

**COMMONWEALTH  
OF  
PENNSYLVANIA**

**ENVIRONMENTAL HEARING BOARD**

**ADJUDICATIONS**

**VOLUME III**

**(Pages 903–1353)**

**1986**

MEMBERS  
OF THE  
ENVIRONMENTAL HEARING BOARD  
DURING THE PERIOD OF THE  
ADJUDICATIONS

1986

Chairman.....MAXINE WOELFLING

Member .....EDWARD GERJUOY

Member.....ANTHONY J. MAZULLO Jr.,  
until 1/31/86

WILLIAM A. ROTH,  
from 6/24/86-present

Secretary.....M. DIANE SMITH

Cite by Volume and Page of the  
Environmental Hearing Board Reporter

Thus: 1986 EHB 1

## FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1986.

The Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, as amended. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1921-A of the Administrative Code, provides as follows:

### "§1921-A Environmental Hearing Board

(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.

(b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.

(c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.

(d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4009.1; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(a); the Dam Safety and Encroachment Acts, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.21; and the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, 58 P.S. §601.506. Also, the Board reviews the Department's assessment of civil penalties under the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.17(f); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b); the Coal Refuse Disposal Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.61; the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.13(g); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, §6018.605; and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22.

Although the Board is made, by §62 of the Administrative Code, 71 P.S. § 62 an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its Chairman and two members are appointed directly by the Governor, with the consent of the Senate<sup>1</sup> and their salaries are set by statute.<sup>2</sup> Its Secretary is appointed by the Board with the approval of the Governor.

The department is always a party before the Board. Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties. In third party appeals from permit issuances, the department often does not actively participate in the appeal, but lets the permittee defend the permit issuance.

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<sup>1</sup> Section 472 of the Administrative Code, 71 P.S. §180-2.

<sup>2</sup> Section 709 of the Administrative Code, 71 P.S. §249(m).

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1986. A copy of this Pre-Hearing Order was forwarded to the President of Glen Irvan Corporation.

The Board did not receive Appellant's Pre-Hearing Memorandum by the specified date. Shortly thereafter, the Board notified both counsel for Appellant, and Appellant's President that the requisite Pre-Hearing Memorandum had not been filed. The Board's notification also warned that failure to comply with an order of the Board could result in the imposition of sanctions, including dismissal. 25 Pa. Code §21.124.

The Board directed a second default notice, dated June 25, 1986, to Appellant's counsel warning that failure to file the Pre-Hearing Memorandum on or before July 7, 1986, would result in the imposition of sanctions. Appellant failed to comply with the Board's second order directing the filing of a Pre-Hearing Memorandum.

The Board has repeatedly held that dismissal is an appropriate sanction for a party's noncompliance with an Order directing the submission of a Pre-Hearing Memorandum, especially where the party in default has the burden of proof, as we believe to be the case here. See East Fallowfield Township v. DER, 1984 EHB 549; Marino v. DER, 1984 EHB 547; and Amity Coal Inc. and Anthony P. Dicenzo v. DER, 1984 EHB 533. In the instant case, the Board has sent several notifications to the Appellant indicating its Pre-Hearing Memorandum had not been filed. The Board did not receive any response to these notifications. The sanction of dismissal is, therefore, appropriate.

ORDER

AND NOW, this 22nd day of August, 1986, Appellant's Appeal from a denial of an Application for a Bonding Increment is dismissed for failure to comply with an Order of the Board.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

**DATED:** August 22, 1986

**cc:** Bureau of Litigation

**For the Commonwealth, DER:**  
Winifred M. Prendergast, Esq.  
Central Region

**For Appellant:**  
Robert M. Hanak, Esq.  
Reynoldsville, PA

b1





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

P.R.I.D.E. (PALISADES RESIDENTS IN	:	
DEFENSE OF THE ENVIRONMENT),	:	
Appellant	:	
v.	:	EHB Docket No. 86-265-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 22, 1986
	:	
and	:	
	:	
BUCKS COUNTY CRUSHED STONE, INC.,	:	
Permittee	:	

OPINION AND ORDER

Synopsis

Permittee's Motion to Dismiss for untimely filing of Appellant's Notice of Appeal is granted in part and denied in part because publication of the issuance of a Mine Drainage Permit is sufficient notice of issuance of that permit only; notice of issuance of a Mining Permit will not be imputed to interested parties from such publication.

OPINION

Palisades Residents in Defense of the Environment (Appellant) seeks to appeal the DER's issuance of Mine Drainage Permit No. 7974SM2A2 and Mining Permit No. 300956-7974SM2-01-1 to Bucks County Crushed Stone, Inc. (Permittee) for the commencement of a surface non-coal mining operation. The two separate permits in question were issued by DER on March 28, 1986. Notice of the issuance of Mine Drainage Permit No. 7974SM2A2 was published in the

Pennsylvania Bulletin on April 12, 1986. 16 Pa.Bulletin 1381 (April 12, 1986). Thereafter, Appellant received a copy of both permits on April 22, 1986. On May 20, 1986, Appellant filed a Notice of Appeal with the Board from the issuance of both Mine Drainage Permit No. 7974SM2A2 and Mining Permit No. 300956-7974SM2-01-1.

The Board only has jurisdiction over timely filed appeals. Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761, 763 (1976). The rule governing timely filed appeals is found at 25 Pa.Code §21.52(a), which states

. . .jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin...  
25 Pa.Code §21.52(a)

Appellant first received notice of the issuance of Mine Drainage Permit No. 7974SM2A2 from publication in the Pennsylvania Bulletin on April 12, 1986. Appellant did not file a Notice of Appeal with the Board until May 20, 1986. Appellant failed to appeal this DER action within the requisite 30 day period and therefore the Board lacks jurisdiction to consider Appellant's appeal of Mine Drainage Permit No. 7974SM2A2. Appellant argues that publication in the Pennsylvania Bulletin need not constitute notice. This argument is irrelevant in view of the plain language of §21.52(a), by which we are bound. Moreover, 1 Pa.Code §§5.5 and 5.4 specifically state that publication in the Bulletin is sufficient notice "to any person subject thereto or affected thereby." Appeal from the issuance of the Mine Drainage Permit is dismissed.

Permittee argues that publication of the issuance of a Mine Drainage Permit in the Pennsylvania Bulletin also constituted notice to Appellant of

the issuance of a Mining Permit. In support of this argument, Permittee presents an affidavit of a District Manager of the Bureau of Mining and Reclamation who states that, as a practice, Mining Permit issuances are not published in the Pennsylvania Bulletin. Mining Permits, the District Manager asserts, are issued simultaneously with Mine Drainage Permits and thus, the notice of the Mine Drainage Permit serves as notice of the Mining Permit.

Permittee's arguments do not persuade the Board. Adequate notice of administrative action is notice which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Clark v. Com., Dept. of Public Welfare, 58 Pa.Cmwlth. 142, 427 A.2d 712 (1981) quoting from Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). The interested party to the present appeal is PRIDE, a local environmental public interest group. The Board has interpreted 25 Pa.Code §21.52(a) publication requirement to provide notice to "the members of the 'public', of which body Appellants are members, who might be aggrieved by the issuance of the permits, with the due process notice of appeal rights to the Board." Citizens Opposing Sewage Treatment Systems v. DER and Bear Creek Watershed Authority, 1983 EHB 612. It is unreasonable to assume that members of the public are intimately acquainted with the minutiae of the Department's manner of administering its regulatory programs and that, as a result, they receive notice of the issuance of a mining permit from the publication of the issuance of a Mine Drainage Permit. Although related, these are separate and independent permits. Each permit addresses a separate aspect of mining regulation. Each permit receives an independent permit number assigned by the DER. DER's practice of nonpublication of the issuance of Mining Permits does not relieve DER of its duty to satisfy the constitutional

due process requirements of adequate notice.

Moreover, from a review of the publication in the Pennsylvania Bulletin, it is again unreasonable to assume that a member of the public would be notified of the issuance of two permits. The publication states...

7974SM2A2, Bucks County Crushed Stone, Inc. (P.O. Box 196, Penns Park, Pa. 18943), amendment to a trap rock quarry in Nockamixon Township, Bucks County affecting 61.3 acres, receiving streams Rapp Creek to Delaware River, application received May 31, 1985, permit issued March 28, 1986. (emphasis added)

The publication does not mention the Mining Permit or the corresponding Mining Permit number assigned by DER. Only issuance of the Mine Drainage Permit is evident from the publication. In addition, the singular form of the noun "permit" is employed to describe the DER's action.

In conclusion, the Board holds that, considering all the circumstances, publication of the issuance of a Mine Drainage Permit alone is insufficient public notice of the issuance of a Mining Permit. As a result, Appellant did not receive notice of the issuance of the Mining Permit until Appellant obtained a copy of issued mining permit on April 22, 1986. Having been filed on May 20, 1986, Appellant's Notice of Appeal from the issuance of the Mining Permit was timely filed within the statutory 30 day period.

Finally, Appellant argues DER's behavior regarding publication constituted fraud, as to allow Appellant to appeal nunc pro tunc the issuance of the Mine Draining Permit. There is no evidence of fraud by DER and the Board is reluctant to grant an appeal nunc pro tunc absent extraordinary circumstances. Soberdash Coal Company v. DER, 1983 EHB 323. Appellant's request to appeal nunc pro tunc from the issuance of the mine drainage permit is denied.

ORDER

AND NOW, this 22ndday of August, 1986, it is ordered that Appellant's Notice of Appeal from the issuance of Mine Drainage Permit No. 7974SM2A2 is dismissed for untimely filing.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: August 22, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
John Wilmer, Esq.  
Eastern Region  
For Appellant:  
Robert J. Sugarman, Esq.  
Philadelphia, PA  
For Permittee:  
Kenneth R. Myers, Esq.  
Philadelphia, PA

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COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

LOWER ALLEN CITIZENS ACTION GROUP, INC., :  
   v. :     **EHB Docket No. 86-246-W**  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :     **Issued: August 22, 1986**  
   and :  
 HEMPT BROS., INC., Permittee :

**OPINION AND ORDER**

**Synopsis**

Permittee's Motion to Dismiss for untimely filing of a notice of appeal is granted because Appellant received adequate written notice of DER's action more than 30 days before Appellant filed Notice of Appeal with the Board.

**OPINION**

On March 18, 1986, the Department of Environmental Resources (DER) approved an amendment to a permit authorizing the operation of a limestone quarry owned by Hempt Bros., Inc. (Permittee) in Lower Allen Township, Cumberland County. Lower Allen Citizens Action Group (Appellant) filed a Notice of Appeal from the DER action on May 5, 1986. Shortly thereafter, Permittee filed a Motion to Dismiss alleging untimely filing of the Notice of Appeal. In support of this Motion to Dismiss, the Permittee asserted, but did not present evidence otherwise, that adequate written notice of the DER action was mailed to several of Appellant's representatives on March 20, 1986. In response to this assertion, Appellant states the Notice of Appeal was filed within 30 days of publication of the DER action in the Pennsylvania Bulletin.

The Board issued an order on July 18, 1986 deferring judgment on Permittee's Motion to Dismiss pending the production of additional evidence proving Appellant was sent adequate written notice on March 20, 1986, as Permittee alleged.

On August 6, 1986, Permittee filed an Affidavit in Support of Permittee's Motion to Dismiss. The Affidavit consisted of a sworn statement by a DER Clerk-Typist stating that the Clerk-Typist was directed to notify a list of individuals of the DER action in question. Mr. William H. Andring, Esq., counsel for Appellant, is listed among the individuals to receive notice. Moreover, Mr. Gilbert L. Wilson, a signatory of Appellant's Notice of Appeal, was also listed as an individual to receive notice. The affiant further stated that she placed a copy of the DER letter approving the permit in each envelope and duly addressed and mailed the notification letters on March 20, 1986.

The Board has jurisdiction only over timely filed appeals. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761, 763 (1976). The rule governing timely filed appeals is found at 25 Pa. Code §21.52(a), which states

...jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin...  
25 Pa. Code §21.52(a).

The Board has interpreted Rule 21.52 as providing two independent bases for determining the timeliness of a notice of appeal. Consolidated Coal Company v. DER and J & D Mining, Inc., 1983 EHB 339. The 30 day filing period commences by either the receipt of a written notice of Departmental action by

a party appellant or by publication of a notice of such action in the Pennsylvania Bulletin, whichever is earlier. Id.

Notice of DER's action in this matter was published in the Pennsylvania Bulletin on April 5, 1986. Appellant filed the Notice of Appeal on May 5, 1986; exactly 30 days after notice was published in the Pennsylvania Bulletin. Thus, Appellant's appeal was timely filed within the 30 day period unless Appellant received written notice of the DER action at some time prior to April 5, 1986.

In Permittee's Affidavit in Support of Motion to Dismiss, Affiant swore she mailed written notice to a number of Appellant's representatives on March 20, 1986. It is presumed Appellant received this written notice within due course after mailing. See Franklin Interiors, Inc. v. Browns Lane Inc., 227 Pa. Super 252, 323 A.2d 226, 228 (1979). The Permittee alleges Appellant received the written notice before April 5, 1986. This presumption has not been rebutted by Appellant. It is, therefore, deemed admitted by Appellant. Id. The Board, therefore, presumes Appellant received adequate written notice prior to April 5, 1986. Thus, the tolling of the 30 day filing period began at some date prior to April 5, 1986 and necessarily tolled prior to the Board's receipt of Appellant's Notice of Appeal on May 5, 1986. As a result, the Board does not have jurisdiction over this appeal and it must be dismissed for untimely filing.



ORDER

AND NOW, this 22nd day of August, 1986, it is ordered that Permittee's Motion to Dismiss is granted, and the appeal of Lower Allen Citizens Action Group is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: August 22, 1986

cc: **Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Amy L. Putnam, Esq.  
Central Region  
**For Appellant:**  
William H. Andring, Esq.  
Camp Hill, PA  
**For Permittee:**  
Horace A. Johnson, Esq.  
Lemoyne, PA

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COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

EDWARD VOGEL

V.

COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
:  
:  
:  
:  
:  
:

Docket No. 86-333-R

Issued: August 25, 1986

OPINION AND ORDER SUR MOTION TO DISMISS

Syllabus

A notice of violation of a consent order and agreement, absent some action affecting the litigants' rights or duties, is not an appealable action. 25 Pa. Code §§21.2(a) and 21.52(a).

OPINION

The above-captioned matter involves the appeal of Edward Vogel (Appellant), owner of Vogel Disposal Service, of a Notice of Violation of a Consent Order and Agreement issued by the Department of Environmental Resources (DER). The Consent Order and Agreement (COA) was entered into by Appellant and DER on October 11, 1985 and approved by this Board in an Adjudication of Settlement. See, Edward Vogel, Sr. v. DER, EHB Docket No. 85-237-G (issued October 25, 1985). The Notice of Violation (Notice) here appealed, dated June 6, 1986 and signed by Gary J. Wozniak, a Waste Management Specialist, informed Appellant that DER believed Appellant was in violation of the COA. The Notice referred to two specific violations and informed Appellant that DER believed it was owed \$1500 under the penalty provision of the COA. On July 2, 1986 Appellant filed the above-captioned appeal claiming that no

violations of the COA had occurred. On July 21, 1986 DER filed a Motion to Dismiss stating that the Notice was not an appealable action. On July 25, 1986 Appellant filed a Reply to the Motion to Dismiss, to which DER filed a Response on July 28, 1986. The Board here rules on said Motion to Dismiss.

DER argues that the Notice is simply a standard notice of violation, and as such is a non-appealable action as the Board has repeatedly held. See, K. M. & K. Coal Co. v. DER, EHB Docket No. 86-201-W, issued June 24, 1986; Perry Brothers Coal Co. v. DER, 1982 EHB 501; see also, Sunbeam Coal Corp. v. DER, 8 Cmwlth. Ct. 622, 304 A.2d 169 (1973). Actions of DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa. C.S.A. §101, or "actions" under Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa. Code §21.2(a)(1). Sunbeam Coal, supra.; Reitz Coal Co. v. DER, 1984 EHB 793; Perry Brothers, supra. In order for an action of DER to be appealable to this Board, said action must affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of the litigant. 25 Pa. Code §§21.2(a) and 21.52(a); See, Sunbeam, supra; Standard Lime and Refractories v. DER, 2 Cmwlth. Ct. 434, 279 A.2d 383 (1971). DER here argues that the Notice is not an appealable action or adjudication. DER claims that the Notice is not a binding action upon Appellant and thus does not affect Appellant's rights or duties, etc.

Appellant's Reply to the Motion to Dismiss points to the language of the Notice to support Appellant's claim to appealability; specifically:

A. "Vogel has failed to comply with both Paragraph 11 and Paragraph 14 of this Order." (i.e., the October 11, 1985 Order).

B. "Therefore, a penalty of \$1,500.00 is due this Department before July 10, 1986, as described in Paragraph 19 of the Order."

C. "Be advised that any future failure to meet your obligations under Paragraph 14 will result in this Department's call for added penalties under Paragraph 18."

Appellant argues that the above statements amount to an order by DER which includes an assessed penalty against Appellant. Appellant further argues, relying on the case of Gateway Coal Co. v. DER, 41 Cmwlth Ct. 442, 399 A.2d 802 (1979), that a letter stating that certain acts are contrary to law constitutes an appealable action.

The Board finds it must agree with DER. The only order which is actually involved here and which is the one referred to in (A), (B), and (C) above is the original COA to which Appellant agreed. The only matter which the Board finds questionable is statement (B) above. The Board can see how, on first examination, it might be interpreted as an order to pay a newly imposed fine. However, examination of paragraph 18 of the October 11, 1985 COA shows that a \$1500 penalty is called for by the COA should any violation of the COA occur.<sup>1</sup> Thus the Notice, in addition to informing Appellant that DER believes a violation has occurred, informs Appellant that because a violation has occurred DER believes the penalty provision is applicable. The Board believes, as DER claims, that the \$1500 penalty statement is merely DER's interpretation of the COA and essentially a request to comply. The due date which DER sets in the Notice is apparently a date after which DER would take legal action to enforce the COA. At that point Appellant may have a right to appeal, depending upon the nature of the remedy DER chooses to compel Appellant to satisfy this obligation. The Notice is not a binding order on

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<sup>1</sup> The statement in the Notice (statement B above) which refers to a penalty in paragraph 19 of the COA is apparently a typographical error by DER. Paragraph 18 (as referred to elsewhere in the Notice) deals with the penalty, not paragraph 19.

Appellant. In order for DER to collect the \$1500 it is due, and to enforce the COA, DER must pursue legal action in a court of competent jurisdiction; any decision the Board would render necessarily would be advisory. See, Pengrove Coal Co. v. DER, EHB Docket No. 85-195-G (issued January 17, 1986).

Appellant has also misconstrued Gateway, supra. Gateway concerned the Bituminous Coal Mine Act and a letter from the Commissioner of Deep Mine Safety concerning statutorily required testing for methane gas. Contrary to Appellant's apparent belief, the letter in Gateway was not merely a statement of DER's opinion that a violation existed, but rather an order stating that there was a violation of a statute and ordering Gateway to work out a new plan. See, George Enterprises Inc. v. DER, EHB Docket No. 85-291-G (issued December 19, 1985). In the present matter DER has not directed compliance with a law and has not imposed any new liability upon Appellant. Rather, DER has informed Appellant that it believes Appellant is in violation of the previously agreed-to COA. Thus, the Board here finds that Appellant's rights, duties, and obligations are not affected by the Notice here appealed.

Finally, although the Board concurs with DER's view of the June 6, 1986 letter, it believes that the letter could have been more artfully phrased. The statement that a penalty is to be paid by a specific date does, at first glance, appear to be a penalty assessment similar to those in the surface mining program. However, examination of the COA puts the statement in proper context. Further, as DER knows, or should know, simply titling a document a "Notice of Violation" and including a disclaimer that the document, "may not be construed as a final action of DER" carries very little weight. Nor is a recipient of such a document expected to delve into whether or not a particular DER employee had the "legal" authority to take a particular action, as DER appears to claim in its reply of July 28, 1986. DER would do well to

more carefully draft its notices of violation.

ORDER

AND NOW, this 25th day of August, 1986, DER's Motion to Dismiss in the above-captioned appeal is granted. Appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

cc: Bureau of Litigation

For the Commonwealth:  
Patti J. Saunders, Esq.

For the Appellant:  
Leo M. Stepanian, Esq.  
Butler, PA

DATED: August 25, 1986

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COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

Del-AWARE UNLIMITED, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	EHB Docket No. 86-028-G
NESHAMINY WATER RESOURCES, Permittee	:	(Consolidated Appeals)
and	:	
PHILADELPHIA ELECTRIC COMPANY, Permittee	:	Issued August 26, 1986
and	:	
NORTH PENN AND NORTH WALES WATER	:	
AUTHORITIES, Intervenors	:	

OPINION AND ORDER

Synopsis

Del-AWARE has appealed DER's extensions of time to complete construction under five permits previously granted by DER in connection with the so-called Point Pleasant project. Del-AWARE had appealed four of these permits when DER originally had granted them, and the Board had adjudicated those appeals after extensive hearings. One of the permits had never been appealed. The Board concludes that these permit extensions are DER actions which are appealable to this Board. The general rule of issue preclusion, however, Restatement 2d, Judgments §27, precludes Del-AWARE from relitigating in these new appeals any issues which had been adjudicated in the appeals of the original permits and which were essential to that adjudication, even though new information pertinent to those issues has come to light since that adjudication was rendered. Exceptions to this general issue preclusion rule sometimes are warranted, of the sort listed in Restatement 2d, Judgments, §28, but it is Del-AWARE's heavy burden to justify any such exception. The

issue of Del-AWARE's standing to pursue these five appeals, here consolidated under a single docket number, has not been precluded by the Board's previous ruling that Del-AWARE had standing to prosecute its appeals of the original permit grants. An issue in these permit extension appeals is whether DER had "good cause" to grant the permit extensions, i.e., whether the permittees had manifested faults or other deficiencies demonstrating that they should not be entrusted with the responsibility for completing the projects. Issues pertaining to good cause must be distinguished from issues pertaining to possibly harmful environmental, social or financial effects on the communities surrounding the Point Pleasant project as a result of the project's operations. These latter issues are of the sort thoroughly litigated previously, and which therefore (barring special exceptions) now should be precluded from relitigation.

#### OPINION

##### A. Introduction

The above-captioned matter involves five appeals (now consolidated at the above docket number) filed by Del-AWARE as part of Del-AWARE's continued objection to the so-called Point Pleasant project, which already has been the subject of a lengthy adjudication by the Board. Del-AWARE Unlimited v., DER, Docket Nos. 82-177-H and 82-219-H, 1984 EHB 178 (hereinafter "Del-AWARE I"). This very complicated project, whose details we shall not describe any more than absolutely necessary to make this Opinion understandable (the reader seeking further details of the project should refer to our 1984 adjudication), requires numerous permits from DER. The five consolidated appeals which are the subject of this Opinion were taken from DER's extensions of five of those permits.

For the purposes of this Opinion, the relevant facts concerning these



appeals are as follows.

1. Original Docket No. 86-028-G. Appeal of a December 20, 1985 letter from DER to Neshaminy Water Resources Authority ("NWRA"), extending the time limit for completion of construction under Permit No. ENC 09-81. To be constructed were, inter alia, a water intake structure on the Delaware River and an energy dissipator and outlet channel on the North Branch Neshaminy Creek. The permit was issued on February 8, 1982, and had been scheduled to expire on December 31, 1985 if all work had not been completed by that date. Construction under this permit had been commenced before the December 31, 1985 deadline, but obviously was not going to be finished by the December 31, 1985 deadline. The new expiration date set in DER's December 20, 1985 letter was "90 days following a final decision by the Pennsylvania Supreme Court in the matter of Daniel J. Sullivan, et al. v. County of Bucks, et al." This final decision now has been rendered--the Supreme Court, on May 8, 1986 and on June 26, 1986, has denied all Petitions for Allowances of Appeals from an October 11, 1985 Commonwealth Court affirmance of the Bucks County Common Pleas Court adjudication of the aforementioned cases. Thus, the extended Permit ENC 09-81 will expire on September 24, 1986.

2. Original Docket No. 86-029-G. Appeal of a January 7, 1986 DER Order extending the time limit for completion of construction under NWRA's Water Allocation Permit No. 978601. This permit, which authorized acquisition and use

of water rights in the Delaware River and other Commonwealth waters for public water supply purposes, was originally issued on November 1, 1978. The time limit for commencement of construction on this DER permit depended on permits and approvals from other federal, state and regional authorities. On January 11, 1983, these other permits and approvals having been acquired, NWRA timely commenced construction of the works needed for the development of the allocated public water supply; the terms of Permit No. 978601 then implied that the construction had to be completed by January 11, 1985. Because of the aforementioned Sullivan et al. litigation, however, construction of the project was suspended about June 1984. On January 7, 1985, and then again on May 28, 1985, DER extended the time limit for completion of the construction, pending final conclusion of the litigation; the previously effective time limit before the presently appealed-from extension, was January 8, 1986. Because the language in the appealed-from January 7, 1986 DER order extending the expiration date under Permit No. 978601 tracks the above-discussed expiration date language in DER's December 20, 1985 letter extending Permit NO. ENC 09-81, the new time limit for completion of construction under Permit No. 978601 also is September 24, 1986.

3. Original Docket No. 86-030-G. Appeal of a December 9, 1985 DER letter to Philadelphia Electric Company ("PECO") extending to December 31, 1986 the time limit for completing construction under Permit No. ENC 09-51; under

this permit, PECO was to construct a water supply pipeline. This permit had been issued originally on September 2, 1982, and was due to expire on December 31, 1985.

4. Original Docket No. 86-031-G. Appeal of a December 9, 1985 DER letter to PECO extending to December 31, 1986 PECO's time limit for constructing an outfall structure on the East Branch Perkiomen Creek, under Permit ENC 09-77. This permit originally had been issued on September 2, 1982, and apparently also was due to expire on December 31, 1985.

5. Original Docket No. 86-032-G. Appeal of DER's November 19, 1985 letter to PECO extending to December 31, 1986 the time for PECO to complete construction of the so-called Bradford Reservoir project under Permit No. DAM 09-181. This permit originally was issued on September 2, 1982 and its expiration date already had been extended to December 31, 1985. As of October 31, 1985, construction work on this project had not been started.<sup>1</sup>

PECO now has filed a motion to dismiss these appeals, as have Intervenors North Penn and North Wales Water Authorities ("NP/NW"). The alleged grounds

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<sup>1</sup> The above summary of the facts pertinent to these five now-consolidated appeals is based on the pre-hearing memoranda and other documents filed by the parties, plus--to a minor extent--Findings in the Board's adjudication in Del-AWARE I, supra. The parties' filings do not establish facts; correspondingly, the summarized facts concerning these appeals cannot be considered established. On the other hand, the facts we have listed have not been challenged, and their details are not crucial to this Opinion, as will be obvious infra; moreover, the summarized facts are needed to make this Opinion understandable by its readers. Therefore, we do proceed as if the summarized facts have been established. Parties who believe the facts summarized are not wholly correct, and who feel prejudiced thereby, will have the opportunity to petition the Board to rectify the alleged errors. See the Order, infra, accompanying this Opinion.

for dismissal are: (i) the permit extensions are not appealable actions; (ii) Del-AWARE lacks standing; (iii) the issues raised by Del-AWARE were fully adjudicated against Del-AWARE in Del-AWARE I, so that raising those issues in these appeals is precluded by principles of res judicata or collateral estoppel. Del-AWARE has responded to these motions to dismiss. DER, though given the opportunity to do so, has chosen not to formally respond. There has been some oral argument on these motions, at a hearing May 28, 1986. Subsequent to that hearing, the Board, in an Order dated June 2, 1986, at the above-captioned docket number, deferred action on a number of active discovery disputes pending the Board's rulings on these motions to dismiss. Those rulings now will be presented.

#### B. Appealability

NP/NW argues that the appealed-from "permit extensions" are "temporary and interim," in that the presently scheduled expiration dates of September 24, 1986 and December 31, 1986 are almost upon us, and therefore surely will have to be again extended by DER to allow completion of these very complicated construction projects; according to NP/NW, the extensions were granted by DER with the expectation that they would have to be extended to deadline dates realistically compatible with the amount of construction remaining to be completed, once the aforesaid litigation was completed (as it now has been). Consequently, NP/NW contend, these permit extensions cannot be considered "final"; under well-established precedent, DER actions which are not "final" are not appealable to this Board. Snyder Township Residents for Adequate Water Supplies v. DER, Docket No. 84-316-G, 1984 EHB 842.

We reject this NP/NW argument, however. If any of the appealed-from permit extensions had not been granted, the corresponding permits would definitely and "finally" have expired. DER's letters granting the permit

extensions were categorical, and without reservation; there was no indication that whether or not to grant the extensions still was a matter under consideration by DER. The circumstances of these DER permit extensions are altogether different from those in DER actions which the Board had held not to be final. See, e.g., Snyder, supra; Snyder Township Residents for Adequate Water Supplies v. DER, Docket No. 84-355-G (Opinion and Order, January 8, 1985); Doran v. DER, Docket No. 86-166-G (Opinion and Order, July 23, 1986). The Board has considered, and has deemed "final", a DER action which cannot be deemed more categorical or less reserved than the instant permit extension. Cambria Coal Company v. DER, Docket No. 84-109-H, 1982 EHB 517. The allegation that the permit extensions will have to be extended anew does not require modification of the foregoing reasoning. These permit extensions were final DER actions.

NP/NW also argues that the permit extensions, whether or not "final", are not appealable DER actions under the Administrative Agency Law, 2 Pa.C.S. §101, 25 Pa.Code §21.2 and applicable Board precedent. Again, we disagree, although here the decision is closer than on the finality issue. Despite NP/NW's contentions, we believe these permit extensions do affect "property rights, immunities, duties, liabilities or objections," in the language of 2 Pa.C.S. §101 and 25 Pa.Code §21.2. It is true, as NP/NW argue, that whether any particular type of final DER decision should be regarded as appealable is a matter of public policy. Man O' War Racing Association v. State Horse Racing Commission, 433 Pa. 432, 250 A.2d 172 (1969); Bethlehem Steel Corporation v. DER, 37 Pa.Cmwlth. 479, 390 A.2d 1383 (1978); James E. Martin v. DER, Docket No. 83-120-G, 1984 EHB 736; Consolidation Coal Company v. DER, Docket No. 85-220-G (Opinion and Order, September 18, 1985). In Martin we analyzed the implications of Man O' War and Bethlehem, and concluded that the

mere fact that a DER action maintained the status quo (as, e.g., extending the time for completion of construction arguably can be said to do) did not per se make the action unappealable. Martin held that a DER refusal to modify a surface mining permit--to allow terrace backfilling rather than the originally scheduled backfilling to approximate original contour--was an appealable action because of the public policy consideration that the citizens of the Commonwealth should not have reason to think DER is "free to be as arbitrary and capricious as it cares to [be]" in denying requests for amendments of surface mining permits.

Similarly, in the instant appeals, we do not believe it is sound public policy to give the impression that DER can avoid review of any decision to extend the life of a permit, no matter how egregious that decision seems. It well may be that these permit extensions are quite legitimate and that these appeals should be dismissed, but the dismissals should be on the merits, not on the general principle that permit extensions are never reviewable. This was the point of view we took in Martin, supra, where we dismissed Martin's appeal because we held that DER's refusal to modify the permit, though appealable, no longer was challengeable on the merits in view of issue preclusion principles. In Consolidation Coal, supra, we explained that a DER refusal of a third party request that DER revoke a permit generally should not be appealable on public policy grounds, thus affirming the result though not the logic of George Emeric v. DER, 1976 EHB 249, aff'd on reconsideration, 1976 EHB 324. The instant facts do not resemble those of Consolidation Coal in any way. These permit extensions are appealable actions of DER.

### C. Standing

NP/NW contend that Del-AWARE does not have standing to challenge the

extensions of NWRA's permits (the appeals originally at Docket Nos. 86-028-G and 86-029-G). According to NP/NW, Del-AWARE does not meet the Pennsylvania "substantial, immediate and direct" test for standing. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). PECO has not specifically moved to dismiss Del-AWARE's extensions of PECO's permits (appeals originally docketed at 86-030-G through 86-032-G), but has stated that PECO "will hold Del-AWARE to its burden of proof to demonstrate standing to appeal the permit extensions." Del-AWARE contends that because this Board ruled Del-AWARE had standing to litigate Del-AWARE I, supra, the issue of Del-AWARE's standing to pursue the instant appeals is precluded.

Del-AWARE does have the burden of showing that it deserves standing to prosecute these appeals. Moreover, it must justify its standing for each of these five consolidated appeals; the fact that the appeals have been consolidated for the Board's and the parties' convenience does not mean that Del-AWARE's demonstration of standing to pursue any of the appeals automatically conveys standing to pursue each of the other four. Since, as Del-AWARE itself notes, Del-AWARE I did not adjudicate an appeal of the NWRA Water Allocation Permit No. 978601, Del-AWARE's standing to pursue the appeal originally docketed at 86-029-G certainly cannot follow from any issue preclusive effect of Del-AWARE I. In addition, the Board's grant of standing to Del-AWARE in Del-AWARE I rested entirely on very specific facts about Del-AWARE's membership at the time the appeals involved in Del-AWARE I were filed. There is no evidence on the present record to show that Del-AWARE's membership today still includes those persons whose ability to meet the William Penn test gave Del-AWARE its standing to pursue Del-AWARE I. There is no evidence on the record that Del-AWARE's membership presently includes any individuals (they can be different individuals for different appeals) who

can meet the William Penn test for any of these five appeals. Though we do afford Del-AWARE I issue preclusive effects in the instant appeals (see infra), specific facts needed to establish standing, like those we have just listed, cannot be considered established in these appeals merely because Del-AWARE was awarded standing in Del-AWARE I.

By this time we probably should have had on the record, via Del-AWARE's pre-hearing memorandum or supplements thereto, the specific factual allegations which, in Del-AWARE's view, warrant its standing to pursue each of these appeals. Paragraph 25 of Del-AWARE's pre-hearing memorandum is too broadly unspecific to judge whether Del-AWARE deserves standing on any of these appeals. It is true that NP/NW and PECO could have flushed out the aforesaid paragraph 25 via interrogatories and depositions, but our June 2, 1986 Order largely has suspended discovery pending our ruling on the motions to dismiss, although we did say (paragraph 5 of our June 2, 1986 Order) that discovery "needed to resolve the pending issue of standing" would be allowed. Under the circumstances, we believe the best way to resolve this standing controversy at this stage of these appeals is to order Del-AWARE to file a supplement to its pre-hearing memorandum containing, for each appeal, those specific factual allegations (including, for each appeal, pertinent names and addresses of persons who were Del-AWARE members when these appeals were filed) which Del-AWARE believes warrant its standing. After such factual allegations are received, and if those allegations make a prima facie case for standing, the other parties will be able to probe the allegations via discovery; discovery will be superfluous, however, if Del-AWARE cannot even allege specific facts which would warrant standing.

The Order which follows is consistent with the foregoing discussion. In the meantime, we reject any motion to dismiss these appeals for lack of



standing, but give the parties opposing Del-AWARE leave to renew such motions after Del-AWARE's aforesaid allegations are filed. In this connection, all parties are urged to review recent Board opinions concerning Del-AWARE's standing to appeal DER actions connected with the Point Pleasant project. Del-AWARE Unlimited v. DER, Docket No. 84-361-G (Opinions and Orders issued May 13, 1985 and March 14, 1986).

#### D. Issue Preclusion

PECO, joined by NP/NW, argues that this consolidated appeal should be dismissed because all the issues Del-AWARE seeks to raise already have been adjudicated in Del-AWARE I, supra, and therefore (according to PECO) cannot be relitigated in the instant appeals. Del-AWARE claims that the criteria for issue preclusion--of the instant appeals by Del-AWARE I--are not satisfied; Del-AWARE also appears to be arguing that some of the issues raised in the instant appeals were not previously litigated. These opposing contentions by PECO and Del-AWARE raise some subtle questions, which require careful examination.

PECO argues initially that the principles of issue preclusion developed by the Pennsylvania courts apply to this Board's adjudications. Del-AWARE does not challenge this argument. Both the United States Supreme Court and the Pennsylvania courts have ruled that adjudication decisions by an administrative agency, such as this Board, are entitled to issue preclusive effect. University of Tennessee v. Robert B. Elliott, 54 LW 5084 (U.S. S.Ct. July 7, 1986); City of McKeesport v. PUC, 442 A.2d 30 (Pa.Cmwlth. 1982). This Board consistently has rendered decisions on issue preclusive grounds. Donald W. Deitz v. DER, Docket No. 82-178-M (Opinion and Order, August 22, 1985); Allegheny County Sanitary Authority v. DER ("Alcosan"), Docket No. 83-075-G, 1984 EHB 777. Moreover, this Board's dismissal of an appeal on

grounds of issue preclusion has been explicitly approved by the Commonwealth Court. William Fiore v. DER, Docket No. 83-160-G, 1984 EHB 643, aff'd 508 A.2d 371 (Pa.Cmwlth. 1986). We take it as conclusively settled, therefore, that the principles of issue preclusion developed by the Pennsylvania courts are applicable to the instant appeals. The question is whether, under those principles, Del-AWARE I precludes relitigation of some or all of the issues Del-AWARE raises in the five appeals now before us.

PECO's argument for dismissal on issue preclusion grounds cites Bethlehem Steel Corp. v. DER, 390 A.2d 1383 (1978), which discusses issue preclusion in terms of the so-called four identities:

- (1) identity of the thing sued for;
- (2) identity of the cause of action;
- (3) identity of the persons or parties;
- (4) identity in quality of the parties for or against whom the claim is made.

PECO, though citing Bethlehem, supra, does not specifically couch its arguments in terms of these four identities. Nevertheless, Del-AWARE's arguments against dismissal are explicitly and totally concerned with above-quoted identities; in particular, Del-AWARE argues that none of the identities are satisfied as (between Del-AWARE I and the instant appeals), and therefore that the issues Del-AWARE has raised in the instant appeals assuredly have not been precluded.

We are inclined to agree with Del-AWARE that the identity of the thing sued for is not the same in the instant appeals as in Del-AWARE I. By deciding, as we have, that each of these appealed-from DER permit extensions was a new appealable DER action, distinct from DER's grant of the original permits, we have committed ourselves to ruling that the "things sued for" in Del-AWARE I (namely, the revocation of each of the permits ENC 09-81, ENC 09-51, ENC 09-77 and DAM 09-181) are not identical with the corresponding

things sued for in the instant appeals at original Docket Nos. 86-028-G, 86-030-G, 86-031-G and 86-032-G respectively (namely, the overturn of the extensions of those respective permits). This conclusion appears to be consistent with Bethlehem, supra, and also is consistent with Board precedent. Alcosan, supra. We do not agree, however, with Del-AWARE's apparent contention that issue preclusion on res judicata grounds cannot conceivably apply to the appeal at original Docket No. 86-029-G (of the extension of Water Allocation Permit No. 978601) because Del-AWARE I did not adjudicate the propriety of DER's original grant of Permit No. 978601. This permit never was appealed, and therefore, under the Board's rules, became final and unchallengeable 30 days after all persons, including Del-AWARE, received actual or constructive notice that the permit had been granted. 25 Pa.Code §21.52(a). Our explicit judgment in Del-Aware I is neither more nor less final than our implicit sustaining of DER's unappealed-from grant of Permit No. 978601. It remains true, however, that Del-AWARE's failure to appeal the original Permit No. 978601 is not a basis for issue preclusion in the appeal at Docket No. 86-029-G under the authority of the four identities, because the identity of the thing sued for in the appeal of the extension of Permit No. 978601 is not the same as could have been sued for in an appeal of the original Permit No. 978601 grant.

On the other hand, the four identities have been the Pennsylvania court's criteria for the applicability of res judicata only. Bethlehem, supra. Issues may be precluded when the circumstances warrant invocation of collateral estoppel, though not res judicata. Township of McCandless v. McCarthy, 300 A.2d 815 (1973); William Fiore v. DER, 508 A.2d 371 (Pa.Cmwlth. 1986); Matson v. Housing Authority of Pittsburgh, 473 A.2d 632 (Pa.Super. 1984). The criteria for issue preclusion by collateral estoppel have been

formulated in Restatement 2d, Judgments, §27:

§27. Issue Preclusion--General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement 2d, Judgements, §27.

The criteria in McCandless, supra, and in Fiore, supra for issue preclusion by collateral estoppel are essentially the same as in the just-quoted Restatement 2d, Judgments rule. This rule also has been cited with approval in Matson, supra and in Day v. Volkswagenwerk Aktiengesellschaft, 464 A.2d 1313 (Pa.Super. 1983). Therefore our rulings concerning issue preclusion in the instant appeals will be based on the above-quoted §27; in so proceeding, we are following Alcosan, supra.

