the Supervisors have no standing to make such an assertion. Ramey Borough v. Department of Environmental Resources, 15 Pa. Cmwlth. 601, 327 A.2d 647 (1974).

Finally, the Supervisors make much of a waiver process[8]--the Form B Waiver--employed by the Department to address land developments which will not

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[7] It may alert him to the fact that development of the property may be restricted for various reasons. Logically, the earlier in the development process one learns about such potential restrictions, the better one is able to deal with problems, if possible, or consider other uses. The Supervisors' attitude in this regard can best be characterized as penny-wise and pound-foolish. The costs of preparing and submitting planning modules for land development may be deferred, but development of the property may also be precluded by unavailability of either adequate renovating soils for on-site disposal or sufficient capacity in a sewage collection and treatment system. The Supervisors' approval of "not for development" subdivisions may endear them to citizens wanting to avoid short-run development costs, but it results in the Supervisors' avoidance of their responsibility for the sewage disposal needs of the Township.

[8] The Supervisors request that the Board take official notice of another waiver--the Form C Waiver--apparently used by the Department. Regardless of whether such a Department form is an appropriate subject for official notice, we decline to take official notice of it here, for its existence is not germane to the issues decided herein.

generate any sewage flows, contending that it is an admission by the Department that it does not have the authority to regulate every subdivision of land under the planning provisions of the Sewage Facilities Act. Very simply put, the existence of any waiver process, whether it be administrative or through a formal exception under §71.55 is not the issue here. The issue is whether the municipality's sewage facilities planning responsibilities are being carried out in a fashion which adequately addresses the present and future sewage disposal needs of its citizens. It may well be that some--or even all--of the "not for development" subdivisions approved by the Supervisors may qualify for exceptions or waivers, but that cannot be ascertained until sewage facilities planning approval is sought. Moreover, there is nothing in the Department's order which would prohibit such waivers or exceptions once the Supervisors comply with the order.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving that its order to the Supervisors not to issue building permits or grant final subdivision approval without sewage facilities planning approval is not an abuse of discretion. 25 Pa. Code §21.101(b)(3)

3. Sewage facilities planning approval under either 25 Pa. Code §71.51 or §71.55 is required when land is subdivided.

4. The Department's order to the Supervisors was authorized by §§10(b)(1) and 10(b)(7) of the Sewage Facilities Act where the Department established that an on-site disposal permit was issued without the requisite planning approval; that a building was erected without either an on-site disposal permit or sewage facilities planning approval; and that the

Supervisors had approved a number of "not for development" subdivisions which had not received sewage facilities planning approval.

5. The Department's order did not intrude upon the Supervisors' power under the Municipalities Planning Code to regulate land development in the Township.

6. The Department's order did not constitute a taking.

7. The Supervisors have no standing to assert claims on behalf of individual property owners in the municipality.

8. The Department's order was not an abuse of discretion.

O R D E R

AND NOW, this 10th day of September, 1993, it is ordered that the Department's May 18, 1992, order is sustained and the appeal of the Supervisors is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Administrative Law Judge
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Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
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Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 10, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

LOWER WINDSOR TOWNSHIP and PEOPLE AGAINST CONTAMINATION	:	
v.	:	**EHB Docket No. 90-580-E (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MODERN TRASH REMOVAL OF YORK, INC., Permittee	:	**Issued: September 15, 1993**

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

The Board dismisses a third party appeal challenging the Department of Environmental Resources' (DER) approval of a permit modification for a 17-acre expansion of an existing municipal waste landfill. The appellants and intervenor have failed to sustain their burden of proving the permit modification application did not comply with the Air Pollution Control Act, 35 P.S. §4001 *et seq.*, and the Solid Waste Management Act, 35 P.S. §6018.101 *et seq.* They further failed to prove their assertion that contaminated groundwater was travelling northward from the unlined portion of the existing landfill to the 17-acre expansion site and was also allegedly contaminating nearby private water wells located one mile southeast of the site. Appellants and intervenor additionally failed to prove that DER incorrectly interpreted §503(d) of the Solid Waste Management Act, 35 P.S. §6018.503(d), or that DER

abused its discretion in finding that the permittee had satisfactorily corrected its unlawful conduct as required by §503(d). Further, they failed to sustain their burden of proving DER abused its discretion in not applying the siting prohibitions contained in 25 Pa. Code §273.202 to the 17-acre expansion.

As to the appeal at Docket No. 91-412-E, the Board sustains this appeal, finding that DER abused its discretion by entering into a September 3, 1991 Consent Order and Adjudication with the permittee, authorizing the permittee to continue disposal of wastes on a single-lined area of its existing landfill until the elevation limits of the permittee's prior permit were reached. While the permittee has completed disposal of wastes on this single-lined area in 1992 and has capped the area, the Board finds the issue is not rendered moot and directs that the improperly disposed of waste be removed and disposed of in accordance with current standards.

Background

Lower Windsor Township (Lower Windsor) initiated an appeal at Docket No. 90-580-F on December 28, 1990, challenging DER's December 4, 1990 approval, under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, of a permit modification and repermitting for Modern Trash Removal of York, Inc.'s (Modern) Solid Waste Disposal Permit (SWDP) No. 100113. This permit modification and repermitting was for a 17-acre northern expansion of Modern's existing municipal waste landfill, which is located in Lower Windsor and Windsor Townships, York County. On November 27, 1991, People Against Contamination (PAC) filed a

petition seeking to intervene in this appeal. We granted PAC's Petition to Intervene by an Order issued February 11, 1992. Lower Windsor also filed an appeal on October 3, 1991, which was assigned Docket No. 91-412-W. This appeal seeks our review of a September 3, 1991 Consent Order and Adjudication (COA) entered into by Modern and DER to partially settle issues raised in an appeal by Modern challenging DER's December 4, 1990 permit modification approval. By order issued April 17, 1992, we consolidated the appeal at Docket No. 91-412-W with the appeal at Docket No. 90-580-F. This consolidated matter was reassigned to Board Member Richard S. Ehmann for primary handling on September 17, 1992 upon the resignation of former Board Member Terrance J. Fitzpatrick and the Docket No. was changed to 90-580-E (consolidated) to reflect that transfer.

A hearing in this matter was held on January 25, 26, and 27, 1993, and February 9, 1993 before Board Member Ehmann. The parties have filed their respective post-hearing briefs and they are deemed to have abandoned all arguments not raised in their post-hearing briefs. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). The record consists of a transcript of 975 pages and numerous exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Lower Windsor, a township of the second class located in York County. (Joint Stipulation of the parties (B-1))[1]

2. Appellee is DER, the agency of the Commonwealth with the authority to administer and enforce the SWMA; the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.* (Act 101); the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (APCA); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL); and Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted thereunder.

3. Permittee is Modern, a Pennsylvania corporation with a business address of R.D. #9, York, PA 17402. (B-1)

4. Intervenor is PAC, a citizens' group representing 640 residents of Lower Windsor. (N.T. 569-570)[2]

5. Modern currently operates a landfill located at R.D. #9, Prospect Road, York, PA (Modern Landfill) pursuant to SWDP No. 100113, which was first issued on August 17, 1978. (B-1) The Modern Landfill is located in Lower Windsor and Windsor Township. (J-1)

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1 References to Board exhibits will be "B__". References to Lower Windsor's exhibits will be "A__". References to Joint Exhibits will be "J__".

2 "N.T." represents a citation to the transcript of the merits hearing.

6. The landfill originally began operating in 1942 as an unlined 66 acre site using the natural renovation method of leachate treatment.[3] (N.T. 863, 887-888)

7. Waste Management of North America (Waste Management), of which Modern is an indirect subsidiary, purchased the landfill in 1984. (N.T. 860, 888, 941,; J-3) On September 20, 1984, Modern entered into a Consent Order with DER requiring the immediate clean up of leachate in the stream on the western portion of the landfill site and the installation of a series of groundwater extraction wells intended to prevent leachate coming from the unlined portion of the landfill from entering the groundwater on the western perimeter of the site. (N.T. 888; J-13)

8. DER and Modern subsequently entered a Consent Order with DER when leachate was found in a tributary on the eastern portion of the landfill site, and Modern's permit was modified to allow Modern to install a groundwater extraction system on the eastern perimeter of the landfill site. (N.T. 888)

9. Modern's western groundwater extraction system went "on line" in 1985 and its eastern system went on line in 1986. (N.T. 889; B-1)

Modern's 1986 Permit Modification

10. Modern's permit was modified on December 12, 1986, authorizing Modern to construct a disposal area which would use a double liner system

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[3] The "natural renovation" method operated on the theory that the landfill's leachate would be renovated as it traveled through the soil before it could reach and contaminate surface or groundwater. (N.T. 887)

on an area known as the 21-acre northern expansion. (N.T. 31, 866-867, 883; B-3)

11. Modern's December 12, 1986 permit modification also authorized Modern to construct a single-lined disposal area on the surface of approximately 30 acres of the previously existing unlined landfill area. (N.T. 30, 866-867, 883) The single liner acts as a cap over previously disposed municipal waste below the single liner. (N.T. 31-32, 113) This single-lined disposal area is called the "slope cap area." (N.T. 31)

Modern's 1988 Permit Modification

12. Modern's permit was modified and reissued on June 21, 1988, changing the daily volumes of municipal waste Modern was authorized to accept but leaving the permit boundaries the same as those in the 1986 permit modification. (N.T. 882, 886; B-1)

13. The boundaries of Modern's permit as they existed in 1986 and 1988 are indicated in pink on the map which is Exhibit J-8. (N.T. 65, 307, 883)

Application for Repermitting and the 17-acre Northern Expansion

14. On October 11, 1988, Modern filed with DER a preliminary application for permit modification for its municipal waste landfill pursuant to 25 Pa. Code §271.111(a) and (b) (regarding filing of a preliminary application for permit modification to describe differences between Modern's existing permit and the requirements of 25 Pa. Code Chapter 271). (N.T. 868-870; M-8)

15. On March 13, 1989, within six months after DER received Modern's preliminary application, DER received from Modern an application seeking both repermitting of its existing landfill and a major modification of its permit so it could dispose of waste on an additional 17-acre area (the 17-acre northern expansion) which was a soil borrow area under Modern's 1986 and 1988 permit modifications. (N.T. 65, 70, 869-870; B-1; J-10) No waste had previously been disposed of in this area of the landfill. (N.T. 152-153)

16. DER considered Modern's March 13, 1989 submission as meeting the requirement in §271.111(d) of 25 Pa. Code (regarding filing of a complete application for permit modification to correct differences between Modern's existing permit and the requirements of 25 Pa. Code Chapter 271). (B-4)

17. DER found Phases I and II of Modern's permit application were administratively complete on December 28, 1989. (B-1)

18. DER held a public hearing on Modern's modification application on June 18, 1990. (N.T. 60; B-1; J-6)

19. DER issued its Response to Public Hearing Comments (J-6) on August 2, 1990. (B-1)

December 1990 Permit Modification

20. On December 4, 1990, DER issued Modern a repermitting of its existing landfill and a major modification of its permit approving the 17-acre northern expansion. (N.T. 28; B-1)

21. The 17-acre northern expansion is outlined in yellow on Exhibit J-8. (N.T. 27, 65, 307) Those areas outlined in yellow which are not adjacent

to the area outlined in pink on J-8 are borrow soil/stockpile areas rather than waste disposal areas. (J-8)

22. The 17-acre northern expansion (and much of the area permitted prior to December 4, 1990 at the Modern Landfill) is located within Lower Windsor. (B-1)

23. Modern's December 1990 permit modification did not change the maximum daily volume of municipal waste Modern was previously authorized to accept. (B-1)

24. Condition 1 of the December 1990 permit modification stated: "[a]ll disposal of municipal waste into the existing landfill not included in repermitting must cease on or before December 31, 1990." (N.T. 45; J-1 at p. 7)

25. Condition 16 was also placed in Modern's December 1990 permit modification requiring Modern to verify that its treatment facility has sufficient capacity to treat leachate from the Modern Landfill and leachate from other sources (pending DER's approval). (N.T. 111; J-1)

26. Condition 21 of Modern's December 1990 permit modification requires Modern to submit to DER an annual written performance evaluation of the western and eastern perimeter groundwater interceptor well systems. (N.T. 129, 349; J-1 at p. 11)

27. Condition 22 of Modern's December 1990 permit modification allows Modern to perform maintenance on the western and eastern perimeter groundwater interceptor systems without first applying to DER for permit modification. (N.T. 129, 349; J-1 at p. 11)

September 3, 1991 Consent Order and Adjudication

28. On January 3, 1991, Modern appealed various permit conditions contained in its December 1990 permit modification at Docket No. 91-001-W. (B-1)

29. Modern and DER entered into a COA on September 3, 1991 which settled all but one part of the appeal filed by Modern at Docket No. 91-001-W. (N.T. 131; B-1; J-2) This COA amended Condition 1 of Modern's December 1990 permit modification to provide that Modern may dispose of municipal waste on the single-lined slope cap area up to the contours permitted by Modern's 1986 permit modification. (N.T. 132; J-2) Prior to this disposal, Modern was to submit to DER for approval specific design drawings of the final contours. (N.T. 50; J-2)

Disposal On The Slope Cap

30. The slope cap area was permitted for waste disposal as of December 15, 1987, and Modern disposed of waste on the slope cap area prior to April of 1988. (N.T. 935)

31. Modern disposed of municipal waste on the surface of the single-lined slope cap area between April 9, 1990 and December of 1990. (N.T. 938) While Modern's appeal at Docket No. 91-001-W was pending, it ceased disposing of municipal waste on the surface of the slope cap area, but resumed this process upon entering the September 3, 1991 COA. (N.T. 938)

32. In December of 1990, Modern exhumed waste from one area on the landfill and moved it to the slope cap area to bring that area up to final grading. (N.T. 938)

33. Modern completed disposing of municipal waste on the slope cap area in 1992. (N.T. 938)

34. As of the time of the merits hearing, all but four acres of the slope cap area had been closed and capped with a geomembrane cap, a drainage layer, and soil and a gas extraction system installed. (N.T. 935-936)

Odors

35. Modern uses mists and masking agents to control odors from leaving the landfill site. (N.T. 839, 920) Modern's permit modification application (J-10) described its nuisance control plan regarding control of odors at Volume III, Section 1.0, Form 14, which states that odors are to be controlled by timely application of daily, intermediate, and final cover.

36. Prior to December of 1990, Modern received between two and four complaints a year about odors coming from its landfill. (N.T. 920) Modern would determine whether the odor was coming from the landfill and take steps to eliminate it. (N.T. 920)

37. DER received complaints about malodors coming from the Modern Landfill prior to December of 1990. (N.T. 81, 142, 605)

38. DER's Scott C. Gebhardt, who is currently an environmental protection specialist for DER, was a solid waste specialist for DER between 1988 and the fall of 1992. (N.T. 782, 786-787) Gebhardt was DER's inspector for the Modern Landfill between June of 1989 and February of 1990, and between August of 1990 and September of 1992. (N.T. 788) Gebhardt conducted unannounced inspections of the Modern Landfill on a monthly basis. (N.T. 789)

39. In response to odor complaints, DER Inspector Scott Gebhardt inspected the Modern Landfill to determine whether it was emitting odors. (N.T. 803) Gebhardt inspected the Modern Landfill in response to an odor complaint on November 26, 1990. (N.T. 142; A-11) Gebhardt found there was a strong odor on the landfill that day and that Modern was engaged in exhuming buried waste from one area of its landfill and moving it to another area of the landfill without prior DER approval. (N.T. 816; A-11) Gebhardt did not detect a strong odor off the landfill site on November 26, 1990. (N.T. 816) Gebhardt ordered Modern to cease exhuming this waste until it had obtained a DER-approved plan and installed odor control equipment. (N.T. 142) Modern ceased moving the trash, submitted an operational plan to DER, and brought in some odor-suppressing equipment. (N.T. 797) Modern also applied foam to the working face of the landfill during the day to seal off any odors, in response to Gebhardt's order. (N.T. 944)

40. Gebhardt never issued Modern a notice of violation (NOV) as a result of odor concerns because Modern always responded promptly with an effort to address any odor concerns Gebhardt raised to them. (N.T. 797)

41. There is no evidence that DER ever determined that any malodor was emanating from the Modern Landfill.

42. Dean Graham, who is a supervisor of Lower Windsor, has received complaints concerning odors coming from the landfill from residents near the Modern Landfill both before and after December of 1990. (N.T. 539, 544-548)

43. On the morning Graham testified at the merits hearing, January 27, 1993, Graham smelled garbage odors and a sickening sweet perfume odor

three miles east of the Modern Landfill but did not smell these odors close to the landfill. (N.T. 551)

Gas Management

44. Gases generated by the 17-acre northern expansion are to be controlled by a gas management plan described at Form 26 of Modern's permit modification application. (J-10, Vol. IV, Section 6.0, Form 26)

45. The gas management system described at Form 26 states that the system will be comprised of gas extraction wells, gas collection header pipes, and condensate management structures which are to be installed at the 17-acre northern expansion once it is filled to final elevations. (N.T. 878-880) The system will be connected to a blower which will apply a vacuum to the landfill to create negative pressure within the landfill to preclude emissions from the landfill, and the blower will blow the gas through a flare, where it will be incinerated. (N.T. 878-879)

46. Modern will install its gas management system once final elevations are reached at the 17-acre northern expansion. The gas extraction wells will be installed through the waste, so that the header piping system can be installed on the surface of the landfill and so that the liquid in the pipes will drain out and will not clog the pipes. (N.T. 879)

47. DER notified Modern in September of 1990 that it would be required to obtain an APCA plan approval and permit for the 17-acre northern expansion's gas management system six months prior to its construction. (N.T. 108-109, 185, 192, 226, 235-236)

Volatile Organic Compounds

48. Modern Landfill has a combined leachate and groundwater collection system and treatment facility which consists of a series of physical/chemical and biological units that treat a combined flow of leachate and groundwater. (B-1) Effluent from these treatment units is pumped to two air stripper towers. (N.T. 177; B-1) The air stripper towers remove volatile organic compounds (VOCs) from leachate and groundwater by a mass transfer process in which air is passed through a cascade of effluent from the combined leachate and groundwater treatment units. (N.T. 177-178; B-1)

49. The air stripper towers are operated pursuant to Air Quality Control Operating Permit No. 67-330-004 issued in 1986. (A-8; B-1)

50. At the time DER approved the 17-acre northern expansion, DER determined that, as currently configured, Modern's wastewater treatment system has the capacity to accept and treat the leachate from the 17-acre northern expansion. (N.T. 129) DER determined that even though additional leachate was being trucked in and treated by Modern's air stripper system, in addition to the leachate generated on the landfill site itself, the water flow through the air stripper system still was significantly lower than that allowed by Modern's 1986 air quality permit. (N.T. 215)

51. DER determined Modern would not be required to obtain a new air quality permit for its air stripper towers. (N.T. 108-109)

Dust

52. Modern's permit modification application (J-10) Volume III, Section 1.0, Form 14 contains Modern's nuisance control plan regarding dust.

It indicates that Modern will control dust on paved access roadways by regular sweeping and on secondary access roads by periodic wetting. It further indicates that stockpile borrow area and covered landfill areas can be controlled by binding compounds or temporary vegetative growth. Form 15 of Modern's permit application is its Dust Control Plan. (B-1; J-10, Vol. IV) Form 15 indicates that fugitive dust will be generated by waste haulage, borrow material haulage, construction, and general operation and preconstruction operation. (J-10, Vol. IV, Form 15) Under its Dust Control Plan, Modern is to use measures to control dust at the landfill site. (N.T. 909) The dust control measures to be used by Modern include applying water to roads and washing mud away from paved roads at the landfill site, use of dust suppressants (e.g., calcium chloride), applying water in areas traveled by vehicles at the site, and posting a speed limit of 15 miles per hour on the permitted area. (N.T. 795, 909-911)

53. Graham has observed windblown dust created from truck traffic and automobiles running over dried mud which the trucks had dragged onto Prospect Road when leaving the Modern Landfill. (N.T. 549)

54. James Smith, who is a designated spokesperson for PAC, has observed dust leaving the landfill site and traveling in an easterly direction on at least two occasions. (N.T. 572)

55. Inspector Gebhardt never observed dust being emitted from the landfill site prior to December of 1990. (N.T. 795) He never issued an NOV to Modern for dust problems. (N.T. 795) After DER's approval of the 17-acre northern expansion, the only incident involving emissions of fugitive dust

from the landfill occurred on April 8, 1991, when one of Modern's sweeper trucks used to sweep up mud on the road was being operated without a sufficient amount of water. (N.T. 795, 832-833, 836; A-14) Gebhardt noted this as a violation in his April 1991 inspection report. (N.T. 836)

56. DER's Bureau of Air Quality determined that Modern would not be required to obtain a separate air quality control plan approval and permit for fugitive dust for the 17-acre northern expansion. (N.T. 108-109)

Vectors

57. Seagulls are present in the York County area near the Modern Landfill as well as at a school and farm fields four miles from the landfill. (N.T. 554, 925) Complaints about the landfill attracting seagulls and about seagull droppings at Yorkana Park, which is located just east of the Modern Landfill, were raised to DER at the public hearing. (N.T. 81-82, 553; J-6)

58. Volume III, Section 1.0, Form 14 of Modern's permit modification application (J-10) contains Modern's nuisance control plan regarding vectors, and states that timely compaction and covering of wastes will minimize access to the wastes by vectors. (J-10)

59. In response to concerns about seagulls being attracted to the landfill, DER has made recommendations to Modern. (N.T. 82)

60. After consulting with ornithologists, Modern has used noisemaking in an effort to discourage the seagulls from coming to the landfill. (N.T. 82, 922-924) Modern employees fire blank cartridges at the birds if they land near the working face, causing the birds to leave. (N.T. 923-924)

61. Inspector Gebhardt has observed that the seagulls which were attracted to the landfill would stay within a few hundred yards of the landfill, even when frightened by noisemaking, and did not go to nearby residences or the Yorkana Park. (N.T. 846-847) Gebhardt also determined that the seagulls did not interfere with the operation of the landfill. (N.T. 795-796) DER never issued a notice of violation to Modern concerning the seagulls. (N.T. 795, 921)

Litter

62. Litter (consisting of plastic bags and sheets of paper) is blown off the Modern Landfill by wind. (N.T. 552, 622-623, 964; A-40) Modern's permit modification application (J-10) at Volume III, Section 1.0, Form 14 describes Modern's plan for preventing litter from blowing or becoming deposited offsite, which includes erecting a four foot high fence (made of wire or vertical slats) around the active disposal area and collection of refuse from along perimeter fencing following each significant wind event or at a minimum of once per week. (J-10) When litter is blown off-site, Modern sends some of its employees or retains temporary employees to pick up the litter that same day or the following day. (N.T. 793-794, 926, 942)

63. Modern installed litter control fences near the active face of the landfill to prevent litter from blowing from its disposal area. (N.T. 597, 927) Modern has installed a perimeter fence around its entire disposal area and additional litter fences in the fields surrounding the landfill and along the permit boundary. (N.T. 927)

64. DER has never issued Modern an NOV regarding blowing litter. (N.T. 793)

65. Graham received complaints from residents near the landfill about blowing litter both before and after December of 1990. (N.T. 544-548) When Graham investigated these blowing litter complaints, he found litter in the form of plastic bags and paper on farm fields and in trees near the landfill site. (N.T. 552, 623, 964)

66. Although PAC spokesman James Smith testified litter from the landfill's working face could blow past Modern's litter control fences, there was no evidence offered by the appellants that the litter in the farm fields and the trees had blown off the landfill's working face rather than off trucks travelling to or from the landfill. (N.T. 965)

Traffic

67. In connection with the 1988 permit modification, Modern submitted a Traffic Impact Study for Permit Modification Modern Landfill Permit No. 100113 prepared by Buchart-Horn, Inc. to DER on May 12, 1988. (N.T. 949; B-1)

68. Modern did not conduct a traffic impact study for the 17-acre northern expansion but instead resubmitted the 1988 Buchart-Horn Study since there would be no increase in waste volume coming to the landfill. (N.T. 949-950)

69. In connection with Modern's permit application for the 17-acre northern expansion, DER requested that the Pennsylvania Department of Transportation (PennDOT) review the traffic corridors to the facility to be permitted. (N.T. 64, 96)

70. PennDOT conducted a traffic assessment at the landfill and was satisfied with the 17-acre northern expansion proposal *vis à vis* traffic considerations. (N.T. 64; J-6, p. 2)

71. DER concluded that since the 17-acre expansion permit application did not request an increase in the volume of waste, there would be no increase in truck traffic to the Modern facility. (N.T. 64)

72. DER did not conduct an assessment of the traffic impacts of the 17-acre northern expansion but relied on PennDOT's assessment. (N.T. 96-97)

73. There was no evidence offered by the appellants that any roads would be used in connection with accessing the 17-acre northern expansion site other than those contained in the Buchart-Horn study and reviewed by PennDOT.

74. Residents who live near the Modern Landfill expressed concern about traffic hazards posed by trucks travelling to and from the landfill in the form of the number of trucks, litter blowing off of the trucks and onto the roadways, speeding, failure to observe stop signs, and liquid leaking from the trucks onto the roadway. (N.T. 544, 574-575, 583, 608, 610, 619)

75. Modern does not operate any waste trucks. (N.T. 927)

76. When Modern receives a complaint about trucks coming to and from the landfill or if Modern notices a problem with a particular truck, Modern contacts the truck's owner by telephone to apprise the owner of the problem. (N.T. 928)

Groundwater Contamination

77. Portions of the unlined Modern Landfill (permitted prior to December 12, 1986) were declared a Superfund site pursuant to the

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 *et seq.* (CERCLA), and placed on the United States' Environmental Protection Agency's (EPA) National Priority List in June of 1986. (N.T. 30, 33; B-1; J-11) The Superfund site includes the unlined portion of the Modern Landfill and the areas where leachate constituents are known to exist between the landfill and the groundwater extraction systems on the eastern and western perimeters. (N.T. 894)

78. Modern and DER entered into a Consent Order and Agreement on November 4, 1987, pursuant to which Modern agreed to undertake and pay for Remedial Investigation and Feasibility Study (RI/FS) to study the effectiveness of the groundwater extraction system in addressing groundwater concerns. (J-3)

79. Golder Associates performed the RI/FS final draft for Modern dated December 9, 1987. (N.T. 28; J-11)

80. The RI/FS was completed in April of 1990 and provided remedial alternatives for the Modern Landfill. Those included capping the unlined portion of the landfill (all but a few acres were capped as of the merits hearing), installation of a gas extraction system, and eastern and western groundwater extraction systems (all of which were installed in April of 1990), construction and operation of the leachate treatment plant (which was constructed and operating in April of 1990), the addition of one groundwater extraction well on the eastern side of the landfill (which was

installed in April of 1990), and the addition of a third extraction well on the western side of the landfill (which was completed in 1992). (N.T. 891-892; J-12)

81. Three factors determine the direction of groundwater flow: 1) the porosity of the rock or percentage of void space available to hold water; 2) the permeability or interconnectedness of that void space; and 3) the gradient or hydraulic head. (N.T. 426)

82. The equipotential lines (lines of equal elevation head) are in an east-west configuration for the Modern Landfill site, indicating a perpendicular gradient forcing the groundwater flow to the north and northwest. (N.T. 327, 330)

83. The natural flow of the groundwater at the footprint of the Modern Landfill site (without considering the northern expansion) is to the north. (N.T. 317, 366)

84. The groundwater extraction system at the Modern Landfill consists of two lines of groundwater extraction wells located along the eastern and western perimeters of the landfill site. These wells collect and continuously pump contaminated groundwater through a piping system to Modern's wastewater treatment plant for treatment. (N.T. 286-287; B-3)

85. After the installation of the groundwater extraction system on the eastern and western perimeters of the Modern Landfill site, a large component of the groundwater flows to the east and west toward those extraction systems. (N.T. 365-367, 434)

86. Monitoring wells, which do not have pumps, collect groundwater for sampling on a periodic basis in order to determine whether the leachate leaving the unlined portion of the landfill is contaminating the groundwater in the area of that well. (N.T. 287-288, 317) Modern is required to submit to DER an annual evaluation of the groundwater extraction system and quarterly groundwater monitoring results. (N.T. 323-324)

87. Golder Associates, Inc., prepared annual assessments of the groundwater extraction system at the Modern Landfill. (N.T. 291-296; A-21, A-22, A-23)

88. DER hydrogeologist Thomas Miller recommended to Modern that it install more groundwater recovery wells in the area near monitoring well MD 111, which is located to the west of Modern's western extraction system, northwest of the unlined portion of the landfill, because that monitoring well was indicating contamination was bypassing the extraction system. (N.T. 343)

89. In late 1989, Modern proposed to DER that it would install additional groundwater extraction wells to the northwest of the unlined portion of the landfill to capture any groundwater bypassing the extraction system. (N.T. 668-669, 759; B-3) These additional extraction wells were B-20, W-68, and W-69 along the western perimeter of the landfill near MD 111. (N.T. 665-666; B-3)

90. When DER approved the 17-acre northern expansion, Modern's groundwater extraction system was not capturing all of the contaminated groundwater flowing from the unlined portion of the Modern Landfill. (N.T. 741-742)

91. Extraction well W-60 was added to the groundwater extraction system on the eastern perimeter of the Modern Landfill in January of 1990 to prevent groundwater flowing from the unlined portion of the landfill from reaching monitoring well MD 119, which is located to the northwest of Modern's eastern extraction system. (N.T. 360, 741, 747)

92. Well B-20 was added to the groundwater extraction system on the western perimeter of the Modern Landfill in January of 1992, and wells W-68 and W-69 were also added to the western extraction system in the early part of 1992. (N.T. 741; B-3)

93. The water chemistry data for the first three quarters of 1992 for MD 111 show a decrease in the concentrations of VOCs detected in that monitoring well. (N.T. 668)

94. DER's Robert Benvin, who is the regional facility manager for DER's south central regional office, and DER's Thomas Miller, who is a hydrogeologist at DER's Bureau of Waste Management, were satisfied that Modern had responded adequately to DER's concerns about groundwater pollution at the Modern Landfill and had implemented a remedial system adequate to address DER's concerns. (N.T. 25, 127-128, 318-325, 342-343, 347-348, 383-385)

95. Residents of Gun Club Road, which is located less than one mile to the southeast of the Modern Landfill, were sent letters from DER in the fall of 1988 relating to the results of sampling of their private well water. (N.T. 305, 308, 363, 567, 589; A-27, A-28, A-29)

96. The only data which Miller has which would connect the groundwater degradation at the Modern Landfill to the groundwater degradation

in the private wells along Gun Club Road is the similarity in the class of contaminants. (N.T. 325)

97. Based on the existing groundwater flow direction, the existence of other groundwater discharges between the landfill and the Gun Club Road private wells, and the topography between the landfill and the private water wells near Gun Club Road, DER's hydrogeologist Thomas Miller concluded the contamination in the private water wells was unrelated to the groundwater flowing from Modern Landfill. (N.T. 317, 326)

98. DER is satisfied with Modern's groundwater remediation at the landfill site with regard to collecting leachate and preventing it from traveling beyond the landfill's permit boundary. (N.T. 385)

Wetlands, Perennial Streams, and Floodplain Isolation Distances

99. There are five wetlands (indicated on map J-8 by cross-hatching) located to the west of the 17-acre northern expansion area. (N.T. 77, 389-390; J-8) All five of the wetlands to the west of the 17-acre northern expansion are greater than 300 feet from the permit boundaries for the 17-acre northern expansion. (N.T. 398) There is also a wetland to the north of the 17-acre northern expansion which is located within 300 feet of the disposal area permitted by the 17-acre northern expansion. (N.T. 77, 399-400; J-8) This northern wetland was located within the landfill's boundary as it was permitted on April 1, 1988 within the northern soil borrow area. (N.T. 399, 885; B-1: J-8)

100. Floodplain areas (indicated on J-8 by dark blue coloring) are located near the 17-acre northern expansion. (N.T. 70-71; J-8)

101. The only permitted boundaries of the Modern Landfill within the 100-year floodplain of waters of this Commonwealth were permitted prior to April 9, 1988. No permitted disposal areas are within 100-year floodplains. (B-1)

102. The dotted line between the floodplain areas on J-8 indicates a perennial or intermittent stream. (N.T. 71; J-8) The stream flows through the area permitted under Modern's 1986 and 1988 permit modification areas. (N.T. 885-886; J-8)

103. The only permitted boundaries of the Modern Landfill closer than 100 feet to the stream were permitted prior to April 9, 1988. (B-1) The attachment to Form D of Modern's permit (J-10) indicates refuse disposal will be separated by a minimum of 175 feet from the nearest stream. (N.T. 89-90; J-10 at Vol. II, p. A.1)

Discussion

Lower Windsor and PAC have used a "shotgun" approach in these appeals raising numerous objections to DER's approval of the 17-acre northern expansion. We shall examine each of their objections in this Adjudication.

We begin our discussion by addressing the issue of burden of proof. Under 25 Pa. Code §21.101(c)(3), a third party appealing DER's issuance or continuation of a permit has the burden of proof. Residents Opposed to Black Bridge Incinerator (ROBBI) v. DER, et al., EHB Docket No. 87-225-W (Adjudication issued May 18, 1993). Thus, in the appeal at Docket No. 90-580-E, Lower Windsor and PAC bear the burden of proving DER's approval of the major modification of Modern's SWDP No. 100113 to allow for the 17-acre

northern expansion was an abuse of DER's discretion or an arbitrary exercise of its duties. Warren Sand and Gravel, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). In the appeal at Docket No. 91-412-E, Lower Windsor bears the burden of proving DER abused its discretion or committed an arbitrary exercise of its duties by entering into the September 3, 1991 COA authorizing Modern to continue disposal on the slope cap area up to the elevation limits of its previous permit, as Lower Windsor is asserting the affirmative in that appeal. 25 Pa. Code §21.101(a); Warren Sand and Gravel, *supra*. In reviewing DER's action, we note that DER is bound to apply the regulations which were in effect at the time it made its decision. Franconia Township v. DER, et al., 1991 EHB 1290; Borough of Glendon v. DER, 145 Pa. Cmwlth. 238, 603 A.2d 226 (1992), allocatur denied, ___ Pa. ___, 608 A.2d 32 (1992). Our review is *de novo*; thus, we may substitute our discretion for that of DER where we determine DER has abused its discretion. ROBBI, *supra*; Morcoal Co. v. DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983).

In our review, we observe that pursuant to 25 Pa. Code §271.201, for DER to approve Modern's permit modification application, Modern must have demonstrated, *inter alia*, the following conditions were met:

> 1) The permit application is complete and accurate.
>
> 2) Municipal waste management operations can be feasibly accomplished under the application as required by the [SWMA], the environmental protection acts, and [Title 25 of the Pa.Code].
>
> 3) The requirements of the [SWMA], the environmental protection acts, [Title 25 of the Pa.Code], and Const. Article I, §27 have been complied with.

> 4) Municipal waste management operations under the permit will not cause surface water pollution or groundwater pollution, except that [DER] may approve an application for permit modification to control or abate groundwater pollution under a new or modified groundwater collection or treatment facility.
>
> . . .
>
> 6) The compliance status of the applicant or a related party under section 503(c) and (d) of the SWMA (35 P.S. §6018.503(c) and (c)) does not require or allow permit denial.

Were the Requirements of the APCA Complied With?

Lower Windsor and PAC first contend that DER's approval of the 17-acre northern expansion failed to ensure that Modern complied with the requirements of the APCA, citing the first prong of the test enunciated in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976), for determining whether DER has properly balanced the conflicts between societal concerns and environmental concerns in view of Article I, Section 27 of the Pennsylvania Constitution.[4]

As Modern correctly points out, however, we have previously ruled that while the Payne test has been typically applied in Article I, Section 27 actions, the Commonwealth Court's opinion in National Solid Wastes Management Ass'n v. Casey and DER, 143 Pa. Cmwlth. 577, 600 A.2d 260 (1991), aff'd __ Pa. ___, 619 A.2d 1063 (1993), held that the Payne test is not the standard of review in cases involving legislation such as the SWMA which expressly states

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4 "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

that one of its purposes is to implement Article I, Section 27, for, in essence, that judgment has already been made by the General Assembly in enacting the SWMA. Empire Sanitary Landfill, Inc. v. DER, 1992 EHB 848; New Hanover Corporation v. DER, 1992 EHB 1629, n. 9. Thus, rather than reviewing DER's approval of the 17-acre northern expansion as to issues raised by Lower Windsor and PAC in the context of the Payne test, as asserted by Lower Windsor and PAC, we instead review whether the requirements of the SWMA and the regulations thereunder were met.

To the extent the APCA is one of the environmental protection acts defined at 25 Pa. Code §271.1, Modern's application was required by 25 Pa. Code §271.201(3) to comply with the APCA. Lower Windsor and PAC contend the Modern Landfill is a source of air contamination in the form of odors, gases, toxic substances, and dust which required APCA plan approvals and permits be issued to Modern prior to DER's approving the 17-acre northern expansion.

At the outset, we reject Modern's contention that DER has not acted here with regard to air quality permitting, based on Columbia Park Citizens Ass'n v. DER, 1989 EHB 905. Columbia Park was an appeal from a DER internal permit coordination form which indicated that an air quality permit would not be required in connection with the construction of a certain sewage facility. In our opinion granting DER's motion to dismiss the appeal as not being from an "action" of DER, we pointed out that there was nothing in the record which indicated DER had intended to make a judicial-type decision on the air quality permit issue and nothing to indicate anyone had ever suggested to DER that an air quality permit might be necessary for the sewage facility construction

project. In contrast, the evidence in the instant matter shows DER's Bureau of Air Quality determined that no plan approvals or permits were necessary to be issued at the time of the December 1990 permit modification. Thus, Lower Windsor and PAC's challenge to DER's decision to issue the SWDP modification without requiring air quality plan approvals or permit is properly before us.

Section 6.1 of the APCA, 35 P.S. §4006.1, provides that a stationary air contamination source cannot be constructed, assembled, installed or modified without receiving from DER written plan approval and an operating permit. See also 25 Pa. Code §§127.11 and 127.21. Section 3 of the APCA, 35 P.S. §4003, defines stationary air contamination source as "[a]ny air contamination source other than that which, when operated, moves in a given direction under its own power." Air contamination source is defined in §3 as "[a]ny place, facility or equipment, stationary or mobile, at, from or by reason of which there is emitted into the outdoor atmosphere any air contaminant." Air contaminant is defined in §3 as including "[s]moke, dust, fumes, gas, odor, mist, vapor, pollen, or any combination thereof."

Odors

We first address whether the 17-acre northern expansion emits odors into the outdoor atmosphere. As we pointed out in Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 1572, 1575, the term "odor" is not defined in the APCA or the regulations, but its common meaning is "a quality of something that stimulates the olfactory organ ... a sensation resulting from adequate stimulation of the olfactory organ: SMELL." Webster's Ninth New Collegiate Dictionary, p. 818 (1983). The test for whether any air contaminant in the

form of an odor is being emitted is found at 25 Pa. Code §123.31(b), which states: "[a] person may not permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source, in such a manner that the malodors are detectable outside the property of the person on whose land the source is being operated." The definition of malodor, in turn, is "[a]n odor which causes annoyance or discomfort to the public and which [DER] determines to be objectionable to the public." 25 Pa. Code §121.1.

Modern uses mists and masking agents to control odors from leaving its landfill site. Prior to December of 1990, Modern received between two and four complaints a year about malodors coming from its landfill. When it received these complaints, Modern would take steps to determine whether the landfill was emitting the odors and to remedy the situation. DER also received complaints about malodors coming from the Modern Landfill prior to December of 1990.

Both in response to citizen complaints and during his unannounced monthly inspections, DER inspector Scott Gebhardt inspected the Modern Landfill concerning odors. Gebhardt testified that he had only ever raised odor problems with Modern on one occasion, and that was on November 26, 1990, when Modern was exhuming trash on one portion of the landfill site and moving it to another. Gebhardt detected a strong odor on the landfill site that day but did not detect the odor off of the site. Gebhardt directed Modern to cease exhuming waste until it had obtained a DER-approved plan and installed odor control equipment. Because Modern quickly complied with Gebhardt's direction, he did not issue an NOV to Modern.

Further, while Lower Windsor Supervisor Dean Graham testified that he and other residents had detected odors off the landfill site both prior to and after December of 1990, Lower Windsor and PAC failed to sustain their burden of proving that those odors were being emitted by the Modern Landfill and that DER abused its discretion in not finding the landfill to be a source of malodors. Clearly Gebhardt found no landfill-generated odors when he inspected the landfill in response to citizen complaints. Graham's testimony, that he smelled garbage odors on his way to the January 27, 1993 merits hearing about three miles east of the landfill but not close to the landfill, lacked proof of a connection between the odors he detected three miles east of the landfill and the landfill itself.

A single malodor incident does not establish systematic or routine or regular malodors to warrant rejection of this application. Thus, Lower Windsor and PAC have failed to sustain their burden of proving that the 17-acre northern expansion is a source of air contaminants in the form of odors for which DER should have required an APCA plan approval and permit.

Landfill Gases

Gases generated by the 17-acre northern expansion are to be controlled by a gas management system described at Form 26 of Vol. IV of Modern's permit modification application, which is Exhibit J-10. This system will be comprised of gas extraction wells, gas collection header pipes, and condensate management structures which are to be installed at the 17-acre northern expansion. Gas extraction will be performed by applying a vacuum to the system using a blower located at Modern's blower/flare station. The

blower will blow gas through a flare, where the gas will be incinerated. The gas management system will be installed on the 17-acre northern expansion once it is filled to final elevations. The gas extraction wells will have to be installed through the waste and the header piping system has to be installed on the surface of the landfill so the liquid in the pipes will drain out and will not clog the pipes. DER notified Modern that it would be required to obtain an APCA permit for the 17-acre northern expansion's gas management system six months prior to its construction.[5]

While DER and Modern acknowledge that a separate APCA permit is necessary for Modern's gas management system for the 17-acre northern expansion, they contend that this permit need not be obtained by Modern at the time of DER's approval of the 17-acre northern expansion, and that DER has properly required that it must be obtained prior to construction and operation of the gas management system. DER correctly points out in its brief that all of the permits relating to the 17-acre northern expansion need not be issued by DER simultaneously (citing Township of Salford v. DER and Mignatti Construction Co., 1978 EHB 62, 94, affirmed on reconsideration, 1978 EHB 342, affirmed on appeal, Mignatti Construction Co. v. Commonwealth, DER, 49 Pa. Cmwlth. 497, 411 A.2d 860 (1980)).