E. Exceptions to Issue Preclusion

Del-AWARE has filed identical notices of appeal in each of these five appeals; these notices of appeal contain some 35 different objections to the appealed-from permit extensions. PECO and NP/NW correctly maintain that very many of the issues raised by Del-AWARE in these notices of appeal appear to be identical with issues which were thoroughly litigated and adjudicated in Del-AWARE I. For example, Del-AWARE alleges that

Operation of the intake would adversely affect fish and fish habitat. Operation of the intake would adversely affect fishing, swimming, boating and tubing, especially at, but not exclusively at, the intake site.

The impact of the intake structure on fish populations in the Delaware River, as well as on fishing and other recreational uses of the Delaware, was thoroughly discussed in Del-AWARE I, supra (at 296-300), and allegations that the intake structure would produce adverse impacts of the sort just listed

were unequivocally rejected; moreover, these rejections were essential to the judgment in Del-AWARE I, because if these allegations had not been rejected the Board would have made them the basis for concluding that DER had abused its discretion.

Consequently, under the authority of Restatement 2d, Judgments, §27, quoted supra, issues of the sort just listed cannot be relitigated in the instant appeals. Del-AWARE argues that such relitigation should be permitted nevertheless, because since Del-AWARE I "there has been a significant change in circumstances, mostly stemming from the massive changes in the Point Pleasant project itself." As an illustration of such a change in circumstances, Del-AWARE states, "For example, groundwater studies published in the past few months indicate that, contrary to the basic assumptions that informed the project, there is adequate groundwater to supply the needs of Bucks County." Del-AWARE also cites Bethlehem, supra as authority for the proposition that issue preclusion should be applied sparingly "where the conduct involved is subject to continuing regulation and flexibility is desired, as it should be in this field of developing technology [in Bethlehem, control of steel plant emissions into the atmosphere]."

This proposition was no more than dictum in Bethlehem. Nonetheless, it is true that under Pennsylvania law there can be exceptions to the general issue preclusion rule of §27, quoted supra. Clark v. Troutman, 502 A.2d 137 (Pa. 1985). In fact, the Restatement 2d, Judgments itself recommends exceptions to its own general issue preclusion rule §27. These recommended exceptions are listed in Restatement 2d, Judgments, §28, which reads as follows:

§28. Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and deter-

mined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

- (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
- (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
- (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
- (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
- (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

This §28 has been quoted approvingly by the Pennsylvania Supreme Court.

Clark, supra. For this reason, and also because we believe it expresses well thought out policy, we adopt Restatement 2d, Judgments, §28 as the standard by which to decide whether, under the facts of the instant appeals, exceptions should be allowed to the general rule of issue preclusion, §27 supra.

We have examined the facts of the instant appeals and--on the record

presently before us--we are unable to see any basis for relaxing the principle of issue preclusion under the standard of §28, supra. The only possibly applicable portion of §28 is §28(5)(a), but examination of the Restatement 2d, Judgments Comments to §28, especially Comments g and h, makes it evident that §28(5)(a) does not apply to the instant appeals. Moreover, irrespective of this inference from §28, we simply do not believe Del-AWARE's arguments, supra, in favor of relitigation of issues decided in Del-AWARE I, are well taken. As we see it, Del-AWARE does not fully comprehend the public policy reasons underlying the doctrine of issue preclusion, which has been judicially created to reflect "the refusal of the law to tolerate a multiplicity of litigation. . .[on] matters actually decided, on the ground that there is no assurance the second decision will be more correct than the first." Day, supra. In Clark, supra, the Pennsylvania Supreme Court has described the policy reasons underlying issue preclusion as follows:

The term "res judicata" is often sweepingly used, by courts and litigants alike, to refer to the various ways in which a judgment in one action will have a binding effect on a later action. "Res judicata" encompasses the modern principle of issue preclusion (traditionally known as estoppel), which is the common law rule that a final judgment forecloses relitigation in a later action involving at least one of the original parties, of an issue of fact or law which was actually litigated and which was necessary to the original judgment. The purposes of the rule are the protection of litigants from the dual burden of relitigating an issue with the same party or his privy and the promotion of judicial economy through prevention of needless litigation. Finality of litigation is essential so that parties may rely on judgments in ordering their private affairs and so that the moral force of court judgments will not be undermined.

The quotations immediately supra, from Day and from Clark, seem indisputably pertinent to the instant appeals. PECO and NWRA have made heavy

investments of time, effort and money in the construction projects whose permit extensions Del-AWARE has appealed. Four of these five permits were previously appealed by Del-AWARE, and very thoroughly litigated.

Everyone--including Del-AWARE and the other parties to the instant appeals--realizes that construction projects of the magnitude under present discussion may take years to complete, even if not delayed by litigation and changes in the leadership of political bodies responsible for portions of the construction. It is to be expected that some of the information on which DER relied when it originally granted the permits would turn out to be somewhat inaccurate as new information became available with the passage of time. It would be bad public policy, inconsistent with the sensible public policy reasons underlying issue preclusion, to use the instant appeals of these construction permit extensions as an excuse to (in effect) reopen the Del-AWARE I hearing to supplement that record with the new information which inevitably and expectedly has accumulated since the Del-AWARE I record was closed. As the Clark court indicated, it is essential that PECO and NWRA be able to rely on the finality of our Del-AWARE I judgment, which now has been affirmed in all respects. Del-AWARE Unlimited, Inc. et al. v. DER and PECO v. DER, 508 A.2d 348 (Pa.Cmwlth.1986). As the Day court indicated, because even more new information will accumulate with the passage of time, there really is no assurance that reopening the Del-AWARE I record now will lead to a decision on the issues litigated in Del-AWARE I which will be superior to the actual Del-AWARE I judgment in the long run.

The preceding paragraph merits amplification. Under, e.g., the Surface Mining Act ("SMA"), 52 P.S. §1396.3a, licenses to conduct a surface mining operation must be renewed annually. Section 1396.3a(d) instructs DER not to renew a surface mining operator's license if it finds that the operator has a



violations history indicating "a lack of ability of intention to comply" with the SMA. Evidently the legislature intended that a license renewal application be reviewed by DER with reference to facts about the operator's performance which have become available in the year since the last license renewal. It would be an abuse of discretion for DER to renew a surface mining operator's license without examining the operator's past year's violations history. In the instant appeals, however, there is no operational history for DER to examine. The permits whose extensions are under appeal are construction permits. Until the construction projects are completed, there will be no information on how these projects, when operated, actually do affect their surrounding communities. The issues we adjudicated in Del-AWARE I fell into the broad category of whether one would expect those communities to be environmentally, socially or financially harmed by operation of the projects Del-AWARE disfavors. Because there is no actual operational experience, very many of the issues Del-AWARE is raising in the instant appeals fall into precisely the same category. For such issues, our Del-AWARE I adjudication, based on a de novo hearing which already took into account much information acquired after DER made its original permit grants, must be afforded issue preclusive effects under the Restatement 2d, Judgments, §27 rule, subject to exceptions of the sort listed in Restatement 2d, Judgments, §28. For reasons explained in the preceding paragraph, we believe it is sound public policy to rule that the mere availability of new information since Del-AWARE I was handed down is not sufficient justification for allowing exceptions to §27 in the instant appeals. On the other hand, in so ruling we do not wish to imply that new information never is admissible in appeals of construction permit extensions; such a blanket endorsement of past litigation also would not be good public policy. For example, in an appeal

of an extension of a permit to construct a nuclear power plant, it would be fatuous to exclude testimony that the already completed containment vessel had cracked in a recent minor earthquake, though such information still is part of the plant's pre-operational history. But none of the allegations Del-AWARE is raising in the instant appeals--except possibly its allegation that substantial changes in project design have been necessitated by a mammoth rock slide which has occurred in the area of the Bradshaw reservoir since the original permits were granted--arouse public health and welfare concerns which are so grave that (as in the case of the nuclear power plant example, supra) ignoring those concerns for the sake of a slavish devotion to the issue preclusion rule §27 would be irresponsible behavior by DER and/or this Board.

#### F. These Appeals' Precluded Issues

We trust the foregoing lengthy (but we believe necessary) discussion has clarified the bases for issue preclusion in these appeals. Provisionally it appears to us that, as discussed supra (see the first paragraph of Section E of this Opinion), very many of the issues Del-AWARE now raises are precluded by Del-AWARE I. Issue preclusion is an affirmative defense, however, whose burden of establishment falls on PECO and NP/NW in these appeals. Rule 1030 of the Pennsylvania Rules of Civil Procedure. On the other hand, Del-AWARE's identical broadside objections to each of these five appealed-from permit extensions (again see the first paragraph of Section E infra), even as amplified in Del-AWARE's pre-hearing memorandum, are sufficiently imprecise that PECO and NP/NW can be forgiven for not having identified precisely, with wholly convincing reasons, the specific issues raised by Del-AWARE which (according to PECO and/or NP/NW) are barred by the aforesaid issue preclusion rule §27.

NP/NW and PECO, via discovery, could have narrowed and clarified the bases for Del-AWARE's objections to the appealed-from permit extensions. Once again, however (recall our discussion of Del-AWARE's standing in Section C, supra), we believe the best way to proceed at this stage of these appeals is to order Del-AWARE to file a supplement to its pre-hearing memorandum listing, for each appeal, the objections it has to that appeal which (Del-AWARE sincerely believes) are not obviously precluded by Del-AWARE I in the light of our discussion supra. Moreover, although it is PECO's and NP/NW's burden to establish issue preclusion, Del-AWARE is ordered to state briefly for each objection on the foregoing list, why it believes that objection has not been precluded by Del-AWARE I; we believe this order, though somewhat unusual when the other side has the burden of establishing issue preclusion, is justified by the broadside fashion in which Del-AWARE has prosecuted these appeals to date. After Del-AWARE has filed this supplement to its pre-hearing memorandum, PECO and NP/NW will be given a reasonable time to renew and/or to supplement their motions to dismiss these appeals, in whole or in part, on grounds of issue preclusion. In the meantime, we defer any ruling on these motions.

Finally, we observe that DER's justification for extending these permits, rather than allowing them to lapse, unquestionably is an issue in these appeals. PECO argues that the standard for extension of construction contract permits such as these should be "good cause." Del-AWARE has not challenged PECO's advocacy of this standard. We find PECO's arguments in this regard persuasive. Therefore, in each appeal it will be Del-AWARE's burden to show that DER did not have good cause to grant the permit extension, where the elements of "good cause" are as discussed in PECO's pre-hearing memorandum and motion to dismiss, namely findings that PECO's and

NWRA's failures to complete these construction projects within the originally permitted time periods were not due to permittees' faults such as lack of diligence, lack of proper planning, etc., demonstrating that PECO and/or NWRA should not be entrusted with the responsibility for completing these projects. Sharp v. Pennsylvania Liquor Control Board, 405 A.2d 1341 (Pa.Cmwlth.1979). Del-AWARE has not yet alleged lack of good cause in any of these appeals, and under our rules and procedures we legitimately could decide that the issue of good cause now has been waived. However, in view of the complexity of the legal issues in these appeals, as discussed supra, we deem it appropriate to give Del-AWARE a last opportunity to plead lack of good cause. If Del-AWARE intends to contend that DER did not have good cause to extend any or all of these permits, it must timely supplement its pre-hearing memorandum with the pertinent allegations. We stress that the issues of "good cause" are wholly distinct from the issues Del-AWARE has raised thus far. In effect, Del-AWARE has been arguing that it would be an abuse of DER's discretion to allow completion of these construction projects by any permittee, however suitable. "Good cause" concerns whether these particular permittees should be allowed to continue their already-behind-schedule construction efforts.

O R D E R

WHEREFORE, this 26th day of August , 1986, it is ordered that:

1. The motions to dismiss some or all of the five appeals which have been consolidated under the above docket number, as having been taken from unappealable DER actions, are rejected; extension of the time to complete a construction project is an appealable DER action.

2. Rulings on the motions to dismiss some or all of these five appeals for lack of standing are deferred (see paragraphs 5-8 infra).

3. Motions to dismiss some or all of these five appeals on grounds of issue preclusion are rejected, in that the issue of whether there was "good cause" to extend the permits is pertinent to each of these appeals and was not precluded by our previous Del-AWARE I adjudication.

4. Despite paragraph 3, supra, it presently appears likely to the Board that very many of the issues raised by Del-AWARE in these appeals should be precluded from relitigation. For the present, however, rulings specifying the issues to be precluded are deferred (see paragraphs 5-8 infra).

5. Within thirty days of the date of this Order, Del-AWARE is to supplement its pre-hearing memorandum as follows, for each of these five appeals:

a. Del-AWARE shall state the specific factual allegations (including pertinent names and addresses of persons who were Del-AWARE members when the appeals was filed) which Del-AWARE believes warrant its standing.

b. Del-AWARE shall state its specific factual allegations, if any, tending to demonstrate that DER did not have good cause to extend the permit.

c. Del-AWARE shall list the specific issues (other than issues related to good cause or standing) which Del-AWARE sincerely believes Del-AWARE is not precluded from relitigation by Del-AWARE I; for each such issue, a brief but cogent explanation of the bases for Del-AWARE's belief must be included.

d. Del-AWARE shall list, with brief cogent explanations, aspects in which the extended permits allegedly are deficient because (Del-AWARE believes) they do not incorporate features which were required by the Del-AWARE I adjudication and under issue preclusion principles should not now have to be relitigated.

6. Within thirty days of the receipt of this supplement to Del-AWARE's pre-hearing memorandum, each of the other parties shall respond as follows, for each of these five appeals:

a. By filing new or renewed motions to dismiss the appeal for lack of standing; and/or

b. By filing new or renewed motions to preclude specific issues from the appeal; and/or

c. By petitioning for leave to engage in discovery on matters bearing solely on standing or issue preclusion, with the intention of filing additional motions--to dismiss for lack of standing or to preclude specific issues--after completing such discovery; such petitions must briefly explain, with reasonable particularity, why discovery is required; and/or

d. By registering objections to Del-AWARE's allegations under paragraph 5d supra.

7. Del-AWARE will have 15 days, absolutely no more, to respond to the parties' filings under paragraph 6 supra.

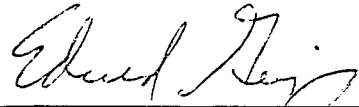
8. The Board will rule on the motions filed under paragraphs 6a and 6b as soon as possible after receipt of Del-AWARE's response called for in paragraph 7 supra; the Board will feel free to rule without the benefit of Del-AWARE's response if it is not timely received.

9. Unless very good cause to do otherwise is shown, the Board expects to allow discovery requests made in conformity with paragraph 6c supra; no other discovery will be permitted, however, until all questions of standing and issue preclusion are disposed of.

10. All parties, but especially Del-AWARE, are cautioned that the Board will impose sanctions if the filings called for above, or future filings, are not carefully and explicitly related to each of these five appeals. Although the appeals have been consolidated for the parties' and the Board's convenience in handling and in ultimate hearings on the merits, they remain distinct and individually complex. The Board has had great difficulty in coming to grips with the standing, issue preclusion, etc. issues in each of these appeals on the basis of the conglomerate filings received to date; we do not intend to again chart our course through a welter of undifferentiated claims and counterclaims relating to these five appeals. Del-AWARE's decision to file five identical notices of appeal was particularly unhelpful.

11. Within 10 days of the date of this Order, any party believing that facts stated in this Opinion are erroneous, and that correcting those errors would lead to modification of this Opinion, may petition the Board to correct those errors and modify the Opinion. Unless and until the Board grants such a petition, however, or stays some paragraphs of this Order, all the above paragraphs of this Order remain in effect.

**ENVIRONMENTAL HEARING BOARD**



**EDWARD GERJUOY, MEMBER**

**DATED:** August 26, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Louise S. Thompson, Esq.  
Eastern Region  
**For Appellant:**  
Robert J. Sugarman, Esq.  
Philadelphia, PA  
**For Neshaminy Water Resources Authority:**  
Lois Reznick, Esq.  
DECKERT, PRICE & RHOADS  
Philadelphia, PA  
**For Philadelphia Electric Company:**  
Troy Connor, Jr., Esq.  
Eugene Bradley, Esq.  
Philadelphia, PA  
**For North Penn and North Wales:**  
Jeremiah J. Cardamone, Esq.  
TIMONEY, KNOX, HASSON & WEAND  
Ambler, PA

b1





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

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 SECRETARY TO THE BOARD

KOCHER COAL COMPANY :

:  
 :  
 : DOCKET NO. 84-236-G

:  
 : Issued September 4, 1986

v. :

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Memoranda written by various DER personnel to DER counsel, containing information concerning actual or potential litigation and requesting advice, are protected from disclosure under the attorney-client privilege. Documents written by DER's counsel to DER personnel are not protected by the attorney-client privilege unless the contents of those documents would enable the reader to infer communications from the client (in this case DER personnel) to DER's counsel. Notes taken during a luncheon meeting of the officers of a trade association, without any indication that the meeting was held for the purpose of seeking legal advice, are not protected under the attorney-client privilege merely because counsel for the trade association was one of the attendees. A letter addressed by an officer of the trade association to numerous members of the association, announcing a conference, is not protected under the attorney-client privilege merely because counsel for the trade association was one of the recipients of the letter. In the absence of statutory or case law authority, the Board believes

it would be poor public policy to invoke DER's asserted "deliberative process privilege" as grounds for a protective order preserving documents from production under the discovery rules of the Pennsylvania Rules of Civil Procedure. The bare fact that counsel was consulted is not a communication falling under the attorney-client privilege, unless revealing the fact of consultation somehow would prejudice the client. Advice by appellant's counsel to the appellant, on a matter possibly related to the instant litigation, is protected under the attorney work product doctrine. The party seeking to withhold a document bears the burden of justifying its protection.

#### OPINION

DER and Kocher each have filed motions to compel the opposing party to produce documents which have been withheld on various asserted grounds. The parties have filed memoranda of law in support of their contentions, and have furnished the disputed documents to the Board for in camera inspection. We have performed an in camera inspection of the disputed documents, and proceed to rule.

#### I. Documents Withheld by Kocher

1. March 11, 1985 memorandum to file prepared by Kocher engineer Robert C. Dolenc. Kocher has produced all but a two-sentence paragraph of this one-page memorandum. Kocher claims the paragraph is protected by the attorney-client privilege. DER argues the paragraph should be produced because it is not protected by the attorney work product doctrine. Obviously there has not been a meeting of the minds.

The first paragraph of this memorandum describes a telephone conversation between Mr. Dolenc and a DER inspector concerning DER's desire to gain access to Kocher's property to conduct an inspection of some sedimentation ponds. The first

sentence of the withheld paragraph bears on this conversation, but discloses no information about the contents of the conversation. Indeed this first sentence discloses no information that can be termed a "communication"; if this first sentence discloses any information not already revealed by the portions of the document Kocher produced, that information (revealed by inference only) is merely that Mr. Dolenc was aware of the litigation and of the desirability of consulting with counsel. Although there is a paucity of case law on the issue, it does appear that the bare fact that counsel was consulted is not a communication falling under the attorney-client privilege, unless revealing the fact of consultation somehow would prejudice the client. U.S. v. Grand Jury Investigation, 401 F.Supp. 361 (D.C.Pa. 1975); In re Grand Jury Investigation, 631 F.2d 17 (1980), cert. den. Tinari v. U.S., 101 S.Ct. 869, 449 U.S. 1083. Kocher must disclose the first sentence of the withheld paragraph.

On the other hand, the second sentence of the withheld paragraph concerns advice offered by Kocher's attorney. Such advice is not protected by the attorney-client privilege unless its revelation would disclose the substance of the client's confidential disclosures to its attorney. Bradford Coal Company, Inc. v. DER, Docket No. 85-163-G (Opinion and Order, August 16, 1985, hereinafter "Bradford I"). But such advice, offered at a time when Kocher and DER were in litigation, on a matter possibly related to that litigation, deserves protection under the work product doctrine. Bradford Coal Company, Inc. v. DER, Docket No. 83-061-G (Opinion and Order, December 19, 1985, hereinafter "Bradford II"). Kocher need not disclose the second sentence of the withheld paragraph.

2. July 10, 1984 "Notes of Discussions Over Lunch".

The luncheon meeting was attended by Mr. Dolenc and Leon Richter, whom Kocher identifies as a Kocher "official"; Mazie Mohney, termed an executive of the

Anthracite Industry Association ("AIA"); Louis Pagnotti, identified as an official of an AIA member company and a member of AIA's board of directors; and two attorneys who are counsel for AIA. Kocher claims that this document is protected by the attorney-client privilege between attorneys for the AIA and members and executives of the AIA. DER asserts the document is not protected by the attorney-client privilege, being merely notes of a meeting between Kocher and third parties at which no Kocher attorney was present. DER also identifies Ms. Mohny as an energy consultant to the AIA, rather than as an AIA executive.

In deciding whether these notes of a luncheon discussion are protected, two principles must be borne in mind. First, in order that a communication to an attorney be protected under the attorney-client privilege, the communication must have been made to the attorney for the purpose of obtaining legal advice in the context of an attorney-client relationship; without such a purpose or relationship, there is no privilege. Okum v. Com. Unemployment Compensation Bd. of Review, 465 A.2d 1324, 77 Pa.Cmwlth. 386 (1983); Brennan v. Brennan, 422 A.2d 510 (Pa.Super. 1980). Second, the proponent of the privilege, in this case Kocher, has the burden of justifying its application, as Kocher itself maintains in its motion to compel production of the documents DER withheld. This document on its fact identifies the place of the meeting as "Catalanos", which the Board takes to be a restaurant. The notes of the meeting indicate that much of the discussion involved exchanges of information between the various AIA officials, rather than information offered to the two attorneys present for the purpose of obtaining legal advice. Kocher has not met its burden of showing that information of the sort just described, exchanged during lunch at a restaurant, deserves invocation of the attorney-client privilege, by Kocher as a member of AIA, merely because two of AIA's attorneys were part of the luncheon group. Insofar as the attorney-client privilege is concerned,

this document is discoverable. Kocher quite correctly has not invoked the work product doctrine to protect that portion of the document summarizing the attorney's statements, because the attorneys were counsel for AIA, not for Kocher in the instant litigation. This document must be produced.

3. October 3, 1984 letter from Mohney. The letter was written by Ms. Mohney, here identified as AIA "Commonwealth Representative", to various AIA officials and to AIA's counsel. On its face, the letter has been sent merely to inform the recipients of a meeting that has been scheduled; there is not the slightest suggestion that the information was provided to AIA's counsel to better enable him to render legal advice to AIA. Kocher already has produced notes taken at the meeting, which was attended by some thirty persons, including various DER officials and representatives of many coal companies. Under the circumstances, Kocher's claim that--merely because one of the recipients was AIA's counsel-- the letter advising the meeting had been scheduled falls under the attorney-client privilege is frivolous, and a regrettable waste of the Board's time. This document must be produced.

## II. Documents Withheld by DER

DER has refused to produce 46 documents, claiming that the documents withheld are covered by the attorney-client privilege and/or the "deliberative process privilege."

1. Attorney-Client Privilege Claims. Of the 46 documents withheld, DER claims 21 squarely fall under the attorney-client privilege. The Board, after examination of these 21 documents, concludes that all of them, excepting document No. 36 (documents are numbered in Exhibit A to the affidavit of DER Secretary De Benedictis accompanying DER's memorandum of law in support of its objections to producing the aforementioned 46 documents), are protected by the attorney-client

privilege. The protected documents all are either (i) addressed to DER's counsel from DER personnel, with questions or detailed information concerning matters relating to ongoing or possible litigation; or (ii) written by DER's counsel to DER personnel, in Obvious response to documents of the sort (i), and with details sufficient to infer the substance of the original communication to counsel from his client. As such, these documents clearly do fall under the attorney-client privilege, as discussed supra. Bradford I, supra. On the other hand, document No. 36, identified by DER as a one-paragraph memorandum from the Chief of DER's Bureau of Water Quality Management to DER's Deputy Secretary for Environmental Protection and to two of DER's attorneys, actually appears to be written to the Chief, Bureau of Water Quality from the other three persons. We are forced to accept the document on its face; a memorandum co-authored by a non-attorney and (as is the case for the instant document) containing no information about confidential communications to DER counsel does not fall under the attorney-client privilege.

DER also has made a general claim of attorney-client privilege, without supporting argument, respecting those documents which we have not yet mentioned. Our examination of those other documents discloses three, Nos. 17, 18 and 30, which were written by DER personnel to DER counsel (No. 17, like No. 36, apparently was mislabeled in the index attached to Secretary DeBenedictis' affidavit), and which also clearly fall under the attorney-client privilege. We do not understand why DER's memorandum of law did not specifically include Nos. 17, 18 and 30 among the documents "squarely" falling within the attorney-client privilege, but we do not feel it would be fair for us to allow this inadvertence to override an important long-established privilege, which after all was generally asserted for all the withheld documents.

In summary, documents Nos. 1, 3, 4, 7, 9, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, 38 and 43 fall within the attorney-client privilege. The other documents do not. Kocher correctly argues, citing Bradford II, supra, that if only a portion of a document contains privileged information the remainder of the document must be produced. However the Board sees no way to redact these 23 just-listed protected documents so that portions of the documents can be produced without revealing privileged information; these 23 documents can be withheld in toto by DER.

2. Deliberative Process Privilege Claims. According to DER, all the documents withheld fall under the deliberative process privilege, which according to DER "includes matters relating to forms of government information, disclosure of which would be injurious to the consultative functions of government." DER cites only two Pennsylvania cases in support of its argument, issued in 1815 and 1878. Kocher argues that the deliberative process privilege is inapplicable to the above-captioned matter.

We totally agree with Kocher. Many privileges limiting evidence which may be elicited in Pennsylvania civil proceedings are statutory. 42 Pa.C.S.A. §§5921-5945.1. The "deliberative process privilege" is not listed under the just cited statutes. DER has pointed to no reasonably recent on point Pennsylvania decisions which would provide judge-made authority for its assertion of a deliberative process privilege in civil actions such as the instant appeal. As Kocher argues, the deliberative process privilege appears to reflect language in the Freedom of Information Act ("FOIA"), 5 U.S.C. A. §§550 et seq., by which this Board is not bound. We discern no deliberative process privilege in the Pennsylvania Right to Know Act, 65 P.S. §§66.1 et seq., which can be regarded as this Commonwealth's version of the FOIA. In fact, although we by no means are making

a definitive ruling, it appears to us that many of the documents DER seeks to withhold would be obtainable under the Right to Know Act. Documents obtainable under the Right to Know Act by any citizen who requests them surely must be obtainable under the discovery rules of the Rules of Civil Procedure by a party to whose appeal those documents are relevant. Pa.R.C.P. Rule 4003.1.

In this connection we remark that DER has not objected that the withheld documents are irrelevant; DER has rested its claims that the documents should not be produced on the attorney-client privilege (which we already have discussed) and on the deliberative process privilege under present discussion. Therefore, although we have some doubts that DER policy memoranda written over ten years ago (a category into which a full half of the withheld documents fall) have any real relevance to our de novo adjudication of this appeal, our ruling on the instant discovery dispute must deem the documents relevant, i.e., must deem waived any DER objections that they are irrelevant.

Returning now to DER's attempt to invoke the deliberative process privilege (and wholly ignoring any implications of the Right to Know Act which we admittedly may be misreading), the real issue is whether--in the absence of statutory or case law supporting a deliberative process privilege--DER's public policy argument that disclosure of the documents would negatively affect its ability to freely deliberate on policy questions should override the public policy objective of the Pennsylvania discovery rules, which obviously seek to ensure that every litigant is able to present its best possible case to the finder of fact, even if preparation of its case depends on information in the possession of an opposing party. DER's argument is not frivolous, but--again in the absence of statutory or case law authority--we do not believe that DER's laudable desire for



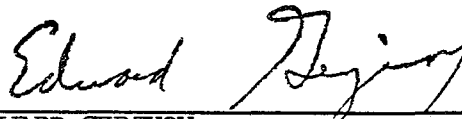
totally untrammelled policy deliberations should override the even more laudable principle that insofar as is reasonably possible the finder of fact in a judicial dispute should have the benefit of all relevant facts. Adherence to this principle is especially important when the party seeking disclosure is appealing a governmental action, as in some of the appeals which have been consolidated under the above-captioned docket number. Under our democratic system of government, of which we are justly proud, a governmental agency should be able to defend its discretionary actions on the merits, without reliance on its ability to withhold information on grounds other than well-established privilege. The attorney-client principle is well established, and we have upheld DER's withholding of 23 documents on that basis. The deliberative process privilege is not well established in Pennsylvania. All withheld documents not falling under the attorney-client privilege must be produced by DER.

O R D E R

WHEREFORE, this 4th day of September, 1986, it is ordered that:

1. DER need not produce documents Nos. 1, 3, 4, 7, 9, 11, 13, 15-26, 29, 30, 38 and 43 (identified in Exhibit A to Secretary DeBenedictis' affidavit).
2. DER must fully produce the other documents it has withheld.
3. Kocher must fully produce the three documents it has withheld (described in the accompanying Opinion), with the exception of the second sentence of the previously withheld paragraph in Robert Dolenc's March 11, 1985 memorandum to file.
4. The parties are reminded of the time limits set in paragraphs 4-6 of the Board's Order of March 19, 1986.

ENVIRONMENTAL HEARING BOARD



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EDWARD GERJUOY  
Member

cc: Bureau of Litigation  
Timothy J. Bergere, Esq., for DER/Western  
Martin H. Sokolow, Jr., Esq. for DER/Central  
For Appellant:  
Stephen C. Braverman, Esq. and  
Charles E. Gutshall, Esq.  
BASKIN, FLAHERTY, ELLIOT AND MANNINO, P.C.  
Philadelphia, PA  
  
Allen Shaffer, Esq.  
Millersburg, PA

DATED: September 4, 1986



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

NORTH CAMBRIA FUEL COMPANY :

:

:

DOCKET NO. 85-297-G

:

Issued September 5, 1986

:

v.

COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

A Motion for "Final Judgment", filed by a party after it has nearly completed its case-in-chief at a hearing on the merits of an appeal, but before the other party has begun to present its case, and relying on deposition testimony as well as testimony at the hearing on the merits by the moving party's own witnesses, is rejected as an untimely motion for summary judgment. The moving party's arguments that recent Board adjudications entitle the movant to judgment in its favor as a matter of law can be made in a motion in limine, to limit the other party's testimony on the grounds that the recent Board adjudications have made much of that intended testimony irrelevant.

OPINION

We rule on DER's Motion for "Final Judgment" in this matter, filed September 2, 1986. Four days of hearings on the merits of this matter already have been held, during the week of May 5, 1986, and the hearings are scheduled to resume

on December 8, 1986. DER, which had the burden of production, may or may not have completed its case. North Cambria Fuel ("NCF") has not yet put on its case. DER's motion asserts in effect that recent Board decisions control this matter, and so obviously require the Board to rule in DER's favor that additional hearings are not necessary. In so arguing, DER cites DER v. Lawrence Coal Company, Docket No. 81-021-CP-M (Adjudication, May 27, 1986); Hepburnia Coal Company v. DER, Docket No. 85-309-G (Adjudication, May 28, 1986); William J. McIntire Coal Company v. DER, Docket No. 83-180-M (Adjudication, July 7, 1986).

As it happens, the Board has granted petitions for reconsideration in both Lawrence and McIntire, supra, although the Board has not yet ruled on the ultimate merits of either petition; i.e., the Board has not yet decided whether revision of either Lawrence or McIntire adjudication is required. Thus, although the Lawrence and McIntire adjudications certainly are valid Board precedent unless and until revised, reliance on these decisions to put NCF out of court before NCF has had a chance to put on its case seems questionable, especially when DER's motion is relying very largely on deposition testimony by NCF's mine superintendent Terrence J. Smith and NCF's expert witness Dr. Edgar Meiser, Jr., which testimony will not be admissible at the hearing on the merits.

Irrespective of how much reliance the Board should be placing on the presently under reconsideration McIntire and Lawrence decisions, DER's motion appears to be procedurally inappropriate. In effect, DER is asking for summary judgment. It is clear from Rule 1035 of the Rules of Civil Procedure that a motion for summary judgment should be made before hearings begin. On rare occasions, summary judgment may be warranted after hearings have begun but before both parties have been able to fully present their testimony. William Fiore v. DER, Docket No. 83-160-G, 1984 EHB 643, aff'd 508 A.2d 371 (Pa.Cmwlth. 1986). In Fiore the Board suspended the

hearing on the merits of Fiore's appeal before Fiore had put on his case, but only after the parties and the Board had agreed the matter could be decided as a matter of law on summary judgment. Furthermore, the Board rendered its decision in Fiore solely on the basis of facts which had been established as res judicata in an earlier Commonwealth Court hearing; the Board's Fiore decision did not rely on deposition testimony, nor on any DER testimony during the Fiore hearing before the Board. In the instant motion, DER is relying not only on deposition testimony but also on testimony by its own witnesses at the hearing (namely DER inspector Thomas McKay and DER hydrogeologist Randy Wood) before NCF has had the opportunity to rebut this testimony.

It may be DER correctly asserts that there are undisputed facts already on the record in this matter which warrant judgment in its favor as a matter of law, but once the hearings have begun neither DER nor the Board can rely on deposition testimony to establish such facts, and surely the Board cannot rely on DER's testimony at the hearing without awaiting NCF's testimony. Once the Board has ruled on the merits of the McIntire and Lawrence petitions for reconsideration, it may be appropriate to have a motion in limine from DER, to limit NCF's testimony at the hearing on the grounds that recent Board decisions have made irrelevant much of the testimony NCF plans to offer. When the hearings resume, it also may be appropriate for DER's counsel to request an offer of proof from NCF's counsel, with the specific intent of determining whether NCF intends to rebut the testimony from DER's witnesses which DER believes conclusively establishes DER's right to judgment in its favor. Possibly the Board's rulings on such motions and requests will make unnecessary much of NCF's presently planned testimony.

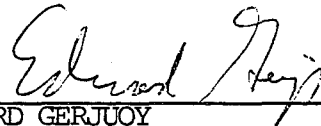
In fairness to NCF, any future DER motions in limine should be made in writing and should be served on NCF and on the Board at least thirty (30) days before the hearing is scheduled to resume; if so served, NCF may, but need not,

respond in writing within the Board's usual 20-day period specified in our Pre-Hearing Order No. 2. The Board reserves the right to schedule oral argument on any such motion, either before the hearing resumes or at the opening of the hearing.

O R D E R

WHEREFORE, this 5th day of September, 1986, DER's Motion for Final Judgment in this matter is denied. The Board will accept motions in limine from DER, consistent with the foregoing Opinion, if made in writing not less than thirty (30) days before the hearing on the merits of this appeal recommences.

ENVIRONMENTAL HEARING BOARD



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EDWARD GERJUOY  
Member

DATED: September 5, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Michael E. Arch, Esq.  
Western Region

For Appellant:  
Beverly A. Gazza and John Bonya, Esqs.  
MACK AND BONYA  
Indiana, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

WEST FREEDOM MINING CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
 :  
 : DOCKET NOS. 85-491-G  
 : 85-492-G  
 : 85-493-G  
 : 85-494-G

Issued: September 8, 1986

OPINION AND ORDER

Synopsis

When the Board has dismissed a number of bond forfeiture appeals for failure to file a pre-hearing memorandum after repeated reminders and warnings of possible dismissal, a letter from a previously unheard of attorney, received after the last deadline for filing the pre-hearing memorandum had passed, stating that appellant's original counsel of record in these appeals no longer represents appellant, but going on to say that the writer of the letter is not appellant's new counsel in these appeals but nevertheless requests an indefinite extension of time to file the pre-hearing memorandum until new counsel "has been retained and given reasonable time to review the file," does not justify vacating the previously prepared dismissal orders. However, because the Board wishes to be fair, the appellant is given leave to file a petition for reconsideration of the dismissals, within the time limit set by the Board's rules for such petitions, 25 Pa.Code §21.122, but without the limitations on the allowable reasons for reconsideration which §21.122 prescribes.

## OPINION

The above-captioned appeals have been dismissed in an accompanying Opinion and Order of this date, at Docket No. 85-426-G, which amply details the continued disregard of the Board's orders which led the Board to dismiss the above-captioned appeals. On August 18, 1986, after the aforesaid Opinion and Order at 85-426-G had been prepared, but before it had been typed and mailed to the parties, the Board received a letter from attorney Kurt S. Rishor, stating:

1. Robert O. Lampl, who to the Board's knowledge always has been West Freedom's counsel in the above-captioned appeals, no longer represents West Freedom.
2. Attorney Rishor represents West Freedom in its Chapter 11 Bankruptcy case, but does not represent West Freedom in the above-captioned appeals.
3. West Freedom does not yet have new counsel, to replace Mr. Lampl, in the above-captioned appeals.
4. West Freedom requests an extension of time to file a pre-hearing memorandum "until counsel for West Freedom has been retained and has been given reasonable time to review the case."

The Board recognizes that the above-captioned appeals involve considerable sums of money. We also recognize that the sanction of dismissal should be imposed reluctantly on appellants of bond forfeitures, wherein DER bears the burden of proof. Penn Minerals Company v. DER, Docket No. 85-221-G (Opinion and Order, July 31, 1986). Our 85-426-G decision to dismiss these appeals was taken in full awareness of such considerations. Our review of the 85-426-G Opinion and Order convinces us that the decision to dismiss was correct under the facts detailed therein. The question before us now is whether Mr. Rishor's letter adds new facts which would justify our vacating the 85-426-G dismissal Order. We think not, for the following reasons.

As of this date, Mr. Lampl has not withdrawn his appearance in these



appeals; in the Board's files he still is listed as West Freedom's counsel of record. Mr. Rishor has not filed an appearance. Granting, however, that Mr. Rishor is authorized (as he asserts) to act for West Freedom in its Chapter 11 Bankruptcy case, and to dismiss Mr. Lampl as counsel in the above-captioned appeals, Mr. Rishor has not explained why new counsel for West Freedom has not filed an appearance in these appeals, nor when (if ever) we may expect such appearance, nor why West Freedom has so long been represented by counsel who have not obeyed the Board's orders, nor why Mr. Rishor's letter requesting a wholly indefinite extension of time was not written early enough to be received by the Board no later than August 15, 1986, our previous deadline date for filing of West Freedom's pre-hearing memorandum.<sup>1</sup> Once again, as the instant Opinion and Order demonstrates, West Freedom's continued failure to follow the Board's rules has forced the Board to expend valuable time on West Freedom's appeals, which time could have and should have been profitably spent on appellants who have not flouted the Board's rules.

Therefore, we shall not vacate our 85-426-G dismissal of these appeals on the sole grounds of Mr. Rishor's August 18, 1986 letter. West Freedom has the right to request reconsideration of the dismissals however, under the Board's rules, 25 Pa.Code §21.122. If West Freedom finds counsel who can file their appearance with the Board and request reconsideration within the 20-day time limit set by §21.122, the Board will seriously consider West Freedom's arguments,

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<sup>1</sup>We add that although Mr. Rishor's letter, dated August 14, 1986, states, "This letter is to confirm my conversation this date with your secretary in Harrisburg regarding the above referenced matter," no member of our Harrisburg office recalls such a conversation, and there is no indication of any such conversation on the docket card for these appeals. In any event, paragraph 3 of our Pre-Hearing Order No. 2, issued under the docket number 85-426-G at which these appeals formerly were consolidated, states that requests for extensions of time must be made in writing and must specify the desired duration of the extension.

if any, for vacating our 85-426-G Order dismissing these appeals. We do not wish to be unfair to West Freedom; it is possible that the facts do warrant our vacating our 85-426-G Order. But it now is up to West Freedom to convince us that our 85-426-G Order should be vacated. We add, again because we wish to be completely fair to West Freedom, that West Freedom's arguments for vacating the dismissals of the above-captioned appeal need not be limited by the criteria set forth in 25 Pa.Code §21.122, because those criteria seem unsuited to requests for reconsideration under the special circumstances forming the subject of this Opinion and Order.

#### ORDER

WHEREFORE, this 8th day of September, 1986, it is ordered as follows:

1. The Board's Order of September 8, 1986 at Docket No. 85-426-G, dismissing the above-captioned appeals, is affirmed.
2. However, West Freedom is given leave to petition for reconsideration of these dismissals, via a timely petition for reconsideration by counsel appearing for West Freedom in these appeals.
3. Such a petition for reconsideration must meet the 20-day deadline set by 25 Pa.Code §21.122, but its substantive arguments need not be restricted as set forth in §21.122.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

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MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

---

EDWARD GERJUOY, MEMBER

*William A. Roth*

---

WILLIAM A. ROTH, MEMBER

**DATED:** September 8, 1986

**cc:** Bureau of Litigation, Harrisburg  
For the Commonwealth, DER:  
Timothy J. Bergens, Esq., Western Region  
**For Appellant:**  
Robert O. Lampl, Esq., Pittsburgh  
Kurt S. Rishor, Esq., Butler



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MID-CONTINENT INSURANCE COMPANY	:	
	:	
v.	:	DOCKET NO. 85-426-G
	:	(Consolidated appeal)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 8, 1986

OPINION AND ORDER

Synopsis

Four consolidated appeals of bond forfeitures are dismissed for failure to file a pre-hearing memorandum, when the Board has sent the appellant two certified letters warning of possible dismissal for failure to file, when the appellant has made no response to any of the warnings, and when the total time that has elapsed from the deadline date set by the first certified letter exceeds five months.