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5 We note that paragraph 42 of Modern's permit modification provides "one year prior to the anticipated installation of a gas monitoring system, an application for plan approval must be submitted to the ... Bureau of Air Quality Control." (J-1, p. 14) This condition was eliminated from the permit modification by the September 3, 1991 COA. (J-2, ¶ 2q)

The only argument offered by Lower Windsor and PAC in support of their position is the requirements of Article I, Section 27 would mandate DER's consideration of the impact of landfill gases before the 17-acre northern expansion was approved and not after the approval "when the Department will be faced with a *fait accompli* in the form of a certain quantity of landfill gases that will have to be dealt with in one way or the other." Lower Windsor and PAC point to no requirement under the SWMA or the regulations thereunder which preclude DER from issuing the landfill modification approval prior to requiring the APCA plan approval and permit for the 17-acre northern expansion's gas management system. While they urge DER should have studied the impact of the landfill gases emitted from the site, they produced no evidence of the gases' impact. Thus, Lower Windsor and PAC have failed to support their argument with sufficient evidence for us to find DER abused its discretion by issuing the 17-acre northern expansion modification and requiring Modern to obtain APCA plan approval and a permit for its gas management system six months prior to its construction.

Toxic Substances from Leachate

The Modern Landfill has a combined leachate and groundwater collection system which consists of a series of physical/chemical and biological units that treat a combined flow of leachate and groundwater, and the effluent from this flow is pumped to two air stripper towers. The air stripper towers remove VOCs from the leachate and groundwater through a mass transfer process by which air is passed through a cascade of effluent from the combined leachate and groundwater treatment units. These air stripper towers

were permitted by Air Quality Control Operating Permit No. 67-330-004 issued in 1986. DER's approval of the 17-acre northern expansion provided for Modern's use of its existing permitted air stripper towers in connection with treatment of leachate from the 17-acre northern expansion.

In their brief, Lower Windsor and PAC argue that Modern's 1986 application for an Air Quality Control plan approval only anticipated treatment of contaminated groundwater and emissions from groundwater pumped from wells located around the landfill and that Modern's 1986 Air Quality permit has never been amended to authorize the addition of contaminants from either the 1986 21-acre northern expansion or the December 1990 17-acre northern expansion. They claim DER erred by not requiring Modern's 1986 Air Quality permit to be amended to allow for additional emissions, arguing that a "new source" of leachate and higher volumes of leachate will be treated by Modern's treatment plant because of the 17-acre northern expansion's approval.

Lower Windsor and PAC are not collaterally attacking Modern's 1986 Air Quality permit, as Modern contends. Insofar as the issues they raise relate to circumstances arising after DER's issuance of the 1986 Air Quality permit for the air stripper towers bear on the need for amendment of that permit or issuance of a new permit in connection with the 17-acre northern expansion, they are not collaterally attacking the 1986 Air Quality permit. See Hubert D. Taylor v. DER, et al., 1991 EHB 1926.

There is no evidence before us suggesting that the 17-acre northern expansion is a "new source" of air contaminants as defined in DER's regulations at 25 Pa. Code §121.1. It is the air stripper towers which are

the source of air contamination in the form of VOCs emitted into the outdoor atmosphere, not the 17-acre northern expansion.

Pursuant to §6.1 of the APCA, a stationary air contamination source such as Modern's air stripper towers cannot be modified without receiving from DER written plan approval and an operating permit. DER's regulations define modification as:

> A physical change in a source or a change in the method of operation of a source which would increase the amount of an air contaminant emitted by the source or which would result in the emission of an air contaminant not previously emitted.

25 Pa. Code §121.1. Thus, Lower Windsor and PAC bear the burden of proving that a modification of the source of air contaminants in the form of VOCs, i.e., Modern's air stripper towers, occurred in connection with the 17-acre northern expansion regarding an updated APCA plan approval and permit for the air stripper towers.

DER determined at the time of its approval of the 17-acre northern expansion that Modern's wastewater treatment system has the capacity to accept and treat leachate from the 17-acre northern expansion. Further, DER determined that even with the additional leachate flowing through the air stripper system, the water flow through the air stripper system was significantly less than the amount permitted by the 1986 Air Quality permit for the air stripper towers. Additionally, Condition 16 of the permit modification for the 17-acre northern expansion requires Modern to verify that its treatment facility has sufficient capacity to treat leachate from the Modern landfill and leachate from other sources. Mahmoud F. Abd-el-Bary,

Ph.D., who testified as an expert on behalf of Lower Windsor and PAC, was unable to determine what impact, if any, the leachate coming from the 17-acre northern expansion would have on the air stripper towers.

Lower Windsor and PAC presented no evidence to show either a physical change in the air stripper towers or the method of operation of the air stripper towers which would increase the amount of the air contaminants emitted by the air stripper towers or the emission of an air contaminant not previously emitted. Thus, Lower Windsor and PAC have failed to sustain their burden of proof as to the necessity for an updated APCA plan approval and permit for Modern's air stripper towers.[6]

Fugitive Dust

The parties do not dispute that the 17-acre northern expansion is a source of air contaminants in the form of dust. Form 15 of Modern's SWDP modification application (Exhibit J-10, Vol. IV, Form 15) indicates that fugitive dust will be generated by waste haulage, borrow material haulage, construction and general operation and preconstruction operation.

Lower Windsor and PAC acknowledge that pursuant to 25 Pa. Code §127.14, certain sources of air contamination are exempt from the air quality plan approval requirements of the APCA. This section of DER's regulations provides at 25 Pa. Code §127.14(8) an exemption for "[o]ther sources and

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6 Citing 25 Pa. Code §§127.1 and 127.12(a)(5), Lower Windsor and PAC also contend that DER should have required Modern to use the BAT for its air stripper towers at the time DER approved the 17-acre northern expansion. Since we have no APCA plan approval for the air stripper towers before us to review, we need not address the issue of whether the air stripper towers use the BAT attainable as of December of 1990.

classes of sources determined to be of minor significance by [DER]." Lower Windsor and PAC contend there is no record that DER made such a determination here, either in Modern's permit application or in the Pennsylvania Bulletin.

DER, on the other hand, contends its Bureau of Air Quality determined the 17-acre northern expansion was a source of minor significance pursuant to 25 Pa. Code §127.14(8), pointing to Section 7.10 of the Permitting Criteria for Municipal Waste Landfills contained in DER's Bureau of Air Quality permit manual dated May 4, 1990. Section 7.10 of this Permitting Criteria at page 4 states:

> This criteria specifies the reasonable actions that are necessary for the prevention of fugitive dust emissions from the operation of landfills in accordance with these requirements. Landfills which meet this criteria are considered to be of minor significance with regards to particulate emissions and are not subject to Air Quality permitting requirements when no gas venting system is present.

Lower Windsor and PAC offer no response to Section 7.10 of DER's Permitting Criteria determination of source of minor significance to in any way show us that the 17-acre northern expansion failed to meet the criteria found in Section 7.10. Instead, it offers us only a citation to a published "source of minor significance" exemption list at 19 Pa. Bulletin 5243 which pre-dates Section 7.10 of DER's Permitting Criteria. Thus, we find Lower Windsor and PAC have failed to sustain their burden of supporting their claim that there is no record of DER's "source of minor significance" determination

regarding fugitive dust in this matter. They accordingly have failed to sustain their burden of proving an APCA plan approval and permit was necessary for the 17-acre northern expansion regarding emissions of fugitive dust.

Nuisance Concerns

Lower Windsor and PAC contend that DER failed to comply with the mandates of Article I, Section 27 of the Pennsylvania Constitution, arguing DER was aware that the Modern Landfill was causing adverse impacts on the residents of Lower Windsor and the environment in the form of malodors, dust, litter, and seagulls, yet DER approved the 17-acre northern expansion without studying these impacts. Lower Windsor and PAC cite only the Payne test and a prior appeal decided pursuant to the Payne test, Doris J. Baughman v. DER, 1979 EHB 1, in support of their argument. As we have previously explained in this Adjudication, however, the Payne test is not the standard of review we are employing here in reviewing the Article I, Section 27 arguments, but rather, we are looking to the requirements of the SWMA and the regulations promulgated thereunder.

Section 273.136 of DER's regulations requires an application for a municipal waste landfill to contain a plan in accordance with 25 Pa. Code §273.218 (relating to nuisance control) to prevent and control hazards or nuisances from vectors, odors, noise, dust and other nuisances not otherwise provided for in the permit application. Regarding nuisance control, §273.218 provides:

> a) The operator may not cause or allow the attraction, harborage or breeding of vectors.

> b) The operator shall also prevent and eliminate conditions not otherwise prohibited by [subchapter c of Chapter 273] that are harmful to the environment or public health, or which create safety hazards, odors, dust, noise, unsightliness and other public nuisances.

The evidence shows that Modern's permit modification application (J-10) described its nuisance control plan at Volume III, Section 1.0, Form 14. Odors are to be controlled by timely application of daily, intermediate and final covers, as well as through implementation of Modern's gas management system.

Lower Windsor and PAC have not shown us how Modern's application was inadequate as to odor control. While residents surrounding the Modern Landfill have complained about odors, we have found in our discussion of odors relating to APCA plan approvals and permits, *supra*, that these residents' complaints were not verified by DER to be malodors coming from the landfill, nor does the evidence establish that these odors are coming from the Modern Landfill, as opposed to some other source.

As to dust, Modern's application provides at Volume III Section 1.0, Form 14 that dust is to be controlled on the roadways by Modern's regular sweeping of paved access roads and by periodically wetting secondary access routes with water or commercially available compounds. Dust from stockpile, borrow area, and covered landfill areas is to be controlled by Modern's use of binding compounds or temporary vegetative growth. The evidence shows that residents who live near the Modern Landfill have complained about windblown dust created by truck traffic and automobiles running over dried mud on Prospect Road which trucks had dragged onto Prospect Road when leaving the

Modern Landfill. PAC's spokesman, James Smith, testified he has observed dust leaving the Modern Landfill site and travelling in an easterly direction on at least two occasions. DER's Inspector Gebhardt, who conducted monthly and unannounced inspections of the Modern Landfill observed a dust problem at the Modern Landfill on only one occasion, however. This was April 8, 1991, which was after DER's approval of the 17-acre northern expansion. On April 8, 1991, Gebhardt observed one of Modern's sweeper trucks used to sweep up mud on the road was being operated without a sufficient amount of water. Gebhardt has never issued Modern an NOV for dust-related problems. Occasional dust from landfill operation which occurs, despite operation of Modern's dust suppression system, would not violate Section 273.218(b) unless it rose to nuisance levels. Such a nuisance level would have to be a regular or routine occurrence. We have inadequate evidence offered from which to find a violation of Section 273.218(b). With only one DER-documented and two PAC-documented incidents of dust problems at the Modern Landfill, we cannot conclude, based on the evidence presented, that DER abused its discretion in approving Modern's 17-acre northern expansion.

Regarding vectors, Modern's plan is to minimize access to the waste by vectors through timely compaction and covering of all wastes. Lower Windsor and PAC claim that seagulls are attracted to the Modern Landfill and that these seagulls are a problem for residents who live near the Modern Landfill, particularly because of "bird droppings" at Yorkana Park, which is located just east of the landfill. The evidence presented at the merits hearing demonstrates that seagulls are present in the York County area near

the Modern Landfill as well as at a school and farm fields four miles from the landfill. In response to complaints about the Modern Landfill attracting seagulls, DER has made recommendations to Modern. After consulting ornithologists, Modern has used noisemaking in an effort to discourage the birds from coming to the landfill. Modern's employees fire blank cartridges at the birds if they land near the landfill's working face, causing the seagulls to leave. Inspector Gebhardt has observed that the seagulls would stay within a few hundred yards of the landfill when frightened by the noisemaking and did not go to nearby residences or to Yorkana Park. Further, Gebhardt determined the seagulls did not interfere with the operation of the landfill. Gebhardt has never issued Modern an NOV regarding seagulls.

While Lower Windsor and PAC contend that seagulls attracted to the landfill are creating a health hazard for users of Yorkana Park and for a farmer who lives near the landfill, they presented no evidence as to what these health hazards consist of. Further, the evidence presented at the merits hearing fails to establish that the seagulls which are attracted to the park or the nearby farm field are connected to the operations at the Modern Landfill, as opposed to seagulls which are otherwise present in York County. Thus, Lower Windsor and PAC have failed to sustain their burden of proving DER abused its discretion in approving the 17-acre northern expansion because of vector problems at the landfill.

Litter

DER's regulations at 25 Pa. Code §273.137 require a municipal waste landfill application to contain a litter control plan in accordance with 25 Pa. Code §273.220. Section 273.220, in turn, provides:

> a) The operator may not allow litter to be blown or otherwise deposited offsite.
>
> b) Fences or other barriers sufficient to control blowing litter shall be located in the immediate operating area downwind from the working face. Fences or other barriers shall be constructed of mesh, snow fencing or other material approved by [DER] as part of the permit.
>
> c) At least weekly, litter shall be collected from fences, roadways, tree line barriers and other barriers, and disposed of or stored in accordance with the SWMA and regulations thereunder ... .

Regarding litter, Modern's permit modification application (J-10) at Volume III, Section 1.0, Form 14 describes Modern's plan for preventing litter from blowing or becoming deposited offsite. Modern states that a litter fence will be constructed as necessary around the active disposal area to control blowing litter from the site. This fence is to be four feet high and constructed of wire or vertical wooden slats. Any gaps or breaks in the fence are to be promptly repaired. Modern is to collect refuse from along the perimeter fencing following each significant wind event or at a minimum of once per week.

The evidence shows that Modern has installed litter control fences to prevent litter from blowing from its disposal area. Additionally, Modern has installed a perimeter fence around its entire disposal area and additional litter control fences in the fields surrounding the landfill and the permit

boundary. Whenever litter is blown off the Modern Landfill site, Modern sends some of its employees or temporary employees to pick up the litter that same day or the following day.

Lower Windsor and PAC assert that although Modern employees pick up the litter which blows off its site, they are unable to recover litter which blows into nearby farm fields or trees, and that this litter, which they say consists of plastic bags and sheets of paper, adversely affects the environment, the nearby farm fields, and the region's aesthetics. The evidence offered by Lower Windsor and PAC shows that Lower Windsor Supervisor Graham received complaints from residents near the landfill about blowing litter both before and after December of 1990. When Graham investigated these blowing litter complaints, he found litter in the form of plastic bags and paper on farm fields and in trees near the Modern Landfill. Lower Windsor and PAC bear the burden of proving Modern's non-compliance with DER's regulations regarding the litter they say is leaving the site. The evidence shows Modern has complied with DER's regulations at 25 Pa. Code §273.220(b) by erecting the appropriate fencing at its landfill site, and has complied with §273.220(c) by promptly sending its employees out to collect litter as prescribed by the regulation. As to §273.220(a), PAC spokesman James Smith testified litter could blow from the landfill's working face past Modern's litter control fences, but Lower Windsor and PAC offered no evidence to show that the litter in trees and fields neighboring the landfill site had blown from the landfill site, as opposed to blowing from trucks travelling to and from the landfill or some other source. DER has never issued Modern an NOV regarding blowing

litter and no evidence was offered by Lower Windsor and PAC of any citation of Modern by DER for litter. Instead, the evidence shows Modern's repeated efforts to comply with DER's regulations regarding litter blowing from the site. PAC's spokesman Smith conceded on cross examination by Modern that Modern has "welcomed" the residents' concerns regarding blowing litter, but he testified that these efforts are "not enough" because Modern does not prevent every piece of litter from escaping its site. (N.T. 596-597) Under the theory advanced by Lower Windsor and PAC, DER should not have approved the 17-acre northern expansion because a piece of litter escapes collection by Modern and blows off site. Even if pieces of litter escape from the landfill, this does not show Modern's failure to comply with 25 Pa. Code §273.137. Lower Windsor and PAC have shown no violation of 25 Pa. Code §273.137. We thus conclude that Lower Windsor and PAC have not sustained their burden of proving DER abused its discretion in approving the 17-acre northern expansion with regard to litter concerns.

Traffic

Citing Mr. and Mrs. John Korgeski v. DER, 1991 EHB 935, Lower Windsor and PAC assert that DER is required to study traffic safety considerations when it evaluates a solid waste permit application. They argue that DER did not fulfill this duty in connection with Modern's 17-acre northern expansion. Lower Windsor and PAC claim that trucks travelling to and from the Modern Landfill were adversely impacting traffic safety and the environment prior to DER's approval of the 17-acre northern expansion and that DER failed to consider the impacts of truck traffic on residents of Lower Windsor or on the

environment in approving the 17-acre northern expansion, and reviewed only the 1988 traffic impacts study which was submitted with Modern's application for the 17-acre northern expansion modification.[7] In Korgeski, *supra*, we stated that the SWMA and Article I, Section 27 mandate an inquiry into traffic safety considerations when DER evaluates a solid waste permit application. As we explained in T.R.A.S.H., Ltd. and Plymouth Township v. DER, et al., 1989 EHB 487, aff'd 132 Pa. Cmwlth. 652, 574 A.2d 721 (1990), the Board has based its decisions concerning DER's authority under the SWMA to consider traffic safety issues on the language in §§102(4) and 104(6) of the SWMA, which empowers DER to regulate the transportation of solid waste, and that the regulation of traffic safety is an "inherent and necessary factor to be considered in the regulation of solid wastes ...." Id. at 551. We further have explained that because of DER's realm of expertise, it may have to consult with and obtain the recommendations of PennDOT. Korgeski, at 949. DER does not commit an abuse of discretion by referring traffic safety issues to PennDOT and deferring to PennDOT's conclusions. See T.R.A.S.H, *supra* at 551. However, the ultimate authority to issue permits under the SWMA rests with DER. Id.

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[7] We reject Modern's contention that Lower Windsor and PAC are in effect untimely challenging DER's issuance of the June 1988 permit modification because the 17-acre northern expansion permit modification did not increase the volume of waste (and, thus, truck traffic), from the volume set in the June 1988 permit modification (citing Richards v. DER, 1990 EHB 382; and Specialty Waste, Inc. v. DER, 1992 EHB 382)). Their contention goes to DER's approval of the 17-acre northern expansion without an updated traffic study. Clearly, they may challenge Modern's permit modification based on post-1988 facts. Hubert D. Taylor, *supra*.

The evidence in this matter shows that in connection with the 1988 permit modification, Modern submitted to DER on May 12, 1988 a Traffic Impact Study prepared by Buchart-Horn. Modern did not conduct a traffic impact study for the 17-acre northern expansion, but instead again resubmitted the 1988 Buchart-Horn study since there would be no increase in the volume of waste coming to the landfill. DER similarly concluded that since the 17-acre expansion permit application did not request an increase in the volume of waste, there would be no increase in truck traffic to the Modern facility. DER requested PennDOT to review the traffic corridors to the 17-acre northern expansion. PennDOT conducted a traffic assessment and was satisfied with the 17-acre northern expansion *vis à vis* traffic considerations. DER did not conduct an assessment of the traffic impacts of the 17-acre northern expansion but relied on PennDOT's assessment.

Although Lower Windsor and PAC object to DER's review of traffic impacts being based on the 1988 Buchart-Horn study, they presented no evidence that any roads would be used in connection with the 17-acre northern expansion other than those contained in the Buchart-Horn study and reviewed by PennDOT. Thus, we cannot conclude that DER erred in basing its review on this study.

Residents who live near the Modern Landfill expressed their concerns at the merits hearing about traffic hazards posed by trucks travelling to and from the landfill in the form of the increased number of trucks, litter blowing off of trucks and onto roadways, speeding and failure to observe stop

signs by these trucks, and liquid leaking from the trucks onto the roadway.[8] While Lower Windsor and PAC assert that DER should have conducted a study of these concerns prior to approving the 17-acre northern expansion, they fail to show us how these concerns required DER to deny Modern's 17-acre northern expansion permit application. Under their theory, DER should have denied Modern's expansion because trucks travelling to and from the Modern Landfill have been observed to run stop signs, speed, lose litter or leak liquid and because these conditions arguably have the potential to contribute to the occurrence of a traffic accident. We cannot conclude DER abused its discretion in not denying Modern's 17-acre northern expansion for these reasons, especially where the evidence shows that Modern does not operate any waste truck and that whenever Modern receives a complaint about trucks coming to and from its landfill or notices a problem on its own, it contacts the truck's owner and advises it to remedy the problem. Thus, Lower Windsor and PAC have failed to sustain their burden of proof on this issue.

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8 The only evidence offered by Lower Windsor and PAC in support of its contention that there has been an increase in truck traffic to the 17-acre northern expansion as opposed to the 1988 traffic study is an informal count of trucks entering the landfill conducted by some Lower Windsor residents on May 5, 1991, which produced a count of 364 trucks. (N.T. 608) They then point to the 1988 Buchart-Horn Study, Exhibit J-5 at p.1, which states that the average daily traffic is to be 248 vehicles. The evidence offered by Lower Windsor and PAC does not show an increase in traffic as they allege, since they produced evidence of traffic on one day following the 17-acre northern expansion and did not produce any evidence of an increase in the <u>average</u> daily volume of traffic because of the expansion.

Groundwater Contamination

Lower Windsor and PAC assert that the evidence shows contaminated groundwater from the unlined portion of the Modern Landfill escapes Modern's groundwater extraction system and flows northward beneath the 17-acre northern expansion. They contend such a northward flow will complicate DER's monitoring of the 17-acre northern expansion's double liner system, asserting DER will be unable to tell whether contaminated groundwater which might appear in the monitoring wells for the 17-acre northern expansion (located north of the 17-acre northern expansion) is flowing from the expansion area or from the unlined portion of the landfill. They also contend that contaminated groundwater from the unlined portion of the landfill was escaping Modern's groundwater extraction system and entering private water wells along Gun Club Road, which is located less than one mile to the southeast of the Modern Landfill, and that DER should not have approved the 17-acre northern expansion where the Modern Landfill was the source of contamination of private water wells.

Modern argues in response that groundwater at the landfill does not escape the groundwater extraction system and thus cannot contaminate off-site wells or interfere with leak detection associated with the 17-acre northern expansion.

At the merits hearing, Lower Windsor and PAC called the DER hydrogeologist who was responsible for reviewing the 17-acre northern expansion, Thomas Miller. (N.T. 280-281) They also presented the expert testimony of Timothy Bechtel, Ph.D., who is a self-employed hydrogeologist.

(N.T. 401; A-38) Modern, on the other hand, also called Miller as a witness on its behalf. Modern additionally presented the expert testimony of Richard King, who is a hydrogeology and geology consultant for Golder Associates. (N.T. 644-645; M-6)

Miller testified that the groundwater flow at the footprint of the Modern Landfill (minus the 17-acre northern expansion) is in a northerly and northwesterly direction, but that groundwater flowing from the unlined portion of the landfill veers to the west before reaching the 17-acre northern expansion area. (N.T. 317, 327, 330-331, 365) After the installation of Modern's groundwater extraction system on the eastern and western perimeters of the landfill site, Miller testified that the groundwater flow pattern was changed, so that while there still may be a northerly flow component, a large component of the flow moves to the east and west, toward the extraction systems. (N.T. 365-366) Miller further testified that throughout the history of operation of Modern's groundwater extraction system, there have been isolated instances where the monitoring (used to determine whether the system is functioning as designed) outside the extraction system has shown VOCs in a particular quarterly monitoring report, leading him to conclude that the contamination had eluded the extraction system. (N.T. 382) Because monitoring well MD 111, which is located adjacent to and to the west of the western perimeter of the groundwater extraction system as it runs along the unlined portion of the landfill, was showing an increase in contaminants over time, Miller recommended that Modern install more groundwater extraction wells in the vicinity of MD 111. (N.T. 285-288, 343-344; B-3)

In late 1989, Modern proposed to DER that it would install additional groundwater extraction wells to capture any groundwater extraction wells to capture any groundwater bypassing the extraction system. (N.T. 668-669, 759) These additional extraction wells included B-20, W-68, and W-69 along the western perimeter of the landfill, to the northwest of the unlined portion of the landfill. (N.T. 360, 665-666; B-3) B-20 was added in January of 1992, and W-68 and W-69 were added in early 1992. (N.T. 739, 741) W-60, which is located to the northwest of the eastern extraction system, was also converted into an extraction well in January of 1990 because of the increase in contaminants the monitoring wells located in that vicinity were showing. (N.T. 360, 741) Miller believes these additional extraction wells might have the effect of preventing northward migration of contaminated groundwater flowing northward from the unlined portion of the landfill. (N.T. 358-359) Miller testified that he does not believe Modern's groundwater extraction system captures all contamination, to a molecular level. (N.T. 353, 382) Miller testified, however, that the monitoring well data did not indicate VOCs were migrating beneath the 17-acre northern expansion area before DER approved the expansion, and subsequent to DER's approval, the monitoring well data for the monitoring wells located north of the 17-acre northern expansion have not shown groundwater contamination. (N.T. 331-332) Both Miller and DER's Robert Benvin, who is the regional facility manager for DER's south central regional office, are satisfied that Modern has responded adequately to DER's concerns about groundwater pollution at the Modern Landfill and has implemented a remedial system adequate to address DER's concerns.

While Miller was aware of the contaminated private water wells along Gun Club Road one mile southeast of the landfill, he concluded there is no connection between the contamination at those wells and the contamination at the Modern Landfill. (N.T. 305-307) Miller based this conclusion on the existing groundwater flow at the Modern Landfill and topographic conditions between the landfill and the affected residential wells. (N.T. 325-326) Miller testified that although there is a similarity of the contaminants found at the landfill and those found in the Gun Club Road wells, the wells sit on a relatively high topographic area and there are intervening groundwater discharge areas between the contaminated groundwater at the Modern Landfill and the affected residential wells. (N.T. 326)

Timothy Bechtel testified that in his expert opinion, there is probably a component of flow escaping Modern's groundwater extraction system and flowing northward from the unlined portion of the landfill which, in the future, will cause leachate to be picked up in the witness zone between the two liners for the 17-acre northern expansion. (N.T. 431-432, 446) Bechtel testified that once there is leachate between the two liners, the only way to determine if the secondary liner for the 17-acre northern expansion is leaking leachate is by looking at the monitoring well data for the 17-acre northern expansion (located north of that area), and, if those wells are already indicating the presence of VOCs, it may be more difficult to determine whether the secondary liner is leaking. (N.T. 432-433) Bechtel expressed concern that all of the contamination flowing from the landfill is not being captured by the extraction system because monitoring wells outside both the eastern and

western perimeter systems have shown VOCs at various points in time. (N.T. 434)

Bechtel concluded that the rock at the Modern Landfill site is more permeable to the east and west (anisotropic permeability), but that some particles of groundwater would still flow to the north, although he could not say to a reasonable degree of scientific certainty how many water particles are flowing in that direction. (N.T. 463-468) He acknowledged that it is likely that for some particular flow paths, the northerly flow component never reaches the 17-acre northern expansion area. (N.T. 471) However, based on incidences of VOC contamination in monitoring wells MD 114S and MD 115D, which have been decommissioned but were previously located in the 17-acre northern expansion area, and at MD 208I, located about 100 feet north of the 17-acre northern expansion area, he concluded that contamination was flowing north out of the unlined portion of the landfill and into the 17-acre northern expansion area. (N.T. 430-431, 472, 481-482; B-3) Reports prepared by Golder Associates, Inc. for Modern indicated for MD 114S, "hits" of[9] tricholorofluoromethane in the fourth quarter of 1987, in the first quarter of 1988, in the third quarter of 1988, and also in the second quarter of 1989. (N.T. 485-487; A-22 of Table 9) For MD 115D, the Golder Associates report indicates a hit of trichloroethylene in the first quarter of 1987, the third quarter of 1987 and the first quarter of 1988. (N.T. 487-488; A-22 at Table 9)

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9 A "hit" means sample analysis from a sample at that well shows the specific chemical is found in that well in that sample but not in subsequent samples of the same well (except as indicted). (N.T. 516)

The Golder Associates report for MD 115D also shows hits of trans -1, 2-dichloroethylene in the first quarter of 1987, the third quarter of 1987 and the fourth quarter of 1987, and shows hits of trichlorofluoromethane in the third quarter of 1987, the fourth quarter of 1987, and the third quarter of 1988. (N.T. 488; A-22 at Table 9) For MD 208I, there was a hit of trichlorofluoromethane in the fourth quarter of 1991. (N.T. 488) Although there are other monitoring wells in the vicinity of MD 208I, Bechtel has not seen any detection of VOCs in those wells. (N.T. 482) Bechtel concludes that the pattern of infrequent hits of VOCs in these monitoring wells indicates "slugs", pockets of waste, are travelling through the groundwater from the unlined portion of the landfill, and is not indicative of separate spill incidents. (N.T. 514-515) The other explanation he offered was a laboratory artifact, i.e., that some of that compound had previously volatized on the glassware used by the laboratory analyzing the samples. (N.T. 517-518) Bechtel did not explain how only slugs of waste could be travelling in this otherwise clean groundwater and there are no plumes of continuously contaminated leachate.

Moreover, Bechtel testified that in looking at the impact of the addition of extraction wells W-60 and B-20 to Modern's extraction system, he inferred a flow of groundwater to the north would exist between these two additional wells' capture zones. (N.T. 504-509; A-38(a) and (b)) Bechtel further testified that he based his conclusion about the flow path between extraction wells B-20 and W-60 on modeling of just those two wells, and that once those wells were brought "on line" and taking into account Modern's other

extraction wells, it is entirely possible that the wells would capture all of the contaminated groundwater flowing to the north. (N.T. 529-531) Bechtel was uncertain as to when the additional extraction wells had been brought on line, but he testified that once they were brought on line, the flow path probably changed dramatically by going to the east and west. (N.T. 530-532)

Richard King testified that the anisotropy at the Modern Landfill causes the groundwater to flow to the west. (N.T. 702) He believes that in the area beneath the surface of the 21-acre expansion area (which is located north of the unlined portion of the landfill and south of the 17-acre northern expansion) the groundwater contours indicate the groundwater pressure would tend to push the groundwater toward the northwest. (N.T. 664) King concludes there is a western component and a northern component of flow beneath the 21-acre expansion area. (N.T. 746) He believes that this western component, coupled with the anisotropy, sends the groundwater beneath the 21-acre expansion area rather than due north. (N.T. 664, 746-747) King attributes the three hits of contamination detected in MD 115 in 1987 and 1988 to one isolated incident. (N.T. 755-756) He does not believe it is consistent with a finding of a plume of contamination emanating from the landfill because it was not at continuous level over time. (N.T. 753-756)

On the basis of the 1987 and 1988 annual assessments of the groundwater extraction system performed by Golder Associates, Inc., King recommended the addition of extraction well W-60 to the northeast of the unlined portion of the landfill and the additional extraction wells near well B-20 to the northwest of the unlined portion of the landfill. (N.T. 665) King

testified that W-60 was added to the eastern extraction system to prevent the potential for the groundwater to travel further north of the 21-acre expansion and exit beyond where the eastern perimeter groundwater extraction system was in operation. (N.T. 695, 747), but that before W-60 was installed, he was sure that no contaminated groundwater was reaching the 17-acre northern expansion area. (N.T. 764-767) W-60 was installed because the sampling data from monitoring well MD 119 showed that contamination was bypassing the eastern perimeter extraction system, and King wanted to capture that water with W-60 before it travelled further westward. (N.T. 767) Because the monitoring well data for MD 111 showed there was a bypass condition near well B-20, B-20 was deepened to capture that bypass of contaminants. (N.T. 768)

King disagrees with Bechtel's conclusion regarding a northerly bypass of the extraction system between W-60 and B-20, even after they were installed, sending the groundwater beneath the 17-acre northern expansion area, because he believes the hydrogeologic conditions beneath the 21-acre expansion area cause a westerly flow of groundwater in that area. (N.T. 702) With the addition of B-20 and W-60 to the system, King does not believe a northerly bypass of the system occurs. (N.T. 707) King testified that the water chemistry data from W-60 shows that it is capturing groundwater previously escaping from the eastern system and preventing it from flowing northward from that point and then westward. (N.T. 666-668) King further testified that the water chemistry data for the wells which were added to the

western perimeter extraction system, B-20, W-68 and W-69, shows they are capturing the water which was previously bypassing the north end of the western extraction system. (N.T. 666-668)

In view of the evidence before us, Lower Windsor and PAC have failed to sustain their burden of proving that contaminated groundwater is escaping from Modern's groundwater extraction system and is travelling northward to the area of the 17-acre northern expansion. While Miller was unwilling to testify that Modern's groundwater extraction system was preventing all groundwater to a molecular level from flowing northward to the 17-acre expansion area, he was satisfied that the monitoring well data did not indicate that the contaminated groundwater was reaching that area, either prior to or following DER's approval of the 17-acre northern expansion. Moreover, Miller believes that the additional groundwater extraction wells which Modern added to its system might have the effect of preventing the northward migration of contaminated groundwater from the unlined portion of the landfill. While Bechtel testified that in his expert opinion, there was a component of flow escaping Modern's extraction system, Bechtel was unaware of when the additional extraction wells had been brought on line. He testified that once they were brought on line, the flow path probably changed dramatically by going to the east and west. The only evidence Bechtel had to support his theory that contaminated groundwater was travelling northward to the 17-acre northern expansion area was the several hits of VOCs detected in MD 114 and MD 115 in the 17-acre area (before they were decommissioned) and the hit of VOC contamination at MD 208 I detected in 1991. Bechtel acknowledged these sporadic hits could have come

from something other than a plume of contamination travelling from the unlined portion of the landfill, i.e., spills of contaminants or laboratory artifacts. We cannot find such slugs of contamination exist, in view of King's testimony. Bechtel's testimony simply did not establish by a preponderance of the evidence a flow of groundwater contamination from the unlined portion of the landfill to the 17-acre northern expansion. C&K Coal Company v. DER, 1992 EHB 1261.

Nor did Lower Windsor and PAC establish their assertion regarding contamination of the water wells along Gun Club Road, one mile to the southeast of the landfill. They offered no evidence which would prove Miller's conclusion that the contamination of those wells is unrelated to the Modern Landfill to be incorrect and they even argue in their brief that the source of the contamination of those wells is unknown. In fact, their expert testified that the groundwater flow in the unlined area of the landfill was in the direction opposite Gun Club Road. Lower Windsor and PAC would have DER study the Gun Club Road private well contamination before approving the 17-acre northern expansion, but they offered no evidence of record to prove a connection between the two areas. They thus have failed to sustain their burden of proof as to this issue. C&K Coal Co., *supra*.

Was §503(d) of the SWMA complied With?

Section 503(d) of the SWMA provides:

> (d) 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.

35 P.S. §6018.503(d)

"Unlawful conduct" is defined in Section 610 of the SWMA (35 P.S. §6018.610) to include operating in violation of the SWMA or in violation of rules, regulations and orders of DER, and operating so as to create a public nuisance or threat to the public health, safety and welfare.

Lower Windsor and PAC argue that §503(d) requires that Modern's "unlawful conduct", recognized in the 1987 COA, to have been completely corrected before DER could issue the permit modification to Modern.

DER does not dispute that Modern has engaged in "unlawful conduct" at the landfill site, but argues that as the agency charged with the administration of the SWMA, its interpretation of §503(d) of the SWMA is entitled to great weight and deference. DER interprets §503(d) as providing that where the applicant has engaged in unlawful conduct as defined in §610 of the SWMA, 35 P.S. §6018.610, DER must deny the application unless the applicant "demonstrates to the satisfaction of [DER] that the unlawful conduct has been corrected". On this basis, DER alleges that the pivotal question is whether Modern's unlawful conduct has been corrected to DER's satisfaction, and it argues the DER's determination of whether Modern has "cleared the permit bar of §503(d)" should be given deference.

DER is correct that the construction of a statute by those charged with its execution and application is entitled to great weight and should be disregarded or overturned only for cogent reasons and if clearly erroneous. Slovak-American Citizens Club v. Pennsylvania, LCB, 120 Pa. Cmwlth. 528, 549

A.2d 251 (1988). Pursuant to §104 of the SWMA, 35 P.S. §6018.104, DER is charged with the administration of the SWMA.

Lower Windsor and PAC have failed to prove that there are cogent reasons for overturning DER's interpretation of §503(d) or that DER's interpretation is clearly erroneous. They argue only that the Legislation could have used the words "is being corrected" rather than "has been corrected", and that the use of "has been corrected" indicates that the unlawful conduct must have been completely corrected before DER may approve the permit modification. Under the interpretation advanced by Lower Windsor and PAC, DER would never be able to issue a permit under the SWMA to Modern (or its parent located elsewhere) until all of the leachate ceases to flow from the unlined portion of the landfill or at least no longer needs treatment. We do not believe this to have been the Legislature's intent in enacting §503(d). Thus, we see no reason to overturn DER's interpretation of this section of the SWMA. We will, however, review DER's determination that Modern has satisfactorily corrected the unlawful conduct.

According to the testimony of DER's Robert Benvin, who is the regional facility manager for DER's south-central regional office, and DER's Thomas Miller, who is a hydrogeologist at DER's Bureau of Waste Management, DER was satisfied that Modern had responded adequately to DER's concerns about the groundwater pollution at the Modern Landfill and had implemented a remedial system adequate to address DER's concerns.

The evidence shows that Waste Management, of which Modern is an indirect subsidiary, purchased the unlined portion of the landfill in 1984.

On September 20, 1984, Modern entered into a COA with DER (Exhibit J-13) to immediately address groundwater degradation concerns and install a groundwater extraction system. Subsequently, in 1987, Modern and DER entered into another COA (Exhibit J-3), pursuant to which Modern agreed to pay for and undertake an RI/FS pursuant to CERCLA to study the groundwater extraction system and its performance. This 1987 COA (Exhibit J-3) states that the conditions and activities described in Findings of Fact P through T of that COA constituted violations of the terms and conditions of Modern's SWDP No. 100113, was unlawful conduct pursuant to Sections 610(2) and 610(4) of the SWMA (35 P.S. §§6018.610(2) and 610(4)), and was a public nuisance pursuant to §602 of the SWMA (35 P.S. §6018.602). The RI/FS was completed in April of 1990 and provided remedial alternatives for the Modern Landfill. Those included capping the unlined portion of the landfill (all but a few acres were capped as of the merits hearing), installation of a gas extraction system and eastern and western groundwater extraction systems (which were installed in April of 1990), construction and operation of the treatment plant (which was constructed and operating in April of 1990), the addition of one groundwater extraction well on the eastern side of the landfill (which was installed in April of 1990) and the addition of two groundwater extraction wells and deepening of a third extraction well on the western side of the landfill (which was completed in 1992). Modern clearly has taken action to correct the unlawful condition at its site and meet DER's concerns. Thus, we find no abuse of DER's discretion here.

Were the siting Requirements of 25 Pa. Code §273.202 complied with?

Section 273.202 of 25 Pa. Code sets forth a number of areas where municipal waste landfills are prohibited. This section provides in pertinent part:

> a) Except for areas that were permitted prior to April 9, 1988, a municipal waste landfill may not be operated as follows:
>
> 1) In the 100-year floodplain of waters of this Commonwealth.
>
> 2) In or within 300 feet of an important wetland, as defined in §105.17 (relating to wetlands).
>
> ...
>
> 7) Within 100 feet of a perennial stream.

Lower Windsor and PAC contend DER erred by not applying the siting prohibitions in §273.202 to the 17-acre northern expansion, arguing the exception for areas permitted prior to April 9, 1988 does not apply to the 17-acre northern expansion because it was previously permitted as a soil borrow area, and not as a disposal area.

DER, on the other hand, interprets 25 Pa. Code §273.202 as providing an exception from the siting prohibition for all areas of the Modern Landfill which were permitted prior to April 9, 1988, regardless of whether those areas were used for disposal or served as soil borrow areas. Based upon this interpretation, DER did not believe it necessary to evaluate whether the wetland located within 300 feet of the 17-acre northern expansion (northern wetland) is an "important wetland" since it lies within the boundaries of

Modern's previous permit.[10] Further, DER points to the proposed rulemaking for §273.202 at 17 Pa. Bulletin 2303, 2347, which included the word "disposal" in the exception clause, and contends this shows that the EQB intentionally deleted the word "disposal" from §273.202 as promulgated.

DER correctly asserts that its interpretation of its regulations is entitled to controlling authority unless it is plainly erroneous or inconsistent with the authorizing statute. Morton Kise, et al. v. DER, et al., 1992 EHB 1580; Orth v. Dept. of Labor and Industry, 138 Pa. Cmwlth. 443, 588 A.2d 113 (1991).

Lower Windsor and PAC have failed to sustain their burden of proving that DER's interpretation of 25 Pa. Code §273.202 is plainly erroneous. The language of this section does not plainly make the distinction between areas which were permitted prior to April 9, 1988 as to whether disposal activities or soil borrow area activities were to take place on that permitted area. Nor have Lower Windsor and PAC shown us how DER's interpretation is in any way inconsistent with its authorizing statutes. Further, their citation to the former regulations' definitions of a sanitary landfill at 25 Pa. Code §75.1 does nothing to show that DER is incorrectly interpreting 25 Pa. Code

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10 As Lower Windsor and PAC correctly point out, 25 Pa. Code was amended, effective October 12, 1991. See 21 Pa. Bulletin 4911. The amended §105.17 no longer speaks in terms of "important wetlands", but rather "exceptional value wetlands," suggesting an inconsistency within the regulations as they now exist. We need not address this inconsistency, however, since the amendment to §105.17 occurred after DER's action here.