OPINION

This is a consolidated appeal. Included under the above docket number are the appeals of West Freedom Mining Corporation ("WFMC") at Docket Nos. 85-491-G, 85-492-G, 85-493-G and 85-494-G. The original appeal at Docket No. 85-426-G was filed by Mid-Continent Insurance Company ("MCIC"). MCIC is appealing DER's forfeiture of Bond No. BD2294 for \$115,000 posted by WFMC in connection with WFMC's surface mining operations, on which bond MCIC was surety. This bond is one of four bonds forfeited by DER in a letter to WFMC, which letter was appealed by WFMC at Docket No. 85-492-G. The other three

bonds included in the WFMC appeal at 85-492-G, and the fifteen bonds included in the WFMC appeals at 85-491-G, 85-493-G and 85-494-G, all also are surety bonds, but from sureties other than MCIC. Those other sureties have not appealed any of the WFMC bond forfeitures, although--according to DER's (appealed-from by WFMC) forfeiture letters--all such sureties were notified of the forfeitures by certified mail.

WFMC and MCIC are represented by separate counsel in these appeals. Therefore, on December 13, 1985, when the five appeals were consolidated under the above docket number, MCIC and WFMC were informed that they might file a joint pre-hearing memorandum if they wished, but that otherwise each party would be required to file its own pre-hearing memorandum. Due dates for these filings were set in our December 13, 1985 Order. The parties never informed the Board whether they intended to file jointly or separately, and by March 10, 1986 all pre-hearing memoranda (separate or joint) were well overdue. Consequently the Board, on March 10, 1986, sent individual certified letters, return receipt requested, to MCIC and WFMC, advising them that sanctions, including dismissal of their appeals, might be imposed unless the pre-hearing memoranda were filed by March 25, 1986. The return receipts from MCIC and WFMC have been received, but the pre-hearing memoranda have not yet been filed. Starting on March 24, 1986, however, four requests for extensions of time to file its pre-hearing memorandum were received from MCIC. These requests all were granted; the last extension was to July 25, 1986.

Nevertheless, on August 4, 1986 no pre-hearing memorandum had been received from either party and no request for extension of time had been filed. On August 4, 1986, therefore, each party again was sent an individual certified

letter, warning of possible sanctions including dismissal if pre-hearing memoranda were not filed by August 15, 1986. Again, the receipts from MCIC and WFMC have been returned to the Board. On August 15, 1986, MCIC filed a request for another 30-day extension of time to file its pre-hearing memorandum, asserting that DER had no objection to the extension and that settlement negotiations were in progress. WFMC has not asked for an extension of time. Indeed WFMC never has given the slightest indication that it is aware of the need to file its pre-hearing memorandum, even though it received our warning letters. WFMC never has indicated that it expects, or has reason to believe, that MCIC's pre-hearing memorandum (pertinent solely to the forfeiture of Bond No. BD2294) could serve as WFMC's pre-hearing memorandum (which presumably would pertain to the other 18 bonds WFMC also has appealed).

The Board has neither the time nor the inclination to continually remind appellants of their obligations to file pre-hearing memoranda. The Board by now has issued four Orders granting MCIC extensions of time, and has mailed MCIC two certified letters warning of possible default, but we still don't have MCIC's pre-hearing memorandum. We see no reason to believe that this new request for a 30-day extension of time will produce an MCIC pre-hearing memorandum at the end of that interval. However, since MCIC did file its latest extension request by the August 15, 1986 deadline, and since the Board never had stated explicitly that no additional extensions would be granted, we will grant MCIC this last extension, with the stern warning that we absolutely will not grant any additional extensions. Even though MCIC may be close to a settlement, unless it actually has come to a settlement it must file its pre-hearing memorandum within thirty days or face sanctions. We simply cannot continue to lavish unproductive time on MCIC's appeal.

As for WFMC, it is obvious that this appellant has flagrantly ignored the Board's orders. Had WFMC filed its pre-hearing memorandum on or before our last August 15, 1986 deadline date, we might not have imposed sanctions, even though WFMC never had requested an extension of time from our earlier March 25, 1986 deadline date, now more than five months past; after all, we had been granting extensions of time to MCIC. Under the actual circumstances, however, namely that WFMC has not filed its pre-hearing memorandum nor (like MCIC) made a timely request for an extension of time beyond August 15, 1986, we see no reason to devote any more Board time whatsoever to WFMC's appeals. Although DER has the burden of proof in these bond forfeitures, the Board has not hesitated to dismiss appeals of bond forfeitures for flagrant disregard of Board orders, as in the instant WFMC appeals. See Penn Minerals Company v. DER. Docket No. 85-221-G (Opinion and Order, July 31, 1986) and citations therein.

#### O R D E R

WHEREFORE, this 8th day of September, 1986, it is ordered that:

1. The appeals which have been consolidated under the above-captioned docket number are unconsolidated.
2. West Freedom Mining's appeals, originally docketed at Nos. 85-491-G, 85-492-G, 85-493-G and 85-494-G, are dismissed.
3. The only remaining matter under the above captioned docket number is Mid-Continent's appeal--and only Mid-Continent's appeal--of the forfeiture of Bond No. BD2294.
4. Unless a settlement agreement pursuant to 25 Pa.Code §21.120 has been filed, Mid-Continent's pre-hearing memorandum is due thirty days from the date of this Order.

5. Failure to meet the requirement set forth in paragraph 4 of this Order will result in dismissal of Mid-Continent's appeal; the Board will not grant any further extensions of time for Mid-Continent to file its pre-hearing memorandum, and will not give Mid-Continent any further warnings that failure to file its pre-hearing memorandum will mean dismissal of its appeal.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

*Edward Gerjuoy*

**EDWARD GERJUOY, MEMBER**

*William A. Roth*

**WILLIAM A. ROTH, MEMBER**

**DATED:** September 8, 1986

**cc: Bureau of Litigation, Harrisburg  
For the Commonwealth, DER:  
Timothy J. Bergere, Esq./Western Region  
For Appellant (Mid-Continent Insurance):  
David J. Flower, Esq.  
YELOVICH & FLOWER, Somerset  
For Appellant (West Freedom Mining):  
Robert O. Lampl, Esq., Pittsburgh  
Kurt S. Rishor, Esq., Butler**





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

WILLIAM J. McINTIRE COAL COMPANY, INC. et al. :

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
 : DOCKET NO. 83-180-G  
 :  
 :  
 : Issued: September 8, 1986  
 :

OPINION AND ORDER  
SUR PETITION FOR RECONSIDERATION

Synopsis

In order that jurisdiction of this matter might be retained under Rule 1701(b) of the Pennsylvania Rules of Appellate Procedure, the Board previously had granted a petition for reconsideration of its July 7, 1986 adjudication of this appeal, with the proviso that the grant of reconsideration carried no implications as to the merits of appellants' arguments for modification of the July 7, 1986 adjudication. The Board now has reviewed appellants' arguments, and wholly affirms its previous adjudication. Appellants' argument that the Board's adjudication should have taken into account an alleged unwritten DER policy--concerning the treatment of post-mining discharges which existed pre-mining--is deemed waived in that no mention of this policy was made in appellants' post-hearing briefs; moreover, such an unwritten policy, even if proved, could not overrule the statutory language which, in the Board's view, makes the appellants responsible for treating the post-mining discharges which

are the subject of this appeal. Appellants' argument that the Board should not have rendered its adjudication from the record made by a former Board member who completed the hearings and viewed the mining site, but who resigned before preparation of the adjudication commenced, is rejected. Appellants did not request new hearings in the five-month interval between the former Board member's resignation and the issuance of the July 7, 1986 adjudication; appellants have not offered any reasons, other than their dislike of the adjudication's result, why the Board should have departed from its regular practice of preparing adjudications from the record after resignation of the Board member who made the record.

#### OPINION

The appellants have filed a timely petition for reconsideration of our adjudication of the above-captioned appeal, issued July 7, 1986. That adjudication dismissed four appeals which had been consolidated under the above docket number. Appellants' petition argues:

1. The Board did not take into account the existence of an allegedly well known unwritten DER policy, to the effect that the operator of a surface mine would not be held responsible for treating a post-mining discharge emanating from the mine site if the discharge had existed pre-mining and if there was no evidence the post-mining discharge was worse than the pre-mining discharge in quantity or quality.

2. The Board's decision was prepared from the record made by former Board Member Anthony J. Mazullo, Jr., who had completed hearings on the merits of the consolidated appeal and had viewed the site, but who had resigned from the Board on January 31, 1986, before preparation of the July 7, 1986 adjudication commenced.

3. The Board's adjudication is contrary to law, particularly in its interpretations of the Pennsylvania Supreme Court's holdings in Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed 415 U.S. 903, and in Barnes and Tucker Company v. Commonwealth, DER, 435 Pa. 392, 319 A.2d 871 (1974).

The appellants therefore petitioned the Board (i) to reconsider its July 7, 1986 adjudication and (ii) after granting reconsideration to issue an Order:

(a) Reopening the record for the purpose of hearing testimony pertinent to the aforesaid alleged DER policy and to appellants' allegations that the post-mining discharge was not worse than the pre-mining discharge in quantity or quality; or

(b) Vacating the July 7, 1986 adjudication in its entirety, with the intent of holding a new full hearing on the merits by a presently sitting Board member, who would be able to view the site and independently judge witness credibility; or

(c) Modifying the July 7, 1986 adjudication to correct (i) the Board's misinterpretations of Harmar and of Barnes and Tucker, supra, and (ii) the Board's failure to take into account DER's alleged policy concerning liability for pre-mining discharges.

Appellants' petition for reconsideration was filed on the last possible day under the Board's rules, which require that such a petition be filed within 20 days after a decision is rendered. 25 Pa.Code §21.122. In this case the 20th day fell on a Sunday, so that the petition actually was filed on the 21st day after July 7, 1986, still timely however under 25 Pa.Code §21.11 and 1 Pa.Code §31.12. The Board's normal practice, stated in paragraph 6 of the Board's Pre-Hearing Order No. 1 issued in the appeal at the above docket number, is to allow 20 days for responses to petitions. On the other hand, as the appellants' petition for reconsideration recognized, if the appellants were to file a timely appeal of our July 7, 1986 adjudication, then--under Pa. Rules of Appellate Procedure Rule 1701(b)(3)--a decision by us to grant reconsideration

of our July 7, 1986 adjudication could not be delayed for the full 20 days of DER's allowed time to respond to appellants' petition.

On July 30, 1986, therefore, we granted reconsideration within the 30-day period specified by R.A.P. Rules 1512(1) and 1701(b)(3), with the proviso that our grant of reconsideration carried no implications as to the merits of appellants' petition, pending receipt of DER's response. Nevertheless the appellants appealed our July 7, 1986 adjudication to Commonwealth Court on August 4, 1986. Although this appeal was timely under R.A.P. Rule 1512(1), in our view this appeal to Commonwealth Court has been rendered nugatory by our July 30, 1986 grant of reconsideration, under the language of R.A.P. Rule 1701(b). In other words, we believe that under the Rules of Appellate Procedure we have retained jurisdiction over appellants' petition for reconsideration, and--having timely received DER's response--now can proceed to rule on the merits of that petition.

We must examine appellants' petition in the light of our Rule 122, 25 Pa.Code §21.122, which reads as follows.

§21.122. Rehearing or reconsideration.

(a) The Board may on its own motion or upon application of counsel, within 20 days after a decision has been rendered, grant reargument before the board en banc. Such action will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:

(1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.

(2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

On the criteria of §21.122, we do not believe the appellants' request for reconsideration is merited, for reasons which we now detail.

We have carefully reviewed the parties' post-hearing briefs. DER and the appellants each filed their original post-hearing briefs on the same day, July 5, 1984. Each of these briefs contained proposed Findings of Fact and Conclusions of Law, as required by our rules, 25 Pa.Code §21.116(b). The appellants' post-hearing brief--whether in its proposed Findings of Fact and Conclusions of Law, or in its discussion--makes no reference whatsoever to DER's allegedly "well known" policy concerning post-mining discharges which existed pre-mining and were not worsened by mining. DER's post-hearing brief clearly argues (i) that the appellants' responsibility for treating post-mining discharges emanating from land which the appellants had mined stems from the language of Section 315(a) of the Clean Streams Law, and (ii) that this responsibility is not relieved by any showing that the discharges existed pre-mining and were not worse post-mining than pre-mining, in quantity or quality. For example, DER's proposed Conclusions of Law Nos. 26, 38 and 44 state:

26. The prohibition against unauthorized discharges in 35 P.S. §691.315(a) applies to all discharges from a mine regardless of the source of the pollution. Even if an operator is not responsible for polluting all the water discharging from its mine, the operator is nevertheless responsible for treating all water which discharges from its mine.

38. The imposition of liability of a mine operator to abate post-mining AMD is not dependent on the conduct of the operator in the operation of the mine, but stems entirely from the fact that a mine was operated.

44. The Department is not required to prove that the pre-existing discharges at the Heilman Mine were made worse as a result of the McIntires' surface mining operations in

order to prove that the McIntires are responsible for the existing post-mining discharges.

Nevertheless the appellants did not file any response to DER's post-hearing brief. DER filed a response to the appellants' post-hearing brief; this reply brief of DER's reiterated DER's claim that the appellants were liable for treating the discharges simply because the discharges were flowing from the mining site. The appellants did file a response to DER's reply brief. This two-page response reads, in pertinent part:

After reading appellee-DER's Reply Brief to the post-hearing Memorandum of Law filed on behalf of R. G. McIntire Coal Co., Inc., et al., ("appellants-McIntire"), and after a careful and detailed review of appellants-McIntire's Proposed Findings of Fact and Conclusions of Law, it is appellants' decision not to file a further reply brief in response to appellee-DER's Reply Brief. This is simply for the reason that anything further that might be said in this case would be repetitive.

Only one other comment with respect to the DER's Reply Brief is necessary or appropriate. The true thrust of the DER's argument in this case is that William J. McIntire Coal Co., Inc., should be required to treat and abate the preexisting AMD from the Heilman Site. This argument is reiterated by the DER on page 5 of its Reply Brief, where it is stated:

"In fact, Special Condition 15 of the permit required the treatment of all gravity drainages encountered from previous mining until elimination."

This is a last desperate attempt by the DER to impose liability on McIntire by contending that Special Condition 15 required McIntire to treat and abate all preexisting mining discharges. DER could not and did not meet its burden of proof in demonstrating to your Honorable Board that the activities of McIntire adversely affected or worsened the preexisting discharge, so appellee now takes the position that McIntire was required to abate or treat it in any event. This spurious argument is answered in detail on page 66 of Appellants' Memorandum of Law.

As already mentioned, however, neither page 66 nor any other page of appellants' post-hearing brief makes any mention of the aforementioned alleged

DER policy.

On these facts we conclude that we had no basis whatsoever for giving consideration to DER's alleged policy when preparing our July 7, 1986 adjudication. The appellants' post-hearing filings never had called the possible existence of such a policy to our attention, though they had ample opportunity to do so. Therefore, in accordance with well established post-trial and appellate procedures, issues connected with this alleged DER policy are deemed waived. Schneider v. Albert Einstein Medical Center, 257 Pa.Super. 348, 390 A.2d 1271 (1978); Equipment Finance, Inc. v. Toth, 476 A.2d 1366 (Pa. Super. 1984); Robert Kwalwasser v. DER, Docket No. 84-108-G (Adjudication, January 24, 1986). Moreover, even if the possible existence of the policy had been raised, it would not have altered our July 7, 1986 rulings. The policy, whether written or unwritten, could not overrule the enforcement clauses of enacted statutes, such as §315(a) of the Clean Streams Law, 35 P.S. §691.315(a), on which our July 7, 1986 adjudication primarily relied. If we have wrongly interpreted §315(a), together with Harmar and/or Barnes and Tucker, supra, then perhaps the testimony [listed as (a), supra] appellants seek to present would be relevant to these appeals if such testimony has not been irrevocably waived. But we do not believe we have misinterpreted the applicable law. We conclude, therefore, that appellants' argument 1, supra, warrants neither reargument nor reopening of the record under the criteria of 25 Pa.Code §21.122.

Appellants' argument 3, supra, though perhaps grounds for reversal of our adjudication by the Commonwealth Court, obviously does not meet the criteria of §21.122. Thus there remains only appellants' argument 2. In essence appellants are arguing that the Board should have recognized before preparing

the July 7, 1986 adjudication--and should now admit--that a proper adjudication of these appeals could not be rendered solely from the record made by Mr. Mazullo, without actually hearing the testimony and viewing the site. This is not an argument which falls under the criteria of §21.122, but rather amounts to a claim that the July 7, 1986 adjudication somehow violated due process requirements. We agree that appellants are entitled to due process, but we do not see how appellants' due process entitlements have been violated. As DER's response to appellants' petition for reconsideration points out, the appellants have not pointed to a single Finding of Fact in our July 7, 1986 adjudication which was wrong or even merely misstated because we had to prepare our Findings of Fact from the record. The appellants have not pointed to any case law which would require the Board to hold a full rehearing once Mr. Mazullo had resigned before preparing an adjudication of these appeals.

Most importantly, the post-hearing briefs and responses thereto all had been filed by September 6, 1984. Mr. Mazullo resigned on January 31, 1986. The appellants surely must have expected that the Board would attempt to reassign and adjudicate Mr. Mazullo's completed (except for adjudication) appeals as soon as possible, and that their appeals--whose adjudication had been so long delayed--would be high on the list for reassignment and adjudication. Yet until our July 7, 1986 adjudication was issued, fully five months after Mr. Mazullo's resignation, the appellants never informed the Board that in their opinion a full rehearing was required. Instead the appellants waited contentedly for our July 7, 1986 adjudication to appear, and only thereafter--having found the adjudication not to their liking--made the argument that a full rehearing was required. On these facts, we must conclude that the appellants acquiesced in our preparation of the adjudication from the record



made by Mr. Mazullo, so that they should not now be allowed to argue that new hearings are required. We doubt that the appellants would have made the argument being discussed if we had sustained their appeals. In adjudicating these appeals from the record the Board has done nothing unusual; such always has been the Board's practice when Board members have resigned. See, e.g., Lower Paxton Township Authority v. DER, Docket No. 80-205-W, 1982 EHB 111. We already have adjudicated other appeals from the record made by Mr. Mazullo before he resigned. See, e.g., Lower Providence Township v. DER, Docket No. 84-338-G (Adjudication, August 7, 1986). In sum, we see no reason, in fairness or in law, to give the appellants two bites at the apple. They have pointed to no errors in our reading of the record Mr. Mazullo made, and have cited no case law in support of their request for new hearings. Their argument 2, supra, does not merit reopening the record or revision of our July 7, 1986 adjudication.

Before we can conclude this Opinion, there is one other matter to be dealt with. During the time these appeals were assigned to Mr. Mazullo, he granted writs of supersedeas in the appeals originally (before consolidation) docketed at 83-136-M and 83-180-M. Our July 7, 1986 Order vacated those writs. On August 11, 1986, the appellants petitioned the Board to reinstate those supersedeases, pending a ruling by the Commonwealth Court on their August 4, 1986 appeal to Commonwealth Court. We deny this petition under established criteria. Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983). We see no reason to believe that the appellants are likely to prevail in their appeal to Commonwealth Court; to protect the waters of the Commonwealth, the discharges which are the subject of their appeal should be treated as soon as possible by the persons having the

responsibility to perform the treatment, whom we have held to be the appellants.

O R D E R

WHEREFORE, this 8th day of September, 1986, having granted reconsideration, and having carefully reviewed our July 7, 1986 adjudication of these appeals in the light of the arguments in appellants' petition for reconsideration, our July 7 adjudication is wholly affirmed. Appellants' petition to reinstate the supersedeas writs vacated by our July 7, 1986 Order is denied.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

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MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

\_\_\_\_\_  
EDWARD GERJUOY, MEMBER

*William A. Roth*

\_\_\_\_\_  
WILLIAM A. ROTH, MEMBER

DATED: September 8, 1986

cc: Bureau of Litigation,  
Harrisburg  
For the Commonwealth, DER:  
Diana J. Stares, Esq./Western  
For Appellant William J. McIntire Coal Co.:  
Leo M. Stepanian  
STEPANIAN & MUSCATELLO  
Butler, PA  
For Appellant R. G. McIntire Coal Co.:  
B. Patrick Costello, Esq.  
COSTELLO & BERK  
Greensburg, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

H & R COAL COMPANY :

:

DOCKET NO. 86-174-G

:

Issued: September 11, 1986

v.

COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Appellant's appeal is dismissed for repeated failure to obey the Board's orders to file a pre-hearing memorandum, under the authority of 25 Pa.Code §21.124. Appellant bears the burden of proof in this appeal of DER's denial of appellant's request for release of appellant's surface mining bond. 25 Pa.Code §21.101(a).

OPINION

Appellant's pre-hearing memorandum originally was due June 16, 1986. On July 1, 1986, the pre-hearing memorandum not having been filed, a certified letter, return receipt requested, was sent to appellant, setting a new due date of July 16, 1986 and warning that failure to file the pre-hearing memorandum by that date risked sanctions including dismissal of the appeal. Nevertheless, on August 8, 1986 the pre-hearing memorandum still had not been filed. On that date the Board sent the appellant another certified letter, return receipt requested,

extending the due date a second time, to August 18, 1986, and again warning the appellant that failure to file risked sanctions, including dismissal.

As of this date, the pre-hearing memorandum remains unfiled, although the Board has received the signed return receipts from the certified letters. Indeed, nothing whatsoever has been heard from appellant since the appeal was filed on March 27, 1986. This is an appeal of DER's denial of appellant's request for release of appellant's bond posted in connection with appellant's surface mining operations. In such an appeal, the appellant bears the burden of proof, under the general rule that the burden vests with the party asserting the affirmative of the issue, in this case the appellant who claims to deserve the requested bond release. 25 Pa.Code §21.101(a). Even when the appellant does not bear the burden of proof, the Board has dismissed appeals for failure to file a pre-hearing memorandum after numerous extensions of time and warnings of default. Penn Minerals Company v. DER, Docket No. 85-221-G (Opinion and Order, July 31, 1986). Therefore, under the facts and applicable Board precedent, we see no reason not to dismiss the instant appeal, under the authority of 25 Pa.Code §21.124. Glen Irvan Corporation v. DER, Docket No. 86-179-W (Opinion and Order, August 22, 1986). The appellant has flagrantly disregarded the Board's Orders, and has shown no interest whatsoever in prosecuting its appeal.

O R D E R

WHEREFORE, this 11th day of September, 1986, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

\_\_\_\_\_  
MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

\_\_\_\_\_  
EDWARD GERJUOY, MEMBER

*William A. Roth*

\_\_\_\_\_  
WILLIAM A. ROTH, MEMBER

DATED: September 11, 1986

cc: Bureau of Litigation  
Harrisburg

For the Commonwealth, DER:  
Joseph K. Reinhart, Esq.  
Western Region

For Appellant:  
Martin L. Erdley, President  
H & R Coal Company  
Kittanning, PA 16201



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

Maxine Woelfling, Chairman  
 EDWARD GERJUOY, MEMBER  
 William A. Roth, Member

M. DIANE SMITH  
 SECRETARY TO THE BOARD

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Plaintiff

v.

LAWRENCE COAL COMPANY,

Defendant

:  
 :  
 :  
 : DOCKET NO. 81-021-CP-M  
 : Issued: September 12, 1986  
 :

OPINION AND ORDER  
SUR PETITION FOR RECUSAL I

Synopsis

A petition that a Board member recuse himself is to be decided in the first instance by the Board member on his own, with or without a hearing conducted by that Board member. The issue of the Board member's recusal should be decided by another Board member only if a hearing is required, and if the hearing will reach the Board member's own credibility or the Board member intends to give evidence concerning his own conduct. In the instant case, the Board member whose recusal is sought by Lawrence Coal decides on his own, without a hearing, that Lawrence's allegations in support of recusal are meritless and do not deserve a hearing. In particular, Lawrence's allegations amount to the assertion that because the Board member has ruled against Lawrence in an earlier Opinion and Order and in a recent adjudication of the merits of this matter, he must be biased against Lawrence. Lawrence may be correct that the

Board member's decisions against Lawrence were incorrect under applicable law and should be reversed, but erroneous decisions cannot per se be equated to bias.

## OPINION

### A. Introduction

On May 27, 1986 the Board issued an adjudication of the above-captioned matter. The adjudication was signed by Board Chairman Maxine Woelfling and Board Member Edward Gerjuoy; at the time, these were the only members of this Board because the vacancy occasioned by the resignation of former Board Member Anthony J. Mazullo, Jr. had not yet been filled. On June 6, 1986 Lawrence Coal ("Lawrence") filed a timely petition for reconsideration, which asked the Board a) to dismiss the DER complaint for civil penalties which had initiated this matter, or in the alternative b) to have Ms. Woelfling recuse herself from this matter and have the Board appoint "an unbiased hearing examiner to hold a re-hearing of the case and prepare a proposed adjudication for the Board."

The Board granted reconsideration on June 17, 1986. Thereafter, on June 24, 1986, before the Board could rule on the merits of Lawrence's June 6, 1986 petition, Lawrence filed a "supplemental" petition for reconsideration, which inter alia now asked, no longer in the alternative, that a) our May 27, 1986 adjudication be vacated and that b) Mr. Gerjuoy as well as Ms. Woelfling be recused from further consideration of this case. Lawrence's supplemental petition was untimely under our rules. 25 Pa.Code §21.122. Therefore the Board is not required to rule on Lawrence's request that Mr. Gerjuoy recuse himself (the Board, having granted reconsideration, is required to rule on the question of Ms. Woelfling's recusal, which was timely requested in Lawrence's original petition). Nevertheless, because the petition for Mr. Gerjuoy's recusal makes the serious charge that Board Member Gerjuoy is "biased in favor

of the DER in this matter," the Board will examine the question of Mr. Gerjuoy's recusal on its merits, rather than dismissing this question as having been untimely raised, as the Board is entitled to do.

The procedure to be followed under Pennsylvania law by a judicial officer (here the Environmental Hearing Board member) who receives a petition for recusal has been clarified recently by the Pennsylvania Supreme Court. Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County, 489 A.2d 1286 (Pa. 1985); Reilly By Reilly v. Southeastern Pa. Transportation Authority, 489 A.2d 1291 (Pa. 1985). These opinions make it clear that initially the petition for recusal is to be examined by the Board Member whose recusal is sought, in the light of the Code of Judicial Conduct, Canon 3C. If in this light the Board Member believes the petition for recusal is without foundation, and that the allegations of bias or conflict of interest do not merit hearing, then he may dismiss the recusal petition on his own, without a hearing and without referral to or consultation with another Board Member. Should a hearing be needed, it may be desirable that it be conducted by another Board Member than the Member whose recusal is requested, to avoid any appearance of impropriety; there is no requirement that another Board Member be appointed to conduct this hearing, however, if the Board Member whose recusal is requested believes he can do so fairly and if his credibility is not at issue. If the hearing will reach his own credibility, or if he intends to give evidence concerning his own conduct, then the Board Member whose recusal has been requested should not conduct the hearing.

On the basis of the procedure described in the preceding paragraph Board Member Gerjuoy has reviewed Lawrence's allegation and arguments in support of his recusal, and has determined that they are meritless and do not deserve



a hearing. The remainder of this Opinion, prepared by Mr. Gerjuoy, explains the reasons for his decision not to recuse himself. This Opinion has been signed by newly appointed Board Member William A. Roth for the sole purpose of confirming that the Board agrees with the assertions made in this Opinion up to this point. Mr. Roth has not reviewed Mr. Gerjuoy's decision not to recuse himself and does not intend to do so; the remainder of this Opinion is the responsibility of Mr. Gerjuoy alone, as is his decision against recusal. Because: 1) Lawrence also has requested Board Chairman Maxine Woelfling's recusal; 2) on August 7, 1986 Ms. Woelfling determined (and informed the parties) that Mr. Gerjuoy and Mr. Roth, not Ms. Woelfling herself, should decide whether she should be recused from this matter; and 3) Mr. Gerjuoy and Mr. Roth have not yet reached their decision on Ms. Woelfling's recusal, Board Chairman Woelfling has not signed this Opinion nor played any role whatsoever in its preparation. To emphasize that the remainder of this Opinion, on the subject of Lawrence's petition for Mr. Gerjuoy's recusal has been written by Mr. Gerjuoy alone, said remainder is written in the first person singular.

#### B. Request For Board Member Gerjuoy's Recusal

I have reviewed Lawrence's allegations and arguments in the light of the Code of Judicial Conduct Canon 3C, as interpreted by Municipal and Reilly, supra. Lawrence's contentions in support of its petition for my recusal, construed (where there is ambiguity) as strongly as possible in Lawrence's favor, amount to the following:

1. Former Board Chairman Dennis J. Harnish originally was assigned this matter, and presided over eleven days of hearings on the merits, concluded on November 23, 1982.

2. On May 16, 1983, Mr. Harnish resigned from the Board without having prepared an adjudication, but it was the understanding of the parties that Mr. Harnish would prepare a proposed adjudication for the Board's approval and issuance.

3. Nevertheless, after Mr. Harnish's resignation the Lawrence case was assigned by the Board to a hearing examiner, Edward R. Casey, who was given the task of writing the proposed adjudication Lawrence had expected Mr. Harnish would prepare.

4. Lawrence first learned of Mr. Casey's assignment in a letter to counsel for Lawrence and for DER, dated October 20, 1983.

5. Mr. Casey's letter made various findings favorable to Lawrence, and suggested the parties resolve the matter by imposition of a "nominal" fine of about \$1,000 against Lawrence.

6. In response to Mr. Casey's letter, DER's counsel filed a petition for recusal of Mr. Casey and filed a motion requesting reassignment of the case to another Board member.

7. DER's reasons for the requests in paragraph 6, supra, were, inter alia, that Mr. Casey was biased against DER, inexperienced in environmental matters and had ignored recommendations made by Mr. Harnish.

8. Although Lawrence opposed this petition and motion, the Board, in an order of November 22, 1983, reassigned the case to then Board Member Mazullo for the purpose of drafting an adjudication.

9. The Board's action described in paragraph 8, supra, was taken without a hearing and contrary to the provisions of 1 Pa.Code §35.186.

10. During the pendency of the aforesaid petition and recusal, DER's counsel revealed, in documents filed with the Board and copied directly to Mr. Mazullo and myself (the only Board members at the time), that after resigning from the Board Mr. Harnish had engaged in improper ex parte communications with DER's counsel concerning the Lawrence case.

11. On the basis of these improper communications with the DER, the substance of which was revealed to the Board members, and the November 22, 1983, decision of the Board, Lawrence petitioned that all members of the Board recuse themselves in this matter, that the complaint be dismissed or that a hearing be scheduled to hear testimony regarding the communications to determine the extent and content of the communications.

12. The Board denied this petition of Lawrence's in an Opinion and Order at the above-captioned docket number, 1983 EHB 608 (December 12, 1983); this Opinion and Order was signed by Mr. Mazullo and myself.

13. This Opinion reflected the Board's bias, in that it removed Mr. Casey from this matter at DER's request and over Lawrence's objections on the basis of Mr. Harnish's improper communications, although it was DER, not Lawrence, who had received those communications.

14. The aforesaid Opinion was wrong, in that the Board stated there was no need for its members to recuse themselves even though the Board members had been made aware of the contents of Mr. Harnish's ex parte communications to DER's counsel.

15. The Board's adjudication of this matter was not issued until May 27, 1986, long after Mr. Mazullo's resignation from the Board (in January 1986).

16. The May 27, 1986 adjudication was signed by Edward Gerjuoy and Maxine Woelfling.

17. The May 27, 1986 adjudication was adverse to Lawrence, and thus was contrary to Mr. Casey's findings which had been favorable to Lawrence; in particular, the Board adjudication imposed a civil penalty of \$150,700 on Lawrence whereas Mr. Casey had suggested a fine of about \$1,000.

I cannot see how these allegations and contentions conceivably could require I recuse myself under the Code of Judicial Conduct Canon 3C. There are no claims that I have personal knowledge of the facts in this dispute between Lawrence and DER, or that I have conflicts of interest, or that I myself have engaged in any conduct which could call my impartiality into question. I know of no logic which would suggest that my receipt of a copy of a letter DER's counsel filed with the Board, revealing the substance of a conversation concerning this matter between DER's counsel and Mr. Harnish after Mr. Harnish left the Board, is evidence that I am biased against Lawrence. Aside from this illogical suggestion, Lawrence merely is arguing that because the decisions concerning Lawrence in which I already have participated--namely the December 12, 1983 Opinion and the May 27, 1986 adjudication--have gone against Lawrence, I must be biased against Lawrence. Put this way, and I don't see how Lawrence's contentions can be put any other way, Lawrence's request that I recuse myself

obviously is absurd. My decisions may have been incorrect under applicable law, as Lawrence is privileged to try to convince the Commonwealth Court, but that judgment, even if rendered by Commonwealth Court, would not of itself imply I am biased. Under the applicable statutes and regulations, I had no obligation whatsoever to accept Mr. Casey's proposed findings or conclusions of law. 71 P.S. §510-21(f); 25 Pa.Code §21.86(a). Nor did the Board have any obligation to keep Mr. Casey assigned to the Lawrence case after his obviously improper (and unauthorized by the Board) revelation of his preliminary findings to the parties before those findings had been reviewed by any Board member. As Mr. Casey himself admits in his letter of December 5, 1983 to DER's counsel (copied to Lawrence's counsel, Mr. Mazullo and myself), neither Mr. Mazullo nor I had been consulted by him before he wrote his October 10, 1983 letter to the parties.

The foregoing rejection of Lawrence's call for my recusal has been based on Lawrence's contentions as stated by Lawrence. Before closing, however, I point out that the contention 11, supra, which is copied verbatim from paragraph 17 of Lawrence's June 6, 1986 petition for reconsideration, is not wholly supported by the record. Lawrence never had petitioned for my recusal before it filed its supplemental petition of June 24, 1986. On November 30, 1983, Lawrence did petition for Mr. Mazullo's recusal but not mine; this petition was the subject of the Board's December 12, 1983 Opinion. The Board's docket shows no other Lawrence petition which might have called for my recusal and conceivably has been overlooked by the Board until now; Lawrence has not cited any petition or other specific request for my recusal. It is true that Lawrence's answers to DER's petition and motion concerning Mr. Casey (described in contention 6, supra) stated, under "New Matter":

The other members of the Environmental Hearing Board who served with Mr. Harnish would be unable to render an objective determination in this matter in view of their relationship to Mr. Harnish and the alleged communication by Mr. Harnish to the Department.

WHEREFORE, the answering party asks that the petition be dismissed.

This statement did not amount to a formal request for my recusal, however; Lawrence merely asked that the aforesaid petition (and motion) be dismissed. The answers containing the just-quoted allegation about my inability to be objective were filed on November 9, 1983, before Lawrence filed its November 30, 1983 petition which only requested Mr. Mazullo's recusal.

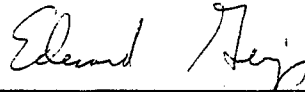
The facts just recounted greatly vitiate Lawrence's already very feeble case for my recusal. It now appears that Lawrence was willing to have me participate in the adjudication of this matter until it received our May 27, 1986 adjudication, at which point it decided that I was biased against Lawrence. Under the circumstances, it is difficult for me to see how Lawrence's request for my recusal is more than a last desperate attempt to secure "two bites at the apple." As I have explained, I admit that the May 27, 1986 adjudication may be incorrect (I do not claim infallibility), but this admission cannot be equated to an admission of bias against Lawrence.

In sum, Lawrence has utterly failed to meet its burden of alleging (I'll ignore the requirement of producing) evidence "which has a tendency to show bias, prejudice or unfairness" on my part. Reilly, supra at 1300. I have no doubt that I can and will decide fairly any remaining issues before the Board in this matter, such as the merits of Lawrence's petition for reconsideration and the question of Ms. Woelfling's recusal. I will not recuse myself. I see no need to withhold this decision until a hearing is held on the petition for my recusal.

O R D E R

WHEREFORE, this 12th day of September, 1986, Lawrence's petition for Board Member Gerjuoy's recusal in this matter is denied.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY, Member



WILLIAM A. ROTH, Member

DATED: September 12, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Diana J. Stares, Esq.  
Western Region

For the Defendant:  
William M. Radcliffe, Esq.  
COLDREN, DeHAAS & RADCLIFFE  
Uniontown, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

MILL SERVICE, INC. :  
 :  
 v. : EHB Docket No. 86-514-R  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: September 16, 1986

OPINION AND ORDER  
 SUR  
PETITION FOR SUPERSEDEAS

Synopsis

Appellant's Petition for Supersedeas is denied sua sponte for nonconformance to the Board's rules of practice and procedure at 25 Pa.Code §21.77.

OPINION

On September 5, 1986, Mill Service, Inc. (Appellant) filed an appeal of certain provisions of Solid Waste Disposal Permit No. 301071 (Permit) issued to it by the Department of Environmental Resources (DER). Specifically, Appellant is seeking elimination of Permit Paragraph 22 which requires Appellant to obtain environmental impairment insurance (impairment insurance). Concurrent with its appeal, Appellant filed a Petition for Supersedeas (Petition) to stay the effect of the requirement for impairment insurance, which petition is the subject of this opinion and order.

The Board's rules of practice and procedure regarding supersedeas are presented at 25 Pa.Code §21.75 et seq. Rule 21.77 specifies the contents of a petition for supersedeas as follows:

§21.77. Contents of petition for supersedeas.

(a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:

(1) Affidavits, prepared as specified in 231 Pa.Code Rules 76 and 1035(d) (relating to definitions and motion for summary judgment), setting forth facts upon which issuance of the supersedeas may depend.

(2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

(b) A petition for supersedeas shall state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas.

(c) A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings, or sua sponte, without hearing, for one of the following reasons:

(1) Lack of particularity in the facts pleaded.

(2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.

(3) An inadequately explained failure to support factual allegations by affidavits.

(4) A failure to state grounds sufficient for the granting of a supersedeas.

(d) The Board, upon motion or sua sponte, may direct that a prehearing conference be held.

(Emphasis added)

This rule was adopted by the Environmental Quality Board and published at 16 Pa.B 3108 (August 23, 1986), effective upon publication. It clearly states requirements for the content of petitions for supersedeas, as well as standards for denial of petitions for failure to satisfy



content requirements.<sup>1</sup> Though Appellant's petition incorporates its Notice of Appeal and supporting documents, the Board, nonetheless, finds Appellant's petition lacking particularity as well as adequate support.

Appellant, at paragraphs 3 and 4 of its petition, presents the following factual allegations and legal contentions in support:

3. By appeal of even date herewith, Mill Service filed an appeal before the Environmental Hearing Board challenging the portion of Paragraph 22 regarding environmental impairment insurance on the following grounds:

- a) that such insurance is not commercially available and compliance with Paragraph 22 of the Permit is impossible; and
- b) that regulations do not require such insurance and no other person in the Commonwealth has been required to obtain such insurance.

4. Because environmental impairment insurance is not commercially available, Mill Service will not be able to operate under the Permit and will be caused irreparable harm unless a supersedeas is issued.

Other than the allegations that "...insurance is not commercially available..." and that "...no other person in the Commonwealth has been required to obtain such insurance..." no other factual allegations are made and the support for pleadings required by 25 Pa.Code §21.77(a)(1) or (a)(2) is not provided. In addition, the petition contains no citations of legal authority as required by 25 Pa.Code §21.77(b). Pursuant to 25 Pa.Code

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<sup>1</sup> By comparison, the former rule was more general in nature:

§21.77. Contents of petition for supersedeas.

A petition for supersedeas shall state with particularity the facts and citations of legal authority upon the basis of which the petitioner believes the petition should be granted. A petition for supersedeas may be denied without hearing for lack of such specificity, or for failure to state grounds sufficient for the granting thereof.

§21.77(c), any one of these deficiencies is reason enough to deny the petition.

ORDER

AND NOW, this 16th day of September, 1986, Appellant's Petition for Supersedeas is denied sua sponte for nonconformance to 25 Pa.Code §21.77.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: September 16, 1986

cc: **Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Western Region  
**For Appellant:**  
John E. Beard, Esq.  
Kenneth M. Argentieri, Esq.  
KIRKPATRICK & LOCKHART  
Pittsburgh, PA

bl



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

Maxine Woelfling, Chairman  
 EDWARD GERJUOY, MEMBER  
 William A. Roth, Member

M. DIANE SMITH  
 SECRETARY TO THE BOARD

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Plaintiff

v.