§273.202.[11] "Sanitary landfill" was defined by 25 Pa. Code §75.1 as "[a] land site on which engineering principles are utilized to bury deposits of solid waste...." This section does not clearly exclude the 17-acre northern expansion area from being a permitted area prior to April 9, 1988. It is not apparent from §75.1 that a soil borrow area was not part of the permitted landfill area, as is argued by Lower Windsor and PAC, and they advance no case law in support of their position. Thus, they have not succeeded in proving that DER abused its discretion in not apply the siting prohibitions of 25 Pa. Code §273.202 here or in not considering whether the northern wetland was an "important wetland."

Docket No. 91-412-E-Disposal on the Slope Cap Area

In its appeal at Docket No. 91-412-E, Lower Windsor contends that DER acted contrary to its regulations at 25 Pa. Code §271.112 in allowing Modern to continue to dispose of waste on the single-lined slope cap area in the September 3, 1991 COA.

We disagree with the argument raised by DER and Modern that this issue is moot since Modern ceased disposing of waste on the slope cap area in 1992 and all but four acres of the slope cap area have been closed and capped. As we explained in Carol Rannels v. DER, EHB Docket No. 90-110-W (Opinion issued April 29, 1993), the term "moot" indicates that a case or controversy no longer exists, for whatever reason. We pointed out in Rannels that an appeal becomes moot when an event occurs which deprives the Board of the

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[11] Section 75.1 of 25 Pa. Code has been deleted from the regulations. See 22 Pa. Bulletin 5105.

ability to provide effective relief, such as DER's rescission of the action forming the basis of the appeal (citing Roy Magarigal, Jr., v. DER, 1992 EHB 455). As Lower Windsor points out in its reply brief, the Board has the authority to order Modern to remove the waste from the slope cap area if we find its disposal there was contrary to DER's regulations. In Concerned Citizens Against Sludge v. DER, 1983 EHB 442, the Board examined whether an appeal of DER's issuance to the City of Philadelphia of a permit to dispose of sewage sludge was rendered moot because the sewage had been spread and the permitted sites reclaimed before the appellants filed their appeal with the Board. The Board reasoned that if the appellants proved DER had approved sludge applications, contrary to its regulations, which "surely were going to pollute the waters of the Commonwealth for a very long time," the Board's ordering removal of the sludge would be appropriate. Further, the Board pointed out that to hold otherwise would mean that a permittee could in any circumstance delay a final decision on the validity of the permit until after the permittee's completion of the permitted activity and the Board would have to declare the issue moot and not justiciable. Thus, we reject Modern's contention that Lower Windsor should have filed a petition for supersedeas in this matter. The fact that Modern has capped a large portion of the slope cap area does not remove this issue from our consideration, based on our reasoning in Concerned Citizens Against Sludge.[12]

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12 We similarly reject DER's contention that we are being asked to grant declaratory relief on this issue, as we are not being asked to render an advisory opinion on this issue. See Giorgio Foods, Inc. v. DER, 1989 EHB 331.

Section 271.112 of 25 Pa. Code provides in relevant part:

> (a) By October 11, 1988, no person ... that possesses a municipal waste landfill ... permit under the [SWMA] ... which was issued prior to April 9, 1988, may dispose or process waste under the permit, unless a preliminary application for permit modification or a closure plan is filed under §271.111 (relating to permit application filing deadline).
>
> (b) By April 9, 1990, no person or municipality that possesses a municipal waste landfill ... permit under the act issued prior to April 9, 1988, may dispose or process waste under the permit, unless one of the following applies:
>
> (1) A complete application for permit modification is filed under §271.111, and the Department has not yet rendered a decision with respect to the application.
>
> (2) The person or municipality possesses a permit for the facility issued under this chapter [271].
>
> (c) An operator may continue to dispose of waste, up to final permitted elevations as of December 15, 1987, on permitted disposal areas where waste was disposed as of April 9, 1988 if the operator complies with this section and §271.111. The Department may take action it deems necessary at the facilities to enforce the act, the environmental protection acts and the regulations promulgated thereunder.

Section 271.112(d) makes provisions for disposal of waste on areas which were not permitted for waste disposal prior to April 9, 1988.

Section 271.111(a) of 25 Pa. Code requires a person who possessed a permit for a municipal waste landfill under the SWMA which was issued by DER prior to April 9, 1988 to have filed with DER, by October 11, 1988, either a preliminary application for permit modification under §271.111(b) or a closure plan. Section 271.111(b), in turn, requires that the preliminary application for permit modification for a municipal waste landfill describe differences

between the existing permit and the requirements of Chapter 271, including a number of items listed at §271.111(b). Section 271.111(d) then provides that within six months after receiving notice from DER, a person who filed a preliminary application for permit modification must have filed with DER a complete application for permit modification to correct differences between the existing permit and the requirements of Chapter 271.

DER urges that since disposal was occurring on the slope cap area as of April 9, 1988, §271.112(c) (and not §271.112(d)) was applicable to Modern. DER contends that §271.112(c) contains no specific cut off date for the continued disposal and that this disposal is limited only by the remaining disposal capacity up to the final elevations permitted as of December 15, 1987. DER stresses that §271.112(c) further provides that DER may take whatever actions at the facility where continued disposal is taking place it deems necessary to enforce the SWMA, the environmental protection acts defined at §271.1, and the regulations promulgated thereunder. DER asserts that here DER had no reason to question the integrity of the slope cap area's single liner, so it allowed Modern to continue to dispose of waste in the slope cap area until that portion of the landfill reached the elevation approved in the 1986 permit modification.

DER correctly asserts that its interpretation of its regulations is entitled to controlling authority unless it is plainly erroneous or inconsistent with the authorizing statute. Kise, supra; Orth, supra.

We addressed the interpretation of §§271.111 and 271.112 in City of Bethlehem v. DER, 1991 EHB 224, which the parties' briefs do not cite. In

City of Bethlehem, DER issued a SWMP to a previously permitted municipal waste landfill as part of the repermitting scheme established in the April 9, 1988 regulations. After it became apparent that the new permit was ambiguous with respect to a previously permitted unlined area, DER issued a modification excluding the area. The Board subsequently denied the supersedeas request filed by the owner of the municipal landfill who was contesting the modification, rejecting the interpretation of §271.112(c) which would give an operator of a municipal waste landfill legal authority to continue using a portion of its site which does not meet the requirements of the 1988 amendments to the regulations until it reaches final permitted elevations, no matter how long that takes. We explained that such an interpretation ignores the clear intent of the new regulations to force existing landfills to meet higher standards or close down. We stated:

> Itemizing the differences between the pre-existing permit and the standards of the new regulations, as landfills were required to do in their preliminary applications for permit modification, §271.111(b), serves no purpose except to define areas where upgrading is needed. This purpose is made plain by the requirement in §271.111(d) that the complete application for permit modification "correct differences between the existing permit and the requirements of this Chapter [271]." While these applications are pending, landfills are allowed to continue using previously permitted areas up to their final permitted elevations. When the new permit is issued, however, conforming to the new standards, landfills can operate only in accordance with permit conditions.

Id. at 231. We then determined that the unlined area of the landfill involved in City of Bethlehem could not come into compliance with the 1988 amendments to the regulations without, at least, a liner (citing 25 Pa. Code

§273.251(a)). On this basis, we ruled in City of Bethlehem that the unlined area could not legally be used as a disposal area under the landfill's 1990 permit, and if that permit was capable of being construed to permit disposal on the unlined area, DER had a mandatory duty to clarify that the permit would not allow disposal on the unlined area.

We agree with DER that under §271.112(a), Modern could continue to dispose of waste on the slope cap area after October 11, 1988 because it filed a preliminary application for permit modification by that date. See Charles Bichler, 1990 EHB 1584. The parties have stipulated that DER treated the permit modification application submitted by Modern to DER on March 13, 1989 (within six months of the October 11, 1988 preliminary application) as a complete application for permit modification under §271.111(d). Thus, Modern was able to continue disposal on the slope cap area while it was awaiting DER's action on that complete permit application. DER acted on Modern's complete application for permit modification on December 4, 1990.[13] Modern ceased disposing of municipal waste on the slope cap area while its appeal at Docket No. 91-001-W was pending until the September 3, 1991 COA.

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13 We reject Modern's contention that Lower Windsor did not raise the issue of whether Modern was able to dispose of waste on the slope cap area between April 9, 1990 and December 31, 1990 by failing to specifically raise that issue in its notice of appeal. Lower Windsor's notice of appeal at Docket No. 91-412-E claims the permit modification, as amended by the September 3, 1991 COA, is contrary to 25 Pa. Code §271.112. Our review of that issue necessarily entails an examination of the time limits contained in that section of DER's regulations. See Croner, Inc. v. DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991).

Following our reasoning in City of Bethlehem, we reject DER's interpretation of §271.112(c) as a "grandfather clause" which would allow Modern to dispose of waste on the slope cap area until it reached final elevation limits under its previous permit. As Modern's complete application for permit modification did not provide that Modern would correct the deficiencies in its slope cap area *vis à vis* the liner requirements of 25 Pa. Code §273.251, DER had a mandatory duty to ensure that Modern ceased disposal on the slope cap area. DER's entry into the September 3, 1991 COA allowing disposal on the slope cap area was, thus, an abuse of its discretion.

There was ample testimony and evidence in this matter regarding the escape of leachate from the unlined portion of the landfill into the groundwater and the necessity for Modern to remedy this situation. Because the slope cap area is constructed on top of the unlined area using only a single liner, it is possible that some of the leachate travelling from the unlined area is in fact leaking through the single liner of the slope cap, and Modern failed to produce any evidence to show us it is not.

As the waste disposed of by Modern on the slope cap area after September 3, 1991 was not in compliance with DER's regulations, Modern must remove that waste to a proper disposal area in compliance with DER's regulations.[14] While this result may seem unjust to Modern since Modern completed disposal on the slope cap area in 1992 and all but four acres of the

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[14] In light of the testimony that DER previously detected malodors at Modern's landfill when garbage was being exhumed, we expect DER and Modern will take steps to see that further malodor problems do not arise while this redisposal operation takes place.

slope cap area has been capped, we remind Modern that after it ceased disposing of the waste on the slope cap area during its appeal and recommenced this activity on settlement with DER, it then capped the area despite the appellants' timely appeal of the September 3, 1991 COA to the Board. It did this with the knowledge that we might not rule in its favor on this issue. Further, to the extent that Modern was relying on the COA it entered with DER on September 3, 1991, this reliance was misplaced, because the Board had issued the City of Bethlehem decision in February of 1991 and counsel for both DER and Modern should have been aware of the interpretation of §271.112(c) as allowing the disposal of waste on the slope cap area up to the permitted elevations of Modern's previous permit was questionable at best.

Accordingly, the parties must be returned to the status quo before the settlement at Docket No. 91-001-W regarding disposal on the slope cap area.

Having concluded we should sustain the appeal at Docket No. 91-412-E and dismiss the appeal at Docket No. 90-580-E, we accordingly arrive at the following conclusions of law, unconsolidate the two matters, and enter the following order.

CONCLUSIONS OF LAW

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

2. Any contentions not raised in the parties' post-hearing briefs are deemed to be abandoned. Commonwealth, DER v. Lucky Strike Coal Company, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

3. Lower Windsor and PAC bear the burden of proof at Docket No. 90-580-E, as they are third parties appealing DER's issuance of the permit modification. ROBBI, *supra*; 25 Pa. Code §21.101(c)(3).

4. Lower Windsor bears the burden of proof at Docket No. 91-412-E as it is asserting the affirmative in that appeal. 25 Pa. Code §21.101(a)

5. In our review, we note DER is bound to apply the regulations in effect at the time it made its decision. Franconia Township, *supra*; Borough of Glendon, *supra*.

6. The Board's review is *de novo* and the Board may substitute its discretion for that of DER where we determined DER has committed an abuse of discretion. ROBBI, *supra*; Morcoal, *supra*.

7. An appeal becomes moot when a case or controversy no longer exists, for whatever reason. Carol Rannels, *supra*.

8. The Board may order Modern to remove the waste from the slope cap area if we find its disposal there was contrary to DER's regulations. Concerned Citizens Against Sludge, *supra*.

9. DER'S interpretation of its regulations is entitled to controlling authority unless it is plainly erroneous or inconsistent with the authorizing statute. Kise, *supra*; Ortho, *supra*.

10. 25 Pa. Code §271.112(c) does not act as a "grandfather clause" permitting Modern to dispose of waste on the slope cap area to the elevations permitted by Modern's previous permit. See City of Bethlehem, *supra*.

11. DER abused its discretion by entering the September 3, 1991 COA regarding disposal on the slope cap area.

12. The three-pronged test of Payne v. Kassab, *supra*, is not applicable to this appeal since the SWMA has as its purpose the implementation of Article I, Section 27 of the Pennsylvania Constitution. Empire, *supra*; New Hanover, *supra*.

13. DER did not commit an abuse of discretion in determining that no additional APCA plan approvals or permits were necessary at the time it approved the Modern's 17-acre northern expansion.

14. Lower Windsor and PAC failed to sustain their burden of proving DER abused its discretion by approving the 17-acre northern expansion because of malodors, dust, litter and seagulls, where they did not prove the Modern landfill was causing problems with regard to these concerns.

15. DER did not abuse its discretion in relying on PennDOT's conclusions as to traffic safety in connection with the 17-acre northern expansion. Korgeski, *supra*; TRASH, *supra*.

16. Lower Windsor and PAC failed to sustain their burden of proving there is a northward migration of contaminated groundwater travelling from the unlined portion of the Modern Landfill escaping the groundwater extraction system.

17. Lower Windsor and PAC failed to sustain their burden of proving there is a connection between groundwater travelling from the existing landfill and the contamination in private water wells along Gun Club Road one mile southeast of the landfill and that DER should have studied such a connection before approving the 17-acre northern expansion.

18. Lower Windsor and PAC failed to sustain their burden of proving DER's interpretation of §503(d) of the SWMA, 35 P.S. §6018.503(d), is incorrect. Slovak-American Citizens Club, *supra*.

19. Lower Windsor and PAC failed to sustain their burden of proving DER abused its discretion in finding Modern had corrected its unlawful conduct to DER's satisfaction, in compliance with §503(d) of the SWMA.

20. Lower Windsor and PAC failed to sustain their burden of proving DER's interpretation of 25 Pa. Code §273.202 as excluding the 17-acre northern expansion from the siting criteria set forth in that regulation was plainly erroneous or inconsistent with the authorizing statute. Orth, *supra*.

ORDER

AND NOW, this 15th day of September, 1993, it is ordered that:

1. Lower Windsor and PAC's appeals at Docket Nos. 90-580-E and 91-412-E are unconsolidated.

2. Lower Windsor and PAC's appeal at Docket No. 90-580-E is dismissed;

3. Lower Windsor and PAC's appeal at Docket No. 91-412-E is sustained, and Modern is directed to remove the waste improperly disposed of on the slope cap area after September 3, 1991 to a proper disposal area in compliance with DER's regulations.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

** Judge Joseph N. Mack abstains.

DATED: September 15, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

EASTERN CHEMICAL WASTE SYSTEMS, INC.	:	
	:	
v.	:	**EHB Docket No. 92-288-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 16, 1993**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

A Motion for Summary Judgment is denied because of the existence of genuine issues as to material facts.

OPINION

Eastern Chemical Waste Systems, Inc. (Appellant) filed a Notice of Appeal on July 31, 1992 seeking review of a Compliance Order (C.O.) issued by the Department of Environmental Resources (DER) on July 2, 1992. The C.O., based upon an April 30, 1992 inspection, cited Appellant for operating a transfer station without a DER permit at 1307B South Pennsylvania Avenue, Morrisville, Bucks County, in violation of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* The C.O. directed Appellant to cease the unlawful activity and to take corrective action.

On June 16, 1993 DER filed a Motion for Summary Judgment, supporting affidavits and legal memorandum. Appellant filed its Answer, supporting affidavit and legal memorandum on July 19, 1993.

We can enter summary judgment if the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). We must view a motion for summary judgment in the light most favorable to the non-moving party: *Robert C. Penoyer v. DER*, 1987 EHB 131.

After considering DER's Motion within the context of these legal principles, we are satisfied that it cannot be granted. The precise nature of the activities engaged in by Appellant is not clear from the record available to us at this point and, in any event, is largely contested by Appellant. Genuine issues as to material facts exist.

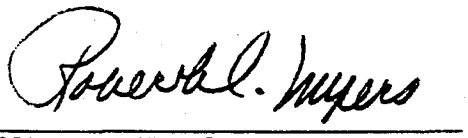
ORDER

AND NOW, this 16th day of September, 1993, it is ordered as follows:

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

2. DER shall file its pre-hearing memorandum on or before October 5, 1993.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 16, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

MORRIS M. STEIN, DOWN UNDER G.F.B., INC.	:	
	:	
v.	:	EHB Docket No. 93-062-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 17, 1993
AND PHILADELPHIA TRANSFER AND RECYCLING,	:	
PERMITTEE	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS AND LIMIT ISSUES

Robert D. Myers, Member

Synopsis

In considering a Motion to Dismiss and Limit Issues, the Board dismisses two objections apparently abandoned by Appellants but refuses to dismiss the others. In reaching its conclusion, the Board rules that Appellants may raise siting issues in an appeal from a permit modification authorizing receipt of infectious and chemotherapeutic waste at a municipal waste transfer station even though no appeal was filed when the transfer station permit was originally issued a decade ago.

OPINION

On March 19, 1993 Morris M. Stein and Down Under G.F.B., Inc. (Appellants) filed a Notice of Appeal seeking review of the issuance by the Department of Environmental Resources (DER) on February 18, 1993 to Waste Management of Pa., Inc. (Permittee), of Solid Waste Disposal and/or Processing

Facility Permit No. 101290 (1993 Permit modification). This Permit modification authorized the construction and operation of an infectious and chemotherapeutic (I and C) waste transfer station in the 3600 block of Grays Ferry Avenue, Philadelphia, on the site of an existing municipal waste transfer station.

Appellants stated 27 objections to issuance of the 1993 Permit modification. On June 4, 1993 Permittee sought to have 22 of these objections removed from the proceedings by filing a Motion to Dismiss and Limit Issues accompanied by a legal memorandum. Appellants filed their Brief in Opposition to the Motion on June 24, 1993. Permittee filed a Reply Brief on July 6, 1993.

The five objections not challenged - Nos. 8, 11, 18, 21 and 24 - will not be considered.

One of the challenges to many of the other objections is based on Appellants' erroneous assumption that I and C waste is residual waste governed by 25 Pa. Code Chapters 287 through 299. As Permittee points out, I and C waste is regulated as municipal waste (25 Pa. Code Chapters 271 through 285) by specific direction of the regulations: 25 Pa. Code §§271.2(b) and 287.2(b).

In their Brief, Appellants substitute references to the municipal waste regulations for the references to the residual waste regulations. Permittee asserts that this represents an untimely amendment to the Notice of Appeal. However, the citations to the residual waste regulations contained in the objections, as originally stated, are preceded by the words *inter alia*. These words traditionally have alerted the reader that the citation given is not the only one applicable. Appellants' adding other citations in their

Brief is not unacceptable, in our opinion, because the substance of the objections was not changed at all - only the regulatory citations. Consequently, we will not strike any of the objections on this ground.

Permittee challenges certain of the objections on the basis of administrative finality, alleging that a Permit for this municipal waste transfer station was first issued in 1983 and was amended in 1989. Since Appellants did not appeal those earlier actions of DER, according to Permittee, they cannot litigate in this proceeding issues which could have been raised before. This is a correct statement of governing law: *Strongosky v. DER et al.*, Board Docket No. 92-263-MJ, Opinion and Order sur Motion for Summary Judgment issued March 31, 1993; and Appellants are limited to issues properly falling within the scope of the modification to the Permit issued by DER on February 18, 1993: *Arthur Richards, Jr. V.M.D. and Carolyn B. Richards v. DER et al.*, 1990 EHB 382.

Applying this legal principle in this case is complicated by the fact that the Permit modification allowed Permittee to bring onto its property a different type of municipal waste - I and C waste. Permittee argues that Appellants should be precluded from litigating any objections pertaining to the siting of the transfer station (specifically objections Nos. 2, 5 and 17) because those issues were necessarily relevant to the issuance of the Permit in 1983 and to the 1989 amendment. Appellants submit that DER's authorization of I and C waste introduces concerns for public health and safety that were not applicable to the earlier Permit actions. We agree.

Lumping I and C waste into the regulatory scheme for municipal waste is somewhat misleading because it suggests that I and C waste is no more innocuous than household garbage. Yet, the regulations belie that suggestion. I and C waste is dealt with apart from other types of municipal waste

throughout the regulations. See, for example, 25 Pa. Code §271.101(b)(8), §271.102, §271.421(b)(2), §§271.711 to 271.744, §272.223(b) and (c), §273.411, §273.511, §273.512, §283.302, §283.402, §285.132, §§285.141 to 285.148, §§285.221 to 285.224, §§285.301 to 285.345 and §§285.401 to 285.434.[1] It is obvious that the peculiar nature of this waste and the distinctive risks associated with it mandate special treatment. It is for this reason that it is included within the definition of "special handling waste" in 25 Pa. Code §271.1. As such, it cannot be accepted at municipal waste landfills, composting facilities, resource recovery facilities or transfer stations unless the DER permit specifically authorizes such waste: 25 Pa. Code §273.201(d), §279.201(c), §281,201(c) and §283.201(c).

DER recognized the unique nature of the transfer station authorized by the 1993 Permit modification. In the Public Comment Response Document (attached to the Motion as Exhibit E), DER stated the following:

> The infectious waste transfer station operation will be required to be operated separately from the existing municipal waste trash transfer operation. Infectious waste and non-infectious waste will not be mixed. Separate trucks will be involved for the infectious waste operation. (DER response to comment 3)

When this response is considered in context with the regulatory requirements, it is clear that the 1993 Permit modification authorized Permittee to accept a type of waste requiring special storage, transportation and disposal and which had to be handled in a completely separate operation that assured that the waste would not be mixed with other waste.

[1] The citations to Chapter 285 are of particular interest because they establish exceptional and highly detailed requirements for the transportation and storage of I and C waste.

It would be unreasonable to hold that Appellants, who claim to be aggrieved by the authorization for I and C waste, should have foreseen the possibility of this authorization a decade ago when the Permit was first issued. If they had filed an appeal at that time, challenging the Permit because of such a future possibility, we would have dismissed it as premature. See *Lankenau Hospital v. DER et al.*, 1990 EHB 1264. The time is ripe now, however, and Appellants can properly challenge the siting of the I and C waste transfer station (objections Nos. 2,[2] 5, and 17).

Objections 3, 16 and 27 deal with traffic concerns. Permittee argues that these objections should be stricken because they are beyond DER's jurisdiction. Appellants point out, however, that traffic is one of the elements to be included in the environmental assessment required to be submitted with the Permit application: 25 Pa. Code §§271.126 and 271.127. Consequently, these objections are properly raised in appeals to this Board.

Permittee wants to exclude other objections because, in Permittee's view, they are based on erroneous facts. Included are objection No. 4 (mixing of hazardous and non-hazardous waste), No. 7 (plans for constructing an incinerator) and No. 22 (lack of specific waste limits). Appellants did not respond with respect to objections Nos. 4 and 22, apparently willing to abandon them. With respect to objection No. 7, Appellants claim that plans for constructing an incinerator do exist and that they should be allowed to probe the issue by discovery.

A Motion such as the one filed by Permittee is premature when it seeks dismissal of an objection on factual grounds. A Motion for Summary

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[2] Objection No. 2 erroneously refers to population within 500 feet of the facility. Appellants corrected this to 300 feet in their Brief. The issue will be limited to 300 feet.

Judgment filed after the close of discovery is a more appropriate means of challenging such an issue. Accordingly, we will retain objection No. 7 but we will strike objections Nos. 4 and 22 since Appellants have apparently abandoned them.

Several other objections which Permittee seeks to dismiss are supported by regulatory provisions. Transfer stations receiving waste after September 26, 1990, including expansions of existing facilities, are required to have a plan relating to recycling: 25 Pa. Code §279.122. Objection No. 5 criticizes DER for its failure to consider an alleged lack of recycling facilities in South Philadelphia. The objection is appropriate.

Objection No. 6 complains of DER's alleged failure to notify the Grays Ferry Community Council about the Permit application. Appellants claim that DER abused its discretion by not requiring Permittee to give notice to this group - a power vested in DER by 25 Pa. Code §271.141(c). While the significance of this issue is not apparent to us, we are unwilling to strike it at this stage of the proceedings before the close of discovery.

Appellants claim in objection No. 14 of the alleged lack of screening procedures for excluding hazardous waste, radioactive waste and chemotherapeutic waste. Since the last mentioned waste is specifically authorized by the 1993 Permit modification, excluding it makes no sense. However, hazardous waste and radioactive waste are excluded, by definition, from I and C waste: 25 Pa. Code §271.1. Permittee argues that there is no screening required of transfer stations; generators of I and C waste are responsible for keeping it separate from other waste (25 Pa. Code §285.411).

Transfer stations are required, however, to have a "plan for assuring that solid waste received at the facility is consistent with §279.201..." (25 Pa. Code §279.102(d)). §279.201(e) prohibits transfer stations from receiving

hazardous waste. Clearly, therefore, Permittee has to have a plan to assure that hazardous waste, at least, is not received. Appellants claim that a screening procedure is necessary and was not required. The objection is appropriate.

Objection No. 20 deals with DER's alleged failure to consider discrepancies in the amount of waste reported by Permittee as having been received at the transfer station. Annual reports required by 25 Pa. Code §279.252 must contain this data. Obviously, if the actual record is altered for purposes of reporting to DER, the Permittee's integrity is undermined, perhaps to the point where its eligibility for a Permit is destroyed under §503(c) of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.503(c). The objection is appropriate.

In objection No. 25 Appellants assert that DER granted the Permit modification despite a "complete lack of empirical evidence that the facility poses no threat to the neighboring community and its residents...." In their Brief, Appellants state that this objection is based on 25 Pa. Code §271.127 dealing with an environmental assessment. That section requires DER to determine whether the proposed operation has the potential to cause environmental harm. If it does, mitigation measures must be considered. If these are not totally adequate, the social and economic benefits of the proposed operation must be weighed against the potential harm.

We do not know at this point how many steps in this process DER engaged in. Since the Permit modification was issued, DER must have been satisfied either (1) that there was no potential for environmental harm, or (2) the potential was adequately mitigated, or (3) the benefits outweighed the potential harm. Appellants take issue with this determination. While Appellants' phrasing gives the impression that DER had to do more than the

regulatory language requires, we will disregard it. Appellants are admonished, however, that their objection is based on §271.127 and the language of that provision is controlling.

Finally, Permittee wishes to strike certain objections (Nos. 9, 25, 26 and 27) for not being specific enough. We have reviewed these objections and conclude that they satisfy the test used by Commonwealth Court in *Croner, Inc. v. Department of Environmental Resources*, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991).

ORDER

AND NOW, this 17th day of September, 1993, it is ordered that Permittee's Motion to Dismiss and Limit Issues is granted in part and denied in part in accordance with the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

EHB Docket No. 93-062-MR

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 17, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

BLACK ROCK EXPLORATION COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 93-070-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 20, 1993

OPINION AND ORDER SUR DER'S MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

This Board lacks jurisdiction over an appeal from a DER civil penalty assessment where the appellant timely files a skeleton appeal but fails to timely escrow the amount of the civil penalty as required by Section 18.4 of the Surface Mining Conservation and Reclamation Act.

A Board Order, acknowledging the filing of a skeleton appeal and directing the supplementing of that appeal as to specific omissions therein, which does not address the escrowing of this penalty cannot be read to modify the statutory requirement that the penalty be timely escrowed. This Order's existence does not otherwise create grounds for an appeal *nunc pro tunc* because it only addressed enumerated omissions in the skeleton appeal without making mention of the escrow of the civil penalty and thus could not reasonably be read to extend the deadline for the escrowing of this penalty amount.

Background

On March 10, 1993, the Commonwealth of Pennsylvania's Department of Environmental Resources ("DER") issued a civil penalty assessment against Black Rock Exploration Company, Inc. ("Black Rock") in the amount of $3,500. The Civil Penalty Assessment alleges violation by Black Rock of 25 Pa. Code §87.97 at its Brownsville II Strip surface coal mine in Redstone and Brownsville Townships, Fayette County. According to the assessment document, DER assessed these penalties pursuant to Section 605(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b), and Section 18.4 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.18(d) ("SMCRA").

By letter dated March 12, 1993, Black Rock wrote to the Board asking for copies of our Notice Of Appeal forms and rules of procedure. The letter is signed by Michael Halliday, who is not only counsel for the company in this appeal but also one of its principals.[1] The Board received Black Rock's letter on March 25, 1993 and docketed it as a "skeleton appeal" pursuant to 25 Pa. Code §21.52(c). On March 31, the Board issued Black Rock an Order providing:

> AND NOW, this 31st day of March, 1993, upon consideration that Appellant Black Rock Exploration Co., Inc. has failed to perfect its appeal in that it has not supplied all of the information required by 25 Pa. Code §21.51, it is ordered that on or before April 15, 1993, Black Rock Exploration Co., Inc. shall file the following information with this Board:
>
> ( ) Complete address
> ( ) Telephone number

---

[1] This is according to both DER's Civil Penalty Assessment and his statements to this effect in a telephone conference call with this Board and opposing counsel on August 16, 1993.

(X) A copy of the Department action being appealed
(X) The date you received notice of the Department's action
(X) Objections to the Department's action
(X) Indications that the persons listed on page three of the attached Notice of Appeal form have been notified

Failure to supply the missing information as ordered may result in dismissal of the appeal under 25 Pa. Code §21.52(c).

On April 15, 1993, Black Rock filed a Notice Of Appeal form containing the missing information. It also deposited the $3,500 civil penalty assessed by DER in escrow with this Board on that date.

Thereafter, the parties filed their Pre-Hearing Memoranda. Accompanying DER's Pre-Hearing Memorandum was the instant Motion. Black Rock has responded thereto, and on August 26, 1993 we received Black Rock's Brief in support of its response.

OPINION

DER's Motion takes the position that its $3,500 assessment against Black Rock could only be appealed by Black Rock in accordance with the appeal procedures set forth in Section 18.4 of SMCRA. DER contends this section requires both the appeal be filed and the civil penalty escrowed with this Board within thirty days of Black Rock's receipt of this assessment in order for jurisdiction over the appeal to vest in this Board. It then asserts that Black Rock's initial appeal was timely but that it failed to escrow this penalty in a timely manner, thus depriving us of jurisdiction over this matter.

Black Rock's Answer and New Matter admits virtually all of DER's allegations. At several instances it confuses this Board with DER and

suggests or implies that this Board is a part of DER.[2] Black Rock admits receipt of DER's Civil Penalty Assessment on March 12, 1993 and the escrow being deposited with this Board on April 15, 1993. Black Rock asserts that our Order dated March 31, 1993 extended the deadline for the escrowing of these funds to April 15, 1993. It also argues waiver of this thirty day requirement through our order of March 31, 1993 and timely compliance with that order. Next, Black Rock suggests the plain meaning of our order allows perfection of the appeal by April 15, 1993. Alternatively Black Rock says the three day delay in escrowing the money is *de minimus* and should be disregarded or the entire matter considered as an appeal *nunc pro tunc*. Further, Black Rock argues that this Board's March 31, 1993 order estopped DER from denying Black Rock's appeal. Finally, in its Brief, Black Rock argues a denial of its due process rights because granting this motion will deny it a right to be heard.

Clearly Section 18.4 requires that the monies be escrowed with us within thirty days of the assessment. In relevant part this somewhat lengthy section provides:

> When the department proposes to assess a civil penalty, the secretary shall inform the person or municipality within a period of time to be prescribed by rule and regulation of the proposed amount of said penalty. The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty, such bond shall be executed by a surety licensed to do business in the Commonwealth and be satisfactory to the department. ... Failure to forward the money or the

---

[2] For example, it asserts DER waived objection to the thirty day requirement by virtue of issuance of this Board's Order dated March 31, 1993.

> appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

As pointed out by DER's Brief, we have interpreted this Section as mandating the escrow of these funds within thirty days to be a prerequisite to this Board having jurisdiction over a civil penalty assessment appeal. Everett Stahl v. DER, 1984 EHB 825; ORCT Corporation v. DER, 1984 EHB 941. Moreover, this is an issue on which our appellate courts have concurred with us in this regard. See Boyle Land and Fuel Co. v. Commonwealth, Environmental Hearing Board, 82 Pa. Cmwlth. 452, 475 A.2d 928 (1984), affirmed, 507 Pa. 135, 488 A.2d 1109 (1985). Thus, there is no doubt that the thirty day perfection period applies as to the escrowing of these funds and when such a timely escrowing of funds does not occur, we lack jurisdiction over what is an otherwise timely appeal.

Here Black Rock admits receipt of the assessment on March 12, 1993 and the escrowing of these funds on April 15, 1993. Thus, it admits these funds were not escrowed in thirty days. Accordingly, it stipulates to the Board's lack of jurisdiction over this appeal unless one of its other arguments has merit.

Black Rock argues a waiver by DER of this statutory thirty day period by virtue of this Board's Order of March 31, 1993. For this theory to hold water it would have to have been DER which issued the March 31, 1993 Order rather than this Board, because this Board and DER are not part and parcel of each other as suggested by Black Rock. In 1970 DER was created by Act 275. See The Administrative Code of 1929, Act of April 9, 1929, as amended by Act 275, Act of December 3, 1970, P.L. 834, No. 275, 71 P.S. §510-1 *et seq.* That same act created the Environmental Hearing Board. See Section 1921-A of Act

275 (71 P.S. §510-21). At that time Black Rock could have argued that if this Board was not a part of DER, it at least came from the same womb. Times have changed, however, and with this change the separateness of DER and this Board has been crystallized. Section 1921-A was repealed in 1988, when the Legislature enacted the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7511, *et seq.* As Section 3(a) of this act (35 P.S. §7513(a)) provides: the Environmental Hearing Board is established as an "independent quasi-judicial agency". While its area of responsibility (to hear appeals from DER's actions) is unchanged, this statute clearly ends any suggestions that this Board is a limb of DER's body. Since this statute formalizes the previously independent nature of this Board's decision making role, it also eliminates any arguments that by virtue of this Board's actions in issuing orders, DER has acted in some fashion or has waived its rights as an independent party appearing before us. This Board's independence from DER is simply incompatible with this waiver argument.

The next argument advanced by Black Rock is that this Board's Order of March 31, 1993 modified the appeal perfection date, making that date April 15, 1993 instead of April 12, 1993.[3] The first problem with this argument is that our Order, quoted in full above, never mentions anything about any modification of the deadline in Section 18(d) or even the escrowed funds. The order specifically addresses four items. They include: (1) a copy of the DER action being challenged; (2) an indication of the date Black Rock received notice of DER's action; (3) Black Rock's objections to DER's action, and (4)

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[3] March 12, 1993 plus thirty days is April 11, 1993, which was a Sunday, so the last date for timely perfection of Black Rock's appeal under Section 18(d) was April 12, 1993.

proof of service of the appeal on DER. In short, Black Rock asks that we read into this order a fifth perfection issue -- the escrowing of these funds. We issued a clear order and see no reason to muddy it now by making such a strained interpretation.

Even if we were inclined to read this order as Black Rock urges, we would be unable to do so. Section 18(d) imposes a legislative thirty day time period for perfection of timely appeals from civil penalty assessments. Nothing we can find in either SMCRA or the Environmental Hearing Board Act empowers this Board to issue orders countermanding or modifying this legislative time window. Neither our rules of procedure nor those in 1 Pa. Code Chapter 31 *et seq.*, authorize such orders, either. Finally, Black Rock points us to no legislative authorization of such orders. Accordingly, we conclude we are not legislatively empowered to issue such an order and thus reject this argument on Black Rock's behalf.

Having stated above that our order of March 31, 1993 only addressed limited issues, not including the escrowing of these funds, we also must reject Black Rock's argument that the clear meaning of our order was an extension of this escrow deadline. Our order cannot be read clearly to grant such an extension.

Black Rock also argues for an appeal *nunc pro tunc*. Such appeals before this Board are governed by 25 Pa. Code §21.53(a). We have interpreted this section of our rules to limit appeals *nunc pro tunc* to those circumstances where a party shows either fraud or breakdown in this Board's operation. Petromax, LTD v. DER, 1992 EHB 507. No showing of fraud is attempted by Black Rock. It also does not attempt to show a breakdown in this Board's operation, except as relates to its allegations concerning our order

of March 31, 1993. No showing of such a breakdown is accomplished, however. This Board's standardized operating procedures were timely followed by its staff. When the Board issued its Order, the Order was sent to Black Rock and received by it. Moreover, the subject matter covered by the Order is clearly set forth in its face. What appears to have happened here was a misunderstanding or misreading by Black Rock of Section 18(d) of SMCRA, the cited cases and our Order. While we may be personally sympathetic with such an occurrence, it is not an occurrence showing fraud or a breakdown in the Board's operations. Accordingly, an appeal *nunc pro tunc* does not lie here.

In its Answer and New Matter, Black Rock also asserts DER is estopped from raising the claim set forth in its Motion because of the issuance of this Board's Order of March 31, 1993. This assertion must also be rejected as it is based on the previously rejected scenario which has this Board as an arm of DER's entity. Because this Board is independent of DER, DER did not act in any fashion when we issued our Order dated March 31, 1993. Since DER did not act, it cannot be estopped by our actions (as opposed to its own actions). Absent a DER action misleading Black Rock, its estoppel argument must fail. Willowbrook Mining Company v. DER, 1992 EHB 303.

Finally, Black Rock asserts a denial of its constitutional right of due process. Black Rock says that DER cites Tracey Mining Company v. Commonwealth, 117 Pa. Cmwlth. 628, 544 A.2d 1075 (1988) ("Tracey"), for the proposition that the bond must be filed within thirty days. Black Rock argues that the reasoning behind the Tracey decision no longer exists and it is being denied due process rights. Black Rock's three-paged Brief does not explain how Black Rock draws its conclusions as to denial of due process or that the reasoning behind Tracey no longer exists. The question of the

constitutionality of the requirement of prepayment of civil penalties as a condition of appeal from such an assessment was considered in Boyle Land and Fuel Company, *supra*, cited above and in Tracey. There, the Commonwealth Court addressed both the due process rights issue and a right to appeal to a court of record based on Article V Section 9 of the Constitution argument and found no denial of constitutional rights. Our Supreme Court affirmed *per curiam.* Thus, we reject this due process argument here. We point out as we do so that while Black Rock's counsel says the reasoning behind Tracey no longer exists, we can find no indication that either it or Boyle Land and Fuel Company has been reversed on this issue.[4]

The last three lines of Black Rock's Brief say prepayment of this money as a condition of appeal is a financial hardship. If Black Rock was unable to pay this money as a precondition of its appeal, it might file an otherwise timely appeal and make this allegation. If it had done so, we would have held a hearing to determine if its financial allegations were as alleged and if they were, permitted the appeal to go forward without the bond's posting. See Diamond Fuel Company v. DER, 1991 EHB 897. Here, however, there was no timely allegation of financial inability to pay, merely late payment and a somewhat tardy allegation that prepayment is a hardship (rather than an impossibility). Prepayment is a hardship in every case because it requires payment of the appellant's money up front.

Since any payment up front is a hardship for the payer, more is needed to invoke the mechanism in Diamond Fuel and even that mechanism only

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[4] Black Rock's Brief also notes that 71 P.S. §510.21 was repealed in 1989 and argues this closes any avenue of appeal. As explained above, this repeal came with passage of the Environmental Hearing Board Act, *supra*, wherein appeal rights are still protected in Section 4. See 35 P.S. §7514.

gets Black Rock a hearing on the merits of its financial allegations, not an appeal without posting bond. There is nothing more to wring out of this appeal's procedural facts. Bond was posted albeit in an untimely manner. Accordingly, we enter the following order.

ORDER

AND NOW, this 20th day of September, 1993, it is ordered that DER's Motion To Dismiss is granted and Black Rock's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 20, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

ROBERT K. GOETZ, JR. :
:
v. : EHB Docket No. 91-153-E
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: September 22, 1993

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

In a consolidated appeal where the appellant complies in full with DER's administrative order prior to the merits hearing, this Board can no longer grant him meaningful relief so the appeal is moot and will be dismissed as such.

Where DER assesses civil penalties for violations of the SWMA by appellant at two separate locations and as to one location fails to show the appellant brought to that site the wastes found at the site, the penalty assessment must be overturned.

As to the second separate location and that civil penalty, DER has established that appellant hauled loads of demolition waste to that site and dumped it there only to subsequently process it to remove most of the wood and metal therefrom. Demolition waste does not become "clean fill" which may be

dumped or disposed of at unpermitted processing and disposal sites by first being dumped at the unpermitted site and then being cleaned of all offending material. Clean fill must be created from demolition wastes either at the generating site or at a permitted disposal site before it becomes an exception to the requirement that such wastes may only be hauled to permitted processing or disposal sites.

Where DER establishes the violation's occurrence and a reasonable fit of the violation to the amount of penalty it assessed following its guidance documents, DER has not abused its discretion in assessing this penalty amount.

Background

This appeal was filed with this Board by Robert K. Goetz, Jr., ("Goetz") on April 18, 1991. It challenges the propriety of an administrative order dated March 19, 1991 and issued to Goetz by the Department of Environmental Resources ("DER") under the authority in the Clean Streams Law Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1; the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §6018.1 *et seq.* ("SWMA"); and Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17. DER's Order finds that Goetz disposed of demolition waste and solid waste on the Roger Gerhart ("Gerhart") property in Warwick Township, Lancaster County on March 16, 1991. It directs Goetz to cease disposing of waste at unpermitted facilities, remove all such wastes from the Gerhart property and dispose of the removed wastes at a DER permitted facility within fifteen days.

Goetz's Notice Of Appeal claims that no demolition/solid waste was taken to the Gerhart property nor disposed of there. It asserts that neither Goetz nor Gerhart was operating a solid waste disposal or processing facility. Third, it argues that neither Goetz nor Gerhart need a permit for their actions or activities because these activities were legal under the SWMA and applicable regulations and that the only materials taken to the Gerhart property required no DER permit for their deposit there. This appeal was assigned Docket No. 91-153-E.