LAWRENCE COAL COMPANY,

Defendant

:  
 :  
 :  
 :  
 : DOCKET NO. 81-021-CP-M  
 : Issued: September 16, 1986  
 :

OPINION AND ORDER  
SUR PETITION FOR RECUSAL II

Synopsis

Under the Code of Judicial Conduct Canon 3C, a petition for recusal of a Board Member who was a DER attorney during the period of this litigation merits an evidentiary hearing to ascertain the actual facts concerning the Board Member's association with this litigation while a DER attorney. Because the Board Member whose recusal has been requested probably will have to testify at said evidentiary hearing, she cannot conduct the hearing herself and the decision on her recusal must be made by the other Board Members. The evidentiary hearing will be unnecessary, however, and need not be held, if the two other Board Members unanimously decide to fully affirm the Board's previous adjudication of this matter.

## OPINION

On September 12, 1986, we issued an Opinion and Order (hereinafter "Lawrence I") at this docket number, rejecting the petition by Lawrence Coal ("Lawrence") that Board Member Edward Gerjuoy recuse himself from any further participation in this matter. As we explained in that Opinion, under Pennsylvania law a petition that a Board Member be recused can be--and in Mr. Gerjuoy's case was--rejected by the Board member himself, on his own authority and without a hearing if he deems a hearing unnecessary. Lawrence also has petitioned for Board Chairman Maxine Woelfling's recusal. Ms. Woelfling, in accordance with the reasoning of our Lawrence I Opinion, has informed the parties that she will not herself decide whether she should be recused from this matter, but will leave that decision to the other members of the Environmental Hearing Board. Therefore the undersigned now rule on Lawrence's petition for Ms. Woelfling's recusal. Board member Gerjuoy is participating in this decision by virtue of our Lawrence I Order.

Much of the pertinent history of this matter has been stated in Lawrence I and need not be repeated here, which will concentrate on Lawrence's contentions in support of Ms. Woelfling's recusal. These contentions, taken from Lawrence's petitions and construed (where there is ambiguity) as strongly as possible in Lawrence's favor are as follows:

1. On May 27, 1986, the Board issued an adjudication of the above-captioned matter, assessing civil penalties of \$150,700 against Lawrence.
2. This adjudication, which was signed by Board Member Woelfling as well as by Board Member Gerjuoy, originally was prepared by Ms. Woelfling and then approved by Mr. Gerjuoy.
3. Maxine Woelfling was employed by DER, in the capacity of an attorney, before being appointed to the Board.

4. In this capacity Ms. Woelfling held various DER positions, including the position of Chief Regulatory Counsel to DER, which involved reviewing pleadings and briefs, including the documents in this matter filed by DER with the Board.

5. Ms. Woelfling held these positions at the time of the alleged Lawrence violations which are the subject of this action, at the time DER filed the complaint for civil penalties which initiated this action, and during the hearings on this matter.

6. As Chief Regulatory Counsel, Chairman Woelfling would have been instrumental in policy making decisions involving the very regulations sought to be enforced by DER in this matter.

7. The determination in this case concerns certain policy issues wherein DER has taken a position contrary to Lawrence.

8. Maxine Woelfling, at the time this matter was being litigated, had an interest in the outcome because of her position with DER.

9. At one time in the past, long before Ms. Woelfling joined the Board, but while she was DER's Chief Regulatory Counsel, this matter was assigned to a hearing examiner named Edward R. Casey.

10. On October 20, 1983, Mr. Casey wrote a letter to the parties which made various findings favorable to Lawrence, and suggested the parties resolve the matter by imposition of a "nominal" fine against Lawrence, of about \$1,000.

11. As a result of this letter, DER requested that Mr. Casey be recused from this matter, and that the case be reassigned to another Board member.

12. These DER requests were granted over Lawrence's objections.

13. Ms. Woelfling is personally acquainted with DER's former and present counsel in this matter.

14. The May 27, 1986 adjudication obviously is contrary to Mr. Casey's findings, and imposes very much more than a nominal fine of \$1,000 against Lawrence.

15. Lawrence first became aware of Ms. Woelfling's participation in this matter when it received the May 27, 1986 adjudication.

Lawrence argues that the above-listed contentions justify Ms. Woelfling's recusal under the Code of Judicial Conduct Canon 3C, whose pertinent sections read:

C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary

A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

Before deciding whether in the light of the above-quoted Canon 3C Ms. Woelfling should be recused from further participation in this matter, it is important to recognize that such a decision is the only one we are rendering in this Opinion. Lawrence's contentions in support of Ms. Woelfling's recusal are embodied in a petition and supplemental petition for reconsideration of our May 27, 1986 adjudication. Lawrence argues that Ms. Woelfling should have recused herself from participation in the May 27, 1986 adjudication, and that her failure to recuse herself has "irreparably tainted" that adjudication. Perhaps so, and for that reason we have agreed to reconsider the May 27, 1986

adjudication. But before we proceed to decide the merits of Lawrence's request for reconsideration, i.e., before we decide whether our May 27, 1986 adjudication should be modified or even vacated, we first must decide which Board members should participate in our ruling on those merits.

We believe that Lawrence's contentions listed supra warrant an evidentiary hearing to ascertain the actual facts concerning Ms. Woelfling's previous association with this litigation. Although we have no reason whatsoever to doubt Ms. Woelfling's impartiality in this matter, our standard must be Canon 3C's language that recusal is warranted when impartiality "might reasonably be questioned." Under Canon 3C(1)(b), as amplified by the Commentary we have quoted, Ms. Woelfling should be recused from this matter if her previous association with DER, especially her position as Chief Regulatory Counsel, would occasion a reasonable neutral observer to question her impartiality, irrespective of whether or not she actually has any partiality toward DER in this matter. Without an evidentiary hearing, at which Ms. Woelfling would have to testify about the nature and degree of her former association with this litigation and with DER's counsel therein, we cannot decide whether her impartiality "reasonably" can be questioned. We agree that Lawrence's contentions, taken at face value without fleshing out the facts, could justify such "reasonable" questioning of Ms. Woelfling's future participation in this matter. We add that in view of this ruling it is evident that Chairman Woelfling's conclusion that the decision on her recusal should be made by the remaining Board members was quite correct, since under applicable authority she should not be making that decision herself when an evidentiary hearing requiring her testimony will have to be held.

Municipal Publications, Inc. v. Court of Common Pleas of Philadelphia County,  
489 A.2d 1286 (Pa. 1985).

We see no immediate necessity for this evidentiary hearing, however, which only can further delay our final resolution of this already long-delayed matter. The Board now once again boasts a full complement of three members. Board Members Gerjuoy and Roth are competent to rule on the merits of Lawrence's petition for reconsideration of our May 27, 1986 adjudication. If they should agree that the adjudication should be affirmed, the affirmation will have been by a majority of the full Board and there will be no need for Ms. Woelfling's participation in the affirmation. On the other hand, if Mr. Gerjuoy and Mr. Roth cannot agree on affirmation of our May 27, 1986 decision, or even if they agree modification of that adjudication will be necessary, then Ms. Woelfling's participation in further consideration of this matter should not be prevented unless her recusal indeed is required under Canon 3C; in these latter events, therefore, an evidentiary hearing on the subject of Ms. Woelfling's recusal will be held and the remaining Board members will decide whether or not she should be recused, before the final ruling on the merits of the petition for reconsideration is issued.

Before closing we stress that the aforesaid evidentiary hearing, if held, will be concerned solely with Ms. Woelfling's relationship to this litigation during her tenure as a DER attorney. We will not permit, e.g., testimony or discovery concerning communications in 1983 between former Board Chairman Dennis Hamish and DER counsel or the Board; similarly we will not permit testimony or discovery about any past recommendations made by Mr. Casey and/or Mr. Mazullo concerning the adjudication of this matter. Such testimony would be quite irrelevant to the question of Ms. Woelfling's recusal under Canon 3C. As we stated in Lawrence I, the present Board members are in no way bound by any recommendations from past hearing examiners or Board members who never completed a formal adjudication of this matter. Ms. Woelfling and the other present Board



members always are free to differ with each other about any draft adjudication prepared by any one of them, and therefore certainly have no obligation to accept or even take seriously recommendations which never were formally adopted by the Board, from persons who never were or no longer are Board members. The errors, if any, in our May 27, 1986 adjudication must be discernible from the evidence on the record and the parties' post-hearing briefs. The claim that Mr. Casey would have written a draft adjudication much more favorable to Lawrence (which draft adjudication very well might have been utterly rejected by the Board) is quite irrelevant to the issue of the correctness of our May 27, 1986 adjudication and to the issue of Ms. Woelfling's requested recusal.

O R D E R

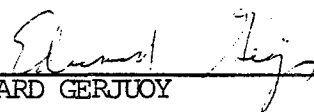
WHEREFORE, this 16th day of September, 1986, it is ordered that:


1. A final decision on Lawrence Coal's petition that Board Chairman Woelfling be recused from any further participation in this matter is deferred until the undersigned Board Members have completed their deliberations concerning Lawrence's petition for reconsideration of our May 27, 1986 adjudication of this matter.
2. If the undersigned agree that Lawrence's petition for reconsideration is meritless, and that our May 27, 1986 adjudication should be affirmed without any modification, Lawrence's petition for Ms. Woelfling's recusal will be moot and will be dismissed as such.
3. If the undersigned do not agree that our May 27, 1986 adjudication should be affirmed without modification, an evidentiary hearing will be scheduled, solely on the subject of Ms. Woelfling's relationship to this litigation during her tenure as a DER attorney.

4. In this event, a final decision on Lawrence's petition for reconsideration will be deferred until the undersigned determine whether Ms. Woelfling should participate in the reconsideration decision.

5. Until the undersigned render their final decision on Lawrence's petition for Board Chairman Woelfling's recusal, she will not participate in this matter.

ENVIRONMENTAL HEARING BOARD

  
EDWARD GERJUOY  
Member

  
WILLIAM A. ROTH  
Member

DATED: September 16, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Diana J. Stares, Esq.  
Western Region

For the Defendant:  
William M. Radcliffe, Esq.  
COLDREN, DeHAAS & RADCLIFFE  
Uniontown, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
 EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

MR. AND MRS. DANIEL E. BLEVINS  
 and MRS. NANCY LEE ELLIS :  
 v. : EHB Docket No. 82-154-M  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 and :  
 SOUTHEASTERN CHESTER COUNTY REFUSE :  
 AUTHORITY, and NEW GARDEN TOWNSHIP, : Issued: September 17, 1986  
 Permittees :

OPINION AND ORDER

Synopsis

Permittee's Motion to Dismiss is denied because Appellant properly seeks review of appealable issues relating to the reissuance of a solid waste permit. See Bethlehem Steel v. DER, 390 A.2d 1383, 37 Pa. Cmwlth 479 (1978); Newlin Township v. DER and Strasburg Associates, 1979 EHB 33. The scope of Appellant's appeal, however, is limited to those issues not considered during the original issuance of this permit.

OPINION

On September 9, 1977 the Department of Environmental Resources (DER) issued a permit to the AAK joint venture (AAK) for the operation of a natural renovation solid waste landfill. There was no appeal taken from the issuance of this permit. The permit was reissued in 1982 to New Garden Township (New Garden), and subsequently reissued a second time in 1984 to Southeastern Chester County Refuse Authority (SECCRA), the present permit holder. Mr. and Mrs. Daniel Blevins and Mrs. Nancy Lee Ellis (Appellants) appealed both of

these reissuances. Since this time, this case has become a procedural imbroglio.

Appellants appealed the New Garden Township permit reissuance to the Board. Shortly thereafter, New Garden transferred the permit to SECCRA. Subsequent to this transfer, New Garden Township argued to the Board that the appeal had been mooted by New Garden's transfer of the permit to SECCRA. The Board agreed with New Garden and dismissed the appeal. Appellants petitioned Commonwealth Court for review of the Board's decision, and it reversed and remanded the case to the Board for determination on the merits. The Commonwealth Court based its decision on the fact that the permit was never actually extinguished and, thus, the case was never mooted.

During this time, Appellants had filed a notice of appeal from the reissuance of the permit to SECCRA. By an Order dated September 18, 1985, the Board consolidated Appellant's appeals against New Garden (Docket No. 82-154-M) and SECCRA (Docket No. 84-382-M). SECCRA, being the present permit holder, is actively arguing the case before the Board.

Presently, SECCRA has filed a Motion to Dismiss asserting that, since Appellants did not contest the original permit issuance in 1977, Appellants have waived their right to appeal all issues explored in the subsequent reissuances. Appellants contend, however, that between the time of the original permit issuance and its subsequent reissuances, the law governing solid waste disposal was amended and now requires consideration of issues not explored during the original permit issuance.

The initial issuance of the permit in question was pursuant to the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, 35 P.S. §6001 et. seq., (repealed). This law was repealed in 1980 by the enactment of the Solid Waste Management Act, the Act of July 7, 1980, P.L.

380, 35 P.S. §6018.101 et. seq. Both reissuances of the solid waste permit in question were evaluated under the standards of the 1980 Act.

Appellants aver that DER abused its discretion by approving the solid waste permit despite the overwhelming evidence running contrary to permit reissuance. Moreover, Appellants also aver that, in light of previously unconsidered evidence, the DER violated its constitutional duty as trustee of the public resources of Pennsylvania. SECCRA, on the other hand, asserts that the 1980 solid waste law is essentially identical to the 1968 version in both the scope and nature of considerations required for the issuance of a solid waste permit. The Appellants, according to SECCRA, have, thus waived their rights to appeal any matter considered during reissuance.

Failure of an aggrieved party to file a timely appeal from an initial permit issuance operates as a waiver of the party's right to contest that permit issuance at a later date. See Bethlehem Steel v. DER, 390 A. 2d 1383, 37 Pa.Cmwlth 479 (1978); and Newlin Township v. DER and Strasburg Associates, 1979 EHB 33. If an uncontested permit is reissued, matters necessarily considered during the original issuance proceeding are unappealable upon reissuance. Id.

Upon review, the Board does not agree with SECCRA's position that the quantity and quality of factors considered under The Solid Waste Management Act of 1980 are the same factors evaluated under the Pennsylvania Solid Waste Management Act of 1968. The Solid Waste Management Act of 1980, 35 P.S. 6018.101, has, among other things, expanded the scope of factors to be considered by DER prior to the issuance of a solid waste permit. Compare The Solid Waste Management Act of 1980, 35 P.S. 6018.503; and The Pennsylvania Solid Waste Management Act of 1968, 35 P.S. 6007.

Section 503 (c) of the Solid Waste Management Act of 1980 states the

Department may deny a permit if " [it] finds that the permittee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection..." 35 P.S. 6018.503(c).

Consistent with this language, the DER has generated a questionnaire, commonly referred to as a Module 10, which inquires into the compliance history of the permittee. Production of historical, compliance evidence of this nature by the permittee was not required under the 1968 solid waste law. Appellants plan to appeal the previously unconsidered contents of SECCRA's Module 10 in the present litigation. Since such information was not considered during evaluation of the original permit application, it cannot be said that Appellants have waived their rights to contest this evidence. See Bethlehem Steel v. DER, 390 A.2d 1383 (1978); and Newlin Township v. DER and Strasburg Associates, 1979 EHB 33. Any decisions made by the DER which were based upon the compliance history information submitted by SECCRA during the reissuance procedure are, therefore, reviewable by the Board.

In addition to evaluating evidence regarding history of compliance, the DER must consider the environmental concerns enunciated in Pennsylvania Constitution Article I, §27. See 35 P.S. 6018.102. Article I, §27, a self-executing provision, states, "[t]he people have a right to clean air, pure water, and to the preservation of the scenic, historic and esthetic values of the environment... the Commonwealth shall conserve and maintain them for the benefit of all the people". The Pennsylvania Commonwealth Court has interpreted this constitutional language to require compliance with a three-part environmental balancing test. See Payne v. Kassab, 312 A.2d 86, 11 Pa.Cmwlth 14 (1973). Specifically, the Payne decision requires inquiries into whether 1) all applicable statutes and regulations relevant to natural resource protection have been complied with; 2) the record of the case

demonstrates a reasonable effort to reduce the environmental incursion to a minimum; and 3) the environmental harm which will result from the action in question so clearly outweighs the benefits to be derived therefrom that to proceed would be an abuse of discretion. Id. at 94. It should be noted that the DER was obligated to consider both Article 1, §27 and the Payne decision at the time of the initial permit issuance.

Since August 1, 1980, however, the DER satisfies the obligations of Article 1, §27 by requiring the submission of an environmental assessment statement. This environmental assessment statement, or Module 9, is a questionnaire, required for all permits, inquiring extensively into the environmental ramifications of a proposed DER action.

SECCRA correctly asserts that some possible environmental consequences were evaluated under the Pennsylvania Solid Waste Management Act of 1968. The Module 9, however, requires an exponentially more particular and extensive inquiry into environmental impacts than previously required. See Township of Middle Paxton, et.al. v. DER, 1981 EHB 315, 337. See also Exhibit A-9 from Transcript of Hearing April 1, 1986 (a copy of SECCRA's completed Module 9). Specifically, environmental concerns evaluated during reissuance of the permit in question, yet not during the original issuance, include; the effect of increased automotive traffic in the vicinity if the landfill (Exhibits A-7,A-12), plant and wildlife endangerment resulting from reissuance of the solid waste permit (Exhibit A-9), and Module 9 comments generated by the local County and Township affected by the landfill permit reissuance (Exhibit A-2, A-3, A-5). These additional areas of inquiry, not considered by DER in 1977, are appealable issues, since no adversely affected party has had the opportunity to challenge them until the present time.

Finally, in reviewing the permit reissuance applications, the DER considered information regarding the possibility of groundwater pollution by natural renovation landfills. Evidence of this type was not available to the DER upon original issuance of the permit, and thus was not considered. See Brief of Commonwealth, DER, June 18, 1986. Consistent with the discussion above, previously unaddressed issues considered by DER during a permit reissuance are reviewable by the Environmental Hearing Board. See Bethlehem Steel, 390 A.2d 1383. Specifically, DER's Norristown Regional Waste Management Facilities Chief Lawrence Lusk considered parameters, such as biological oxygen demand (BOD), total organic carbon (TOC), and total halogenated organics (TOX), which allegedly could effect groundwater present below the landfill in question. SECCRA was directed by DER to monitor for such parameters, unlike AAK or New Garden Township, in an attempt to determine the merits of "natural renovation" landfills. DER's consideration of additional safeguards is a reviewable exercise of discretion for the Board. See Brief of Commonwealth, DER, June 18, 1986.

In light of the above discussion, the Board holds that the previously uncontested issues enuciated above, which were not subject to inquiry during the evaluation of the original permit issuance, are appealable issues before the Board, and thus have not been waived by Appellants. Therefore, SECCRA's Motion to Dismiss is denied. The scope of review before the Board, however, will be limited to issues evaluated by the DER during reissuance, but not considered during the initial permit issuance. Specifically, these previously unaddressed issues are as follows: Module 10 history of compliance considerations; Module 9 constitutional concerns including increase in traffic, the threat to endangered wildlife, and comments of Chester County and London Grove Township; and finally, groundwater pollution problems possibly



associated with natural renovation landfills.

ORDER

AND NOW, this 17th day of September, 1986, it is ordered that SECCRA's Motion to Dismiss is denied. The scope of the issues of this appeal, however, will be limited to those not addressed during the original permit issuance as enuciated above.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

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MAXINE WOELFLING, CHAIRMAN

DATED: September 17, 1986

cc: **For the Commonwealth, DER:**  
Kenneth A. Gelburd, Esq.  
Eastern Region  
**For Appellants:**  
John C. Snyder, Esq.  
Paoli, PA  
**For New Garden Township:**  
George A. Brutscher, Esq.  
Kennett Square, PA  
**For SECCRA:**  
Roger E. Legg, Esq.  
West Chester, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 WILLIAM A. ROTH, MEMBER

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 SECRETARY TO THE BOARD

DELTA EXCAVATING & TRUCKING CO., INC. :  
 and DELTA QUARRIES & DISPOSAL, INC. :  
 :  
 v. : EHB Docket No. 86-266-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA : Issued: September 17, 1986  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER  
 SUR  
PETITION TO INTERVENE

Synopsis

A municipality's request to intervene in an appeal challenging the Department of Environmental Resources' (Department) rejection, pursuant to a Consent Order, of procedures to cap a landfill is granted, but limited in several respects. The municipality is not permitted to introduce evidence of whether the capping procedures comply with the Department's regulations, as its interest there is adequately protected by the Department, and, the municipality is not permitted to present evidence on the adequacy or legality of the underlying Consent Order.

OPINION

The above-captioned appeal involves Delta Excavating and Trucking Co., Inc.'s and Delta Quarries and Disposal's (Appellants) appeal of an April 21, 1986 letter from the Department of Environmental Resources (Department) stating that the Department would not entertain any further efforts to approve Appellants' current capping procedures at the Delta Landfill. The

landfill is located in Franklin Township, Huntingdon County. The Department apparently believes Appellant has failed to properly submit an approvable capping plan for certain overfilled areas of the landfill, as called for in a Consent Order dated November 1, 1984, entered into by Appellants and the Department. This appeal was filed May 25, 1986. On July 17, 1986, the Franklin Township Board of Supervisors (Township) filed a Petition to Intervene. Appellants filed an Answer on August 11, 1986, requesting the Board to deny said petition. The Board here grants the Petition to Intervene, but limits its scope as outlined below.

Township's petition gives the following reasons why it should be granted intervention: disposition of this appeal may affect the health and welfare of its residents; there is a threat to groundwater in the vicinity of the landfill; contamination has been detected in monitoring wells down gradient from the landfill; local trout streams used by residents could be contaminated; this appeal may adversely affect another appeal in which Township and Appellants are parties at EHB Docket No. 84-403-W; the Consent Order does not require adequate remediation; and the capping as it has been performed, as well as the requirements of the Consent Order, violates DER regulations. Appellant's Answer claims that, to the extent Township has any interest in this matter, it will be fully and adequately represented by the Department, Township is attempting to usurp the enforcement powers of the Department, any relation between this appeal and No. 84-403-W is not an "interest" for purposes of this appeal, intervention would unnecessarily complicate this appeal, no threat to groundwater exists, and Appellant's other claims are baseless.

Intervention is discretionary with the Board and is subject to such terms and conditions as the Board may prescribe. 25 Pa.Code §21.62(b).

Although not exclusive, the Board considers the following in ruling upon a petition to intervene: (1) the prospective intervenor's precise interest; (2) the adequacy of representation provided by the existing parties; (3) the nature of the issues before the Board; (4) the ability of the prospective intervenor to present relevant evidence; and (5) the effect of intervention on the administration of the statute(s) under which the original proceeding is brought. Franklin Twsp. v. DER, 1985 EHB 853.

The prospective intervenor must show that its interests are relevant and would not be adequately represented by another who is already a party to the case. 25 Pa.Code §21.62(a); See Etna Equipment and Supply Company, Inc. v. DER, EHB Docket Nos. 86-146-G, 86-147-G (Opinion and Order issued July 28, 1986). The Board's policy is to grant intervention to parties having substantial, immediate, and direct interests in the outcome of a matter before the Board where to do so would be in the public interest. Al Hamilton Contracting Co. v. DER, 1982 EHB 387.

In this matter the interests and perspectives of the Department and the Township do not appear to be precisely the same, although they are, at times, overlapping. Township's position as host to the landfill places it in an excellent position to examine and report on environmental conditions near the site. For that reason, we will permit the Township to present evidence on the issues of whether the Delta capping procedures rejected by the Department are presently contaminating or posing a threat of contamination to the groundwater, Spruce Creek, and the Little Juniata River. The Board, however, will not permit the presentation of any evidence relating to the adequacy and legality of the Consent Order between Appellants and the Department which is before the Board at Docket No. 84-403-W. Township contends that this appeal may affect the outcome of that appeal, but, if

anything, the obverse is true.

The Board also will not permit the Township to present any evidence relating to whether Delta's rejected capping procedure complied with the Department's regulations. We cannot ascertain, on the basis of the pleadings, how the Department will not fully and adequately represent the Township's interests relating to this issue. The Township's allegations regarding this issue seem to be no more than a thinly-veiled attempt to again attack the adequacy of the underlying Consent Order which is the subject of Docket No. 84-403-W.

**ORDER**

AND NOW, this 17th day of September, 1986, Township's Petition to Intervene is granted, but the scope of its intervention is limited to the issue of whether Appellant's capping procedures contaminate or pose a threat of contamination to the ground and surface waters of the Township.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

**DATED:** September 17, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**

James D. Morris, Esq.  
Eastern Region

**For Appellant:**

John F. Stoviak, Esq.  
Michael L. Krancer, Esq.  
DILWORTH, PAXSON, KALISH & KAUFFMAN  
Philadelphia, PA

**For Intervenor:**

Robert B. McKinstry, Jr., Esq.  
David G. Mandelbaum, Esq.  
WOLF, BLOCK, SCHORR & SOLIS-COHEN  
Philadelphia, PA

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 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

JOSEPH A. STEIGHNER

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
:  
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:

EHB Docket No. 86-047-W

Issued: September 17, 1986

OPINION AND ORDER

Synopsis

Appellant's Motion for Summary Judgment is denied because material issues of fact remain in controversy after a review of all pleadings and pre-trial discovery evidence submitted in this case. J.T.C. Industries, Inc. v. DER, 1985 EHB 615.

OPINION

On August 8, 1984, Joseph A. Steighner (Appellant) submitted a petition to the Department of Environmental Resources (Department) requesting the designation of a 51 square mile area of the Muddy Creek watershed in Butler County as unsuitable for surface mining pursuant to the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(e). The Department returned the Appellant's petition as incomplete on August 20, 1984. Appellant, unable to obtain the requisite information within the 30 day time limit established by the Department, withdrew the petition in an attempt to avoid any prejudice caused by a Departmental determination that the petition was "frivolous". Subse-

quently, the Department, consistent with a request by Appellant, conducted an investigation of the Muddy Creek area during October, 1984.

Appellant resubmitted the petition on September 30, 1985. The Department again returned the petition, on November 1, 1985, due to its alleged incompleteness. Specifically, the Department letter stated, "[i]f you desire further Departmental consideration, please make the necessary revisions to your petition and return it to the Department within 30 days. Failure to reply within 30 days will result in the petition being declared "frivolous" and returned to you with no further Departmental consideration". By a letter dated December 27, 1985, the Department returned the Petition and stated it had not been accepted for study.

On January 28, 1986, Appellant filed a timely Notice of Appeal with the Board from the Department's rejection. After commencing discovery, Appellant filed a Motion for Summary Judgment which is the focus of this Order.

Pennsylvania Rule of Civil Procedure §1035 states that a motion for summary judgment should not be granted unless, after a review of pleadings, depositions, admissions and other pretrial evidence, it is proven there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. 42 P.S. § 1035. See J.T.C. Industries, Inc. v. DER, 1985 EHB 615. The evidence reviewed in determining the merits of a summary judgment motion must be evaluated in a light most favorable to the non-moving party. Simpson v. Pennsylvania Board of Probation and Parole, 473 A.2d 753, 81 Pa. Cmwlth 432 (1984).

Appellant argues the Department can reject a petition for surface mining unsuitability only if the petition fails for one of the procedural reasons listed in 25 Pa.Code §86.124(a). One of the reasons set forth in the regulations is rejection because the petition is "frivolous". The Department's

rejection letter, however, failed to specify the rejection was based on the "frivolous" nature of the application. Consequently, Appellant argues that because the Department's rejection letter is not based upon §86.124(a), Appellant is entitled to judgment as a matter of law. The word "frivolous", in fact, never appears in the Department's rejection letter, but the Department is presently arguing it denied the Appellant's petition on this ground. Prior correspondence between the Department and the Appellant, however, indicates the petition would be rejected for being "frivolous" unless further information was provided.

The Board denies Appellant's Motion for Summary Judgment because a genuine issue of material fact does exist after reviewing all pre-hearing evidence in a light most favorable to the non-moving party. The heart of the issue before the Board is whether the Department, in fact, rejected Appellant's petition based on its "frivolous" nature. Evidence has been produced advancing both sides of the factual issue. Neither party has made an explicit or implicit admission which would resolve the issue. As a result, the Board concludes that this fact is in controversy and is material to the ultimate determination of this appeal.



O R D E R

AND NOW, on this 17th day of September, Appellant's Motion for Summary Judgment is denied. Appellant is further ordered to file its response to the Commonwealth's Motion for a Protective Order on or before September 26, 1986.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

DATED: September 17, 1986

cc: For the Commonwealth, DER:  
Richard P. Mather, Esq.  
Bureau of Regulatory Counsel  
For Appellant:  
K. W. James Rochow, Esq.  
ROBERT J. SUGARMAN & ASSOC.  
Philadelphia, PA  
and  
Eugene E. Dice, Esq.  
Harrisburg, PA

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 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

CONCERNED RESIDENTS OF ELDRED TOWNSHIP :  
 :  
 v. : EHB Docket No. 86-258-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES and : Issued: September 18, 1986  
 EASTERN INDUSTRIES, INC., Permittee :

OPINION AND ORDER

Synopsis

Permittee's Motion to Dismiss is granted because Appellant failed to file a Notice of Appeal with the Board within 30 days from publication of notice of Departmental action. 25 Pa. Code 21.52(a). Consolidated Coal Co. v. DER and J & D Mining, Inc., 1983 EHB 339.

OPINION

On March 18, 1986, the Department of Environmental Resources (DER) approved an amendment to a mine drainage permit for a quarry owned by Eastern Industries, Inc. (Permittee) located in Eldred Township, Monroe County. Formal notice of this DER action was published in the Pennsylvania Bulletin on April 12, 1986. 16 Pa. Bulletin 1381 (April 12, 1986). The Board received a Notice of Appeal from this DER action, filed by Concerned Residents of Eldred Township (Appellants), on May 13, 1986. The Permittee presently filed a Motion to Dismiss for untimely filing, to which Appellant's failed to respond.

The Board has jurisdiction only over timely filed appeals. Rostosky v. DER, 26 Pa. Commonwealth Ct. 478,481, 364 A.2d 761,763 (1976). Board Rule of

Practice and Procedure 21.52 states in part, " ... 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 thirty days after the party appellant has received written notice of such action or within thirty days after notice of such action has been published in the Pennsylvania Bulletin... ". 25 Pa. Code 21.52(a).

The Board has interpreted Rule 21.52 as providing two independent bases for determining the timeliness of a notice of appeal. Consolidated Coal Co. v. DER and J & D Mining, Inc., 1983 EHB 339. Notice of DER's action was published in the Pennsylvania Bulletin on April 12, 1986. The Board received Appellant's Notice of Appeal on May 13, 1986, exactly thirty-one days after notice was published in the Pennsylvania Bulletin. The Board cannot extend filing periods as a matter of indulgence. Rostosky v. DER, 364 A.2d 761 (1976). Permittee's uncontested Motion to Dismiss is, therefore, granted, and this appeal is dismissed for untimely filing.

ORDER

AND NOW, this 18th day of September, 1986, it is ordered that Permittee's Motion to Dismiss is granted, and the appeal of Concerned Residents of Eldred Township is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: September 18, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Bernard A. Labuskes, Jr., Esq.  
Central Region  
For Appellant:  
Phil Marano  
Kunkletown, PA  
For Permittee:  
Sherill T. Moyer, Esq.  
Joel R. Burcat, Esq.  
Harrisburg, PA

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 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

Maxine Woelfling, Chairman  
 EDWARD GERJUOY, MEMBER  
 William A. Roth, Member

M. DIANE SMITH  
 SECRETARY TO THE BOARD

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
	:	
Plaintiff	:	
	:	
v.	:	DOCKET NO. 81-021-CP-M
	:	
LAWRENCE COAL COMPANY,	:	Issued: September 19, 1986
	:	
Defendant	:	

OPINION AND ORDER  
SUR PETITION FOR RECONSIDERATION

Synopsis

A petition for reconsideration of a Board adjudication, which alleges that the Board Members who signed the adjudication were biased, but which did not ask for recusal of those Board Members until the adjudication had been issued, is rejected by the Board where the petitioner has given no specific illustrations of error--either of fact or law--in the adjudication, and where a majority of the Board agree the petition should be dismissed even though the issue of whether the third Board member should be recused from participation in the decision on reconsideration has not been resolved. The question whether a Board Member should have been recused from participating in an adjudication is waived when the request for recusal is inexcusably delayed until after the adjudication has appeared.

## OPINION

Lawrence Coal Company ("Lawrence") has petitioned for reconsideration of our May 27, 1986 adjudication of the above-captioned matter. In support of its petition for reconsideration, Lawrence has recited a host of alleged irregularities and improprieties in the Board's past handling of this matter. Insofar as the instant petition is concerned, however, Lawrence's only relevant contentions can be summarized as follows:

1. The May 27, 1986 adjudication was first drafted by Board Chairman Maxine Woelfling and signed by Ms. Woelfling and Board Member Edward Gerjuoy, who on May 27, 1986 were the only members of the Board.

2. The adjudication was prepared from the record made in hearings conducted by former Board Chairman Dennis J. Harnish, who resigned from the Board on May 16, 1983.

3. Although the hearings had been concluded on November 23, 1982, the Board had not issued its adjudication of this matter by the date Mr. Harnish resigned.

4. Although the parties had understood that Mr. Harnish, though resigned from the Board, would prepare a proposed adjudication of this matter, this task actually was assigned to Board hearing examiner Edward R. Casey.

5. On October 20, 1983, Mr. Casey wrote a letter to the parties which contained numerous findings favorable to Lawrence, and which suggested that this matter be settled by imposition of a "nominal" fine on Lawrence, of about \$1,000.

6. Because of this letter, DER petitioned the Board to recuse Mr. Casey and to reassign this matter to another Board member.

7. On November 22, 1983, over Lawrence's objections, Mr. Casey's responsibilities in this matter were reassigned to then Board Member Anthony J. Mazullo, Jr.

8. Mr. Mazullo resigned from the Board in January, 1986, before any adjudication of this matter had been issued by the Board.

9. Ms. Woelfling was appointed to the Board in September 1985.

10. Before being appointed to the Board, Ms. Woelfling had been employed as a DER attorney for many years, most recently as Chief Regulatory Counsel.

11. In her capacity as DER attorney, Ms. Woelfling had contacts with this litigation which should have led her to recuse herself from taking any part in the adjudication of this matter.

12. The adjudication was adverse to Lawrence, was contrary to Mr. Casey's findings, and the fine of \$150,700 imposed on Lawrence obviously was very much greater than the nominal \$1,000 fine Mr. Casey had suggested.

13. The adjudication was irreparably tainted by Ms. Woelfling's participation in it, and its outcome manifested Ms. Woelfling's bias against Lawrence.

14. The adjudication also manifested Mr. Gerjuoy's bias against Lawrence, a bias that already had been manifested by Mr. Gerjuoy's concurrence in the reassignment of this matter from Mr. Casey to Mr. Mazullo.

15. Lawrence first learned of Ms. Woelfling's participation in this matter when Lawrence reviewed the May 27, 1986 adjudication.

On the basis of the foregoing contentions Lawrence has asked that the May 27, 1986 adjudication be vacated, that both Ms. Woelfling and Mr. Gerjuoy be recused from further participation in this matter, and that the Board appoint a new, unbiased hearing examiner to rehear the entire case and then prepare a new proposed adjudication for the Board. The Board has granted Lawrence's petition for reconsideration, without ruling on the merits of that petition, thereby tolling the 30-day appeal deadline specified in the Pennsylvania Rules of Appellate Procedure, Pa.R.A.P. Rules 1512 and 1701. We now rule on the merits of Lawrence's petition.

In an Opinion and Order dated September 12, 1986, in this matter, hereinafter Lawrence I, to which readers should refer, the Board has examined Lawrence's charges of bias against Board Member Gerjuoy. The Board has ruled

that Lawrence has utterly failed to meet its burden of alleging facts which possibly could require Mr. Gerjuoy's recusal from future participation in this matter. The reasoning of Lawrence I is equally applicable to Mr. Gerjuoy's participation in the May 27, 1986 adjudication. Thus we reject Lawrence's arguments that Mr. Gerjuoy's participation in the adjudication require that the adjudication be vacated (or modified in some manner).

In a second Opinion and Order at the above docket number, hereinafter Lawrence II, to which the reader also should refer, the Board has examined Lawrence's claim that Board Chairman Woelfling should be recused from further participation in this matter. Lawrence II decided that Lawrence's allegations in this regard were sufficient to merit an evidentiary hearing on the subject of Ms. Woelfling's relationship to this litigation during her employment as a DER attorney. As Lawrence II was careful to note, however, the Lawrence II Order was prospective only; Lawrence II did not rule on whether Ms. Woelfling should have recused herself from participation in the May 27, 1986 adjudication. Concerning this question we note that although Ms. Woelfling's September 1985 appointment as Board Chairman was well advertised, Lawrence at no time requested Ms. Woelfling's recusal until it had received the May 27, 1986 adjudication. Therefore, just as we remarked in Lawrence I in our discussion of Lawrence's request for Mr. Gerjuoy's recusal, it appears to us that Lawrence's insistence that the May 27, 1986 adjudication has been "irreparably" tainted by Ms. Woelfling's participation amounts to a last, desperate attempt by Lawrence to secure another bite at the apple.

The undesirability of allowing a litigant this sort of second chance at a favorable verdict has been recognized by the Pennsylvania Supreme Court. In Reilly By Reilly v. Southeastern Pennsylvania Transportation Authority,



489 A.2d 1291 (Pa. 1985), the Pennsylvania Supreme Court has stated:

Once the trial is completed with the entry of a verdict, a party is deemed to have waived his right to have a judge disqualified, and if he has waived that issue, he cannot be heard to complain following an unfavorable result. Commonwealth v. Corbin, 447 Pa. 463, 291 A.2d 307 (1972). In order to preserve an issue for appeal, SEPTA had to make a timely, specific objection at trial and raise the issue on post-trial motions. It was not enough to raise new grounds for the first time in post-trial proceedings. Not having followed the proper course, SEPTA waived its right to raise new recusal grounds before the Court en banc or Superior Court.

Waiver is indispensable to the orderly functioning of our judicial process and developed out of a sense of fairness to an opposing party and as a means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party has failed to preserve.

Because every case cannot be subjected to the unlimited questioning of the trial judge's impartiality, a line must be drawn as to when the impartiality can be challenged and we draw that line at the entry of the verdict, as qualified hereinafter...

Charges of prejudice or unfairness made after trial expose the trial bench to ridicule and litigants to the uncertain collateral attack of adjudications upon which they have placed their reliance. One of the strengths of our system of justice is that once decisions are made by our tribunals, they are left undisturbed. Litigants are given their opportunity to present their cause and once that opportunity has passed, we are loathe to reopen the controversy for another airing, save for the greatest of need. This must be so for the security of the bench and the successful administration of justice. Accordingly, rules have developed for the overturning of verdicts and judgments for after-acquired evidence. In our view, recusal motions raised after verdict should be treated no differently than other after-acquired evidence situations which compel the

proponent to show that: 1) the evidence could not have been brought to the attention of the trial court in the exercise of due diligence, and 2) the existence of the evidence would have compelled a different result in the case.

We feel the just-quoted holding of Reilly is squarely on point. We see no reason to distinguish between the circumstances in Reilly (dealing with a post-trial motion for recusal of the trial judge) and the instant circumstances (where we have a post-adjudication motion for Ms. Woelfling's recusal). The Board's rules plainly indicate that every Board member normally is expected to be involved in every final adjudication by the Board. 25 Pa.Code §21.86(a). Lawrence had to know, after Mr. Mazullo's January 1986 resignation, that unless the Board appointed an altogether new hearing examiner (which it had not been requested to do) this matter would be reassigned either to Mr. Gerjuoy or Ms. Woelfling, for preparation of a draft adjudication which the non-assignee Board Member then would review.

In other words, Lawrence--like SEPTA in Reilly--has waived its opportunity to object to Ms. Woelfling's participation in the May 27, 1986 adjudication. Moreover, Lawrence has given us no reasons to overlook this waiver and institute an inquiry into whether Ms. Woelfling should have recused herself despite Lawrence's failure to so request before the adjudication was issued. Lawrence has offered no excuse for not having asked for Ms. Woelfling's recusal (or Mr. Gerjuoy's for that matter, see Lawrence I) before May 27, 1986. Lawrence has not pointed to a single specific Finding of Fact or Conclusion of Law in the May 27, 1986 adjudication which--according to Lawrence--obviously is wrong either factually or legally, thereby demonstrating the irreparable taint Ms. Woelfling and Mr. Gerjuoy imparted to the adjudication.

The point we have just made deserves amplification. Despite the incontestable fact that Lawrence has inexcusably waived its opportunity to object to Ms. Woelfling's (and Mr. Gerjuoy's) participation in the adjudication, we might be disposed to modify the adjudication if there were reason to believe it indeed had been affected by the bias of one or both of its signers. We are no less insistent than Lawrence on Lawrence's right to a fair adjudication. But Lawrence's "evidence" that the adjudication has been unfair amounts solely to the complaint that the adjudication has reached a different result than Mr. Casey suggested. As we have stressed in both Lawrence I and Lawrence II, we are not bound by the recommendations of our hearing examiners. Mr. Casey was preparing a draft opinion from the record, just as Ms. Woelfling did. There is no reason to believe the Board would have approved Mr. Casey's draft adjudication, assuming Mr. Casey had not been removed from participation in this matter (as he deserved to be for his gross impropriety of revealing his tentative findings to the parties before those findings had been approved by the Board). There is no reason to believe Mr. Casey's adjudication would have been more "correct" than the May 27, 1986 adjudication we actually issued. If our adjudication really had been tainted by bias, then surely Lawrence should be able to cite numerous instances of patently incorrect findings of fact or conclusions of law, warranting revision of the adjudication. Yet in Lawrence's petition and supplemental petition for reconsideration, there is not a single specific allegation of error in the adjudication. Lawrence's sole hints at error in the adjudication are to be found in a single paragraph of its 26-page brief in support of reconsideration, where Lawrence states (at p. 24):

[T]he Board inferred that the discharge violations were of a continuing nature for over 254 days on the basis of only eleven observations by the Department during the relevant time period. See Adjudication and Order of May 27, 1986. The Board's opinion does not suggest that its decision was compelled by earlier decisions nor was it able to cite any case law where such an inference was drawn. In addition, the Board, in finding Lawrence responsible for the discharges, relied on cases which are distinguishable from this case and accordingly misapplied the law as to causation.

These vague assertions of error are insufficient to convince us--and we believe would be insufficient to convince the Commonwealth Court--that our adjudication is erroneous, much less tainted by bias.

In sum, Lawrence has been totally unable to show, by reference to the record made by Mr. Harnish, that the adjudication was biased against Lawrence. Lawrence has waived its right to raise the issues of Ms. Woelfling's or Mr. Gerjuoy's failure to recuse themselves from the adjudication by waiting until it received what it regarded as an adverse adjudication before making its claims that Ms. Woelfling and Mr. Gerjuoy were biased against Lawrence. This waiver does not pertain to Ms. Woelfling's and Mr. Gerjuoy's present participation in this matter. However, although an evidentiary hearing is required to decide whether Ms. Woelfling should be recused from present or further participation in this matter (the holding of Lawrence II), there is absolutely no basis for believing that Mr. Gerjuoy should be or should have been recused from participation. (the holding of Lawrence I). Mr. Roth, who has joined the Board very recently, after our May 27, 1986 adjudication was issued, has had no challenge to his participation. The undersigned Board members, constituting a majority of the Board even in the absence of Ms. Woelfling, agree that Lawrence has pointed to no specific errors in our adjudication, and indeed has given no meritorious reasons whatsoever for modifying the May 27, 1986 adjudication in any way.

Certainly Lawrence has not met the requirements of 25 Pa.Code §21.122 for rehearing or reargument.


Ms. Woelfling has not participated in the deliberations which resulted in this Opinion and Order.

O R D E R

WHEREFORE, this 19th day of September, 1986, it is ordered that:

1. Lawrence's petition for reconsideration of our May 27, 1986 adjudication is dismissed.
2. Our May 27, 1986 adjudication is fully affirmed.
3. The issue of Ms. Woelfling's recusal from participation in this decision on Lawrence's petition for reconsideration, or in other decisions concerning this matter, now is moot; no evidentiary hearing on this recusal issue will be scheduled.

ENVIRONMENTAL HEARING BOARD

  
EDWARD GERJUOY  
Member

  
WILLIAM A. ROTH  
Member

DATED: September 19, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Diana J. Stares, Esq.  
Western Region

For the Defendant:  
William M. Radcliffe, Esq.  
COLDREN, DeHAAS & RADCLIFFE  
Uniontown, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
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THE NATURE CONSERVANCY :  
 :  
 v. : DOCKET NO. 85-113-G  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 and :  
 ARTHUR S. HANEY, JR. AND ADA M. HANEY, : Issued: September 24, 1986  
 Intervenors :

OPINION AND ORDER

Synopsis

Under Pennsylvania law, a proposal to create a subdivision on land adjacent to a protected Bog does not require an encroachment permit under the Dam Safety and Encroachments Act, 35 P.S. §§693.1 et seq.; 53 P.S. §10107(21). Therefore this appeal of DER's refusal to require such a permit is dismissed. However, it would have been better policy for the Board to have dismissed this appeal originally, as having been taken from an unappealable DER action. The Board's failure to have originally dismissed this appeal on jurisdictional grounds requires the Board—in the interests of fairness to the appellant—to rule explicitly that the present dismissal of this appeal does not establish as res judicata findings apparently made by DER in its appealed-from letter to the appellant rejecting the appellant's request that an encroachment permit be required for the subdivision.

### OPINION

The Conservancy has appealed a letter from DER to the Conservancy, stating that DER had decided not to require an encroachment permit for a subdivision proposed by Arthur S. Haney, Jr. ("Haney"), one of the Intervenors in this matter. The Conservancy maintains that a permit is required under the provisions of the Dam Safety and Encroachments Act, 32 P.S. §§693.1 et seq. (the "Act") and the regulations promulgated thereto, to protect the Tannersville Cranberry Bog adjacent to the proposed subdivision. The aforementioned DER letter gave DER's reasons for not requiring a permit. These reasons were preceded by the statement, "The following comments are to clarify the decision, which determined no harm would occur to the wetland, not to require an encroachment permit." The reasons listed following the just-quoted statement largely were substantive, e.g., "Within the limits of the Dam Safety and Encroachments Act, we have not been able to determine runoff problems which will have a detrimental effect on the bog."

Shortly after the appeal was filed, DER moved to dismiss the appeal as having been taken from an unappealable action under the Board's rules. 25 Pa.Code §21.2(a). The Board denied this motion, in an Opinion and Order at this docket number. 1985 EHB 737 (September 9, 1985). Thereafter the Intervenors filed a motion for summary judgment against the Conservancy, to which the Conservancy has responded with a cross motion for summary judgment in the Conservancy's favor. All the parties, including DER, have filed memoranda of law on the summary judgment motions. Those motions now are ripe for review, and we herewith rule on them.

The gravamen of the Intervenors' motion for summary judgment is that the action the Intervenors propose to take, namely to subdivide their property, does not fall within the purview of the Act. DER makes the same argument, which

in essence can be summarized as follows. Under Pennsylvania law, 53 P.S. §10107(21), a subdivision is defined to be

the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts or parcels or other divisions of land...

The Act provides that:

No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the department.

32 P.S. §693.6(a). The various terms used in this section of the Act are defined in 32 P.S. §693.3 as:

"Dam." Any artificial barrier, together with its appurtenant works, constructed for the purpose of impounding or storing water or any other fluid or semifluid; or any refuse bank fill or structure for highway, railroad or other purposes which does or may impound water or any other fluid or semifluid.

"Encroachment." Any structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water.

"Water obstruction." Includes any dike, bridge culvert, wall, wing wall, fill, pier, wharf, embankment, abutment or other structure located in, along, across or projecting into any watercourse, floodway or body of water.

The Intervenor and DER argue that under these just-quoted definitions creation of a subdivision, which merely involves creating or redrawing property lines but as such involves no construction whatsoever, cannot be regarded as construction, maintenance, etc. of a dam, water obstruction or encroachment [language of 32 P.S. §693.6(a)]. The Intervenor and DER conclude that §693.6(a) does not apply to the subdivision proposal, and therefore that DER's appealed-from letter correctly asserted the subdivision did not require a permit under the Act.



The Conservancy has not squarely met the foregoing argument and conclusion therefrom. Rather the Conservancy argues that DER's refusal to require a permit under the Act had the practical effect of giving DER's official stamp of approval to the proposed subdivision and any proposed construction thereon; thus, the Conservancy further argues, DER now has given its "official stamp of approval to the subdivision" insofar as the municipal authorities who must approve the subdivision's uses, buildings constructed on the subdivision, etc. are concerned. In other words, the Conservancy asserts, the appealed-from letter "had the practical effect of granting a 'constructive permit' to Mr. Haney while simultaneously ignoring the permit requirements of the Act."

This argument of the Conservancy's is much more ingenious than convincing. The DER-Intervenor argument is convincing. Whether or not the municipal authorities approved the subdivision only because they thought DER had approved it (as the Conservancy alleges), DER's refusal to require a permit cannot be termed a grant of a "constructive permit". Nor can DER be said to have abused its discretion by refusing to require a permit unless authorized to do so under the Act. In sum, the subdivision does not fall under the Act; a permit was not required; DER has not abused its discretion. These last holdings do not rest on any disputed facts. We grant the Intervenor's summary judgment against the Conservancy, and of course simultaneously reject the Conservancy's cross motion for summary judgment.

Before concluding this Opinion, however, there are some issues we should clarify. Delineating the circumstances under which a DER refusal to take an action—against a third party at the request of a would-be appellant of that refusal—should be regarded as an appealable DER action always has been a difficult problem for this Board. George Emeric v. DER, 1976 EHB 249, affirmed on reconsideration, 1976 EHB 324; Delaware Unlimited v. DER, 1983 EHB 259; Consolidation Coal Company

v. DER, 1985 EHB 768. In Emeric, the Board ruled that DER's refusal of Mr. Emeric's request to revoke a third party's permit for operation of a solid waste disposal facility was unappealable. In Delaware, the Board allowed a citizens association to appeal DER's refusal to require a water authority to obtain a National Pollution Discharge Elimination System ("NPDES") permit before diverting water from the Delaware River. In Consolidation, the Board allowed an appeal from DER's refusal to order an oil well driller--whose permits had lapsed according to the appellant--to cease drilling operations until new permits had been obtained.

Our earlier unwillingness in this matter to hold that DER's decision not to require an encroachment permit was an unappealable DER action is not obviously inconsistent with our rulings in Delaware and Consolidation, supra. Nevertheless, on reflection, we now believe that our previous September 9, 1985 Opinion and Order at this docket number was wrongly decided; under the facts of this appeal, DER's refusal to require an encroachment permit should be regarded as unappealable. As we explained in Consolidation, supra (see also James E. Martin v. DER, 1984 EHB 736), whether or not to hold that a specific DER act (e.g., a DER refusal to require a permit) is an appealable DER action largely depends on public policy considerations. Although the decision as to whether a permit is required appears to be purely a matter of law, as in Consolidation, supra, nevertheless on public policy grounds it is undesirable for the Board to intrude into DER's decision-making processes when there is no indication that failure to allow the appeal is likely to result in irreversible damage to the would-be appellant's property interests. In Delaware, supra, a permanent diversion of the Delaware River water was threatened; in Consolidation, supra, a probably irreparable penetration of Consolidation's coal seams was threatened. No such

threats are manifested by the allegations of the instant Notice of Appeal, which objects to a subdivision, not to specific plans for allegedly environmentally harmful construction on the subdivided property.

In short, although we do not vacate our September 9, 1985 Order, we now agree with DER's original contention--in its memorandum of law in support of its motion to dismiss the appeal as having been taken from an unappealable action--that the Conservancy had no basis for an appeal until Mr. Haney had proposed specific subdivision construction which might affect the adjacent Bog. After such a proposal, DER's refusal to require a permit well might be appealable under the logic of Delaware and Consolidation, because allowing the construction to go forward without a permit might (if an encroachment permit really was required) cause irreversible damage to the Bog.

On the other hand, the language of DER's appealed-from letter--with its substantive statements about, e.g., runoff problems which might affect the Bog--undoubtedly had much to do with the Conservancy's decision to file its appeal and with the Board's original decision that DER's refusal to require a permit should be appealable. Indeed, were we now to dismiss this appeal without qualification, those DER statements well might become res judicata findings which could not be challenged in a later Conservancy appeal of a DER refusal to require an encroachment permit for specific planned subdivision construction. Such a result would be unfair to the Conservancy; its very real possibility is an added indication that allowance of this appeal before preparation of specific construction plans was premature.

Board Chairman Maxine Woelfling has recused herself from this matter.

O R D E R

WHEREFORE, this 24th day of September, 1986, it is ordered as follows:

1. The Intervenor's motion for summary judgment in their favor is granted; this appeal is dismissed.
2. The Conservancy's motion for summary judgment in its favor is denied.
3. Despite the normal implications of our dismissal of this appeal, we explicitly hold that none of the assertions made by DER in its appealed-from letter of March 15, 1985, or in earlier, unappealed-from letters to the Conservancy concerning this matter, shall be regarded as established in any later appeals by the Conservancy of DER actions (whether they be permit grants or refusals to require permits) concerning proposed construction in the subdivision which is the subject of this appeal.

ENVIRONMENTAL HEARING BOARD

  
EDWARD GERJUOY, MEMBER

  
WILLIAM A. ROTH, MEMBER

DATED: September 24, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
M. Dukes Pepper, Jr., Esq.

For the Appellant:  
Thomas W. Scott, Esq.  
KILLIAN & GEPHART  
Harrisburg, PA

For the Intervenor's:  
James A. Swetz, Timothy J. McManus  
and Mark A. Primrose, Esqs.  
CRAMER, SWETZ & McMANUS  
Stroudsburg, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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OLD HOME MANOR, INC. :  
 v. : DOCKET NO. 84-076-G  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued September 24, 1986

OPINION AND ORDER

Synopsis

Appellant has appealed DER's refusal of Appellant's application to amend Appellant's coal mining permit, so as to also permit limestone mining on the site. Years after the original limestone mining application was submitted, and more than a year after the limestone mining application was denied, DER voided the original coal mining permit; this voidance of the coal mining permit never was appealed. Thereafter, at the hearing on the merits of the appeal from DER's denial of the limestone mining application, DER argued that this appeal is moot because voiding of the underlying coal mining permit made it impossible for the Board to order that it be amended to allow limestone mining, i.e., made it impossible for the Board to grant the appellant the relief it had requested. The Board agreed that the coal mining permit had been irrevocably voided, and therefore could not be amended. However, especially because DER never before had given the appellant any reason to think that this appeal would not be decided solely on its substantive merits (namely whether DER had abused its discretion in denying Appellant permission

to mine limestone), the Board held that it was in the interests of justice to give the appellant an opportunity to request severance of its limestone mining application from the voided coal mining permit, so that the appeal would not be moot merely because the coal mining permit no longer existed and so could not be amended. Therefore a ruling on DER's motion to dismiss this appeal as moot is deferred until the parties can file documents from which the Board can decide whether the aforesaid severance would be lawful and reasonable.

#### OPINION

##### A. Procedural History

On July 29, 1974 the Department ("DER") issued Mine Drainage Permit 3474SM10 (henceforth the "permit") to Old Home Manor ("OHM"). The permit authorized coal surface mining activities on a 197.2 acre tract of land in Ligonier and Fairfield Townships, Westmoreland County. On or about April 9, 1981, OHM submitted to DER an application to amend the permit to provide for the removal of a second mineral, limestone, from the mine. On March 26, 1982, DER denied OHM's application to amend the permit. The denial was based, in part, on OHM's alleged failure to provide sufficient data and information to enable DER to determine the hydrogeologic consequences of the proposed mining. OHM filed an appeal of the denial with the Board, which was docketed at No. 82-106-G.

Subsequent to the filing of the 82-106-G appeal, DER and OHM entered into a stipulation and agreement whereby OHM agreed to submit to the Department additional information necessary to complete its application and the Department agreed to review the information to determine if OHM's application could be granted. According to DER, OHM failed to submit the necessary information and failed to demonstrate that the proposed limestone mining would not have adverse hydrogeologic

consequences. Therefore, again according to DER, on January 20, 1984 DER denied OHM's application a second time. OHM also appealed this second denial to the Board. This second appeal was docketed at No. 84-076-G, and was consolidated with the 82-106-G appeal, under the 84-076-G consolidated docket number.

Hearings on the merits of this consolidated appeal were held October 15-18, 1985. On October 18, after considerable OHM and DER testimony concerning the environmental effects of the proposed limestone removal, DER for the first time argued that this consolidated appeal was moot because--DER now claimed--the MDP 3474SM10 permit whose amendment OHM sought had expired by operation of law. If this argument of DER's is correct, it would have been a complete waste of time for the Board to complete the hearing on the merits, which would have required a number of additional days of testimony on environmental effects. Therefore the Board, with the agreement of the parties, suspended the hearings and set up a schedule for filing and briefing of a DER motion to dismiss on grounds of mootness.

In so proceeding, the Board was following its precedent in William Fiore v. DER, Docket No. 83-160-G, 1984 EHB 643, aff'd 508 A.2d 371 (Pa.Cmwlth. 1986). DER's motion for dismissal on grounds of mootness is in essence a motion for summary judgment; indeed, its motion was accompanied by an affidavit attesting to certain facts on which DER relied. Normally a motion for summary judgment is untimely if filed after hearings have begun. Pa. Rules of Civil Procedure Rule 1035(a). Nevertheless, the Board may grant a DER motion for summary judgment offered after hearings have begun, when the parties do not object and when the Board does not rely on DER evidence presented at the hearing which the opposing party (in this case OHM) has not had the opportunity to rebut. Fiore, supra, 508 A.2d 371. Thus, the parties' briefs having been received, we now rule on DER's motion to dismiss, being careful not to rely on any material facts which--because

offered by DER at the hearing before rebuttal by OHM--can be regarded as still in dispute.

B. Status of the Voided MDP 3474SM10 Permit

DER's argument in support of mootness runs as follows. On July 30, 1982, the United States Department of the Interior, Office of Surface Mining ("OSM"), granted conditional approval ("primacy"), effective July 30, 1982, to Pennsylvania's surface mining regulatory program, authorizing the Commonwealth to regulate surface mining on non-federal lands within its borders. 47 F.R. 33076 (July 30, 1982); 30 C.F.R. §938.10. Pursuant to Section 503(a) of the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1253(a), such approval can be granted only if the state program includes rules and regulations consistent with regulations promulgated by OSM. Appropriate new Pennsylvania regulations became effective on July 31, 1982, immediately after Pennsylvania received primacy. Under these regulations, notably 25 Pa.Code §86.14, if OHM wished to continue coal mining activities under the permit more than eight months after July 31, 1982, then OHM had to reapply for a permit within two months after July 31, 1982. On September 30, 1982, just within this two month deadline, OHM did reapply for MDP 3474SM10, by submitting a so-called repermitting application. DER was dissatisfied with the information on this re-permitting application; eventually--after OHM twice failed to respond to DER orders that OHM submit additional information--DER on April 19, 1985 wrote OHM:

The Department of Environmental Resources has completed its review of your repermitting application for Mine Drainage Permit No. 3474SM10, identified as Surface Mining Permit Application No. 65743016, for a surface mine in Fairfield and Ligonier Townships, Westmoreland County. Based upon the review, your application for a surface mine permit is denied for the following reason:

Failure to submit the required repermitting information prior to the abatement date listed on Compliance Order, Docket No. 85G156.



Pursuant to Section 86.12 of the Department's Rules and Regulations, 25 Pa. Code Sections 86.12, you have been authorized to continue operations under Mine Drainage No. 3474SM10 pending the Department's review of your repermitting application. The denial of your Repermitting Application No. 65743016 ends all authorization to mine pursuant to Mine Drainage Permit No. 3474SM10. Since you no longer have a valid permit authorizing mining, you are hereby notified of your obligation to backfill and fully reclaim all areas disturbed pursuant to your operation under Mine Drainage Permit No. 3474SM10, which reclamation shall commence immediately upon receipt of this notification. You are further notified that the removal of coal from Mine Drainage Permit No. 3474SM10 is prohibited and will constitute a violation of the Surface Mining Act and Clean Streams Law for mining without a permit, subjecting you to all penalties set forth in those acts.

This action of the Department may be appealable to the Environmental Hearing Board.

OHM did not appeal this April 19, 1985 letter. DER maintains that the letter therefore is a no longer challengeable final DER action, which has irrevocably voided the permit. Consequently, DER further argues, it is not possible for this Board to grant OHM the relief OHM requests, namely amendment of the permit to provide for limestone mining, because a non-existent permit cannot be amended. This result, DER asserts, must mean that this appeal is moot.

The facts which have been recounted to this point, including the facts under section A, supra, are not in dispute and are not based on any testimony at the October 15-18, 1985 hearings (see OHM's reply to DER's motion to dismiss). OHM has not filed any affidavits (as DER did) which might establish material facts implying conclusions different from those which naturally follow from the above-recounted facts. OHM has presented no arguments which might shake DER's conclusion (from those facts) that the unappealed April 19, 1985 letter to OHM terminated any remaining OHM rights to mine under the permit. Therefore we see no alternative

but to agree with this conclusion of DER's, which is completely consistent with established Board precedent. Armond Wazelle v. DER, Docket No. 83-063-G, 1984 EHB 748; Marlin L. Snyder v. DER, Docket No. 84-400-G, 1984 EHB 446.

OHM does argue strongly that DER had no right to terminate the permit for "failure to submit the required repermitting information" (language of DER's April 19, 1985 letter) because: 1) OHM's intent to primarily mine limestone made the 25 Pa. Code Chapter 86 coal mining regulations (relied on by DER in its April 19, 1985 letter) inapplicable to the permit; and 2) DER's counsel had admitted (in a letter to OHM's counsel dated August 21, 1985) that even if OHM had submitted the repermitting information, DER would not have processed the repermitting application which the April 19, 1985 letter denied. But these arguments of OHM's, whether or not meritorious (and we do not rule on their merits) simply are irrelevant at this stage of these proceedings; the legitimacy of the unappealed April 19, 1985 letter cannot be challenged at this late date.

In sum, we unhesitatingly hold that permit MDP 3474SM10 now is void, and therefore indeed cannot be amended.

### C. The Mootness Issue

The basic question before us, however, is whether this just-stated holding requires us to rule this appeal is moot, as DER contends. OHM also argues (in effect) that the appeal should not be dismissed as moot even though the permit now is void. In essence OHM is arguing [citing Magnum Minerals, Inc. v. DER, Docket No. 82-230-G, 1983 EHB 522, and Western Hickory Coal Co. v. DER, Docket No. 82-141-G, 1983 EHB 89] that "considerations of fundamental fairness" demand that this appeal not be dismissed. OHM's reliance on these authorities is misplaced: Western Hickory, supra, considered the fairness of assessing a surface mining violation penalty on the basis of current regulations when those regulations might make the penalty larger than would have been

expected from the regulations which were effective when the violation was committed; obviously Western Hickory carries no implications whatsoever for the instant appeal. In Magnum, supra (which was vacated in part by Magnum Minerals v. DER, 1983 EHB 589), wherein DER's refusal to issue a mine drainage permit had been appealed, the Board refused to automatically moot the appeal merely because new regulations required more information than the appellant originally had furnished; the issue in Magnum was not, as in the instant appeal, whether an appeal of a permit amendment denial automatically becomes moot when the to-be-amended permit is irrevocably voided.

Despite the immediately preceding considerations, however, there is merit in OHM's contention that automatic dismissal of its appeal at this stage of these proceedings, on the sole technical grounds that the voided permit no longer can be amended, would be highly unfair to OHM. OHM originally applied for permission to mine limestone from the coal mining area covered by the permit on April 9, 1981, more than a year before the new regulations requiring repermitting became effective on July 31, 1982. DER's original March 26, 1982 denial of the limestone mining application read as follows.

The request of Old Home Manor, Inc. to amend Mine Drainage Permit No. 3474SM10 (A) is denied. The reason for denial includes:

1. Despite the quantity of limestone on the permitted area, there are several discharges which do not meet effluent limits and water quality criteria. It is the Department's contention that removal of the limestone would further lower the quality of the discharges. Old Home Manor, Inc. has failed to demonstrate that removal of the limestone seams would not have this result. Old Home Manor, Inc. has failed to provide a plan and schedule for the abatement of the present discharges.
2. Old Home Manor, Inc. has failed to provide the detailed mining plans, with an approximate timetable showing what seams of limestone

would be mined, where these seams would be mined, and in what sequence they would be mined, as requested in both of the Department's correction letters.

3. Old Home Manor, Inc. has failed and continues to fail to correct the violations of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., which violations are set forth in the Department's Order of December 23, 1981, and has failed to comply with the terms of that Order.
4. William C. Leasure, has failed and continues to fail to correct the violations of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., which are set forth in the Department's Order of December 23, 1981, and has failed to comply with the terms of that Order.

DER's later January 20, 1984 denial of OHM's revised application for limestone mining (the denial which originally was appealed at the above-captioned docket number) offered essentially the word-for-word identical reasons 1-4, supra, for refusing OHM's limestone mining application. In addition, the January 20, 1984 denial letter stated:

5. Old Home Manor, Inc. has failed to provide the additional information requested in the Department's review letters, necessary to comply with 25 Pa. Code §86.37 and §87.69.

Additionally, the Department is precluded from issuing this permit because you have failed to submit the information required by the July 31, 1982 Rules and Regulations of the Environmental Quality Board pertaining to coal mining, including without limitation, Sections 86.11, 86.31, 86.62, 86.63, 87.52, 87.62, 87.63, 87.66, 87.75, 87.116, and 87.117.

These just-quoted statements did put OHM on notice that DER felt the coal mining regulations in 25 Pa. Code Chapter 86--including the repermitting requirement implicit in §86.11(c) [when taken in conjunction with §§86.12 and 86.14 to which §86.11(c) points]--were germane to OHM's limestone mining application. Nowhere in the January 20, 1984 letter, however, is there any explicit indication to OHM that its limestone mining application automatically would be mooted if its pending repermitting application were rejected.

Moreover, DER's pre-hearing memorandum, filed December 10, 1984, offers to prove the above-quoted reasons (from DER's March 26, 1982 and January 20, 1984 denial letters, henceforth the "appealed-from reasons") for rejecting OHM's limestone mining application, but does not mention the possibility that the appeal might be mooted by rejection of the repermitting application. DER did not supplement its pre-hearing memorandum after its April 19, 1985 letter voiding the MDP 3474SM10 permit, so that OHM might be advised DER intended to argue the appeal was moot. Indeed, insofar as the Board can tell, DER's October 18, 1985 argument during the hearings was OHM's first notice of DER's mootness claim.

The Board's established practice has been to regard as waived any contentions of law not set forth in a party's pre-hearing memorandum, unless allowing such contentions to be raised clearly would not be prejudicial to opposing parties. Pre-Hearing Order No. 1, paragraph 4; Melvin D. Reiner v. DER, Docket No. 81-133-G, 1982 EHB 183; Mt. Thor Minerals v. DER, Docket No. 84-410-G (Opinion and Order, February 21, 1986). It is difficult to avoid the conclusion that OHM has been prejudiced by DER's failure to raise this mootness contention earlier, during the six-month interval between DER's April 19, 1985 voiding of the permit and the October 15, 1985 start of the hearings on the merits. During this interval OHM incurred the expense of preparing for and participating in four days of hearings on the merits of DER's

appealed-from reasons for denying the limestone mining application, including hiring an expert witness, all of which effort was beside the point and wasted according to DER's present thesis that the appeal is moot; preventing a party from inducing such wasted effort on the part of an opposing party undoubtedly is one of the policy reasons underlying our general rule that contentions of law not set forth in the pre-hearing memorandum may be waived.

On the other hand, it remains true that--whether or not OHM has been prejudiced by DER's tardiness in raising its mootness contention--it is senseless to proceed further with this complicated appeal if there really is no relief we can grant OHM; it was on this reasoning that we suspended the hearings on the merits immediately after DER raised its mootness contention. We agree with DER that the permit now is void and cannot be amended. We also agree with OHM's contention, however, that--having come this far--it is in the interests of justice to adjudicate OHM's appeal on its merits, namely the merits of the appealed-from reasons. We reconcile these opposing DER and OHM contentions, with which we agree despite their diversity, by ruling that we will adjudicate OHM's appeal on its merits if we can, meaning if--but only if--we can find a lawful way to avoid the conclusion that the appeal has been mooted by the April 19, 1985 voiding of the permit.

#### D. Severance of the Appeal from the Voided Permit

The only way to avoid the conclusion that the appeal has been mooted by the April 19, 1985 voiding of the permit is to sever the appeal from the permit, i.e., to sever OHM's application to mine limestone from the now voided permit. We realize that OHM itself never has asked for such severance; in particular, OHM did not do so in the interval between April 19, 1985 and October 18, 1985, when DER first raised the mootness issue, nor has OHM requested such severance even now.

Nevertheless, for reasons explained supra, we believe it is in the interests of justice to give OHM another opportunity to request such severance, so that this appeal can be adjudicated on the merits of the appealed-from reasons. After all, if OHM originally had applied for a permit to mine limestone without reference to the then existing MDP 3474SM10 permit, or if there never had been a coal mining permit for the site, DER would not now be able to make the correct (but nonetheless purely procedural and unrelated to the merits) argument that voiding of the MDP 3474SM10 permit has mooted this appeal.

On the facts presently before us, we cannot tell whether severance of OHM's limestone mining application from the now voided MDP 3474SM10 permit would be lawful at this late date, or whether--even if lawful--it would be reasonable to ask DER to accept such a severance. Obviously OHM, if this appeal were mooted as DER requests, simply could apply once again for a permit to mine limestone on the site. What OHM seeks--and what we believe is in the interests of justice so many years after OHM's original April 9, 1981 limestone mining application--is an adjudication by this Board of the merits of OHM's limestone mining application without the additional attendant delays for OHM of: 1) having to file a completely new application, 2) waiting for DER to evaluate and presumably to deny the new application, and 3) then having the new appeal of this new denial adjudicated by this Board on the basis of very much the same evidence as we already have heard concerning the environmental effects of the proposed limestone mining.

Therefore we have decided to defer a definitive ruling on DER's motion to dismiss this appeal as moot until: (i) OHM has had the opportunity to request that its limestone mining application be severed from the now voided MDP 3474SM10 permit, and (ii) DER has had the opportunity to respond to this request. As the accompanying Order indicates, it is not our intention that this deferral be an

excuse for renewed lengthy delays of a final resolution of this matter. It may be that OHM must complete some new application forms, if only to bring its old application up to date; if so, OHM will be expected to complete those forms, as instructed by DER. But we are presuming that these additionally required application forms will be essentially pro forma, to meet the objection that the now voided permit no longer can be amended. In particular, we are anticipating that essentially all the substantive information DER would require from OHM to evaluate a newly submitted limestone mining application already has been requested by DER.

In writing the immediately foregoing, we recognize that DER's appealed-from reasons quoted supra for denying OHM's limestone mining application, notably its reason No. 5, stated that OHM had failed to provide requested additional information. We expect that reason to remain; by giving OHM the opportunity to request severance of its original limestone mining application from the now voided coal mining permit, we are not intending to allow OHM to substantively amend that limestone mining application by including previously unsubmitted information relevant to the limestone mining's environmental effects, which then would require DER to re-evaluate the application on the merits. DER has twice evaluated and then denied the environmental merits of OHM's limestone mining application, largely on the alleged (by DER) grounds that OHM has not shown there will not be adverse environmental effects; OHM has had ample opportunity to furnish DER the information DER thinks is needed to properly evaluate those environmental effects. We do not want DER to re-evaluate the merits of OHM's limestone mining application; we merely want to be able to adjudicate the present appeal in the format of an independent application for limestone mining, not tied to the now voided coal mining permit, so that we lawfully can render the adjudication on the merits without having to



worry about the appeal's possible mootness. If DER can furnish legitimate reasons why the original application to amend the MDP 3474SM10 permit cannot be routinely converted to an independent application for limestone mining, we will have no recourse but to declare this appeal moot. Conversely, if there are no legitimate reasons to prevent severance of the original application from the now voided permit, we will not moot this appeal; instead, as soon as possible, with the highest priority on our schedule, we will complete the suspended hearing and then will adjudicate the appeal on its merits.

#### O R D E R

WHEREFORE, this 24th day of September, 1986, it is ordered that:

1. Within twenty (20) days of the date of this Order, OHM shall submit to DER a request (copied to this Board) that the limestone mining application which is the subject of this appeal be severed from the now voided MDP 3474SM10 permit to which the original limestone mining application, if granted, was to be appended as an amendment.

2. OHM (after consulting with DER) is to include with the aforesaid request any completed forms which--when taken together with its original application--OHM believes should enable DER to lawfully grant OHM its desired limestone mining permit.

3. Within ten (10) days of receipt of the submissions called for in paragraphs 1 and 2 supra, DER shall:

a. Agree that the newly submitted material, together with the previous application, comprise the functional equivalent of an independent application for a limestone mining permit, such that DER--if it were convinced that there will be no adverse environmental effects requiring denial of the

permit--lawfully could grant the desired limestone mining permit; or

b. Disagree with the statement in paragraph a immediately supra, in which event DER must state the reasons for disagreement.

4. If DER disagrees, OHM will have ten (10) days to respond to DER's reasons for disagreement.

5. The material submitted by OHM shall not include previously unsubmitted information relevant to the proposed limestone mining's environmental effects; in this regard, OHM must stand on the information it submitted with its original application.

6. Under paragraph 3b supra, DER shall not--as a reason for disagreeing with the thesis that it could lawfully grant a limestone mining permit on the basis of OHM's submissions if it were convinced there would be no adverse environmental effects requiring denial--claim that OHM has failed to submit the information referred to in paragraph 5 of its appealed-from January 20, 1984 letter denying OHM's former limestone mining application.

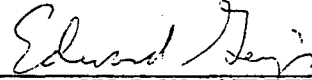
7. For the present, the Board defers a ruling on DER's motion to dismiss this appeal as moot.

8. After receipt of the documents called for in paragraphs 3-5 supra the Board will rule on DER's motion to dismiss this appeal as moot, possibly after a very prompt scheduling of very brief oral argument; unless OHM is granted an extension of time, which will only be for very good cause shown, OHM's failure to meet the deadline set in paragraph 1 supra will be reason to dismiss this appeal as moot.

9. If this appeal is not dismissed as moot, the hearing on the merits will be very promptly rescheduled, so that an adjudication of the merits of this

appeal can be rendered as soon as possible; this objective is to be given the highest Board priority.

ENVIRONMENTAL HEARING BOARD



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EDWARD GERJUOY, MEMBER

DATED: September 24, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Diana J. Stares, Esq.  
Western Region

For Appellant:  
Gregg M. Rosen, Esq.  
ROSEN & MAHFOOD  
Pittsburgh, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
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 SECRETARY TO THE BOARD

HEPBURNIA COAL COMPANY :  
 :  
 v. : DOCKET NO. 86-279-G  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued September 25, 1986

OPINION AND ORDER

Synopsis

Appellant's mere allegation, unaccompanied by affidavit, that its proposed auger mining will not affect the surface, cannot be the basis for summary judgment in favor of appellant, even though DER has not responded to the allegation. Neither 52 P.S. §1396.4(a)(2)F nor 25 Pa.Code §86.64 require the appellant to file a surface landowner's "Supplemental C" consent form if the appellant's proposed auger mining will not affect the landowner's surface.

### OPINION

Hepburnia has appealed DER's denial of Hepburnia's request for an "auger safety permit", which would have permitted Hepburnia to auger mine certain coal seams owned by Hepburnia but residing beneath surface land owned by a landowner other than Hepburnia. DER's denial letter of May 6, 1986 explained that the permit had been denied because Hepburnia had not filed the so-called "Supplemental C" form registering the aforementioned landowner's consent to Hepburnia's auger mining activities beneath the landowner's surface land. According to DER, regulations require DER to refuse the permit unless the Supplemental C is filed.

Hepburnia's Notice of Appeal rejected this just-stated contention of DER's; rather Hepburnia contended that

Neither the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 1396.1 et seq. nor the regulations promulgated thereunder, including but not limited to 25 Pa. Code §86.64, require the land owner's consent to auger mine beneath the surface owner's property.

Thereafter DER has filed a motion for summary judgment, to which Hepburnia has responded, on August 25, 1986, with a cross motion for summary judgment in Hepburnia's favor. Under the Board's Pre-Hearing Order No. 2, sent to the parties on June 3, 1986, a party must respond to an opposing party's motion within twenty days. Although twenty days now have passed since this filing of Hepburnia's, DER has not responded to Hepburnia's motion. Therefore the time is ripe for us to rule on the merits of these cross motions for summary judgment, which we proceed to do.

We note first that neither DER's motion, nor Hepburnia's response to DER's motion, nor Hepburnia's own motion, were accompanied by affidavits.

According to DER, "The facts in this case are not in dispute. The issues in dispute are purely matters of law." However, the first paragraph of Hepburnia's response states:

Appellee DER is not entitled to summary judgment as a matter of law. There are genuine issues of material fact. Alternatively, if this Board concludes that there are no genuine issues of material fact, it is Appellant Hepburnia which is entitled to judgment as a matter of law.

The first question we must decide, therefore, is whether on the record before us, unaccompanied by affidavits, we can be certain there are no genuine issues of material facts.

We have carefully examined DER's motion and Hepburnia's response in this regard, and we cannot agree with DER that there are no genuine issues of material fact. In particular, in the absence of affidavits, we do not see how we can accept as indisputably true Hepburnia's claim that its proposed auger mining will not affect the landowner's surface property, even though: 1) Hepburnia has bolstered this claim with diagrams from a standard treatise on mining, and 2) DER has not responded to--and thus has not specifically disputed--this claim of Hepburnia's. If we were to accept this Hepburnia claim, however, then, for reasons set forth infra, we would render summary judgment in Hepburnia's favor.

The following facts are not in dispute:

1. Although Hepburnia owns the mineral rights at the mine site, Hepburnia does not own the surface over the coal which it desires to mine.

2. Hepburnia has failed to provide as part of its Auger Mining Permit Request Number 5129 a landowner's consent to entry, commonly known as a "Supplemental C", from the surface owner of the area above the area which it requests authority to auger.

3. DER denied Hepburnia's auger permit request because Hepburnia failed to submit the aforementioned "Supplemental C" consent form.

4. DER's claimed authority for requiring the "Supplemental C" as a condition for issuing the auger permit is the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §§1396.1 et seq., and regulations promulgated thereto, notably 52 P.S. §1396.4(a)(2)F and 25 Pa.Code §86.64.

DER argues that auger mining falls under the SMCRA and associated regulations, via the definitions of "surface mining" and "surface mining activities" in 52 P.S. §1396.3 and 25 Pa.Code §86.1. Hepburnia argues that its proposed auger mining is excluded from surface mining falling under the SMCRA by virtue of the clause, in the 25 Pa.Code §86.1 definition of "surface mining activities":

but not including those portions of mining operations carried out beneath the surface by means of shafts, tunnels, or other underground mine openings

But whether DER or Hepburnia are correct about the general applicability of the SMCRA to Hepburnia's proposed auger mining, it is clear that the SMCRA and Pa. Code §86.64 requirements of a "Supplemental C" are limited to the circumstance that the landowner's land will be affected by the mining. §1396.4(a)(2)F reads:

the application for a permit shall include...  
the written consent of the landowner to entry  
upon any land to be affected by the operation  
(emphasis added).

Section 86.64 employs essentially the identical language which has just been quoted from §1396.4(a)(2)F.

On this reasoning, were we to accept Hepburnia's claim that its auger mining will not affect the landowner's surface, we would have to conclude that DER's denial of the auger permit because Hepburnia did not file a "Supplemental C" consent from this landowner was an abuse of DER's discretion. The Order which

follows is consistent with this conclusion, but recognizes our inability to grant a summary judgment which rests on the unsupported allegation by Hepburnia that its auger mining will not affect the surface.

O R D E R

WHEREFORE, this 25th day of September, 1986, it is ordered that:

1. Within twenty (20) days of the date of this Order,
  - a. Hepburnia is to file affidavits in support of its claim that its proposed auger mining will not affect the surface.
  - b. DER is to file affidavits in opposition to Hepburnia's aforesaid claim, if it continues to dispute that claim.
2. The Board will rule definitively on Hepburnia's motion for summary judgment, in the light of the above Opinion, after receipt of the affidavits called for in paragraph 1 supra.
3. For the present, until the filings called for in paragraph 1 are received, the Board also defers its ruling on DER's motion for summary judgment, although on the record already before us it appears that Hepburnia assuredly is disputing the allegation--necessary to DER's motion for summary judgment--that the auger mining will affect the surface.
4. A ruling on Hepburnia's pending motion to compel discovery and for sanctions also is deferred until the Board can rule on these summary judgment motions.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation  
Joseph K. Reinhart, Esq.  
Stephen C. Braverman, Esq.