Thereafter in November of 1991, Goetz requested consolidation of this appeal with that at Docket No. 91-139-F, but that request was denied because the appeal at No. 91-139-F had been dismissed the prior month. Goetz and DER both filed their Pre-Hearing Memoranda, but the case was not heard because of the assigned Board Member's hearing backlog. Subsequently, on September 15, 1992, this appeal was transferred to Board Member Richard S. Ehmann and assigned Docket No. 91-153-E.

The appeal at Docket No. 91-553-F is Goetz's challenge to a November 26, 1991 civil penalty assessment by DER in the amount of $74,975. This penalty was assessed under Section 605 of the SWMA (35 P.S. §6018.605). It is based in part on Goetz's transportation of solid waste to the Gerhart property and its disposal there. It is also based on the transportation of solid waste to Reazer's Scrap Yard (also known as Reazer and Sons Scrap Yard) in North Lebanon Township, Lebanon County and its disposal there on March 6, 1991. This appeal was filed with us on December 17, 1991 and initially assigned Docket No. 91-553-F. Goetz's appeal argues that his conduct at Reazer's and

Gerhart is not violative of the SWMA or the applicable regulations promulgated thereunder and was not a public nuisance. It asserts DER abused its discretion in assessing this civil penalty and that if a violation is shown, it was not a willful violation, there was no environmental damage and no cost to the Commonwealth for restoration and abatement. Here also the parties filed their Pre-Hearing Memoranda and the matter was placed on the sitting Board Member's list of cases ready for hearing. This appeal was also reassigned to Board Member Richard S. Ehmann on September 15, 1992 and both appeals had their docket number changed to 91-153-E and 91-553-E respectively to reflect this change.

On September 28, 1992, we ordered these appeals consolidated at Docket No. 91-153-E.

Thereafter, the consolidated appeal was scheduled to be heard on December 8, and 9, 1992. When Goetz's counsel withdrew, this hearing was cancelled at Goetz's request and rescheduled for March 15, and 16, 1993 and new counsel entered her appearance on Goetz's behalf. The "Blizzard of 93" caused a further rescheduling of this appeal to April 1, and 2, 1993, when the merits hearings were finally held. Thereafter, the parties filed their respective Post-Hearing Briefs, with the last Brief arriving on June 11, 1993.

After a full and complete review of the record which consists of a transcript of 410 pages and 22 Exhibits, the Board makes the following findings of fact.

FINDINGS OF FACT

1. DER is the executive agency of the Commonwealth charged with the duty and authority to administer and enforce the SWMA, the Clean Streams Law, *supra*, Section 1917-A of the Administrative Code of 1929, *supra*, and the Rules and Regulations promulgated under each. (Stip.)[1]

2. Goetz Demolition Co. is a sole proprietorship operated by Goetz, with a principal place of business at 649 Bingaman Road, Orrtanna, PA 17353. (Stip.)

3. Goetz engages in, among other things, the demolition business. (Stip.)

4. In March, 1991, Goetz engaged in the demolition of the fire-damaged Harrisburg Area Community College ("HACC") building in Lebanon, Pennsylvania, pursuant to a contract with H.B. Alexander Construction Company ("H.B. Alexander"). (Stip.)

5. Goetz's demolition work required that Goetz remove from the demolition site a volume of material, some of which was recyclable and some of which had to be disposed of. (Stip.)

6. Exhibit G-2 is a letter dated February 13, 1991 to Goetz from DER's Anthony Rathfon telling Goetz that demolition wastes are regulated by DER as municipal wastes and they must be disposed of at a permitted facility.

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[1] References to Stip. are references to the parties' Joint Stipulation filed with this Board which contains facts stipulated to by the parties. It was admitted into the record as Board Exhibit No. 1. C-___ is a citation to an Exhibit offered by DER and admitted, while G-___ are Goetz's admitted Exhibits. T-___ references a page in the merits hearing's transcript.

The letter says that Modern Landfill Permit No. 100113 is authorized to dispose of demolition wastes and that in addition, Goetz could sort out unpainted wood from the HACC site and take it to his property in Orrtanna to fuel his boiler. (G-2; T-23)

7. In contracting to demolish the HACC site, Goetz committed in his contract for completion of the building's demolition within 30 days of starting the job on February 26, 1991. (T-195-197)

8. The HACC site consisted of a city block which had five buildings on it. Of these five buildings three were burned out in whole or in part and two were untouched. (T-222, 331)

9. Prior to Goetz commencing demolition, HACC had another contractor remove the asbestos from the buildings. Thereafter Goetz's employees and H.B. Alexander's Barry Hahn conducted salvage in the building removing salvageable items like toilets, electric panel boxes, door frames, panelling, radiators, a coin changer and a pop machine. (T-222, 225-226, 320)

10. After conducting salvage Goetz's people removed as much metal as could be removed with the buildings up, to be sold for scrap. This included steel I beams, tin and other metals. (T-225) This accounted for about 50 tractor loads of metal and it was sold to two junk yards as scrap metal. (T-190-191, 225) More metal was recovered later in the demolition process. (T-227)

11. The next demolition step was to knock down the exterior walls with a clam-shell bucket laying these walls out to the side to be loaded onto trailers with a rubber tired loader. (T-223, 227, 371) This kept these walls

more easily usable as clean fill. (T-223, 341-342) Goetz hauled 60 loads of this brick and stone from the HACC site for his own use and sold 30 other loads to third parties.

12. Unpainted wood from the HACC site went by trailer load to Goetz's Orrtanna property for use as boiler fuel and a few trailer loads went to Goetz's Cashtown property because there was not enough room for all the burnable wood at Orrtanna. (T-222-223) In addition, H.B. Alexander had some larger wooden beams dragged to one side so that it could save them. (T-320)

Reazer Site

13. In the course of performing the demolition and removal work, Goetz transported materials from the demolition site to Reazer and Sons Scrap Yard in Lebanon, Pennsylvania ("the Reazer property"). (Stip.)

14. DER received a telephone call on March 6, 1991 reporting the disposal of demolition wastes at the Reazer property so Rathfon went to that site to inspect it. (T-11)

15. Rathfon observed a truck enter the Reazer property and dump demolition wastes on the ground there. The demolition waste came from the HACC project according to the truck driver. (T-11-12)

16. At the Reazer property, several persons who identified themselves as Goetz employees were sorting through the piled demolition wastes, removing scrap metal and placing it in a separate pile, while a front-end loader graded the dumped material. (T-12, 50-51)

17. C-3 is a photograph of the area at the Reazer property where the demolition wastes were dumped taken by Rathfon. (T-14) In the graded area in

C-3's foreground, the materials include electrical wiring, pieces of wood and pieces of metal plus concrete and brick. (T-14)

18. The Goetz employees told Rathfon that they were finished picking wood and metal from the demolition wastes in the foreground of Exhibit C-3. The materials in the foreground of C-3 were not clean fill. (T-16)

19. The area where the demolition/solid wastes were dumped on the Reazer property is an area about 30 yards wide by 70 yards long. In this area its thickness varies from 6 inches to 2 feet. (T-18)

20. Approximately 40% of the material hauled into the Reazer property was not clean fill. (T-19, 51)

21. As a result of his inspection of the Reazer property, Rathfon issued an Order to Goetz on DER's behalf directing Goetz to immediately cease transporting and disposing of demolition wastes at all unapproved sites and to remove the demolition waste from Reazer's property within thirty days. (C-2; T-16)

22. When DER's order was issued as to the Reazer property, Goetz's men did not finish what they were doing; they simply walked off the site. At some point thereafter and after the meeting identified in Finding of Fact 23, they returned and cleaned up the site. (T-389-390)

23. After DER issued its Order concerning Goetz's activity on the Reazer property to Goetz, it met with him and representatives of H.B. Alexander on March 8, 1991. At that meeting it was agreed that Goetz could dispose of clean fill (stone, brick and concrete not containing wood and metal or other similar materials) at locations other than landfills with H.B.

Alexander inspecting the loads of clean fill before they left the HACC site to be sure it did not contain wood, metal or similar materials. (T-25-29, 317)

24. Rathfon understands DER's regulations to define clean fill to exclude demolition wastes because it contains wood and metal but to allow clean fill which was formerly demolition waste to be disposed of at a site like Reazer property, i.e., the separation of the clean fill from the non-clean fill needed to occur before the mixed materials were hauled to the site which becomes the clean fill's disposal site. (T-18)

25. Goetz has no permits to process demolition wastes or to dispose of demolition waste at Reazer's property. (Stip.; T-33-35)

26. Reazer had no permit to process demolition/solid waste at his scrap yard. (T-41)

27. When Rathfon reinspected the Reazer property on April 23, 1991, the site contained clean fill, with only about 10% wood or metal. Since the wood and metal that remained in the otherwise clean fill were small pieces only, DER elected not to require more of Goetz as to this site. (T-19-20)

28. In addition to issuing its order to Goetz as to his activities at the Reazer property and assessing a civil penalty in regard thereto, DER issued an Order to Reazer and assessed Reazer a $2,000 civil penalty. (T-29-30)

29. After issuing Goetz the order as to the situation at the Reazer property, Rathfon found out that DER had previously issued an order to Goetz

under the SWMA but that order did not concern the Reazer situation. (T-48-49) However, Goetz was told in that earlier order that he could not use unpermitted processing or disposal sites. (T-51)

30. After the March 8, 1991 meeting with DER, Goetz began using a large tub to separate floatable materials (wood) from non-floating materials. (metal and stone). (T-191, 328-329) This floatation tank would not remove 100% of the wood from the demolition wastes, however. (T-337)

31. On at least one occasion after the March 8, 1991 meeting with DER, H.B. Alexander's Barry Hahn stopped Goetz from hauling a load of demolition waste off the HACC site because it contained too much wood. Goetz was required to return it to the HACC site and reprocess the load. (T-242, 332)

32. After the meeting with DER on March 8, 1991, Goetz hauled demolition wastes to the DER permitted Greater Lebanon Landfill, where his employees sorted out the scrap metal for resale. Greater Lebanon accepted the clean fill portion of the remains of the demolition wastes for disposal without cost to Goetz. (T-29)

33. DER allows demolition wastes to be sorted to turn it into clean fill either at the demolition site or at a permitted landfill. (T-33-34)

34. On February 22, 1991, John McCrea, a legal assistant employed by Goetz's counsel, called DER's Don Korzeniewski concerning Goetz's processing of demolition wastes from the HACC site. McCrea wanted permission to haul

demolition wastes to Goetz's property in Adams County for sorting of wood and metal from it (with the remaining clean fill staying at Goetz's property). (T-150-151)

35. Korzeniewski drew a distinction between painted and unpainted wood and said clean fill with unpainted wood in it could be sorted at places other than the HACC site or a permitted site. (T-151-152) There is no evidence that Korzeniewski gave permission to leave the sorted clean fill in place or approve the "off-site" sorting of metal or painted wood from clean fill.

36. McCrea and Korzeniewski did not discuss any processing of demolition waste anywhere but at the HACC site and Goetz's property. (T-155)

37. McCrea, who was aware of Goetz's past difficulties with DER, then prepared a draft letter for Goetz to send DER to memorialize his understanding of his discussion with Korzeniewski and sent it to Goetz but Goetz never sent it to DER. (T-157-159)

38. McCrea told Linda Mellot of Goetz's company about his conversation with Don Korzeniewski and she wrote of it to H.B. Alexander in the letter, which is Exhibit C-29 and is dated March 9, 1991. In this letter she talks of timber mulching being approved by Korzeniewski. (C-29; T-161-163)

39. In Exhibit C-29, Mellot also mentions Goetz's intent to send the McCrea-drafted letter to DER after revision and says McCrea understood demolition/solid waste could be sorted off-site. (C-29)

40. Mellot's letter to H.B. Alexander & Son is dated three days after issuance of DER's order as to the Reazer property and the day after

representatives of Goetz, H.B. Alexander and others met with DER to discuss the order concerning the Reazer property. (C-2, C-29)

41. Goetz had no permits from DER to carry on any activity at his properties in Adams County. (T-165)

The Penalty Assessment

42. Robert France was a compliance specialist in DER's waste management program for six years and served in that role in 1991. (T-92-93)

43. France has prepared over 200 civil penalty assessments for DER and prepared the civil penalty assessment against Goetz concerning Goetz's transportation and disposal of municipal wastes at the Reazer property. (T-93-94)

44. C-27 is DER's civil penalty assessment as to the Reazer property and Goetz's alleged violations at the Gerhart property prepared by France. (T-93-94)

45. In preparing this assessment, France relied on DER's case file including the photographs, field orders and the inspection reports. France also relied on Goetz's prior compliance history, all of which is standard procedure. (T-94)

46. In calculating the amount of the penalty, France used a DER work sheet and reviewed each violation separately in terms of the criteria in Section 605 of the SWMA and application of DER's guidelines to achieve statewide uniformity in working up the amounts of penalties. (T-94-95)

47. C-26 is France's civil penalty assessment work sheet. (T-96) On it, the first violation France looked at was transportation of solid waste to the Reazer property. (T-97)

48. Using the thirteen criteria in DER's guidelines as to the severity of this transportation violation, France concluded the thirteen criteria were not met, so he calculated a penalty based on low severity and in a penalty range of $1,000 to $5,000 for low severity assessed $1,000. (T-97)

49. As to culpability/willfulness of the violator, France looked at Goetz's past compliance history and concluded Goetz was more than negligent because he had been notified in the past that this type of activity was regulated under the SWMA, so he assessed the maximum of $12,500 for recklessness. (T-98)

50. Because of Goetz's history of violations, to wit a prior civil penalty adjudication in the amount of $19,500, 5% of that figure ($975) was added to the penalty here under step six of the work sheet. (T-99)

51. A total penalty of $14,475 was assessed by France for illegal transportation of demolition wastes to the Reazer property. (T-99)

52. France did not assess any penalty for savings to the violator from the violation or for costs incurred by Commonwealth as to this transportation penalty amount because he had no evidence thereof. (T-99-100)

53. In addition to the penalty for transporting waste to the Reazer property, France also calculated a second penalty against Goetz for

dumping/disposal of solid waste at the Reazer property. This second penalty deals with disposing or processing solid waste at the Reazer property itself. (T-101)

54. Again, with low severity, only $1,000 was assessed by France for disposal or processing violation. (T-101)

55. As to disposal or processing, France viewed Goetz's conduct as willful. He drew this conclusion based on a 1987 DER Notice of Violation to Goetz, a prior DER order to Goetz in 1989 for unpermitted processing and disposal, inspections of Goetz's sites at other times including the March 1989 inspection of his Cashtown site, the Commonwealth Court's finding that Goetz was engaged in unpermitted disposal, and Rathfon's letter to Goetz of February 13, 1991 (Exhibit G-2) telling him that HACC site demolition waste disposal was regulated as municipal waste and Modern Landfill was permitted to accept this waste for disposal. Based on this evidence, France concluded Goetz had made a conscious choice to violate the SWMA, so he assessed $19,025 for a civil penalty as to willfulness. (T-102)

56. Under step six of his guidelines, France next added 5% of the prior $19,500 civil penalty to this assessment as well. This produced a total penalty of $21,000 for disposal at the Reazer property. (T-103)

57. France assessed penalties for violation at Reazer's scrap yard based only on the date the Order was issued but believed he could have assessed penalties for more violations. (T-103)

58. Because of Goetz's past compliance history, other violations for which penalties were not assessed and DER's having to institute collection procedures to obtain the previously adjudicated penalty, France concluded that these penalties were fair and reasonable. (T-110)

Gerhart Site

59. France also prepared DER's civil penalty assessment against Goetz to cover both Goetz's transportation of solid waste to the Gerhart property and his disposal of solid waste there. (T-100, 107-108)

60. Though loads of Goetz's demolition waste or clean fill were to be inspected before leaving the HACC site, Goetz took 10-12 uninspected loads of materials from the HACC site to property owned by Roger Gerhart in Warwick Township, Lancaster County on March 16, 1991. (C-6; T-179-180, 321, 347, 359, 361)

61. H.B. Alexander personnel did not work on weekends at the HACC site, so no one from that company was present to inspect these loads before they left the HACC site for Gerhart's property. (T-310-311, 330-331)

62. In 1991, Donald A. Hentz, Jr., was a DER solid waste specialist who was assigned to Lancaster County. He worked in this position for 6½ years. (T-55)

63. In response to a complaint about dumping on the Gerhart property Hentz inspected this land on March 18, 1991 with Roger Gerhart. (T-56)

64. At the rear of the Gerhart property on a farm lane was an area filled with brick, block and stone but as one would travel further down the

farm lane there were demolition wastes including metal duct work, chairs, carpet, piping, machinery, burnt wood and burnt timbers. (T-56-58, 62, 68)

65. The area where these demolition wastes exist on the Gerhart property is about 15 feet high and 50 to 75 feet long. (T-63) It is depicted in the photographs which are exhibits C-8, C-9, C-12, C-14, C-17, C-18 and C-19. (T-63-65, 71)

66. Hentz returned to the Gerhart property with Rathfon on March 19, 1991. Also present were people from HACC and Mr. Gerhart. After reinspecting the Gerhart site Hentz went to the HACC site to serve an order on Goetz which required him both to immediately cease transporting demolition wastes to the Gerhart property and to cease disposing of it there. Because Goetz was not at the HACC site, Hentz served the order on Goetz's HACC site superintendent named Bowling. (T-72)

67. Exhibit C-7 is DER's order to Goetz as to his activities at the Gerhart property. (T-73)

68. When Hentz returned to the Gerhart property on April 3, 1991, cleanup of the property was in progress and it was completed by April 4, 1991. (T-74) Goetz cleaned up the site at the request of Roger Gerhart. (T-298)

69. Goetz was not at the HACC site or the Gerhart site when the materials were taken from the HACC site and dumped at Gerhart's, so he does not personally know what materials came to Gerhart's property. (T-293, 310-311)

70. In March of 1991, Stan Hall ("Hall") worked as a truck driver for Goetz. (T-340) He was at the Gerhart property on March 16, 1991 from morning

till lunch time. (T-347, 361) Hall's job was to dump the truckloads of materials at Gerhart's site which Goetz's inexperienced drivers drove to that site.

71. All of the truckloads dumped by Hall on March 16, 1991 were clean fill but there were materials already on the site which made the area look like an old time dump. Included in these materials were carpets, wood, roofing materials and a clothes press. (T-348)

72. At the time the clean fill was dumped at Gerhart's property, Gerhart was present operating heavy equipment to push the materials where he wanted them. (T-363)

73. Goetz did not talk to DER about hauling any materials from the HACC site to Gerhart's property prior to doing so. (T-253)

74. Goetz understood DER's prior civil penalty assessment was for burning demolition wastes at his Cashtown property. (T-249)

75. All of the receipts showing Goetz took demolition wastes from the HACC site to a landfill for disposal are Exhibit G-1. With one exception which is undated, these receipts are all dated after issuance of DER's order relating to the Reazer property. (T-209)

76. France was aware that Goetz had complied with the DER orders as to both the Reazer property and the Gerhart property when he assessed these penalties. (T-129-131)

77. DER's previous assessment of a civil penalty against Goetz was upheld by this Board in an Adjudication dated August 23, 1991 in Robert K. Goetz, Jr., v. DER, 1991 EHB 1433 ("Goetz I"). (Stip.)

DISCUSSION

As to DER's civil penalty assessment, there is no question that it bears the burden of proof under 25 Pa. Code §21.101(b)(1). Goetz I. It is also clear that DER bears the burden of proof as to its Administrative Order under 25 Pa. Code §21.101(b)(3). Reading Company, et al. v. DER, 1992 EHB 195.

Appeal at Docket No. 91-153-E

With regard to DER's order which is the subject of the appeal portion of this consolidated appeal initially at docket number 91-153-E, however, DER need prove nothing because the appeal is moot. DER's challenged administrative order directed Goetz not to transport or dispose of demolition wastes at Gerhart's property. It also says the demolition wastes there are to be removed and properly disposed of by Goetz. Both Goetz and DER's Hentz agree the site was cleaned up by April 4, 1991, and even France acknowledged this was the case as of the time that he prepared DER's civil penalty assessment. If Goetz has ceased transporting materials to that site and removed all municipal waste from the site, then regardless of the order's merit or lack of merit, we can grant Goetz no meaningful relief with regard thereto. Brandywine Recyclers, Inc. v. DER, Docket No. 91-124-E (Adjudication issued May 13, 1993); New Hanover Corporation v. DER, 1991 EHB 1127; West Penn Power Company v. DER, 1989 EHB 157. Ordinarily, the fact that DER might assess a civil penalty against an order's recipient leaves the order's recipient a sufficient stake in the order to prevent dismissal for mootness. West Penn. However, here there is a civil penalty assessed under the SWMA and

timely appealed to us by Goetz. In such circumstances Goetz cannot be foreclosed in the civil penalty assessment appeal from raising issues which may otherwise be raised in the order's appeal. Gerald Booher v. DER, 1990 EHB 285. This is why we now hold the appeal of this order to be moot.