DATED: September 25, 1986





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 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

C. W. BROWN COAL COMPANY :  
 :  
 v. : EHB Docket No. 86-336-R  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: September 29, 1986

OPINION AND ORDER  
 SUR  
MOTION FOR RECONSIDERATION

Synopsis

The Board's prior order of dismissal at the above-captioned docket number is affirmed and Appellant's Motion for Reconsideration is denied, since the Motion for Reconsideration was untimely and set forth no compelling reasons for reconsideration.

OPINION

By its order of August 6, 1986, the Board dismissed the appeal at the above-captioned docket number due to C. W. Brown Coal Company's (Appellant) failure to perfect its appeal pursuant to 25 Pa.Code §21.52(c). Rule 21.52(c) provides as follows:

§21.52. Timeliness and perfection.  
 \* \* \*

(c) An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51 of this title will be docketed by the Board as a skeleton appeal. The appellant shall,

upon request from the Board, file the required information or suffer dismissal of the appeal.

\* \* \*

(Emphasis added)

Rule 21.51 provides for the form and content of appeals. The relevant portion of §21.51 provides as follows:

§21.51. Commencement, form and content.

\* \* \*

(f) Within ten days after filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department [of Environmental Resources] issuing the notice of departmental action;

\* \* \*

The instant appeal was docketed as a skeleton appeal pursuant to Rule 21.52(c). An "Acknowledgement of Appeal and Request for Additional Information," a standard Board form for incomplete appeals, dated July 8, 1986, was mailed to the Appellant via first class mail.<sup>1</sup> The Board requested an indication that the officer of the Department responsible for the action being appealed was notified. The Board form clearly states that "[u]nless the following [indication of notification of Department officer] is submitted within ten (10) days of the date of receipt of this notice, your appeal may be dismissed." On July 23, 1986, after 15 days had elapsed, the Board, hearing no response from Appellant, mailed a second, identical request via certified mail, return receipt requested. The return receipt showed that Appellant's counsel received the second request on July 28, 1986. Receiving no response by August 6, 1986, the Board ordered the appeal dismissed for

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<sup>1</sup> Included with this form was a copy of the Board's rules of practice and procedure.

failure to perfect, pursuant to Rule 21.52(c).<sup>2</sup> On August 11, 1986, Appellant submitted a "Notice of Appeal," which indicated that the responsible officer of the Department had been notified. By letter dated August 20, 1986, Board Member Roth notified Appellant's counsel that due to the dismissal, and, since a motion for reconsideration had not been filed, the renewed "Notice of Appeal" would not be considered. On September 2, 1986, Appellant filed a Motion for Reconsideration.

The Board's rules for reconsideration appear at 25 Pa.Code §21.122. Time limits provided for filing applications for reconsideration of an agency's decision are normally mandatory. Mayer v. Unemployment Compensation Board of Review, 27 CmwltH Ct. 244, 366 A.2d 605 (1976). As in Rostosky v. DER, 26 CmwltH Ct. 478, 364 A.2d 761 (1976), the time here was established by regulations promulgated pursuant to statute rather than a statute itself. However, a regulation so promulgated has the force of law and is as binding as a statute on a reviewing court. Rostosky, supra; See also, Pa. Human Relations Commission v. Norristown Area School District, 20 CmwltH Ct. 555, 342 A.2d 464 (1975). Where the time period for filing a motion for reconsideration by the EHB has lapsed, Appellants lack statutory authority to then file for rehearing or reconsideration. DER v. Wolford, CmwltH Ct. , 329 A.2d 304 (1974). The Board finds that the untimeliness of the filing deprives the Board of jurisdiction. This rule provides that motions for reconsideration be filed within 20 days of the date of decision. Therefore, the Board has no choice but to deny the motion. Even if the motion were timely, however, the Board would still not grant

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<sup>2</sup> Though August 6, 1986 was the ninth day from Appellant's receipt of the second request, the Board's dismissal on this day rather than August 10 was not problematical, since this was the second request and, as it happened, Appellant submitted nothing until the fourteenth day, August 11, 1986.

reconsideration, since Appellant has advanced no compelling or persuasive reasons.

In its motion, Appellant states at Page 1, "...that I was previously unaware that the compliance officer had to be served with a copy of the notice..." The current rules at 25 Pa.Code §§21.51 and 21.52 have been in effect since August 1, 1979, over seven years.

Two requests for the required information gave Appellant sufficient, indeed ample opportunity, to perfect its appeal. The Board's tolerance of nonconformance to its filing requirements has limits in light of the high number of appeals currently pending. Based on the foregoing, the Board can find no reason to reconsider and reverse its Order of August 6, 1986.

ORDER

AND NOW, this 29<sup>th</sup> day of September, 1986, the Board's order of dismissal of the above-captioned docket number of August 6, 1986 is affirmed and Appellant's Motion for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*William A. Roth*  
WILLIAM A. ROTH, MEMBER

CONCURRENCE

By Edward Gerjuoy, Member

In view of the conclusion, with which I agree, that we have no jurisdiction to grant Appellant's untimely motion for reconsideration, I join in dismissal of this appeal. I wish to state, however, that I am not certain that reconsideration would not be deserved, had the motion been timely.

Although I do not necessarily disagree with the last sentence of the Opinion, the last few paragraphs of the Opinion show no recognition that the Board is bound by 1 Pa.Code §31.2, as well as by numerous Pennsylvania decisions which admonish courts, once jurisdiction has been established, not to then summarily dismiss a case for purely procedural violations which have not prejudiced the opposing party. DeAngelis v. Newman, 460 A.2d 730 (Pa.1983); Byard F. Brogan v. Holmes Electric Protective Company of Philadelphia, 460 A.2d 1093

(Pa.1983).

  
EDWARD GERJUOY, MEMBER

DATED: September 29, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Western Region  
For Appellant:  
William C. Stillwagon, Esq.  
Greensburg, PA 15601

b1



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 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

SPEC COALS, INC. :

:

:

v.

COMMONWEALTH OF PENNSYLVANIA

:

DOCKET NO. 85-197-G

DEPARTMENT OF ENVIRONMENTAL RESOURCES

:

Issued: October 1, 1986

OPINION AND ORDER

Synopsis

Requests for admissions, not responded to by an appellant who does not even appear at the scheduled hearing on the merits, must be deemed admitted under Pa.R.C.P. Rule 4014(b). These admissions suffice to meet DER's burden of showing it is entitled to forfeiture of \$7,000 of a \$10,000 bond covering 10 acres, where the bond states on its face that liability accrues in proportion to the area affected, and where DER itself claims the appellant only affected seven acres. DER's evidence also is sufficient to overcome confusion caused by the appellant having filed (as the DER action appealed-from) a DER letter to the appellant apparently referring to a different site, announcing forfeiture of a \$5,000 rather than a \$10,000 bond. In particular, DER's statement, in its pre-hearing memorandum filed a year before the hearing, that the forfeited bond was for an amount of \$10,000, a statement appellant never contradicted, constituted due notice to the appellant that this matter indeed did involve a \$10,000 bond.

### OPINION

On August 14, 1986 we issued an Opinion and Order in this matter, to which the reader should refer, sanctioning this pro-se appellant for continued failure to respond to discovery requests. Our August 14, 1986 sanctions, which somewhat limited the evidence SPEC would be allowed to present at the hearing on the merits, were less severe than DER demanded and probably was entitled to, but as we said on August 14, we customarily have been very lenient with pro-se appellants. However, DER was given leave to serve requests for admissions on SPEC, to be answered within 15 days of the date of service, provided the 15-day period ended no later than September 10, 1986. This cutoff date was set because the hearing on the merits was scheduled for September 15, 1986.

The hearing now has been held. SPEC did not appear at the hearing, nor offer any excuse for not being present. The parties were notified of the September 15, 1986 hearing date on November 25, 1985, and reminded on June 26, 1986. This matter involves SPEC's appeal of DER's forfeiture of a bond posted for SPEC, so that DER bears the burden of proof. King Coal Co. v. DER, Docket No. 83-112-G, 1985 EHB 104. Therefore, at the hearing the Board adopted the following procedure. DER called its only witness, and the Board asked for an offer of proof from DER's counsel. DER's counsel explained that the witness would testify that reclamation had not been completed and that SPEC had affected seven acres of the bonded area. The witness then stated, under oath, that the offer of proof indeed described his intended testimony, and that he had no corrections or additions to offer.

DER's counsel also offered into evidence (as DER Exhibit 1) the requests for admissions which had been served on SPEC by certified mail but never answered, as well as the return receipt (DER Exhibit 2) showing that SPEC had received the requests for admissions. DER's counsel requested the Board to deem admitted all

the unanswered requests for admission. Under the circumstances, and on the authority of the Rules of Civil Procedure Rule 4014(b), the Board felt it had no recourse but to grant this request of DER's. Even without the aforementioned testimony of DER's witness, these admissions are more than sufficient to meet DER's burden of showing forfeiture was justified. For example, SPEC has admitted it 1) failed to comply with a Consent Order and Agreement it signed (Admissions 29 and 30), 2) did not comply with various abatement orders (Admissions 32-37) and 3) did not properly reclaim (Admissions 10 and 40). We herewith adopt these just-stated admissions, and other admissions cited infra, as Findings of Fact by us in this matter.

In our August 14, 1986 Opinion we stated that this appeal is from forfeiture of a \$5,000 surety bond posted by the Travelers Indemnity Company. This assertion was based on categorical statements in the letter from DER to SPEC announcing the bond forfeiture, which appellant filed with the Board as representing the appealed-from DER action. DER now asserts on the record, however, that this letter was erroneously filed by the appellant; according to DER the bond actually forfeited in this appeal was a \$10,000 bond, Surety Bond B1013, posted by the Mid-Continent Insurance Company. We suppose this fact explains why, as we stated on August 14, 1986, we have heard nothing from Travelers in this matter; this fact does not explain why we have heard nothing from Mid-Continent. DER's pre-hearing memorandum, filed September 19, 1985, does state that the bond forfeited is Surety Bond B1013, as SPEC was notified in a letter from DER dated April 15, 1985. The forfeiture letter filed by SPEC is dated March 28, 1985. The appeal was filed on May 14, 1985, just barely timely for an April 15, 1985 notice, but probably outside the 30-day time limit for appealing set by 25 Pa.Code §21.52(a).



SPEC, though it has had due notice of DER's intent to forfeit Surety Bond B1013 since September 19, 1985, has made no attempt to contradict DER's assertion that this matter involves a \$10,000 bond rather than a \$5,000 bond. One of DER's unanswered requests for admissions, which we have deemed admitted (Admission 7), stated: "Will you admit that the bond [in this appeal] is Surety Bond B1013?" On the facts just recounted, and in the absence of contradiction by the appellant, we adopt, as conclusions of Law in this matter, that this appeal is from forfeiture of Surety Bond B1013, and that the appellant has had notice of the Bond B1013 forfeiture, sufficient to satisfy due process requirements.

We also have deemed admitted the fact that Exhibit A to DER's Exhibit 1 is a true and correct copy of the B1013 surety bond (Admission 8). This bond instrument states on its face that the bond is for 10 acres, and that liability accrues in proportion to the area affected by SPEC's surface mining operations. SPEC has admitted affecting seven acres under this bond (Admission 9), an admission which DER's witness affirmed. It is our further Conclusion of Law, therefore, on the basis of DER's own evidence, that forfeiture of \$7,000, but no more than \$7,000, of this \$10,000 bond is warranted. King, supra.

#### O R D E R

WHEREFORE, this 1st day of October, 1986, it is ordered that:

1. This appeal is dismissed, except insofar as it questions the amount of DER's intended forfeiture of surety bond B1013.
2. Forfeiture of surety bond B1013 is sustained for an amount of \$7,000; DER may immediately cash this bond and pay the \$7,000 into the Surface Mining Conservation and Reclamation Fund.

3. The remaining \$3,000 is to be returned immediately to the appropriate claimant, whether SPEC or the surety, in accordance with established DER practice.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

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MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

---

EDWARD GERJUOY, MEMBER

*William A. Roth*

---

WILLIAM A. ROTH, MEMBER

DATED: October 1, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Patti J. Saunders, Esq.  
Western Region

For the Appellant:  
Robert E. Ankney  
SPEC COALS, INC.  
Somerset, PA



COMMONWEALTH OF PENNSYLVANIA  
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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

CONEMAUGH TOWNSHIP	:	
	:	
	:	
v.	:	EHB Docket No. 79-061-H
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 1, 1986

OPINION AND ORDER

Synopsis

Appellant's appeal is dismissed for failure to prosecute and for noncompliance with an order of the Board.

OPINION

On May 29, 1979, Conemaugh Township (Appellant), Somerset County filed a Notice of Appeal from an administrative Order of the Department of Environmental Resources (DER), dated April 27, 1979, directing Appellant to submit a revised Official Sewage Facilities Plan pursuant to Sections 5(a) and 10 of the Sewage Facilities Act, the Act of June 24, 1966, P.L. 1535, as amended, and 25 Pa. Code §§71.14, 71.15. At the time the Order was issued, Conemaugh Township had adopted Somerset County's Sewage Plan. The DER alleged that due to the growth of Conemaugh Township, it was necessary for the municipality to submit a new plan more closely tailored to its particular needs. Appellant attacked the DER Order as being an arbitrary and capricious abuse of power by the Department. The above captioned appeal was designated EHB Docket No. 79-061-B.

Appellant filed a second Notice of Appeal (EHB Docket No.79-160-W) on

October 17, 1979 from the DER's denial of a proposed revision to the Conemaugh Township Sewage Facilities Plan. The two above appeals were consolidated under EHB Docket No. 79-061-B by an Order of the Board dated November 15, 1979.

Upon filing their respective Pre-Hearing Memoranda, the parties to this appeal promptly initiated settlement discussions in an attempt to resolve this conflict without a Board determination. The settlement negotiations included hiring an engineering consultant and submitting numerous proposed plans for a revised sewage facility. The Board, attempting to remain abreast of any developments in this case, regularly requested status reports from Appellant from 1979-1984. The response to these status report requests typically indicated that both parties were progressing in their attempt to settle this matter. After nearly two years of silence at this docket, the Board issued a Rule to Show Cause why this appeal should not be dismissed for lack of prosecution on July 25, 1986. The Appellant failed to respond to the Board's Rule to Show Cause. The Board also has not been informed of any final settlement agreement as of the date of this Order.

Appellant has the responsibility to resolve or litigate its appeal. The Board cannot permit appeals to linger on its docket for extended periods of time. Because Appellant not only failed to prosecute its appeal, but also failed to respond to the Board's Rule to Show Cause, the Board now dismisses this appeal. Delaware County Regional Water Quality Control Authority v. DER, EHB Docket No. 81-116-M (Opinion and Order issued July 18, 1986).

ORDER

AND NOW, this 1st day of October, 1986, Appellant's appeal is dismissed sua sponte for failure to prosecute and failure to comply with an order of the Board.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
\_\_\_\_\_  
MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*  
\_\_\_\_\_  
EDWARD GERJUOY, MEMBER

*William A. Roth*  
\_\_\_\_\_  
WILLIAM A. ROTH, MEMBER

DATED: October 1, 1986

cc: For the Commonwealth, DER:  
Lisette McCormick, Esq.  
Western Region  
For Appellant:  
Eugene E. Fike, II, Esq.  
FIKE, CASCIO & BOOSE  
Somerset, PA

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 WILLIAM A. ROTH, MEMBER

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 SECRETARY TO THE BOARD

THE BOROUGH OF YOUNGWOOD	:	
v.	:	EHB Docket No. 86-534-R
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
THE YOUNGWOOD BOROUGH AUTHORITY	:	
v.	:	EHB Docket No. 86-535-R
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 2, 1986

OPINION AND ORDER

Synopsis

Appeals not timely filed pursuant to 25 Pa.Code §21.52 will be dismissed. An appellant's failure to mail a notice of appeal to the proper address does not warrant the allowance of an appeal nunc pro tunc.

OPINION

Appellants are the Borough of Youngwood and the Youngwood Borough Authority. These are appeals from a May 30, 1986 Department of Environmental Resources' (DER) order pursuant to the Clean Streams Law, 35 P.S. §§691.1, et seq., the Administrative Code, 71 P.S. §§510.1, et seq., the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, 35 P.S. §750.1 et seq., and the rules and regulations adopted thereunder. Said order requires, inter alia, the Greater Greensburg Sewage Authority (GGSA), acting as the lead agency in cooperation with the Hempfield Township Municipal Authority, Hempfield Township, Youngwood Sewage Authority, the Borough of

Youngwood, the Borough of South Greensburg, the Borough of Southwest Greensburg, and the City of Greensburg, to submit a complete 201 Sewage Facilities Plan to DER by October 1, 1986. Appellants admit receiving the order on June 3, 1986. On July 1, 1986, Appellants mistakenly filed their Notices of Appeal with DER's Bureau of Litigation, rather than with the Board. After realizing their mistake, Appellants filed notices of appeal nunc pro tunc with the Board on September 16, 1986. The appeals nunc pro tunc were accompanied by copies of the original Notices of Appeal that were addressed incorrectly to the Board, "c/o The Bureau of Litigation, P. O. Box 2357, 514 Executive House, 101 South Second Street, Harrisburg, Pennsylvania 17120."

Appeals before the Board from a DER action must be filed within 30 days after the earlier of written notice or publication in the Pennsylvania Bulletin. 25 Pa.Code §21.52(a). Here, that deadline was July 30, 1986, 30 days after Appellants' receipt of written notice. An appeal filed beyond the required time period is beyond the Board's jurisdiction. Rostosky v. DER, 26 Cmwlth.Ct. 478, 364 A.2d 761 (1976).

However, Appellants here file motions with the Board for the allowance of appeals nunc pro tunc. The Board's rules provide that upon written request and for good cause shown the Board may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause are the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth. 25 Pa.Code §21.53. The Board permits the filing of an appeal nunc pro tunc where fraud or some breakdown in the operations of the Board has caused the delay in filing an appeal. Petricca v. DER, 1984 EHB 519; East Side Landfill Authority v. DER, 1982 EHB 299. Appellants here have not averred any circumstances that warrant the granting of appeals nunc pro tunc. The appeals were untimely

filed simply because Appellants attempted to file them at the wrong address. This was done despite the fact that the official appeal form used, 25 Pa.Code §21.51, and the final paragraph of the DER order each provide the Board's correct address, i.e. 221 North Second Street, Third Floor, Harrisburg, PA 17101. Such a failure does not justify an appeal nunc pro tunc. Fuel Transportation Co., Inc. v. DER, 1985 EHB 860; Petricca, supra. Thus, the Board must deny Appellants' motions for appeal nunc pro tunc.

**ORDER**

AND NOW, this 2nd day of October , 1986, the appeal of The Borough of Youngwood at EHB Docket No. 86-534-R and the appeal of the Youngwood Borough Authority at EHB Docket No. 86-535-R are dismissed as untimely filed pursuant to 25 Pa.Code §21.52(g) and Appellants' joint motion to appeal nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: October 2, 1986

cc: For the Commonwealth, DER:  
Zelda Curtiss, Esq.  
Western Region  
For Appellant:  
Gerald J. Yanity, Esq.  
Latrobe, PA





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 SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
 :  
 : EHB Docket No. 85-392-W  
 :  
 :  
 : Issued: October 2, 1986

OPINION AND ORDER

Synopsis

The Department of Environmental Resources' (Department) motion to compel Appellant to identify a mining operation which was alluded to during the course of deposing Appellant's expert is denied as moot. The motion to compel Appellant to describe the techniques of and calculations relating to alkaline addition and resultant water quality at another mine site not the subject of this appeal is denied as burdensome and unreasonably annoying. Appellant's motion for a protective order is granted.

OPINION

This matter was initiated by the filing of a Notice of Appeal on September 24, 1985, by Al Hamilton Contracting Company (Appellant) seeking the Board's review of the Department's denial of an application for a surface mining permit. The parties have filed their pre-hearing memoranda and have engaged in discovery. The present controversy arises as a result of the Department's deposition of Dr. Harold Lovell, an expert witness retained by Appellant.

During the course of Dr. Lovell's deposition on April 28, 1986, he alluded to a mining operation where alkaline material was being added as part of the reclamation process. Appellant objected when the Department requested Dr. Lovell to identify the operation, claiming that responding to the question would force Dr. Lovell to disclose the proprietary information of another operator not party to the proceeding. The Department subsequently filed, pursuant to Pa.R.Civ.P. 4019, a motion to compel, requesting the Board to order Appellant to identify the site alluded to in Dr. Lovell's deposition; answer interrogatories relating to alkaline addition calculations and water quality data at that site; and prohibit Appellant from introducing any evidence regarding other sites where the Department has permitted alkaline addition.

Appellant responded to the Department's motion and also requested that the Board issue a protective order under Pa.R.Civ.P. 4012. As a basis for the protective order, Appellant alleged that the Department's interrogatories exceeded the scope of proper discovery; that the Department had the information it was seeking from Appellant in its own files and that to obtain it Appellant would have to request the Department to furnish it to Appellant by means of a Motion for Production of Evidence; and that the requested discovery was burdensome, unreasonably annoying and sought in bad faith. Appellant also raised new matter by identifying what it believed to be the mine site alluded to in Dr. Lovell's testimony.

Since Appellant has disclosed the identity of the operation as best it could, there is no relief the Board can grant the Department as to this issue. Consequently, that portion of the Department's motion to compel is denied as moot.

The proffered interrogatories incorporated in the Department's

motion request Appellant to describe and attach "all overburden analyses and alkaline addition calculations performed on the mine site" and "all water quality and quantity data analyses that Al Hamilton has access to regarding the site." They also request Appellant to "describe in detail the special handling and/or alkaline addition plans that have been employed at the mine site."

Without ruling on the ultimate admissibility of evidence relating to alkaline addition at other permitted sites, we agree with the Department's assessment that these interrogatories are calculated to lead to the discovery of admissible evidence. The issue then becomes whether responding to the interrogatories would cause unreasonable annoyance, embarrassment or expense.

Appellant claims that the Department already has the requested information in its possession. Discovery is not barred simply because the party seeking the discovery already has the information. Magnum Minerals v. DER, 1983 EHB 310. However, in some instances the fact that the party seeking the information already has the information in its possession may lead to a finding that the discovery sought is unreasonable. The instant matter is analogous to 1958 Assessment of Glen Alden Corp., 17 D&C 2d 624 (1958) wherein it was held that a board of assessment was not required to answer a coal company's interrogatories relating to the amount of coal remaining in various of the company's assessed tracts. The holding turned upon the circumstances of the manner of assessment; assessments were arrived at based on the company's estimates of how much coal remained--the companies prepared them and the assessors accepted them. Because of this, it was held that requiring the Board of Assessment to provide the coal company with data already prepared by the company would cause the board unreasonable annoyance, embarrassment, expense and oppression.

Appellant herein would have two avenues to obtain the information being sought by the Department. It could request the coal company in question to provide it with a copy of its permit application and related materials. That coal company, which may or may not be a competitor, is under no obligation to provide Appellant with the information, as it is not a party to this action. Appellant's other choice is to request the Department to provide the materials from its permit files so that Appellant can then turn around and provide the materials to the Department. Under the circumstances we find that to do so would cause Appellant unreasonable annoyance and oppression, and we will deny the Department's motion.

**ORDER**

AND NOW, this 2nd day of October , 1986, it is ordered that the Department's motion to compel is denied and that Al Hamilton Contracting Company's motion for a protective order is granted.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

**DATED:** October 2, 1986

**cc: For the Commonwealth, DER:**  
Bernard A. Labuskes, Jr., Esq.  
Central Region  
**For Appellant:**  
William C. Kriner, Esq.  
KRINER, KOERBER & KIRK  
Clearfield, PA

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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

RAYMOND WESTRICK COAL COMPANY :  
 :  
 v. : EHB Docket Nos. 86-314-R  
 : 86-362-W  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 8, 1986

OPINION AND ORDER

Synopsis

Appeals of a compliance order are dismissed as untimely filed pursuant to Rule 21.11 of the Board's rules of practice and procedure. The Department of Environmental Resources' refusal to assist Appellant in completing a Notice of Appeal form is not sufficient grounds for the allowance of an appeal nunc pro tunc.

An appeal of a proposed assessment of a civil penalty is dismissed because the notice is not an appealable action.

OPINION

The matter at Docket No. 86-314-R was initiated by the Board's receipt of a hand-written letter from Raymond Westrick (Appellant) on June 25, 1986. The letter requested review of a compliance order issued by the Department of Environmental Resources (Department) pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. The order was issued as a result of inspections conducted at Appellant's mining operation on May 12 and 13, 1986.

Because Appellant's letter lacked all of the relevant information required by Rule 21.51 of the Board's rules of practice and procedure, the Board, on June 30, 1986, sent Appellant its Acknowledgement of Appeal and Request for Additional Information. When the requested information had not been supplied, the Board sent Appellant a second acknowledgement/request on July 15, 1986, this time by certified mail. The acknowledgement/request was received by Appellant on July 16, 1986, but he failed to submit the necessary information by the required date of July 26, 1986. This, in and of itself, was grounds for possible dismissal of the appeal under Rule 21.52.

The matter was complicated by Appellant's filing a completed Notice of Appeal form with the Board on July 22, 1986, which was separately docketed at 86-362-W. The Notice of Appeal related to the May 13, 1986 compliance order which was the subject of Docket No. 86-314-R. Apparently, rather than simply supplying the Board with the information requested at Docket No. 86-314-R, Appellant filed a properly completed Notice of Appeal form.

The Board, upon review of the appeal docketed at 86-362-W, issued a rule to show cause why the appeal should not be dismissed for untimely filing. In response to the rule, Appellant, then represented by counsel, stated that

he was late in filing the appeal because he went to the Ebensburg Office of the Department of Environmental Resources to have them help fill out the appeal form. After they refused, and until he could get an appointment with the undersigned, the appeal period had expired. He advises that he was not able to prepare the appeal form on his own.

The Department filed a separate motion to dismiss Docket No. 86-362-W as untimely filed on August 18, 1986.

The Board routinely dismisses appeals which have not been properly perfected under Rule 21.51 if an appellant, after two requests from the

Board, fails to cure the deficiencies in its Notice of Appeal. Appellant did timely cure the deficiencies in its filing at 86-314-R, but the Board inadvertently docketed the properly perfected appeal at a new, separate docket. Thus, a dismissal for failure to perfect is inappropriate.

Timeliness is an issue whether one examines Docket 86-314-R or 86-362-W. The May 13, 1986 compliance order attached to the Notice of Appeal at 86-362-W indicates that it was personally served on Appellant's agent on May 13, 1986. The appeal of the compliance order would have had to been filed with the Board on or before June 12, 1986. The appeal docketed at 86-314-R was filed on June 25, 1986, thirteen days after the expiration of the appeal period. The late filing would normally deprive the Board of jurisdiction over the matter. Lower Allen Citizens Action Group, Inc. v. DER, et al, EHB Docket No. 86-246-W (Opinion and Order issued August 22, 1986.) The only question remaining is whether, given the reasons alleged by Appellant as the cause of its untimely filing, sufficient grounds exist for allowance of the filing of an appeal nunc pro tunc.

The Board will permit the filing of an appeal nunc pro tunc when fraud or breakdown in the operations of the Board has caused delay in filing an appeal. Fuel Transportation Co., Inc. v. DER, 1985 EHB 860. While a breakdown in the operation of the Board was responsible for the separate docketing of the perfected appeal of 86-314-R at 86-362-W, there is no allegation that the Board was responsible for the initial untimely filing at 86-314-R. The Department's alleged failure to assist Appellant in exercising his appeal rights does not constitute fraud or breakdown on the part of the Board, since the Department and the Board are separate entities. While we sympathize with the plight of appellants who are unfamiliar with the appeal process and who do not have the benefit of counsel, it is the appellant's

responsibility to prosecute its appeal. Thus, granting of an appeal nunc pro tunc under these circumstances is not appropriate.

The appeal docketed at 86-362-W also seeks review of the Department's May 29, 1986 notice of proposed assessment of civil penalties. Appellant received that notice on June 4, 1986, and it was not alluded to in the appeal filed at Docket No. 86-314-R on June 25, 1986. The timeliness of the challenge is immaterial, as the Board has consistently held that proposed assessments of civil penalties are not appealable actions. K.M. & K. Coal Company v. DER, EHB Docket No. 86-201-W (Opinion and Order issued June 24, 1986).



O R D E R

AND NOW, this 8th day of October, 1986, it is ordered that the appeals of Raymond Westrick of the Department's May 13, 1986 compliance order order docketed at 86-314-R and 86-362-W are dismissed as untimely filed. It is further ordered that Westrick's appeal of the Department's May 29, 1986 proposed assessment of civil penalties is dismissed because the notice does not constitute an appealable action.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: October 8, 1986

Bureau of Litigation  
cc: For the Commonwealth, DER:  
Mary Young, Esq.  
Central Region

**For Appellant:**

Merle K. Evey, Esq.  
EVEY, ROUTH, BLACK, DOREZAS,  
MAGEE & ANDREWS  
Hollidaysburg, PA  
and  
Raymond Westrick  
R. D. 1, Box 457  
Patton, PA 16668

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 WILLIAM A. ROTH, MEMBER

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MANOR MINES, INC. :  
 :  
 v. : DOCKET NO. 82-005-G  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 8, 1986

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

By Edward Gerjuoy, Member

Syllabus

Under presently applicable regulations, a mine drainage permit authorizing deep mining becomes void if operations under the permit do not commence within three years of the date of the permit's issuance, unless extensions of the three-year limit are granted by DER for good cause shown. 25 Pa.Code §86.40(b).

INTRODUCTION

On December 23, 1981, DER issued an administrative order (the "Order") addressed to William C. Leasure ("Leasure") and Old Home Manor, Inc. ("OHM") ordering Leasure and OHM to remedy various alleged violations at some sixteen surface mining sites which had been operated by OHM under a number of mine drainage permits from DER. The Order was not addressed to Manor Mines, Inc. ("MMI"), nor did the Order require MMI to take any action. The Order made several findings

of fact, however, one of which (Finding F) read as follows.

F. On June 27, 1975, the Department issued to Manor Mines, Inc. Mine Drainage Permit No. 3274305 which authorizes deep mining on a portion of the surface mining site covered by Mine Drainage Permit No. 3971BSM2 and Mining Permit No. 615-6 and 6(A). On June 9, 1977, the Department granted Manor Mines, Inc. a one year extension until June 27, 1978, to activate the deep mine. Section 99.21 of the Rules and Regulations of the Environmental Quality Board (hereinafter "EQB") states that mine drainage permits are null and void two (2) years after date of issuance, or three (3) years after date of issuance if the Department grants a one year extension, unless the mine has been placed in production within that time. The proposed deep mine has not been placed in production within two (2) years from the date of issuance of the permit, nor within the one (1) year extension granted by the Department, thus Mine Drainage Permit No. 3274305 is null and void by operation of law.

MMI has appealed this just-quoted paragraph F; specifically, MMI asks the Board to vacate this paragraph F and to reinstate MMI's Mine Drainage Permit No. 3274305 (the "permit").

The Order also has been appealed by OHM and by Leasure, at Docket Nos. 82-006-G and 82-007-G respectively. Neither of these appeals has been consolidated with the other, nor with the above-captioned appeal, but the hearings on the merits of the three appeals have been consolidated. The consolidated hearing, held on a single day, February 7, 1985, produced no direct testimony pertinent to the instant appeal at 82-005-G. At this hearing, however, the parties stipulated (Bd Ex. 1) that the record in the instant appeal included all the evidence which had been introduced during lengthy (10 days) much earlier (April-June 1982) hearings on petitions for supersedeas in the appeals at 82-006-G and 82-007-G. Transcript references, infra, are solely to those 82-006-G and 82-007-G supersedeas hearings.

At the conclusion of the February 7, 1985 hearing, a briefing schedule was set; DER's brief was due first, on May 1, 1985. DER then requested, and received,

a number of extensions of this deadline until the Board lost patience and, on August 30, 1985, ordered that DER's post-hearing brief would not be considered in this adjudication if not filed by September 6. DER did meet this deadline, whereas MMI's post-hearing brief became due on January 3, 1986. Thereafter it was MMI's turn to request additional time to file its post-hearing brief until the Board, once again losing patience, ruled on July 2, 1986:

1. The Board will begin adjudicating these appeals as soon as its presently crowded schedule permits, whether or not MMI's brief has been received.

2. If MMI's brief has been received before the process of adjudication begins, no sanction will be imposed (because the Board accepted DER's brief without imposing sanctions, although DER's brief was long overdue).

3. MMI's brief will not be accepted after adjudication begins; the Board will not take the time to revise its adjudication to take account of a so tardily filed brief.

4. MMI will be advised when the Board commences its adjudication, so that it need not expend the time and money to prepare a brief which will not be accepted.

MMI's post-hearing brief had not been received by the time this adjudication was commenced; therefore, consistent with our just-quoted July 2, 1986 Order, MMI was advised that its post-hearing brief no longer would be accepted, and this adjudication has been prepared without the benefit of any such brief. We have made use of DER's brief, however, including an affidavit which accompanied that brief. MMI made no objection to DER's request that this affidavit be included in the record, and we therefore have admitted the affidavit, as Board Exhibit 2. Findings of Fact 3-6, infra, are taken essentially verbatim from this affidavit, by Michael Welch, DER's District Manager with responsibility for the permit; we see no reason to believe that MMI has been prejudiced in any way by the Board's acceptance of Mr. Welch's written statement, taken under oath and backed up by copies of documents (from DER's files) which were attached to the affidavit.

FINDINGS OF FACT

1. The Appellant in this matter is Manor Mines, Inc. ("MMI"), a Texas corporation authorized to do business in Pennsylvania, with Pennsylvania business address R. D. No. 2, Homer City, PA 15748.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"), and the Rules and Regulations of the Environmental Quality Board adopted thereunder, notably 25 Pa.Code Chapter 86.

3. Michael Welch is the District Mining Manager for DER's Ebensburg District Mining Office; as mining manager he is custodian of the files of the Ebensburg District Mining Office.

4. The files of the Ebensburg District Mining Office include a file for Mine Drainage Permit 3274305 (the "permit") issued to MMI, authorizing an underground mining operation in Brushvalley Township, Indiana County.

5. The aforesaid file reflects the following information:

- a. The Department issued the permit on June 27, 1975 (Ex. A to Board Ex. 2).
- b. On June 6, 1977 MMI, by its engineer, Robert E. Cochran, wrote a letter to DER requesting a one-year extension for the commencement of operations under the permit (Ex. B to Board Ex. 2).
- c. On June 9, 1977 DER, by letter, approved this request for a one-year extension (Ex. C. to Board Ex. 2).

6. This June 9, 1977 letter included the paragraph:

Our regulations allow us to give only a one year extension to a mine drainage permit. So if the Manor Mine No. 4 is not placed in operation by June 27, 1978, Permit 3974305 will become null and void, and it will be necessary for you to get a new permit before starting the mining operation.

7. MMI presented no evidence to show that it had requested any additional extensions of the permit.

8. As of April 13, 1982, operations under the permit had not begun (Tr. 65).

#### DISCUSSION

Mr. William C. Leasure, an officer of MMI (Tr. 76), testified that as of April 13, 1982 (the date of his testimony), mining operations under the permit had not commenced (Finding of Fact 8). DER's former regulations, 25 Pa.Code §99.21, stated (under the heading "Mine Drainage Permits"):

§ 99.21. Voiding of permits.

Permits shall become null and void two years after date of issuance unless within that time the mine has been placed in production. A one-year extension of the starting time may be granted if the permittee can demonstrate sufficient reason.

Under §99.21, therefore, which was in effect on June 27, 1978, three years after the permit originally had been issued (Finding of Fact 5a), the permit became void on June 27, 1978. Section 99.21 was rescinded on July 31, 1982. This rescission did not operate to restore the previously voided permit, but in any event the three year limit on placing a mine into operation has been incorporated into the new regulations effective July 31, 1982, notably 25 Pa.Code §86.40(b). Section 86.40(b), unlike the former §99.21, does permit extensions beyond three years for good cause shown, but MMI made no showing that such additional extensions of time had been requested (Finding of Fact 7). Although notice was not required, MMI did receive due notice that the permit would lapse by operation of law if operations did not begin before June 27, 1978 (Finding of Fact 6).

Hence the conclusion is unavoidable that the statements in the appealed-  
from finding of fact F (quoted supra from DER's December 23, 1981 letter) were

accurate and within DER's discretion under applicable regulations. Equally unavoidable, therefore, is the decision to dismiss this appeal. We note that we have grave reservations about our jurisdiction to accept as timely an appeal filed January 7, 1982 of a December 23, 1981 DER letter asserting that a permit to the appellant had lapsed by operation of law on June 27, 1978, of which lapse MMI had been warned long before June 27, 1978. See Alternate Energy Store, Inc. v. DER, 1985 EHB 821. Since DER did not raise this issue until long after it had filed its brief, however, and since we did not ask the parties to brief this issue, we have ignored this possible jurisdictional difficulty and have decided this appeal on its merits.

#### CONCLUSIONS OF LAW

1. The permit became void by operation of law on June 27, 1978.
2. Paragraph F of DER's December 23, 1981 letter to MMI, which notified MMI (through its officer William C. Leasure) that the permit had become void, was not an abuse of DER's discretion nor an arbitrary exercise of its duties or functions.

ORDER

WHEREFORE, this 8th day of October, 1986, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: October 8, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Diana J. Stares, Esq.  
Western Region

For Appellant:  
Gregg M. Rosen, Esq.  
ROSEN & MAHFOOD  
Pittsburgh, PA





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EDWARD GERJUOY, MEMBER  
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M. DIANE SMITH  
 SECRETARY TO THE BOARD

NORWESCO DEVELOPMENT CORPORATION :  
 :  
 v. : EHB Docket No. 86-365-G  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 8, 1986

OPINION AND ORDER

Synopsis

Appeal is dismissed pursuant to Rule 21.52 because Appellant failed to properly perfect the appeal after two requests for additional information from the Board.

OPINION

This matter was initiated by the filing of a document entitled "Amended Appeal" by Norwesco Development Corporation on July 24, 1986. A docket number, 86-007-G, an earlier appeal by Norwesco Development Corporation (Norwesco), was noted on the document. In its entirety, the document read as follows:

AND NOW, this 22nd day of July, 1986, Norwesco Development Corporation appeals the Amended Order dated July 8, 1986, to the same extent and for the same reasons that it has appealed (sic) the Order of January 3, 1986 issued by the Department of Environmental Resources.

The Board, as is its customary practice, docketed the appeal as a skeleton appeal because of content deficiencies. The Board acknowledged receipt of the appeal and, on July 25, 1986, requested Norwesco to provide

the Board with a copy of the Department of Environmental Resources' (Department) action being appealed from, the date the action was received, and an indication that the required persons had been notified. The information was to be supplied to the Board within ten days of Norwesco's receipt of the acknowledgement/request. Norwesco failed to respond to the notice, and the Board, on August 15, 1986, by certified mail, again requested Norwesco to submit the necessary information. Norwesco still has not filed the information with the Board, although the certified mail receipt form was returned to the Board.

The Board would normally dispose of this matter with a form order. However, an opinion is appropriate under the circumstances because of the existence of Norwesco's earlier appeal of a January 3, 1986 Department order at Docket No. 86-007-G. Norwesco is seemingly under the impression that the Department's July 8, 1986 amended order is not an action separate from its original January 3, 1986 order and that an amendment to its Notice of Appeal at Docket No. 86-007-G will suffice to challenge the July 8 amended order.

The Department's July 8 order, to the extent it imposed new or differing obligations or liabilities on Norwesco, was a separate appealable action. The Board's jurisdiction under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, attaches to appeals of discrete Department actions. The Board does not retain continuing jurisdiction over the various actions comprising a course of conduct by the Department toward an operator/permittee/person simply because the Board has taken jurisdiction over an appeal of one of those actions. Consequently, the July 24, 1986 filing by Norwesco was a separate appeal subject to the requirements of 25 Pa.Code §21.51. Since Norwesco failed to properly perfect

its appeal after two requests from the Board, and has not responded in any way to the Board's requests, the appeal at Docket No. 86-365-G will be dismissed pursuant to Rule 21.52. The Board is expected to wait a reasonable time for an appeal to be perfected. R. Czambel, Sr. v. DER, Docket No. 80-152-B, 1980 EHB 508. It would be unreasonable to expect the Board to wait indefinitely for Norwesco's response, after two independent notices from the Board, the last sent certified and definitely received by Norwesco.