Appeal at Docket No. 91-553-E

Even if the appeal of the order were not dismissed as moot, we could not have sustained it and do not sustain that portion of DER's civil penalty assessment which pertains to both illegally transporting demolition/solid wastes to the Gerhart property and illegally disposing of it there. It is DER's burden to prove that Goetz transported the demolition wastes from the HACC site to the Gerhart property and deposited it there without a permit to do so. DER must show this occurred with a fair preponderance of the evidence. That is, it must satisfy an unprejudiced mind as to the existence of the facts DER seeks to prove. Midway Sewerage Authority v. DER, 1991 EHB 1445, citing Standard Pennsylvania Practice 2d §49:47 (and the cases cited therein). DER's evidence does not rise to this level.

The record shows that when DER's staff first visited the Gerhart property on March 18, 1991, they found an area where clean fill had been dumped on a farm lane on Gerhart's property. As the inspectors went along this farm lane further, the clean fill turned into a mixture of clean fill and a significant volume of municipal wastes of various sorts, some of which was at least similar to demolition wastes. The parties agree that Goetz could haul clean fill to this site without violating the SWMA. This is because the definition of construction/demolition wastes excludes "uncontaminated soil

rock, stone, gravel, unused brick and block and concrete". 25 Pa. Code §271.1. So, too, Section §271.101's mandate that owners and operators of municipal waste facilities first obtain a permit therefor from DER contains an exception to the permit requirement where these clean fill materials are separated from other wastes. See 25 Pa. Code §271.101(b)(6)(i). Goetz's witnesses testified that clean fill is what they hauled to Gerhart's property form HACC and that they hauled no demolition wastes there.

DER's evidence does not prove them wrong. DER's inspectors were not at the Gerhart site before Goetz dumped there. As a result, they had no firsthand information about pre-dumping conditions. Goetz's witnesses not only said that Goetz dumped only clean fill there, but also that there were municipal wastes dumped on Gerhart's land when they arrived at this site. Specifically, Hall testified that Goetz had him go to the Gerhart property to do the dumping of the transported materials trucked to Gerhart's land because Goetz's truck drivers were too inexperienced to be allowed to dump the trailer loads. Hall said the area looked like an old time dump when he arrived there and identified both a metal clothes press and construction wastes as part of the material on the site when he arrived. Moreover, Hall testified he dumped all of Goetz's loads and they were clean fill. He further stated that Gerhart was running the heavy equipment at this location which spread the loads around. We believe this "spreading" by Gerhart could account for why DER's inspector thought the materials he viewed looked like they all arrived at once since, at least in part, they were "blended" or spread out by Gerhart's actions which occurred all at one time.

DER did not offer sufficient evidence to rebut Hall's testimony. The only evidence even arguably rebutting it is found on Exhibit C-6, which is solid waste specialist Don Hentz's report of his inspection of March 18, 1991. In that report Hentz relates that Gerhart told him Goetz's trucks first brought clean fill, then later loads brought in demolition waste. While this report was admitted into the record without objection to the hearsay nature of these statements by Goetz's counsel, the statements therein nevertheless remain hearsay. We are unwilling to assign such recorded third party statements more credibility than the statements of Hall which were made before us at the hearing. DER could have called Gerhart as a witness to repeat these statements before us but it did not elect to do so.

DER addresses this issue four ways. It argues that Goetz could have called Gerhart to corroborate Goetz's evidence and did not, so Goetz knew Gerhart's evidence would be harmful. It argues Goetz offered no reason why it would remove the wastes, placed on Gerhart's property by others, simply because Gerhart asked him to do so. It asserts Goetz's evidence is at variance with statements of facts in Goetz's Pre-Hearing Memorandum and thus should not be believed. Finally, it argues Hall is not capable of belief because he testified he was at the HACC site and the Gerhart site simultaneously. We reject these arguments.

While Goetz subpoenaed Gerhart for the merits hearing, Gerhart was not offered as a witness by Goetz but was told by Goetz's lawyer he could leave. When DER's counsel became aware of this he sought to offer Gerhart's testimony as rebuttal. (T-406-407) However, as explained then, DER's failure

to subpoena Gerhart to testify on its behalf or have him there to testify voluntarily either in its case-in-chief or as a rebuttal witness must be laid at DER's doorstep. A lack of Gerhart's testimony cannot be said to inure to the detriment of Goetz when Gerhart is accessible to both sides.

Next, DER argues that Goetz failed to show why he removed the wastes at Gerhart's request. Goetz has no duty to make such a showing so the lack of it has no impact. We observe, however, that Gerhart had a heavy equipment rental business (T-61) and it may be that Goetz rented equipment from him so this would be a business favor to be returned later. It also may be that Goetz did this to comply with DER's order to him. However, even if Goetz removed materials because he dumped them there, we do not know this because there is no proof thereof.

DER also suggests that Goetz's proof/evidence shows something other than what Goetz's Pre-Hearing Memorandum said Goetz would prove. In Goetz's Pre-Hearing Memorandum under the heading "Statement Of Facts Appellant Intends To Prove", Goetz states that more than clean fill was trucked to Gerhart's property by Goetz's employees and that Goetz intended to return and process this waste and remove this material. This is a fair reading of page 2 of Goetz's Pre-Hearing Memorandum in the appeal at Docket No. 91-553-E. If proven this would be proof that Goetz brought more than clean fill to Gerhart's property. If DER had sought either by Pre-Hearing Motion or by a motion made at the hearing to have such statements deemed factual admissions on this point, then we might have this factual evidence before us in this fashion. DER did not seek to do so, however, so the record before us has no

such facts for us to consider. We also cannot assign less credibility to Goetz's evidence on this point based upon these writings which are not part of the evidentiary record since that would have us balance record evidence against statements made "off" the record. Finally, we note these statements as to what Goetz would prove were prepared by Goetz's original counsel who subsequently withdrew before the merits hearing. While we do not condone Goetz's proofs varying from the proffered assertions, we cannot change the evidentiary record before us in response.

Finally, DER asserts that Hall testified he was at both the HACC site removing materials from the float tank when the loads went to Gerhart's property (T-350) and simultaneously at Gerhart's property when all the loads were dumped. (T-359-360) Hall only said he was operating the float when the materials went to the Gerhart property, not that he stayed at the HACC site operating the float tub while the materials were taken to Gerhart's property and dumped. It is possible he left with the first load. It is also possible he was confused in giving this answer. Considering the clear testimony offered by Hall as to Goetz's operations on Gerhart's property on March 16th, we must conclude he was there on that date doing the dumping as he testified.

Reazer Property

While DER's proof failed as to Gerhart, it was more than adequate to sustain DER's burden as to the civil penalty as to Goetz's operations at the Reazer property.

The record before us shows that at least since 1987, Goetz has been involved in more than one disagreement with DER over his operations and

compliance with the SWMA. There is ample testimony showing Notices of Violations, Orders and Civil Penalty Assessments by DER. There were also two Commonwealth Court proceedings between Goetz and DER as to Goetz's compliance with the SWMA.[2] There thus can be no question that Goetz is aware of the regulation by DER of the transportation and disposal of demolition wastes.

In Goetz I, a compliance history or non-compliance history at Goetz's Cashtown and Orrtanna facilities stretching back to 1987 is detailed as to the unpermitted storage, processing and disposal of demolition wastes and the burning of demolition waste. Moreover, in that adjudication we found that in the Commonwealth Court proceeding cited there, the Court found Goetz engaged in the unpermitted disposal of demolition waste. Thus, Goetz cannot be heard here to suggest he was unaware that one may not transport solid waste to an unpermitted disposal site (as required by 25 Pa. Code §285.211(b)) or dispose of solid waste at an unpermitted processing or disposal site (as required by 25 Pa. Code §271.101(a) and Section 201(a) of the SWMA (35 P.S. §6018.201(a)).

As to transportation to the Reazer property, the evidence is clear that Goetz brought HACC demolition wastes to the Reazer property allegedly to fill in a low spot on the property.[3] Goetz admits he hauled materials to

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2 C-30 is a copy of Goetz's Petition For Review in the proceeding at No. 81 M.D. 1991, Commonwealth Docket 1991, seeking injunctive relief. Goetz I references a Commonwealth Court proceeding between these parties at No. 255 Misc. Docket 1989.

3 We think a strong circumstantial case can be made for Goetz hauling materials out of the HACC site to Reazer's property for purposes of picking out metal to sell to Reazer as scrap and wood to burn at Goetz's Orrtanna (footnote continues)

Reazer's property to do this but claims this was clean fill. Clearly, clean fill does not need to be processed to remove wood and metal. If it is clean fill, then wood and metal and anything else which does not fit the clean fill definition has already been removed. Almost clean fill or partially clean fill are not terms recognized by the statute or regulations. As DER's Brief points out, under 25 Pa. Code §271.1, clean fill by definition has this material previously removed. Thus, what arrived at Reazer's property was not clean fill because the testimony from Goetz's own witnesses established that three men were employed by Goetz at Reazer's property to sort metal and wood out of the loads he had hauled there. Moreover, the unrebutted testimony from DER's Inspector Rathfon is that when these employees were asked if they were done processing the demolition wastes in the foreground of the photo which is Exhibit C-3, these employees said that yes they were done sorting there, apparently despite the fact that these wastes still contained significant quantities of materials other than clean fill. Thus, the case is made for transportation of solid waste/demolition wastes at Reazer's property because even if it could be argued that Goetz could sort this material there he nevertheless had to transport it there in the first place.

As to processing or disposal at this site, the Rathfon testimony referenced above also ends any suggestion that there was neither processing nor disposal there. The testimony by Goetz's Mr. Bowling clearly shows

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(continued footnote)
facility as boiler fuel. The thirty day contract to fully demolish the HACC complex left little time for "sorting" valuable materials from the rubble and if the sorting at Reazer's and the information on C-6 are read together, a pattern begins to emerge. However, we need not decide this issue here.

processing there and Rathfon's testimony shows disposal. While Rathfon says 40% of the wastes at Reazer's property was not clean fill and Goetz's evidence says nearly 90% was clean fill, such arguments are irrelevant. Clean fill by definition is not 90% clean fill and 10% demolition waste or 60% clean fill and 40% demolition waste. Moreover, clean fill must be such when it arrives at the fill site, not demolition waste which at some potentially indeterminate time in the future the generator or fill site owner will sort into clean fill. To say otherwise would be to create a scheme of demolition waste landfills contrary to the SWMA's clear contrary intent.

By letter dated February 13, 1991 (Exhibit G-2), Rathfon told Goetz demolition waste is regulated as municipal waste and had to go to a permitted landfill, although unpainted wood could go to Goetz's Orrtanna facility to be used as fuel. Contrary to Goetz's Post-Hearing Brief, this DER letter did not authorize Goetz to haul all wood to his Orrtanna property to sort painted wood from unpainted wood. DER's letter never mentions the painted wood going to Goetz's property and Goetz's own testimony was that painted wood was sorted out at the HACC site, not at his property.

Goetz's Post-Hearing Brief also asserts that his use of the Reazer site was not such as makes it a "transfer facility" as defined in Section 103 of the SWMA (35 P.S. §6018.103). This is because he says the picking and sorting of the demolition wastes conducted at Reazer's property did not involve a "method" or "technology" to convert part of the materials for off-site use so there was no processing of wastes there. Goetz then argues to be within the definition of a "transfer facility" a facility must both receive

and process the waste, and thus, if it does not process waste it is not a transfer station. Goetz then concludes from this argument that his activity at Reazer's property is unregulated activity since he separated wastes there but did not convert them.

Why Goetz makes such a convoluted and circuitous argument is beyond our understanding, since his employees' statements to Rathfon make DER's case for Goetz disposal at Reazer's property. Moreover, DER only assessed a penalty for transportation and disposal, not operating a transfer station. Nevertheless, if those statements had not been made and had DER assessed a penalty for operating an unpermitted transfer station, we would reject this argument. A transfer station receives and temporarily stores wastes or receives and processes wastes. It can do either and need not both store and process wastes. Here, the demolition waste was created at the HACC site and shipped to Reazer's where it was processed. As to the metal picked from the waste, it was sold to a scrap dealer who sells it to be reused. As to the wood, as trailer loads were gathered, it was taken to a landfill for disposal (if painted) or to Goetz's site for use as fuel (if unpainted). Thus, portions of the waste were processed using a very low level of technology or method (hand sorting) so that these portions could be reused off site. Thus, if we had this issue before us in the civil penalty assessment appeal, we would have decided it against Goetz.

At the merits hearing, Goetz's case focused in part on alleged permission from DER to sort demolition wastes at unpermitted facilities. This issue is not raised again as a defense in Goetz's Post-Hearing Brief, so

we deem it abandoned by Goetz according to Lucky Strike Coal, Co., et al v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).[4]

Goetz also argues that the amount of the penalty is too high to fit the alleged violations. Goetz says DER assessed this penalty because Goetz had the gall to challenge its inspectors. He also asserts that the existence of a prior penalty assessed against Goetz by DER for different violations forms no reason to increase the penalty here. Further, he argues DER assessed a penalty without first determining what mitigating factors might exist.

The issue before us as to the amount of this civil penalty is not whether if we would initially assess a penalty ourselves, we would assess exactly the same amounts for exactly the same reasons as DER did originally. A civil penalty assessment by DER is an exercise of its discretion; thus DER must show us its decision on the amount to assess was reasonable via a preponderance of the evidence. We need not agree exactly on the factors and amount per factor, but must only find DER's action reasonable. Goetz I; Zorger v. DER, 1992 EHB 141. Stated another way, our task is to see if there is a "reasonable fit" between the amount of the penalty and the violations. Frederick J. Milos t/b/a Freddy's Refuse v. DER, 1992 EHB 1355.

DER's Robert France assessed this penalty using guidelines which we previously approved in Joseph Blosenski, Jr., et al. v. DER, 1992 EHB 1716 and elsewhere. He used Exhibit C-26, a DER work sheet, to calculate the penalties considering the factors outlined in Section 605 of the SWMA (35 P.S.

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[4] The facts in the record do not support it in any case.

§6018.605). With regard to Goetz's illegal transportation, France assessed only $1,000 as to the severity and nothing as to costs incurred by DER or savings to the violator. He did this although clearly there were costs incurred by DER in investigating this matter, in participating in the meeting of March 8, 1991 and in monitoring Goetz's clean up of the Reazer site. There was also obviously savings to Goetz, who did not pay for landfill disposal costs for the loads of demolition wastes hauled to Reazer's site.

DER next assessed $12,500 against Goetz as to willfulness because with Goetz's numerous prior notices of regulations in this field by DER, including Rathfon's letter of February 13, 1991 specifically addressing the HACC site's wastes, DER felt Goetz's conduct was reckless. DER then asserts an added penalty of $975, equal to 5% of the prior civil penalty against Goetz under the SWMA in Goetz I, and totals this at $14,475 for one day of violation.

As to disposal of solid waste at Reazer's property, DER assessed a total civil penalty of $21,000 for the one day violation. Again, it assessed only $1,000 for seriousness and nothing for costs incurred by DER or savings to the violator. DER assessed $19,025 as to culpability because based on the prior DER order regarding disposal of demolition wastes at Goetz's Cashtown site and the Commonwealth Court's finding in the proceeding referenced above in the footnote, Goetz knew such disposal was illegal. Thus, DER concluded that this violation at Reazer's was willful. DER again added 5% of the prior assessment or $975 to reach this figure.

In neither assessment scenario did DER assess the maximum penalty of $25,000 per violation. Indeed, waste was obviously transported to and dumped at Reazer's property on more than one day and DER assessed no penalties for those days. Thus, greater penalties could have been assessed here.

While it was not well developed in the record of this merits hearing, it is clear that France used DER's guidance documents in assessing this penalty. (T-95) Under these guideline documents the penalties for reckless conduct could have been higher, and the same is true as to Goetz's willful conduct. Booher v. Department of Environmental Resources, __Pa. Cmwlth. __, 612 A.2d 1098 (1992).

As to both the penalty for transportation and the penalty for disposal, DER added 5% of the penalty it previously assessed against Goetz which we affirmed in Goetz I. DER failed to offer us any reasoning in support of its assessment of this 5% penalty as to either of these violations. It may be that this is intended as a deterrent for recidivism on Goetz's behalf or merely as an increased penalty for repeat offenders, but DER did not tell us. Section 605 does not explicitly call for such a penalty but does allow DER to look at all relevant factors. Clearly, if it wants us to agree with a specific penalty for a specific violation as to a specific section of its guidance documents, DER must be explicit as to how it arrived at that figure and the rationale for that section's being included in its guidance documents. Its case was not explicit in this regard.

In response to this penalty total, Goetz asserts that he cannot be penalized more here just because he received past notices of violation of this

act. We agree with Goetz. Up to a point Goetz's penalty cannot be increased just because he receives one such notice from DER. One such notice, however, means he can no longer claim he didn't know this activity was regulated or that a specific type of activity was illegal. Moreover, here, there are a series of communications between DER and Goetz about demolition wastes plus a proceeding before us and proceedings in the Commonwealth Court. In these proceedings, Goetz's interpretation of what he can do apparently always loses. The Commonwealth Court's findings of illegal disposal and the civil penalty assessment in Goetz I bear this out. Thus, while Goetz may disagree strongly with how DER interprets the SWMA and applicable regulations, DER's interpretations have been affirmed where his have been rejected. For him to persist in a course of conduct based on his personal interpretation of the law in such a regulated field can properly be a basis for finding his acts not merely negligent, but, based on the incident's specifics, either reckless or willful.

Goetz also argues his penalty should be reduced because DER assessed a lower penalty against Reazer and no penalty against Gerhart. We reject this argument. As to Gerhart, Goetz is assessed no penalty for his conduct there, either. However, Goetz's conduct and penalties based thereon stand or fall on their own merit or lack thereof. DER's decision as to penalties as to Reazer constitutes an exercise of its prosecutorial discretion which we lack the jurisdiction to review. Westtown Sewer Company v. DER, 1992 EHB 979. Goetz's compliance history shows he knew or should have known not to do what he did.

We stated above that we are required to see if the amount of the penalty assessed constitutes an abuse of DER's discretion. It is not. We need not agree with every dollar assessed in each category but must only see if there is a reasonable fit. Thus, we might be inclined to assess more in one facet of the penalty calculation than DER did and less somewhere else, but the final totals are the key. Thus, without endorsing DER's methodology, we affirm the amounts assessed as to transporting these materials to the Reazer property and disposal of these wastes there.

Accordingly we make the following conclusions of law and enter the following order.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this consolidated appeal.

2. Where DER issues an administrative order or assesses a civil penalty it bears the burden of proof that its actions constituted no abuse of these exercises of its discretion.

3. Where DER's administrative order has been complied with in full by the appellant, because there is no relief which this Board can give, any appeal is moot in regard thereto.

4. Where an appeal from a DER administrative order issued under the SWMA would be dismissable as moot except for the possible ramifications as to civil penalties assessments, the appeal may still be dismissed as moot if DER has assessed a civil penalty in regard thereto and there is a timely appeal of that assessment.

5. Where the record shows demolition waste on a third party's land and the appellant admits only he brought clean fill from a demolition site, DER must prove the appellant brought the demolition wastes to the site and dumped them to meet the burden of proof as to the violations on which it assessed civil penalties.

6. Where demolition wastes are hauled to a third party's lands by the appellant and deposited there, if there is no permit for the processing or disposal of solid waste at that site, the appellant has violated the SWMA as to both transportation and disposal of solid waste.

7. Clean fill cannot be created by hauling demolition wastes to an unpermitted waste processing and disposal site and picking or sorting all of the materials which are not clean fill from the remaining "clean fill" materials. Clean fill must be created at the generating location or at a permitted facility before it may be transported and deposited at unpermitted disposal sites as clean fill.

8. In considering the propriety of the amount of a civil penalty assessed by DER, this Board must evaluate whether in calculating this amount DER abused its discretion, i.e., whether there is a reasonable fit between the penalty and the violation on which it is assessed.

9. Where DER could have assessed larger penalties for the violations on which it assessed penalties, did not assess penalties for other violations which occurred, and assessed penalties within the framework of its own

guidance document's suggestion and the factors outlined in §605 of the SWMA, its penalty assessment is a "reasonable fit", even where we may have assessed different amounts for different factors.

10. DER's assessment of a lesser penalty against the owner of the disposal site constitutes no defense to the amount of its assessment against appellant because DER's decision to act in this fashion is non-reviewable exercise of its prosecutorial discretion.

11. Where appellant has previously been issued an order as to illegal disposal of demolition waste on his own property and as to a new demolition project is informed in writing that demolition wastes from it must be hauled to a permitted landfill for disposal, his decision to haul such wastes to an unpermitted location for disposal may properly be called willful.

ORDER

AND NOW, this 22nd day of September, 1993, it is ordered that Goetz's appeal at Docket No. 91-153-E is dismissed as moot and unconsolidated with his appeal at Docket No. 91-553-E. It is further ordered that Goetz's appeal at Docket No. 91-553-E is sustained as to $39,500 of the civil penalty assessed against him and dismissed as to the remainder.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
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JOSEPH N. MACK
Administrative Law Judge
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DATED: September 22, 1993

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