**ORDER**

AND NOW, this 8th day of October, 1986, it is ordered that the appeal of Norwesco Development Corporation at Docket No. 86-365-G is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: October 8, 1986

Bureau of Litigation  
cc: For the Commonwealth, DER:  
Western Region

For Appellant:  
Kenneth D. Chestek, Esq.  
MURPHY, TAYLOR & ADAMS  
Erie, PA

bl



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 221 NORTH SECOND STREET  
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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

GRANBAY COAL COMPANY, INC. :

:

:

v. : DOCKET NO. 84-347-G

COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 14, 1986

OPINION AND ORDER

Synopsis

This appellant, though requested to do so, has failed to give the Board a telephone number whereby it assuredly can be contacted. Mail to the only address the Board has for the appellant, a Post Office Box, has been returned with the information that the P. O. Box has been closed, with no forwarding address. The Board has not heard from the appellant for over nine months. Under these facts the Board considers that the appellant, even though represented by a lay person not an attorney, has shown that it has no intention of prosecuting its appeal. Therefore the appeal is dismissed.

OPINION

Granbay has appealed DER's denial of Granbay's application for a mine drainage permit. Originally Granbay was represented by counsel, but counsel withdrew as of January 29, 1985; on January 30, 1985, Orlando Ciaffoni, Granbay's chief executive officer, who apparently is not an attorney, indicated to the Board that

he intended to represent Granbay in this matter.

Immediately after the appeal was filed, the Board mailed Granbay Pre-Hearing Order No. 1, setting December 28, 1984 as the due date for Granbay's pre-hearing memorandum. Because of the circumstances recounted in the previous paragraph, Granbay was given numerous extensions of time to file its pre-hearing memorandum. Eventually Mr. Ciaffoni did file Granbay's pre-hearing memorandum, on June 21, 1985; simultaneously Mr. Ciaffoni requested that the hearing on the merits of Granbay's appeal be scheduled. Mr. Ciaffoni was informed by return mail that in accordance with the Board's usual practice the hearing would be scheduled as soon as DER filed its pre-hearing memorandum.

DER filed its pre-hearing memorandum on July 18, 1985. Shortly thereafter the Board, again in accordance with its usual practice, attempted to arrange a conference call with the parties, so that the desired hearing on the merits could be scheduled. The Board was unable to contact Mr. Ciaffoni for this purpose. Therefore, on August 16, 1985, the Board wrote Mr. Ciaffoni as follows, by certified mail, return receipt requested.

Dear Mr. Ciaffoni:

DER now has filed its pre-hearing memorandum. Consequently, as you were advised in my letter of June 24, 1985, scheduling a hearing on the merits of this appeal now is appropriate.

Normally this scheduling is agreed upon during a conference call between the parties and myself. I could just set a time arbitrarily, but to do so could be unfair to you and to DER. Moreover, I cannot schedule intelligently without some notion of how long the hearing is expected to take. I cannot make this judgment without some input from you, as to how many witnesses you really expect to call, etc.

This office has tried to telephone you several times. The two phone numbers we previously had for you, namely 329-4800 and 329-8310, both have been

disconnected we are informed. I know of no other way to reach you other than by letter. It is extremely difficult, and quite wasteful of the Board's time as this letter shows, to have an appellant who doesn't give the Board a telephone number where he can sometimes be reached or at the very least be given a message.

Therefore, I see no alternative to ordering you as follows. Within thirty days of the date of this letter, you are to call the Board, giving us a telephone number where you can be reached during the next week or so after the call you make, with specific times (during regular business hours) when you will be reachable at that number if you cannot be there at all times. Once we hear from you with this information, we will contact DER to set up a conference call as described above, or --if necessary--get back to you to find out more times when you will be available at your telephone number. Ultimately this procedure will result in a conference call, albeit after a lot more trouble than usual.

I further inform you that if we do not hear from you within the thirty-day period specified, I will assume you no longer are interested in prosecuting this appeal, and will dismiss the appeal on those grounds.

This letter was received, and Mr. Ciaffoni's response was as follows.

In response to your letter of August 16, 1985 requesting a telephone number by which to contact me, we do all correspondence by mail. If you wish to contact this office, please do so by letter.

Although this response by Mr. Ciaffoni scarcely complied with the order in our August 16, 1985 letter, nevertheless the Board--reluctant to deny Mr. Ciaffoni his day in court--scheduled a hearing for the week of December 15, 1986, as Mr. Ciaffoni was informed by letter dated December 5, 1985. On September 15, 1986, the Board, still in accordance with its usual custom, mailed Mr. Ciaffoni a copy of its Pre-Hearing Order No. 3 concerning the parties' duties to confer in advance of the hearing for the purpose of stipulating uncontested facts and issues. This letter, which was mailed to the same P. O. Box number as our earlier

August 16, 1985 letter, was returned to the Board by the Post Office, with the information that the P. O. Box had been closed without any forwarding address.

On receipt of this returned letter, the Board tried to reach Mr. Ciaffoni by telephoning the numbers listed in our August 16, 1985 letter supra, again without success; these numbers now no longer are disconnected, but the parties on the other end have no knowledge of Mr. Ciaffoni. DER's counsel in this matter have been contacted; they have the same address and telephone numbers for Mr. Ciaffoni as the Board does. The Board has heard nothing from Mr. Ciaffoni since we wrote him on December 5, 1985; that letter was not sent certified, but it was addressed to the aforementioned P. O. Box and was not returned as undeliverable.

Under the circumstances we have recounted, we feel we have no alternative but to dismiss this appeal. Granbay has the burden of proof in this matter, so that DER does not even have the obligation of demonstrating a prima facie case. 25 Pa.Code §21.101(c) (1). DER should not have to prepare for a week of hearings, including arranging for its witnesses to testify, without some assurance that Granbay will be present to meet Granbay's burden of going forward. The Board should not have to hold these hearing dates open without the same assurance; many other appellants who undoubtedly are prepared to put on their cases have been clamoring for hearing dates. The Board should not have had to expend the time and effort which has been described, trying to contact Mr. Ciaffoni so that Mr. Ciaffoni will be able to prosecute his appeal; even though Mr. Ciaffoni is not a lawyer, simple common sense--especially after our August 16, 1985 letter--should have told him that he was obliged to keep the Board informed of an address whereat he could be reached. In failing to so keep the Board informed, Mr. Ciaffoni in effect has indicated to the Board that he no longer has any intention of prosecuting this

appeal. An appellant's failure to prosecute its appeal is grounds for dismissal. Blake Becker, Jr. v. DER, Docket No. 79-188-B, 1984 EHB 553; Neshaminy Enterprises International v. DER, Docket No. 82-289-G, 1983 EHB 475, Spring Brook Township v. DER, Docket No. 84-122-M (Opinion and Order, April 8, 1986).

O R D E R

WHEREFORE, this 14th day of October, 1986, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
\_\_\_\_\_  
MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*  
\_\_\_\_\_  
EDWARD GERJUOY, MEMBER

*William A. Roth*  
\_\_\_\_\_  
WILLIAM A. ROTH, MEMBER

DATED: October 14, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
Diana J. Stares, Esq. and  
Joseph K. Reinhart, Esq.  
Western Region

For the Appellant:  
Orlando Ciaffoni, CEO  
Granbay Coal Company, Inc.

b1





COMMONWEALTH OF PENNSYLVANIA  
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 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

SUGAR HILL LIMESTONE COMPANY :  
 :  
 v. : EHB Docket No. 86-353-R  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 15, 1986

OPINION AND ORDER  
 SUR  
MOTION FOR RECONSIDERATION

Synopsis

Appellant's motion for reconsideration is granted and its appeal reinstated.

OPINION

By its order of August 19, 1986, the Board dismissed the above-captioned appeal upon failure of Appellant to perfect its appeal in compliance with the regulations of the Board at 25 Pa.Code §21.52(c). Appellant filed an appeal apparently from an assessment of civil penalties imposed by DER for a mining operation. However, the Appellant did not include a copy of the appealed from action with its Notice of Appeal nor did it provide a copy after two requests from the Board. Hence, the Board dismissed the appeal. Appellant has filed a timely Motion for Reconsideration.

Upon reconsideration of the matter, the Board will reinstate the

instant appeal. The Board was too hasty in dismissing this appeal for failure to perfect. This is a harsh measure, especially considering that the appellant is apparently acting pro se. However, we are mindful that Rule 126 of the Pennsylvania Rules of Civil Procedure is a statement of the requirement of fairness and establishes an affirmative duty to follow all procedural rules. DeAngelis v. Newman, 501 Pa. 144, 460 A.2d 730 (1983); Byard F. Brogan v. Holmes Electric Protective Company of Philadelphia, 501 Pa. 234, 460 A.2d 1093 (1983). We can see no prejudice to the Appellee, the Department of Environmental Resources (DER).

In entering this order, we note that a copy of the appealed-from DER action and the date received still have not been provided by Appellant. Appellant will be given a third, and final, chance to perfect its appeal and, if it fails to do so, the appeal will be dismissed.

ORDER

AND NOW, this 15th day of October, 1986, it is ordered that:

1. The motion for reconsideration at the above-captioned docket number is granted and the appeal is hereby reinstated, subject to No. 2 below.

2. Within 10 days of receipt of this order Appellant shall provide to the Board a copy of the appealed-from action and the date received.

3. If the information in No. 2 above is not timely filed, the appeal will be dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: October 15, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Western Region (Barbara Brandon, Esq.)  
For Appellant:  
Russell A. Smith  
Sugar Hill Limestone Company

b1



COMMONWEALTH OF PENNSYLVANIA  
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 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

GREATER GREENSBURG SEWAGE AUTHORITY, et al.	:	EHB Docket No. 86-321-R
	:	
THE BOROUGH OF YOUNGWOOD	:	EHB Docket No. 86-534-R
	:	
THE YOUNGWOOD BOROUGH AUTHORITY	:	EHB Docket No. 86-535-R
	:	
v.	:	Issued: October 15, 1986
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER  
 SUR  
PETITION TO QUASH

Synopsis

Appellee's Petition to Quash is denied because the appeals at Docket No. 86-321-R were timely filed, or in the alternative, as being moot with respect to the appeals at Docket Nos. 86-534-R and 86-535-R.

OPINION

The Department of Environmental Resources (DER), the Appellee, has filed a Response to Appellants' Motion for Filing Appeals Nunc Pro Tunc and Department's Petition to Quash in the above-captioned consolidated appeals at Docket No. 86-321-R. At first glance, DER's response and petition is somewhat confusing in that it is not clear whether the response and petition pertain to the consolidated appeals at Docket No. 86-321-R or to the appeals at Docket Nos. 86-534-R and 86-535-R. In order to prevent confusion among

the parties, the Board is herein ruling on DER's petition.

On May 30, 1986, DER issued an order which pertained to all of the above-captioned appellants. On their Notices of Appeal, all of the above-captioned appellants indicated receipt of DER's order on June 3, 1986. Pursuant to the Board's rules of practice and procedure at 25 Pa.Code §21.52(a), appeals would have to be filed within 30 days in order to be timely. In this case, the last day to file an appeal with the Board was July 3, 1986. Appeals filed after July 3, 1986 would not be timely and the Board would have no jurisdiction, unless the Board granted leave to file an appeal nunc pro tunc.

The appellants at the consolidated appeals at Docket No. 86-321-R filed their appeals as follows:

Greater Greensburg Sewage Authority	June 30, 1986
Hempfield Township Municipal Authority	June 30, 1986
Hempfield Township	June 30, 1986
Borough of Southwest Greensburg	July 02, 1986
City of Greensburg	July 02, 1986
Borough of South Greensburg	July 03, 1986

All of the consolidated appeals at Docket No. 86-321-R were timely filed; these appellants did not file appeals nunc pro tunc. If DER's Petition to Quash was intended to pertain to these appeals, said petition is denied.

On September 16, 1986, the Board did receive Notices of Appeal and Motions for Filing Appeals Nunc Pro Tunc from the Borough of Youngwood and the Youngwood Borough Authority, which were docketed at Docket Nos. 86-534-R and 86-535-R, respectively. The Board, sua sponte, considered these motions, and by order dated October 2, 1986, denied appellants' motions. If DER's

Petition to Quash pertains to the appeals at Docket Nos. 86-534-R and 86-535-R, it is denied as being moot.

**ORDER**

AND NOW, this 10th day of October, 1986, it is hereby ordered that:

1. DER's Petition to Quash as it may pertain to the consolidated appeals at Docket No. 86-321-R is denied since these were timely filed.

2. DER's Petition to Quash as it may pertain to the appeals at Docket Nos. 86-534-R and 86-535-R is denied as moot.

3. The consolidated appeals at Docket No. 86-321-R remain active before the Board.

**ENVIRONMENTAL HEARING BOARD**



**WILLIAM A. ROTH, MEMBER**

**DATED:** October 15, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**

Donna J. Morris, Esq.

Zelda Curtiss, Esq.

Western Region

**For Appellants**

John M. O'Connell, Jr., Esq.

Donald J. Snyder, Jr., Esq.

Daniel J. Hewitt, Esq.

Mark S. Mansour, Esq.

Scott O. Mears, Esq.

Dominic Ciarimboli, Esq.

Gerald J. Yanity, Esq.

b1



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 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

UTICA MUTUAL INSURANCE COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
:  
:  
:  
:  
:  
:

EHB Docket No. 85-128-M

Issued: October 20, 1986

OPINION AND ORDER

Synopsis

An appeal will not be dismissed for failure to prosecute if Appellant is engaging in bona fide, good faith settlement activities off the docket aimed at a non-litigious resolution of the conflict.

OPINION

On April 17, 1985, Utica Mutual Insurance Company (Appellant), surety for J & R Contracting Company's mining operation in Clearfield County, filed a timely Notice of Appeal with the Environmental Hearing Board (Board) contesting the forfeiture of J & R Contracting Company's bonds by Department of Environmental Resources's (DER) Bureau of Mining and Reclamation for its alleged violations of the Surface Mining Conservation and Reclamation Act, 52 P.S. 1396.1 et seq. and the regulations promulgated therewith.

By order of the Board dated August 29, 1985, the appeal was continued for 90 days upon DER's representation that settlement was imminent. In a status report filed January 8, 1986, the DER advised the Board that the parties were still engaged in settlement. Furthermore, the DER requested a stay of all proceedings in this matter for 60 days in an attempt to further settlement

negotiations. Appellant stated in its January 15, 1986 status report that it had successfully reclaimed the mining operation in question and were awaiting the grant of a Stage I bond release by the DER. Upon approval of this release, the Appellant asserted it would formally withdraw the above captioned appeal. The Board granted DER's request for a continuance.

On September 29, 1986, the DER filed a Motion to Dismiss which is the focus of this order. In its Motion, the DER asserts that settlement negotiations with Appellant have failed and there has been no activity at the docket for nine months. In response, the Appellant denies that settlement negotiations have failed and supplied a copy of the formal notice of the Stage I release as evidence of the progression of the negotiations. Appellant also denies that there has been no activity in this case for nine months. Appellant asserts that substantial activity, although off the docket, has occurred during the last nine months which has brought this case close to a complete resolution. Considering the good faith settlement attempts and benefit to the Commonwealth of the reclamation work completed, the Appellant argues that DER's Motion to Dismiss should be denied.

The Board will not dismiss a case for inactivity, absent a flagrant disregard for prosecution or resolution of a case. See Neshaminy Enterprises International and Cochran & Keller Coal Company, Inc. v. DER, 1983 EHB 475. The Board's ultimate decision in this area is often based upon interests of fairness. See Lechene Coal Company V. DER, 1983 EHB 368.

In the present case, the DER's Motion to Dismiss for failure to prosecute is denied. First, this appeal was just filed in April, 1985. Moreover, the DER itself either requested or stipulated to continuances in this case which prevented activity at this docket until March, 1986. The record in this case indicates that Appellant has participated in discussions and reclamation work



in an attempt to resolve this case without an adjudication. This type of diligent settlement behavior off the docket should be encouraged, not penalized. Therefore, in the interests of fairness, DER's motion is denied.

**ORDER**

AND NOW, this 20<sup>th</sup> day of October, 1986, the Department of Environmental Resource's Motion to Dismiss is denied.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*  
\_\_\_\_\_  
MAXINE WOELFLING, CHAIRMAN

**DATED:** October 20, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Bernard A. Labuskes, Jr., Esq.  
Central Region  
**For Appellant:**  
Scott T. Redman, Esq.  
MEYER, DARRAGH, BUCKLER,  
BEBENEK & ECK  
Pittsburgh, PA



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 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

HUGH K. JOHNSTON, :  
 :  
 v. : EHB Docket No. 86-048-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 and GARY R. BUTTERS, Intervenor : Issued: October 20, 1986  
 :

OPINION AND ORDER

Synopsis

Failure to object or respond to interrogatories within the thirty day time limit established by Pennsylvania Rule of Civil Procedure 4006 results in a waiver of all future objections.

OPINION

The above captioned matter regards Hugh K. Johnston's (Appellant) timely filed appeal from the December 12, 1985 Department of Environmental Resources (DER) determination that a supplement to Wellsboro Municipal Authority's Official Sewage Facilities Plan was adequate. Appellant asserts the supplement violates §5 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.5 and 25 Pa. Code §§94.52, 94.53, and 94.56.

On April 4, 1986, Gary R. Butters (Intervenor) served upon Appellant a Request for Production of Documents and Interrogatories. Appellant mailed answers to Intervenor on May 19, 1986. Interrogatory 13(d) read, verbatim, "[w]ith respect to the action by Appellee, Commonwealth of Pennsylvania,

Department of Environmental Resources, of which you complain, state: d) Identify by name, address and telephone number of the person or persons making you aware of each such action". Appellant failed to either respond or object to Interrogatory 13(d).

Intervenor filed a Motion to Compel with the Board requesting a responsive answer to Interrogatory 13(d). Addressing Intervenor's Motion to Compel, the Board issued an Order dated August 9, 1986 directing Appellant to answer Interrogatory 13(d). Appellant responded to the Interrogatory by objecting to the question as being irrelevant and not calculated to lead to the discovery of admissible evidence. Subsequently, Intervenor filed a Motion to Dismiss, or in the alternative, a Motion to Compel a responsive answer which is the subject of the present order. Intervenor presently asserts that Appellant is precluded from objecting to Interrogatory 13(d) because by failing to initially respond or object to Interrogatory 13(d) within 30 days, as required by Rule 4006(a)(2), Appellant has waived its right to all future objections. Appellant, however, argues the Board should disregard its inadvertence because Appellant's error will not affect the substantive rights of the parties. See 42 P.S. §126.

Pennsylvania Rule of Civil Procedure 4006(a)(2) states in part,

"...[e]ach interrogatory shall be answered fully and completely unless objected to ... within thirty (30) days after service". 42 P.S. §4006(a)(2). The courts are split on the issue of whether the failure to comply with Rule 4006 constitutes a waiver of all future objections. Bonk v. Block, 12 D&C 3rd 749 (1980)(failure to comply results in waiver); Kern v. Bethlehem Steel Co., 21 D&C 3d 163 (1981); Nissley v. Pennsylvania Railroad Company, 259 A.2d 451, 435 Pa. 503 (1969). But see, Hall v. Sears Roebuck & Company, Alleg. Cnty Disc. Op. 121 (1978-83)(failure to respond or object is

not waiver).

The Board holds that Appellant's failure to respond or object to Interrogatory 13(d) constitutes a waiver of its ability to object in the future. This result is consistent with a recent Board decision addressing production of document conflicts. Blosenski v. DER, EHB Docket No. 85-222-M (August 15, 1986)(where Board determined that failure to object to or comply with a motion to produce documents resulted in a waiver of future objections).

The Board is not persuaded by Appellant's reliance on Pennsylvania Rule of Civil Procedure 126 which gives the Board discretion to disregard errors of omission not affecting the substantive rights of a party. 42 P.S. §126. Inadvertence or mistake of counsel, without more, will not excuse plaintiff's failure to answer interrogatories. Cf. Vorhauer v. Miller, 457 A.2d 944, 311 Pa.Super. 395 (1983)(where court refused to set aside default judgment due to mistake of counsel). Moreover, the Board believes that unjustified failure to comply with discovery requests can affect the substantive rights of an opposing party. Therefore, Appellant is ordered to substantively respond to Interrogatory 13(d). Chernicky Coal v. DER, 1985 EHB 360.

O R D E R

AND NOW, Appellant is hereby ordered to provide a substantive answer to Intervenor's Interrogatory 13(d) within 10 days of the date of this order.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

DATED: October 20, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
J. Robert Stoltzfus, Esq.  
Central Region  
For Appellant:  
Larry Linder, Esq.  
LINTON, LINDER & COFFEY  
Wellsboro, PA  
For Intervenor:  
William R. Stokes II, Esq.  
COX AND COX  
Wellsboro, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

PENN MARYLAND COALS, INC.

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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:

EHB Docket No. 83-188-W

Issued: November 5, 1986

OPINION AND ORDER

Synopsis

Appellant's Motion requesting an On-Site Viewing and Oral Argument En Banc is granted in part and denied in part. Appellant's request for an on-site view is granted pursuant to 25 Pa. Code §21.98. Appellant's request for oral argument en banc is denied. The Board agrees that oral argument will breathe life into the "cold record" before it, however, en banc consideration is not justified in accordance with the Board's Rules. 25 Pa. Code §§21.98, 21.122.

OPINION

On July 29, 1983, the Department of Environmental Resources (Department) issued an Abatement Order directing Penn Maryland Coals, Inc. (Appellant) to provide interim and permanent treatment to five discharges of acid mine drainage from Appellant's mining operation. Appellant filed a Notice of Appeal with the Environmental Hearing Board (Board) alleging the discharges pre-dated its mining operation. The matter was assigned to then-member Anthony J. Mazullo, Jr. for primary handling. Prior to the hearing on the

merits, Mr. Mazullo participated in an on-site review of Penn Maryland's mining operation. Subsequent to the completion of the hearing, Mr. Mazullo resigned from the Board without delivering an adjudication.

Apparently, after his resignation, Mr. Mazullo initiated discussions with counsel for the Appellant indicating his willingness to be appointed and serve as an "outside" hearing examiner for the purpose of preparing a proposed adjudication of this matter pursuant to the Board's Rule of Practice, 25 Pa. Code §21.86(a). From Appellant's Motion to Appoint Anthony J. Mazullo, Jr. as Hearing Examiner or For Trial De Novo, the Board issued an Order on July 18, 1986 denying the appointment of an outside hearing examiner or trial de novo.

The Board, in its Order of July 18, 1986, however, offered to entertain motions by Appellant for on-site viewing and oral argument. Thereafter, the Board notified all parties to this action that it was intending to formally reassign this action to the current Board Chairman Maxine Woelfling. There were no objections to the reassignment and the case was formally reassigned to Chairman Woelfling.

The Board now addresses Appellant's timely filed Motion requesting both an On-Site Viewing and Oral Argument before the Board En Banc. Appellant asserts that an on-site viewing of the mining operation would materially aid the Board in understanding evidence elicited at the hearing concerning location, features, age and development of the physical area associated with each discharge. The Board agrees with Appellant and grants its Motion for On-Site Viewing in accordance with 25 Pa. Code §21.98.

The original hearing examiner, then-member Anthony Mazullo, deemed an on-site viewing important and participated in this activity on September 17, 1985. The Board considers this fact persuasive in deciding whether it will

participate in a subsequent viewing for purposes of writing the adjudication in this matter. Moreover, the present situation is unique in that the examiner who originally presided over the hearing will not be participating in the adjudication of this matter. The Board, therefore, is open to reasonable measures which will assist it in understanding the testimony and evidence elicited at the hearing by both parties, especially in light of the fact that a previous on-site view was held.

The breadth of the viewing, however, will be limited in its nature and scope. The on-site view will be held on the soonest possible date of mutual convenience for all parties to this suit. Unless impossible, Board Chairman Maxine Woelfling will be accompanied only by the original representatives of each party that escorted Mr. Mazullo through the site on September 17, 1985. Finally, the scope of the upcoming view will not exceed the scope of the original view. The Board is acutely aware of the fact that the site in question has changed since Mr. Mazullo's on-site viewing nearly one year ago. The Board, aware of this fact, will not be prejudiced by such changes.

Appellant's Motion of August 6, 1986 also requested the opportunity for oral argument before the Environmental Hearing Board en banc. The Board denies Appellant's Motion for Oral Argument En Banc. The Board's Rule of Practice §21.92(a) provides that a party may move for oral argument at a time within five days after hearing, yet before adjudication. Appellant's Motion for Oral Argument, although filed prior to adjudication, was received much later than five days after the initial hearing. The Board does not consider this technical error fatal. The Board has discretion to grant oral argument on its own motion. Western Hickory Coal Company v. DER, 1983 EHB 375. The Board agrees with Appellant's assertions that oral argumentation will breathe life into the cold record presently before the Board. Given the unique



procedural setting of this case, the Board concludes that Mr. Mazullo's prior participation, yet present absence, in this case justifies the exceptional imposition of oral argument after hearing.

The Board, however, refuses Appellant's request for en banc consideration by the Board. The Board may, in its discretion, grant or deny requests for oral argument. 25 Pa. Code §21.92. See Western Hickory Coal Company v. DER, 1983 EHB 375. Accordingly, the Board may in its discretion grant or deny a portion of a request for oral argument. Id. En banc consideration by the Board is also discretionary. See 25 Pa. Code §21.86. The Board does not meet en banc absent extraordinary circumstances. See 25 Pa. Code 21.122. See also Western Hickory Coal Company, 1983 EHB 375 (discussion of factors Board will consider upon request for oral argument en banc). The instant case, although procedurally complex, does not rise to the level necessitating en banc review by the Board. Oral argument will be held before the undersigned Board Member.

O R D E R

AND NOW, this 5<sup>th</sup> day of November, 1986, it is ordered that Appellant's request for on-site view is granted subject to the conditions contained herein. Appellant's request for oral argument en banc is denied. Oral argument shall be held before the undersigned Board Member at a time and place to be decided by the Board at a later date. The oral argument will not be held en banc. It is further ordered that each party shall be allotted a maximum time of one-half hour to present argument and ten (10) minutes for rebuttal.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

DATED: November 5, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:  
William F. Larkin, Esq.  
Western Region

For Appellant:  
George G. Mahfood, Esq.  
ROSEN & MAHFOOD  
Pittsburgh, PA

b1



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 ENVIRONMENTAL HEARING BOARD  
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 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
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MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

NORWESCO DEVELOPMENT CORPORATION :  
 :  
 v. : EHB Docket No. 86-365-G  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 7, 1986

OPINION AND ORDER

Synopsis

This appeal had been dismissed for Appellant's failure to properly perfect its appeal. Appellant requested reconsideration, explaining that it timely complied with the requirement to perfect, but filed its documents under the wrong docket number. The Board denies reconsideration and affirms its previous dismissal.

OPINION

Norwesco has filed a motion for reconsideration of our Order of October 8, 1986 at the above-captioned docket number, which dismissed this appeal; our reasons for the dismissal are stated in an accompanying Opinion of that date. Norwesco explains that it did timely comply with the Board's requests (which were described in our October 8, 1986 Opinion), but filed the requested documents under an incorrect docket number, namely 86-007-G.

Norwesco's Motion for Reconsideration arrived under a cover sheet captioned "In The Commonwealth Court of Pennsylvania," which very nearly caused the motion to be treated and filed by the Board as a document pertinent to an appeal to Commonwealth Court of a Board decision. Such

documents typically require no action by the Board, and normally are not docketed with any deadline date for Board action. In other words, had the Motion for Reconsideration been filed as its cover sheet caption would suggest, we probably would not have acted on the motion, if we acted at all, until long after the thirty-day statutory period for appeal of our October 8, 1986 Order had passed. Rules of Appellate Procedure Rule 1512. Such carelessness led to the dismissal of this appeal and now leads to our affirmance of that earlier decision.

We have verified that Norwesco submitted the necessary documentation to perfect its appeal at 86-365-G, but affixed an incorrect docket number. It is Norwesco's responsibility to affix proper docket numbers to its filings, not the Board's. Many appellants have multiple actions pending before the Board, and the Board cannot be expected to determine if an appellant meant to file a document at one docket number or another. We do not believe that carelessness, especially where an appellant is represented by counsel, is sufficient reason for reconsideration in this matter, given the fact that the very same carelessness which led to dismissal was exhibited in the request for reconsideration of that dismissal. Nor do we believe that this result is overly technical in light of the Board's repeated attempts, recounted in our earlier opinion and order, to prod Norwesco to properly perfect its appeal.

O R D E R

AND NOW, this 7th day of November, 1986, it is ordered that Norwesco's motion for reconsideration is denied and that the Board's order of October 8, 1986, dismissing this matter, is affirmed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: November 7, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:

Zelda Curtiss, Esq.

Western Region

For Appellant:

Kenneth D. Chestek, Esq.

Thomas W. Renwand, Esq.

ARTHUR J. MURPHY JR. & ASSOCIATES

Erie, PA

Russell L. Schetroma, Esq.

David Hotchkiss, Esq.

CULBERTSON, WEISS, SCHETROMA & SCHUG

Meadville, PA

Terry R. Bossert, Esq.

McNEES, WALLACE & NURICK

Harrisburg, PA



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

AMBROSIA COAL AND CONSTRUCTION COMPANY :  
 :  
 v. : EHB Docket No. 85-078-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 5, 1986

**OPINION AND ORDER**

Synopsis

The Board grants the Department of Environmental Resources' ('Department') motion for sanctions. Appellant has failed to fully and completely answer various interrogatories propounded by the Department. Appellant has failed to respond to another interrogatory and has failed to move for a protective order; therefore, it is directed to respond. The fact that the Department may already have information requested in an interrogatory in its files does not excuse Appellant from responding to it.

OPINION

This matter was initiated by the filing of a Notice of Appeal on March 15, 1985, by Ambrosia Coal and Construction Company ("Ambrosia") seeking review of an order issued by the Department of Environmental Resources ("Department") directing Ambrosia to provide an adequate source of water at the Marilyn Nelson residence.

The Notice of Appeal was accompanied by a Petition for Supersedeas. The Board held a supersedeas hearing on May 10, 1985, and on May 30, 1985 the

Board issued a temporary supersedeas of the Department's order, conditioned upon Ambrosia's agreement to install a temporary water supply for the Nelson residence pending the disposition of the appeal. On August 6, 1985, the Board indefinitely extended the temporary supersedeas. Then, on December 9, 1985, Ambrosia filed a Motion for Summary Judgment, which the Board, in an Opinion and Order dated April 10, 1985, denied. Since that time, the parties have engaged in extensive discovery in preparation for a hearing currently scheduled for November 18-21, 1986.

As part of that discovery the Department propounded various interrogatories to Ambrosia which, by virtue of the Board's order of September 4, 1986, were to be answered on or before October 17, 1986. The Department filed a Motion for Sanctions with the Board on October 10, 1986, as a result of Ambrosia's alleged failure to properly respond to certain of the interrogatories. The requested sanctions fall into two categories: those for failure to provide full and complete answers and those for failure to provide any answers. Ambrosia has filed a response to the Department's motion, but the response only addresses Ambrosia's failure to respond to Interrogatory No. 3.

The Department, in the instructions accompanying its interrogatories, defined "IDENTIFY" as follows:

state (a) his or her full name and present business; (b) his or her present or last known position and business affiliation, including employer, employer's address, and dates of employment; (c) his or her position and business affiliation at the time in question, including employer, employer's address, and dates of employment, if different; (d) his or her educational background; (e) a summary of his or her information or knowledge with respect to the subject matter of a particular Interrogatory; and (f) whether said person may be called to testify as an expert witness, and if so (1) his or her area of expertise, experience, professional

societies, publications authored or co-authored, date of publication, journal, if any, and summary of the contents, (2) the subject matter on which the expert is expected to testify, as provided in Pa.R.C.P. 4005.5(a)(1)(a); and (3) the substance of the facts and opinions to which he or she is expected to testify, and a summary of the grounds for each opinion as provided in Pa.R.C.P. 4003.5(a)(1)(b).

The Department's definition of "identify" provides the frame of reference for determining whether Ambrosia's responses are full and complete as required by Pa.R.C.P. 4006(a)(2).

The Department has requested information in Interrogatories No. 1 and 2 relating to the identity of individuals who, respectively, prepared the permit application for the Paden mine site and conducted field reconnaissance at the site prior to the initiation of operations. Ambrosia has responded R. B. Shannon and Associates to both interrogatories, but has not specified particular individuals. The identity of the particular individuals is properly discoverable, and Ambrosia's answers to these two interrogatories are not full and complete.

Interrogatory No. 4 of the Department stated:

Please IDENTIFY those individuals who participated in AMBROSIA'S surface mining operation at the Paden Mine, including a DESCRIPTION of their respective responsibilities, dates of employment and most current addresses and phone numbers.

Ambrosia, in its response, only provided the name of the superintendents at the mine site. As the Department's request did not differentiate between supervisory personnel and the general labor force at the site, Ambrosia's response was not full and complete.

The Department's Interrogatory No. 5 required Ambrosia to

Please IDENTIFY any and all persons, known to Ambrosia, who have any knowledge concerning the matters set forth in this appeal.



Ambrosia responded by listing various individuals, including "DER employees" and "Others may be contacted and review the case prior to trial." Because Ambrosia did not name the Department employees and failed to provide any information regarding any individual's dates of employment, educational background, or summary of testimony, Ambrosia's answer is not full and complete. Similarly, Interrogatory No. 6 required Ambrosia to

Please IDENTIFY any and all persons, known to Ambrosia, who have any knowledge concerning the matters set forth in this appeal and who Ambrosia expects to call in the hearing on the merits.

Ambrosia responded by stating "Everyone listed in the answer to Interrogatory 5." While it may be proper to incorporate a previous response by reference, the incorporated response must, in and of itself, be full and complete to satisfy Ambrosia's obligation to adequately respond to the interrogatory. The failure of Ambrosia to fully and completely respond to Interrogatory No. 5 also impacts the adequacy of its response to Interrogatory No. 7. Interrogatory No. 7 required Ambrosia to

Please state the substance of the facts and/or opinions which constitutes the relevant knowledge of Interrogatory 6.

Ambrosia responded by stating:

The witnesses will testify concerning:

1. The chemical analysis of the water in each aquifer.
2. The direction and speed of ground water flow.
3. The geology and hydrology of the area.
4. Affects of or lack of affects of mining on the aquifers.
5. Previous exploration/development of gas or oil wells in the area.

What a particular witness will be testifying about is critical to the Department's preparation of its case. Because Ambrosia has failed to specify which witness will testify in what area, the response is not full and

complete.

Interrogatory No. 7 directed Ambrosia to

Please state the substance of the facts and/or opinions which constitutes the relevant knowledge of each person identified in the answer to Interrogatory 6.

Ambrosia responded to this interrogatory by listing five subject areas, but did not specify which individual would be testifying about what subject.

Such a response is not full and complete.

The Department requested Ambrosia in Interrogatory No. 8 to

Please IDENTIFY any and all persons who will be called as experts at the time of hearing to testify on behalf of AMBROSIA.

Ambrosia's answer to Interrogatory No. 8 was

Patrick J. Copple, Engineer, will testify about mining in general, the elevation of various components of the stratigraphy of the area, and the effect, if any, of Ambrosia's mining on the Paden site on Nelson's well.

Mark Swansiger will testify on lab procedures.

Scott Whipkey - If needed

Anthony Devite - If needed

Wayne Clark - If needed

Ambrosia's response as it relates to the last three individuals named is not full and complete.

Ambrosia has failed to respond to two other Department interrogatories. Interrogatory No. 3 requested Ambrosia to

Please produce and attach hereto copies of all water samples and analysis collected by or on behalf of AMBROSIA or in AMBROSIA'S possession for water wells or waters of the Commonwealth within a one mile radius of the PADEN MINE.

Ambrosia states in its response that

All water sample analysis sheets had been previously submitted to the Department. Any additional sampling results will be submitted upon completion.

The fact that the information requested may already be in the possession of the Department does not, in and of itself, excuse Ambrosia from responding to this interrogatory. Chernicky Coal v. DER, 1985 EHB 360, 364. Ambrosia, at its option, may make its file available to the Department (Pa.R.Civ.P. Rule 4006(a)).

Interrogatory No 14 requested Ambrosia to

Please DESCRIBE any and all DOCUMENTS written to, by or on behalf of AMBROSIA which pertain to this appeal. YOU are hereby requested to produce and attach a copy of each DOCUMENT.

Ambrosia's answer to Interrogatory No. 14 was

The Appellant believes that this Interrogatory goes beyond the scope of permissible discovery and will not answer the same.

Based upon Ambrosia's response, the Board cannot ascertain why this interrogatory was objectionable. In the absence of a motion for protective order detailing the grounds for objection, Ambrosia must respond to this interrogatory.

ORDER

AND NOW, this 5th day of November, 1986, it is ordered that the Department's request for sanctions is granted and that Ambrosia shall fully and completely respond to Department Interrogatories No. 1, 2, 3, 4, 5, 6, 7, 8, and 14 by November 14, 1986.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

DATED: November 5, 1986

cc: **Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Joseph K. Reinhart, Esq.  
Western Region  
**For Appellant:**  
Bruno Muscatello, Esq.  
STEPANIAN & MUSCATELLO  
Butler, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

RAY TURNER, et al :  
 :  
 :  
 v. : EHB Docket No. 80-088-B  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES, and : Issued: November 10, 1986  
 ELWIN FARMS, INC., Permittee :

OPINION AND ORDER

Synopsis

Appellant's appeal is dismissed for failure to prosecute.

OPINION

On May 13, 1980, Ray Turner, et al (Appellants) filed a skeletal Notice of Appeal with the Board challenging the Department of Environmental Resource's (DER) issuance of a solid waste permit to Elwin Farms Inc.(Permittee) pursuant to the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, 35 P.S. §6001, et seq. This appeal was supplemented on June 5, 1986 with information requested by the Board. Permittee filed a Motion to Dismiss on December 16, 1980, asserting that Appellants failed to properly perfect its appeal and join parties. Prior to a Board decision on the Motion to Dismiss, a Petition to Intervene was filed in behalf of Joanne Bozek, et al. on December 24, 1980. This Petition was opposed by the Permittee. By an Order dated January 13, 1981, the Board denied both the Motion to Dismiss and the Opposition to the Petition to Intervene.

A flurry of pre-trial discovery motions, such as protective orders, motions for enlargement, and motions to strike, was filed in early 1981. The Board resolved these issues in a January 28, 1981 Order which essentially served as a discovery timetable. A series of interrogatories and depositions were propounded by the parties to this suit during 1981.

The Department suspended the permit which is the subject of this appeal on April 1, 1981. A hearing was scheduled by the Board for the month of June, 1981. The Commonwealth moved for a continuance in a motion dated May 6, 1981, asserting that since the permit in this case had been suspended by DER, all proceedings should be continued and a hearing be held only when and if the Department reinstates the permit. The Board, on May 6, 1981, issued an Order generally continuing this matter, and canceling the scheduled June hearing.

Since this continuance, there has been no substantive activity at this docket. The Board requested a status report from Appellants on January 28, 1983 and again on July 19, 1985. Appellants responded to the 1983 status request by indicating their desire to proceed with their appeal, while the Board's 1985 request was unanswered. On July 28, 1986 the Board issued a Rule to Show Cause why this appeal should not be dismissed. Appellants failed to respond to the Board's July 28th Rule.

Appellant has the responsibility to resolve or litigate its appeal. The Board cannot permit appeals to linger on its docket for extended periods of time. If for any reason an Appellant intends to discontinue its appeal before the Board, the proper and courteous procedure is to request withdrawal. Because Appellants not only failed to prosecute its appeal, but also failed to respond to the Board's Rule to Show Cause, the Board now dismisses this appeal. Delaware County Regional Water Quality Control Authority v. DER, EHB Docket No. 81-116-M (July 18, 1986); Conemaugh Township v, DER, EHB Docket No.

79-061-B (October 1, 1986).

ORDER

AND NOW, this 10th day of November, 1986, the above captioned appeal is dismissed for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

**DATED:** November 10, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**  
Barbara Brandon, Esq.  
Western Region

**For Ray Turner, et al:**  
Michael Q. Davis, Esq.  
Harrisburg, PA

**For James E. Work, et al.:**  
William M. Radcliffe, Esq.  
Uniontown, PA

**For Elwin Farms:**

Edward M. Dunham, Jr., Esq.  
Philadelphia, PA

**For Joanne Bozek, et al.:**  
Robert M. Brenner, Esq.  
Uniontown, PA

b1



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 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483.

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

INDEPENDENT TRADING COMPANY, Appellant :  
 :  
 v. : EHB Docket No. 80-119-M  
 : 80-165-CP-W  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 10, 1986

OPINION AND ORDER

Synopsis

The Board dismisses an appeal and a related complaint for civil penalties for failure to prosecute.

OPINION

Independent Trading Company (Appellant) filed a Notice of Appeal on July 21, 1980 from an Order of the Department of Environmental Resources (DER) charging Appellant with the operation of a stationary source without a permit in violation of the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119 as amended, 35 P.S. §4001 et seq. and 25 Pa.Code §§ 127.1, 127.11, 127.22, and ordering Appellant to cease operation of its plant. (EHB Docket No. 80-119-M).

The Appellant operated a battery sawing and reclamation plant at the site in question. The administrative order issued by DER alleged that impermissible quantities of lead were being released into the air as a result of Appellant's operation. According to a pleading filed by Appellant on December 2, 1980, the DER and Appellant met on several occasions prior to the



issuance of the Order to discuss acceptable remedies to the pollutional discharge. Appellant agreed to move the location of its plant, plus include several safeguards in the construction design of the new facility in an attempt to remedy this situation. Appellant also indicated that it was financially unable to close its present plant prior to relocation or it would face financial disaster leading to bankruptcy. Construction and permit issuance delays, however, allegedly prevented Appellant from relocating its operation by May 31, 1980 as agreed. DER issued its administrative Order on June 17, 1980.

The plant continued to operate and the DER filed a Complaint for Assessment of Civil Penalties with the Board on October 2, 1980, which is docketed at 80-165-CP-W. Although never formally consolidated, the Appellant filed a Petition for Supersedeas with the Board, on December 2, 1980, seeking relief from both the administrative order (80-119-M) and the civil penalty assessment (80-165-CP-W). The parties engaged in settlement discussions and a continuance was granted on December 16, 1980 regarding the Petition for Supersedeas in an attempt to further settlement negotiations.

In a status report of March 10, 1981, the DER indicated that the Appellant had met all of the requirements of the June 17, 1980 administrative order, save the removal of battery casings from the site. A security interest in the battery casings prevented Appellant from removing them immediately. The parties to this action continued to file status reports every six months during the period from March, 1981 through July, 1985. The content of these reports was essentially the same--bankruptcy proceedings had stalled the removal of the battery casings, which were now the subject of execution by creditors.

The Board, indicating that there had been no activity at either docket

for over a year, issued Rules to Show Cause why these matters should not be dismissed for failure to prosecute on July 25, 1986. Separate rules were issued to each party to this conflict, as ITC is the proponent of the appeal at Docket No. 80-119-M, while DER is the proponent of the civil penalties action at Docket No. 80-165-CP-W. To this date, the Board has not received a response to either Rule to Show Cause.

The Appellant has the responsibility to resolve or litigate its appeals. The Board cannot allow appeals to linger on its docket for extended periods of time. These same concerns apply to DER when filing complaints for the assessment of civil penalties. The Board hereby dismisses these appeals for failure to respond to the Board's Rules to Show Cause and failure to prosecute. Delaware County Regional Water Quality Control Authority v. DER, EHB Docket No. 81-116-M (July 18, 1986); Conemaugh Township v. DER, EHB Docket No. 79-061-B (October 1, 1986).

O R D E R

AND NOW, this 10th day of November, 1986, it is ordered that the above captioned matters are dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

**DATED:** November 10, 1986

**cc:** Bureau of Litigation  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Donald A. Brown, Esq.  
Central Region  
**For Appellant:**  
Michael Q. Davis, Esq.  
Harrisburg, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

NORTH CAMBRIA FUEL COMPANY :  
 :  
 v. : DOCKET NO. 85-297-G  
 :  
 COMMONWEALTH OF PENNSYLVANIA : Issued November 12, 1986  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

The Department of Environmental Resources (DER) has filed a motion in limine, based on its contention that, by virtue of §315(a) of the Clean Streams Law, 35 P.S. §691.315(a), a mine operator is liable for treatment of any polluting discharge within its permit area, regardless of whether the operator caused or contributed to that discharge. The Board, without ruling on the merits of this contention of DER's, denied DER's motion in limine; the contention will be ruled on in the Board's final adjudication of this matter. The Board similarly has deferred a ruling on whether DER's failure to issue an abatement order to an adjoining operator who (Appellant alleges) is the actual source of the pollution in the discharge emanating from Appellant's land was an abuse of discretion. This contention of Appellant's will be regarded as an affirmative defense, with Appellant bearing the burden of proof.

Whether an issue not raised in a party's pre-hearing memorandum should be deemed waived is a matter for the Board's discretion; in general, waiver is not a proper remedy unless prejudice to an opposing party can be shown.

## OPINION

On September 5, 1986, the Board issued an Opinion and Order at the above docket number, rejecting DER's motion for "Final Judgment" in this matter. The Board pointed out that DER's motion in effect was a motion for summary judgment, filed after hearings had commenced, in violation of the requirements of Rules of Civil Procedure Rule 1035. The Board also pointed out that DER's motion relied on two Board adjudications whose reconsideration had been petitioned, and on which petitions the Board had not acted by September 5, 1986. DER v. Lawrence Coal Company, Docket No. 81-021-CP-M (Adjudication, May 27, 1986; William J. McIntire Coal Company v. DER, Docket No. 83-180-M (Adjudication, July 7, 1986).

### A. DER's Motion To Limit Issues

The Board now has affirmed the original rulings in Lawrence, supra, and McIntire, supra. DER v. Lawrence Coal Company (Opinion and Order, September 19, 1986); William J. McIntire Coal Company v. DER (Opinion and Order, September 8, 1986). Subsequent to these affirmations, DER--in accordance with a suggestion made in our September 5, 1986 Opinion--has filed a Motion to Limit NCF's testimony in this appeal, to which NCF has responded. DER argues that the Board's McIntire and Lawrence Coal adjudications mean that under section 315(a) of the Clean Streams Law ("CSL"), 35 P.S. §691.315(a), NCF can be ordered to abate any discharge from within the boundaries of its permit area. The Board has alluded to this construction of section 315(a), Hepburnia Coal Company v. DER, Docket No. 85-309-G (Adjudication, May 28, 1986), but the Board does not agree that this language in Hepburnia necessarily implies that NCF's testimony therefore should be limited (as DER puts it) "to the issue of whether the discharges of acid mine drainage which are the subject of this proceeding are located within the boundaries of the mine drainage and

mining permits of North Cambria Fuel's Dietrich surface coal mine site."

The limitation proposed by DER adopts an interpretation of §315(a) of the CSL which is broader than that espoused by the Board in McIntire, Lawrence, and Hepburnia. The Board never has adjudicated the issue of whether §315(a) imposes liability on an operator solely because a discharge is situated within the boundaries of its permitted area. In Hepburnia, supra, our remarks pertaining to this issue were no more than dicta; McIntire and Lawrence both involved an element of causation. Neither Hepburnia, McIntire or Lawrence imply that section 315(a) should be construed to mean, e.g., that an operator who obtains a mining permit, but never actually mines, thereafter can be held responsible for abating a discharge from the permit area. Moreover, we are not convinced the Supreme Court decided, in either Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed, 415 U.S. 903, or Barnes and Tucker Company v. DER, 455 Pa. 392, 319 A.2d 871 (1974), that §315(a) imposes absolute liability on an operator. Because the Board has never decided the aforesaid issue, we are reluctant to do so within the context of a ruling on a motion in limine.

Whether §315(a) of the CSL may be construed in the manner suggested by DER raises the related issue of whether NCF may argue that DER's abatement order was an abuse of discretion because the order was not also directed to a neighboring mining operation--the Blairsville/Bentley ("B/B") mine--from whose land (Appellant alleges) the polluttional discharge actually originates. This issue poses a particularly difficult problem for the Board. We generally have held that we would not review DER's refusal to exercise its enforcement discretion when requested to do so by a third party. George Eremic v. DER, 1976 EHB 249 and 324. However, because our sustaining DER's order would have profound implications for NCF, in particular because NCF may be responsible

for providing permanent treatment for these discharges, it may be appropriate to regard the instant facts as warranting another exception to the Eremic holding. Consolidation Coal Company v. DER, Docket No. 85-220-G, 1985 EHB 768. Our thinking on this issue is influenced by: (i) our present view that we do not possess the power to compulsorily join the neighboring mine operator in this action, and (ii) our awareness that if NCF can present legally sufficient evidence to substantiate its claim that the adjoining operator caused the discharge, our sustaining DER's order may not resolve the pollution problem. If the groundwater really is acquiring its pollutants in B/B's land, there can be no assurance that NCF's treatment of the discharges emanating from NCF's land is preventing any significant fraction of the pollutants from reaching water wells, trout streams, etc.

Therefore, we are denying DER's motion in limine and will permit NCF to put on evidence relating to these two just-discussed issues. We will defer ultimate rulings on both of these issues until our adjudication on the merits.

#### B. Waiver of Issues

NCF maintains that DER has waived the contention that under section 315(a) NCF can be liable for discharges emanating from areas it has mined, without proof of causation. NCF so maintains because this claim was not made in DER's original pre-hearing memorandum, filed February 12, 1986. Rather, as NCF correctly states, DER's original pre-hearing memorandum asserts that NCF is required to treat the discharges, "because NCF's mining activities have degraded the discharges." Moreover, DER's original pre-hearing memorandum appeals to section 316 of the CSL, 35 P.S. §35.316, not section 315(a), as authority for DER's claim that it is entitled to order NCF to treat the discharges.

Our Pre-Hearing Order No. 1 reads: "A party may be deemed to have

abandoned all contentions of law or fact not set forth in its pre-hearing memorandum" (emphasis added). Thus whether a party's failure to raise an issue in its pre-hearing memorandum should result in waiver of that issue is a matter within the Board's discretion. The General Rules of Administrative Practice and Procedure instruct the Board to construe its rules liberally, to secure just determination of the issues presented. 1 Pa.Code §31.2. Pursuant to this instruction, the Board frequently has permitted parties to amend their pre-hearing memoranda, in order to remedy deficiencies in their originally filed pre-hearing memoranda. Concerned Citizens of Rural Ridge v. DER, Docket No. 82-100-G, 1982 EHB 469 and 496; Howard Fugitt and James E. Gatten v. DER, Docket No. 83-029-G, 1983 EHB 509; Concerned Citizens Against Sludge v. DER, Docket No. 82-221-G, 1983 EHB 512. DER's motion for "Final Judgment", the subject of our September 5, 1986 Opinion and Order, put NCF on notice--well before the presently scheduled December 8, 1986 date for resumption of the hearing on the merits of this matter--that DER now was relying on CSL section 315(a) as justification for its Order. This three-months notice should be more than sufficient for NCF to prepare its case against application of section 315(a) under the facts of this appeal.

Consequently (since the Board is satisfied that NCF has received reasonable notice of DER's section 315(a) contention, sufficient to ensure that NCF's presentation of its case will not be prejudiced by DER's late raising of this contention), the Board's and Pennsylvania court precedents, as well as 1 Pa.Code §31.2, clearly imply that the proper remedy for the 315(a) deficiencies of DER's original pre-hearing memorandum is not to deem the 315(a) contention waived, but instead to allow DER to file a supplemental pre-hearing memorandum incorporating its 315(a) contention. Ragnar Benson, Inc. v. Bethel Mart Associates, 454 A.2d 599 (Pa.Super. 1982); Croom v. Selig,



464 A.2d 1303 (Pa.Super. 1983); Melvin D. Reiner v. DER, Docket No. 81-133-G, 1982 EHB 183. In short, we are rejecting NCF's request that DER's 315(a) contention be deemed waived, but DER will have to supplement its pre-hearing memorandum to incorporate that contention. We add that in so ruling we are dealing evenhandedly with DER and NCF. On October 14, 1986, NCF filed a supplement to its original pre-hearing memorandum, setting forth its contention that DER's refusal to order B/B to treat the discharge--or even "to conduct a meaningful investigation" of the possibility that B/B was the cause of the discharge--was an abuse of DER's discretion. This contention is not contained in NCF's original pre-hearing memorandum, filed January 27, 1986. Nevertheless, for reasons explained supra, we have no hesitation about accepting this supplement to NCF's original pre-hearing memorandum, because NCF already has raised this issue (though perhaps not in quite as clearly articulated a fashion) in the initial hearings on the merits of this appeal, May 5-9, 1986. See also our Opinion and Order of July 25, 1986 at this docket number.

### C. Burdens of Proof

On October 14, 1986, NCF also filed a motion asking the Board to delineate the burdens of proof NCF and DER have in this matter. We find this request to be reasonable, and herewith respond. Under 25 Pa.Code §21.101(b)(3), DER bears the ultimate burden of showing that the appealed-from Order was not an abuse of discretion, i.e. that under §315(a) of the CSL, NCF is responsible for the treatment of the discharges.

However, as to the issue that DER abused its discretion by issuing the Order to NCF alone, we will regard such an NCF contention--to the effect that DER should not be putting on NCF alone the eternal responsibility for treating discharges which are being polluted by other mine operators'

activities--to be an affirmative defense, wherein NCF has the burden of proof. Reiner, supra; Ohio Farmers Insurance Co. v. DER, Docket No. 80-041-G, 1981 EHB 384; 25 Pa.Code §21.101(a). To establish this just-stated contention for any of the instant discharges, NCF normally would have the burden of showing that the pollution in the discharge is arising from the activities of another person (in this case, B/B) and that effective abatement of the pollution is impossible without cooperation of the other person.

Under the special circumstances of this appeal, however, these just-stated burdens would be unfairly onerous on NCF. NCF, through no obvious fault of its own, but rather for reasons stemming in part from this Board's limited powers (in particular, our inability to join B/B as a party, see our July 25, 1986 Opinion and Order), has been unable to perform the tests needed to establish that polluted groundwater is flowing into the instant discharges from B/B's land. Therefore, under the special circumstances of this appeal, NCF--in support of its contention that DER's issuance of the order to NCF alone was an abuse of discretion--merely must show that the belief that B/B is the source of the pollution is reasonable. If NCF meets this burden, then under 25 Pa.Code §21.101(a) the burden of proof will shift back to DER, to show: (i) that DER indeed did fully investigate the possibility that the B/B property was the source of the pollution, and (ii) that on the basis of this investigation DER reasonably had concluded the B/B property was not the source of the pollution, or (if the B/B property is the source) that abatement of the discharges by B/B would not be possible. We recognize that this last shift of the burden of proof to DER is unusual, but we feel that when (as in the instant appeal) DER's order to NCF relies on an absolute liability theory, such shifting is justifiable.

D. Closing Remarks

In closing, we stress that because the issue of the nature of liability under §315(a) has far-reaching implications, we are, with this opinion, merely setting the stage for an ultimate ruling on the merits.

ORDER

WHEREFORE, this 12th day of November, 1986, it is ordered as follows:

1. DER's motion to limit NCF's testimony in this appeal is denied.
2. NCF's contention that DER has waived its CSL section 315(a) theory of NCF's responsibility for treating the discharges is rejected; this theory is to be embodied in a DER supplement to its pre-hearing memorandum, filed before the hearing on the merits reconvenes.
3. The burdens of proof in this matter are as fully described in the Opinion, supra.
4. The parties' post-hearing briefs shall address the issues of whether §315(a) of the CSL imposes absolute liability for any discharge from a permitted area, and whether DER's failure to issue a concurrent order to the adjoining operator was an abuse of discretion.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy  
EDWARD GERJUOY, MEMBER

DATE: November 12, 1986  
cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER  
Michael E. Arch, Esq.  
For Appellant:  
Beverly A. Gazza, Esq.  
John A. Bonya, Esq.



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

SPEC COALS, INC. :  
 :  
 v. : EHB Docket No. 85-197-G  
 :  
 COMMONWEALTH OF PENNSYLVANIA : Issued: November 20, 1986  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Appellant's letter requesting an "appeal" from the Board's dismissal of the above captioned appeal is denied pursuant to 25 Pa.Code §21.122(a), which requires submission of a petition for reconsideration within twenty (20) days of the rendering, rather than the receipt, of a final order of the Board. However, Appellant had been incorrectly advised by a Board Member during a prior hearing that the twenty (20) day period for the filing of a motion for reconsideration began upon receipt of the Board's Order, and the Appellant's letter was received within twenty (20) days of Appellant's receipt of the Board's final order. The Board will thus accept Appellant's letter for reconsideration as a nunc pro tunc petition, preserving this pro se appellant's right to appeal to Commonwealth Court. Nevertheless, on the facts of this appeal, the Board's previous dismissal is affirmed.

OPINION

Robert E. Ankney, who in past correspondence has identified himself

as "owner" of SPEC Coals, has written the Board a letter dated October 29, 1986, received November 3, 1986, "appealing" our Order of October 1, 1986 which dismissed the above-captioned appeal. As explained in our Opinion that accompanied the aforementioned Order, SPEC--through Mr. Ankney--has been appearing pro se in this matter.

Our rules do not permit "appeals" to this Board of our final orders; we may reconsider our final orders, upon petition filed not later than 20 days after a decision has been rendered. 25 Pa.Code §21.122(a). Treating Mr. Ankney's letter as a petition for reconsideration, it has been filed past the October 21, 1986 deadline for its submission. Mr. Ankney's letter asserts, however, that at the related hearing on PNB Coal, Docket No. 85-198-G, held September 17, 1986, the Board member conducting the hearing told Mr. Ankney that he could ask the Board to reconsider its dismissal "within 20 days after you receive that dismissal." This statement of the time limit for submission of a petition to reconsider obviously is inaccurate; the 20-day deadline is from the time the "decision is rendered", not from the time the Opinion and Order embodying the decision is received. But Mr. Ankney has correctly repeated the Board's instructions to him (Transcript of PNB hearing, p. 12). Our returned certified mail receipt shows that Mr. Ankney received our October 1, 1986 Order on October 15, 1986, within 20 days of November 3, 1986. Thus, although the presiding Board member at the PNB hearing obviously misspoke, and although SPEC is presumed to know the law and presumably would have avoided this late filing if it had hired an attorney (as SPEC would have avoided previous problems, see our Opinion and Order of August 14, 1986 at this docket number), we shall accept Mr. Ankney's letter as a nunc pro tunc petition for reconsideration of our October 1, 1986 Order.

Our October 1 Opinion explained that SPEC's appeal was dismissed on the basis of deemed admissions. SPEC was ordered to file its answers to DER's requests for admissions no later than September 10, 1986. On September 15, 1986, the day of the hearing on the above-captioned appeal, DER's counsel stated that the answers to those requests for admissions had not been received. For that reason, and for other reasons stated in the brief transcript of the September 15, 1986 hearing, including the fact that SPEC had not appeared at the hearing, the Board deemed admitted DER's requests for admissions and proceeded with the hearing, all as explained in our October 1, 1986 Opinion. Mr. Ankney's letter offers no excuse for SPEC's non-appearance at the hearing, other than Mr. Ankney's confusion about the previously scheduled different SPEC and PNBP hearing dates; such confusion on Mr. Ankney's part is not an acceptable reason to reopen the SPEC hearing, as Mr. Ankney urges. Mr. Ankney has attached a certified mail receipt to his letter showing that DER's Pittsburgh office received his answers to DER's requests for admissions on September 15, 1986, the day of the SPEC hearing. Evidently these answers were not received on that day by DER's counsel, who was at the hearing; in any event, these answers were received well after our August 14, 1986 Order's clearly specified September 10, 1986 deadline for filing answers to DER's requests for admissions.

For the above reasons, we affirm our Order of October 1, 1986. By accepting SPEC's letter as a petition for reconsideration, filed nunc pro tunc, we have preserved this appellant's right to appeal to Commonwealth Court the Order accompanying this Opinion. Though we have no duty to do so, we state for this pro se appellant's benefit that the appeal must be filed with the Prothonotary of the Commonwealth Court within 30 days of the date of this Order.

O R D E R

WHEREFORE, this 20th day of November , 1986, it is ordered as follows:

1. Robert Ankney's letter, filed November 3, 1986, is accepted as a petition for reconsideration of our October 1, 1986 Order at this docket number.

2. We have reconsidered, and affirm our October 1, 1986 Order.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

**DATED:** November 20, 1986

**cc:** Bureau of Litigation  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Western Region  
**For Appellant:**  
Robert E. Ankney

rm



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
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 SECRETARY TO THE BOARD

COUNTY OF BUCKS	:	
	:	
v.	:	EHB Docket Nos. 83-110-M
	:	84-321-M
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 20, 1986

OPINION AND ORDER

Synopsis

Appellant's appeal at 83-110-M is dismissed for untimely filing. Timely filing is a jurisdictional requirement which may be raised sua sponte by the Board.

OPINION

The County of Bucks filed the above-captioned appeals from refusals by the Department of Environmental Resources to reimburse the County, under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1965, P.L. 1535 as amended, 35 P.S. §§ 750.1-750.20, for certain expenses incurred by the County in the years 1982 and 1983. The parties agreed to the inclusion of various documents in the record of these appeals, and requested the Board to adjudicate these appeals on the basis of the record without a hearing. The parties further agreed not to submit briefs in this matter because they believe that their pre-hearing memoranda adequately cover the legal questions involved. Since there is no factual dispute in these appeals, the Board did



not hold hearings, and the Board will adjudicate these appeals together since involve the same legal issue.

The only issue before the Board in these appeals is whether the County is entitled to reimbursement by the Commonwealth under the Sewage Facilities Act for fifty percent of the cost of providing life insurance and retirement benefits for its sewage enforcement officers.

The Sewage Facilities Act provides for reimbursement to local agencies for "one-half of the cost of the expenses incurred by the local agency in enforcement of the provisions of this act." The Sewage Facilities Act then authorizes local agencies to employ sewage enforcement officers in accordance with their authority to enforce certain provisions of the Act. Therefore, under the language of the Sewage Facilities Act, expenses that local agencies incur in the employment of sewage enforcement officers are eligible for reimbursement under the Act.

Under the regulations of the EQB, wages and salaries of sewage enforcement officers are expressly eligible for reimbursement, but other employee benefits for sewage enforcement officers are neither expressly eligible nor expressly ineligible. DER decisions denying reimbursement are appealable to the Environmental Hearing Board within the time limits established by 25 Pa. Code 21.52.

The County argues that it is entitled to reimbursement for fifty percent of the cost of life insurance and retirement benefits for its sewage enforcement officers because these are reasonable costs, and they are not excluded by 25 Pa. Code §71.63(d). The County further argues that prior to 1980, the Department did reimburse the County for life insurance and retirement benefits, and the regulations have not changed since 1980.

The extent of the Department's argument in the instant appeals is

that in 1980 the Department reimbursed the County for fifty percent of the life insurance and retirement benefits that the County paid for its sewage enforcement officers, but the Department denied reimbursement for such expenses in 1981 because of a change in policy. The denial of the 1981 claims, which the County did not appeal, should have put the County on notice that it would not be reimbursed for fifty percent of the life insurance and retirement benefits that it paid for its sewage enforcement officers in 1982 and 1983. Thus, the Department argues that the County provided these benefits for its sewage enforcement officers in 1982 and 1983 "at its own peril."

From a review of the record in this case, however, the Board finds that it is not necessary to reach the merits of appeal 83-110-M. Appellant must file a notice of appeal from a DER final action under the Sewage Facilities Act within 30 days from the date of denial. 25 Pa.Code 21.52. Failure to timely file a notice of appeal denies the Board of jurisdiction over the appeal. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). This jurisdictional interpretation of 25 Pa.Code 21.52 applies to final denials of reimbursements under the Sewage Facilities Act. Lebanon County Sewage Council v. DER, 382 A. 2d 1311, 34 Pa. Cmwlth 247 (1978). Appellant received notice of DER's denial of 1982 fringe benefit reimbursement request on May 4, 1983. This letter included a copy of the Board's rules of procedure and five copies of the Notice of Appeal form. These facts placed the Appellant's on notice that the DER denial was final. But see Lebanon Valley Council of Governments, 1983 EHB 273 (where reimbursement denial was not final because no indication of finality was expressed by the DER). The Board received Appellant's Notice of Appeal on June 6, 1983- a period of 33 days after Appellant received notice of the DER decision. There were no intervening holidays which might have extended the 30 day deadline. 1 Pa.Code §31.12.

It appears that the Appellant's untimely filing denies the Board of jurisdiction over this appeal docketed at 83-110-M.

The Board recognizes, however, that the DER letter denying Appellant's 1982 fringe benefit reimbursement request contained a potentially misleading error. The May 3, 1983 DER letter referred to reimbursements for calendar years 1980 and 1981, when in fact the denial pertained to calendar years 1981 and 1982. But, the Board concludes that this error was in no way prejudicial to the Appellant, and did not deny the Appellant of proper notice of the DER action. The Board comes to this conclusion from a review of Appellant's Notice of Appeal of the 1982 reimbursement denial (82-110-M). The Appellant acknowledges in its Notice of Appeal that the May 3, 1983 DER letter constituted DER's denial of fringe benefit reimbursement for the year of 1982. Appellant correctly interpreted the DER letter of May 3rd and, therefore, was not misled by the mistaken reference in the denial letter. The Board concludes that Appellant's failure to comply with 25 Pa.Code 21.52 denies the Board of jurisdiction. The docketed appeal 83-110-M is dismissed for lack of jurisdiction due to untimely filing.

Appellant, in a separate appeal (84-321-M), also challenges the DER's failure to reimburse the County for expenses incurred in providing fringe benefits to its sewage enforcement officers in the year 1983. This 84-321-M appeal remains under consideration before the Board. In view of the foregoing discussion of the 83-110-M appeal, the Board thinks it advisable to grant the parties the opportunity to file any further supplemental pleadings they believe might help the Board decide the 84-321-M appeal.

ORDER

WHEREFORE, on this 20th day of November, 1986 Appellant's appeal at 83-110-M is dismissed for untimely filing. Appeal 84-321-M remains before the Board for consideration. The Board will accept supplemental pleadings in the of 84-321-M appeal until November 1986.

Board Chairman Maxine Woelfling has recused herself from this matter.

ENVIRONMENTAL HEARING BOARD

  
EDWARD GERJUOY, MEMBER

  
WILLIAM A. ROTH, MEMBER

DATED: November 20, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
John Wilmer, Esq.  
Eastern Region  
For Appellant:  
Peter A. Glascott, Esq.  
Doylestown, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

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 SECRETARY TO THE BOARD

C & K COAL COMPANY :  
 : EHB Docket Nos. 86-346-W  
 v. : 86-361-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 20, 1986

OPINION AND ORDER SUR PETITIONS  
 FOR THE ALLOWANCE OF APPEALS  
 NUNC PRO TUNC AND SUR MOTION  
 TO CONSOLIDATE

Synopsis

Two petitions for the allowance of appeals nunc pro tunc are denied where appellant has failed to allege any fraud or misconduct on the part of the Board which may have misled it into not filing timely appeals of actions by the Department of Environmental Resources ("Department"). Department actions must be appealed separately; the Board cannot exercise jurisdiction over a series of related Department actions where an appellant has only timely appealed one of the actions.

OPINION

These two matters were initiated by the filing of requests for the allowance of appeals nunc pro tunc by C & K Coal Company ("C & K"). Although seemingly procedurally convoluted, they arise out of the same series of events relating to a mining operation regulated under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. The Department, on January 17, 1986, issued a compliance order to C & K directing it to abate discharges from its Gourley

operation in Monroe and Piney Townships, Clarion County; the Gourley operation was conducted pursuant to Mine Drainage Permit No. 1679123. The Department then, in a letter dated February 5, 1986, refused to release portions of C & K's bonds because of discharges from the Gourley operation. A second compliance order relating to the same discharges was issued by the Department on February 10, 1986. And, finally, on June 23, 1986, the Department inspector prepared an inspection report relating to the Gourley operation and C & K's progress in abating the discharges.

The pleadings filed at both dockets by Appellant are somewhat less than a model of clarity. The petition docketed at 86-346-W, which was filed July 14, 1986, requests that the Board permit the filing of appeals nunc pro tunc of the January 17 and February 10 compliance orders, while the petition docketed at 86-361-W, which was filed July 22, 1986, relates to a February 5, 1986 refusal by the Department to release C & K's bonds. Both petitions were accompanied by a motion to consolidate with Docket No. 85-306-W, which is C & K's appeal of the Department's June 27, 1985 denial of C & K's repermitting application for the Gourley operation.

The reasons advanced by C & K for permission to file its appeals nunc pro tunc are identical for both dockets. Essentially, C & K contends that the Department led C & K to believe it had deferred its decision regarding C & K's liability for discharges from the Gourley operation until after the Department had the opportunity to review a hydrogeologic study submitted by C & K; the Department's evaluation of that study, C & K argues, is expressed in the June 23, 1986 inspection report. In the alternative, C & K argues that the Department's decision was not final until June 23, 1986, and, therefore, the appeals were, in fact, timely. The Department responded to C & K's petitions by arguing that the January 17 and February 10

compliance orders and the February 5 bond release denial were clearly final Department actions and, therefore, appealable to this Board. The Department did not address C & K's alternative argument that the June 23 inspection report was the final Department action appealable to this Board. For the reasons stated below, we will deny both petitions.

Appeals nunc pro tunc are permitted only where the appellant demonstrates that there was some fraud or breakdown in the Board's procedures which resulted in the untimely filing of the appeal. Eugene Petricca v. DER, EHB Docket No. 85-312-G (issued April 9, 1986). C & K has alleged no conduct on the part of the Board which led C & K to believe that it was not necessary to exercise its appeal rights. Moreover, putting aside C & K's interpretation of the Department's conduct, it is clear from the face of the two compliance orders and the bond release denial letter that the actions are final Department actions and, therefore, appealable to the Board.

As for C & K's assertion that the Department's decision was not really final until the preparation of the June 23, 1986 inspection report, the Board must also reject that argument. As we have recently stated in Norwesco v. DER, EHB Docket No. 86-365-W (issued October 8, 1986) the Board's jurisdiction attaches to appeals from individual and distinct Department actions; the Board does not obtain jurisdiction over a series of Department actions simply because an appeal of one is filed with the Board. Furthermore, if one carries C & K's argument to its absurd conclusion, it would be impossible for the Board to determine when its jurisdiction attaches, as that would be dependent on an appellant's perception of when, in the course of a series of acts arising out of the regulation of an operation, the regulated entity believed the Department's action was truly final. Such a diffuse, subjective standard for defining the Board's jurisdiction serves

neither the Board nor the public.

Even if, for the sake of argument, the Board would accept C & K's arguments that there was no finality to the Department's actions until the June 23, 1986 inspection report, we would have extreme difficulty in adopting the interpretation urged on us by C & K. We have repeatedly held that inspection reports are not appealable actions, Bell Coal Company v. DER, EHB Docket Nos. 85-516-W, 85-524-W, 86-026-W, 86-027-W, 86-101-W, and 86-102-W (issued August 8, 1986), and find no compelling or persuasive reason to hold otherwise in the instant appeals.

**O R D E R**

AND NOW, this 20th day of November, 1986, it is ordered that:

- 1) C & K's motions to consolidate Docket Nos. 86-346-W and 86-361-W with Docket No. 85-306-W are denied;
- 2) C & K's petitions for allowance of appeals nunc pro tunc at Docket Nos. 86-346-W and 86-361-W are denied; and
- 3) The appeals docketed at 86-346-W and 86-361-W are dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

*Edward Gerjuoy*

**EDWARD GERJUOY, MEMBER**

*William A. Roth*

**WILLIAM A. ROTH, MEMBER**

**DATED:** November 20, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Michael E. Arch, Esq.  
Western REgion

**For Appellant:**  
Henry Ray Pope, III, Esq.  
Clarion, PA





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

PETER TINSMAN, Appellant

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

:  
 :  
 :  
 : EHB Docket No. 86-328-W  
 :  
 :  
 : Issued: November 20, 1986

OPINION AND ORDER

Synopsis

Appellant's appeal is dismissed for failure to file its Notice of Appeal with the Board within the mandatory time limits established by 25 Pa.Code 21.52. All pleadings must be received by the Board within the time limits prescribed, as opposed to being postmarked before the deadline. 25 Pa.Code 21.11. The Board is without authority to extend the time limits for perfecting appeals.

OPINION

Peter Tinsman (Appellant) is a building stone supplier in Lumberville, Bucks County. Appellant has hand-gathered field stones from the banks of the Delaware River and Paunacussing Creek in Bucks County for several years. On May 31, 1986, Appellant received a compliance order from the Department of Environmental Resources (DER) directing Appellant to cease his practice of collecting field stones pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, No. 219 as amended, 52 P.S. §30.51 et seq., and related laws and regulations.

Appellant contends it was given written permission by DER to gather stones in this area.

Appellant filed a Notice of Appeal from this DER action with the Board on July 2, 1986. Subsequently, the DER filed a Motion to Dismiss Appellant's appeal, asserting Appellant did not file its Notice of Appeal with the Board within 30 days from the time it received notice of the DER action, as is required by 25 Pa.Code 21.52. Appellant responded to DER's Motion to Dismiss by stating that the notice of appeal form is unclear as to whether the Board must receive an appellant's notice of appeal within 30 days or, rather, the appeal must simply be postmarked within 30 days. The Board now addresses the merits of DER's Motion to Dismiss and Appellant's arguments in opposition.

Appellant received the DER compliance order on May 31, 1986. The Board did not receive Appellant's Notice of Appeal until July 2, 1986. Therefore, a period of 32 days elapsed between the time Appellant received notice of the compliance order and the time an appeal was filed with the Board. Appellant contends that the language on the notice of appeal form directing proper filing is unclear. The form states, "[a]ny party desiring to appeal any action of the Department of Environmental Resources must file its Appeal with this Board at the above address within 30 days from the date of receipt. While this language does not precisely state that the appeal must be "received" within 30 days, the plain language compels such a result. Nowhere on this form is there any language which infers that an appeal may simply be postmarked within the 30 day period. Furthermore, the Board's Rules of Practice clearly state that the date of receipt of the notice of appeal by the Board is determinative of timeliness, and not the date of deposit in the mail. 25 Pa.Code 21.11. See also, Bradford Coal Company v. DER, 1985 EHB 863. The failure to file a notice of appeal within 30 days deprives the Board of

jurisdiction. Rostosky v. DER, 26 Pa. Cmwlth 478, 364 A.2d 761 (1976). The Board lacks the authority to extend filing dealines. Without jurisdiction, the Board is unable to address the merits of Appellant's appeal. The Board, therefore, grants the DER's Motion, and dismisses Appellant's appeal at 86-328-W for untimely filing.

O R D E R

AND NOW, this 20th day of November, 1986, DER's Motion to Dismiss is granted and Appellant's appeal docketed at 86-328-W is dismissed for untimely filing.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: November 20, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
John Wilmer, Esq.  
Eastern Region  
For Appellant:  
Peter Tinsman  
Lumberville, PA 18933

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COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
 EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

GERALD C. GRIMAUD :  
 v. : EHB Docket No. 86-263-W  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 and : Issued: November 20, 1986  
 LAKE WINOLA MUNICIPAL AUTHORITY, Permittee:

OPINION AND ORDER  
 SUR  
MOTION TO DISMISS

Synopsis

The Department of Environmental Resources' ("Department") refusal to suspend a water quality management permit upon request of a third party is an exercise of enforcement discretion and, therefore, not reviewable by the Board.

OPINION

This matter was initiated by the filing of a Notice of Appeal by Gerald C. Grimaud on May 16, 1986, seeking the Board's review of a May 13, 1986 letter from the Department of Environmental Resources ("Department") to Grimaud. The Department's letter was generated in response to a May 8, 1986 letter from Grimaud requesting that the Department "Please advise within five days whether or not DER intends to conduct a review as above requested and suspend the current permit pending such a review." The permit to which Appellant was referring was one issued to the Lake Winola Municipal Authority allowing the construction of sewerage facilities pursuant to §207 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.207 ("the Clean Streams Law"). Appellant was alleging that because

blasting was required to construct the facilities, a review of the impacts of the blasting, as well as other alternatives for the project, was required under Article I, Section 27 of the Pennsylvania Constitution, and that the permit should be suspended pending the review.

The Notice of Appeal was accompanied by a Petition for Supersedeas which requested, inter alia, that the Board prevent Permittee's contractors from blasting on Grimaud's property. After a May 22, 1986 telephone conference call with the parties, the Board, on May 28, 1986, issued an order denying the supersedeas, citing substantial doubt regarding whether the Department action was appealable. Permittee Lake Winola Municipal Authority filed a motion to dismiss the appeal on May 23, 1986, arguing that the appeal was barred by either res judicata or the doctrine of administrative finality. Grimaud did not respond to the motion. For the reasons set forth below, we are dismissing this matter.

Section 610 of the Clean Streams Law provides, in pertinent part, that:

The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending, or revoking permits and orders requiring persons or municipalities to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of this act...  
(emphasis added)

Thus, suspension of a permit requires the exercise of enforcement discretion on the part of the Department. The instant matter is on point with that considered by the Board in George Eremic v. DER and Chambers Development Company, Inc., 1976 EHB 249, affirmed on reconsideration, 1976 EHB 324, wherein we held that the Department's refusal to revoke a solid waste permit

upon request of a third party was not an appealable action. We have cited that result more recently with approval in Consolidation Coal v. DER, 1985 EHB 768, 775. The reasoning enunciated in Eremic compels us to also dismiss this matter for lack of jurisdiction. Consequently, it is unnecessary to address the issue of whether this appeal was also barred by res judicata or administrative finality.

**ORDER**

AND NOW, this 20th day of November, 1986, it is ordered that, for the foregoing reason, the appeal of Gerald C. Grimaud at Docket No. 86-263-W is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: November 20, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
John Embick, Esq.  
Eastern Region  
For Appellant:  
Gerald C. Grimaud, Esq.  
Tunkhannock, PA  
For Permittee:  
James E. Davis, Esq.  
Tunkhannock, PA

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COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

WESTERN ALLEGHENY LIMESTONE CORPORATION :  
 :  
 v. : EHB Docket No. 85-495-G  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 25, 1986

OPINION AND ORDER

Synopsis

Appellant's appeal in this bond forfeiture action is dismissed for repeated failure to obey the Board's orders to file a pre-hearing memorandum under the authority of 25 Pa.Code §21.124. Even after sanctions short of dismissal were imposed on Appellant by the Board, the Board's orders were ignored by the Appellant.

OPINION

Appellant's pre-hearing memorandum was originally due on January 28, 1986. On February 25, 1986, when Appellant had not filed the pre-hearing memorandum, the Board sent a certified letter to Appellant, return receipt requested, extending the date to March 12, 1986. Appellant was warned, however, that failure to file a pre-hearing memorandum by this date would risk sanctions, including dismissal of the appeal. The above notwithstanding, on March 19, 1986 no pre-hearing memorandum had been filed. On that date, the Board sent a second certified letter, return receipt requested, imposing

sanctions preventing the Appellant from putting on its case in chief. Said letter also gave Appellant 20 days to indicate a desire to go forward with this matter. Appellant responded on April 8, 1986 with a Petition for Reconsideration, accompanied by a request for a sixty (60) day extension of time to file its pre-hearing memorandum, and requested that it be able to present its case in chief. On April 8 the Board denied both Appellant's Petition for Reconsideration and the requested sixty (60) day extension. The Board did accept the Petition for Reconsideration as Appellant's intention to proceed with the matter and requested that the Department file its pre-hearing memorandum within fifteen (15) days.

After petitioning for leave to conduct discovery on April 4, 1986, on April 8, 1986 the Department forwarded its first set of interrogatories to Appellant. On April 30, the last time this Board was to hear from Appellant, Appellant filed its Answer to Petition for Leave to Conduct Discovery requesting the denial of the Department's Petition. On May 5, the Department filed its pre-hearing memorandum. Then on May 7, 1986 the Board issued an Order granting discovery.

On October 3, 1986, the Department moved for sanctions as the result of the lack of any communication on the Appellant's part. The Board, on October 8, 1986 ordered that the Department's Motion for Sanctions would be treated as a motion to compel and gave Appellant twenty (20) days to respond to the Department's Motion; the Board warned that failure to respond by this 20-day deadline would be cause for dismissal, pursuant to 25 Pa.Code §21.124.

As of this date, the Appellant still has failed to respond in any way to the Department's Motion, although the Board has received the signed returned receipts from the certified letters. Indeed, as stated before, nothing whatsoever has been heard from Appellant since its April 30, 1986



Answer to Discovery Motion. This is an appeal of a bond forfeiture notice in connection with Appellant's mining activities. In such an appeal, the Department bears the burden of proof, Melvin D. Reiner v. DER, 1982 EHB 183. Under these circumstances the sanction of dismissal normally is not imposed. However, this Appellant already has been sanctioned against presenting its case in chief; in the past the Board has dismissed appeals when there is a clearly unresponsive appellant, even though the burden of proof is initially on the Department. Penn Minerals Company v. DER, Docket No. 85-221-G (Opinion and Order, July 31, 1986). Therefore, under the facts presented here and applicable precedent, the instant appeal is dismissed pursuant to 25 Pa.Code §21.124. Appellant here has been intolerably unresponsive to the Board's Orders and has shown no desire to pursue this action.

ORDER

WHEREFORE, this 25th day of November, 1986, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: November 24, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Timothy J. Bergere, Esq.  
For Appellant:  
Robert O. Lampl, Esq.

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COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

HOUTZDALE MUNICIPAL AUTHORITY :  
 :  
 v. : EHB Docket No. 85-391-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 26, 1986

OPINION AND ORDER

Synopsis

The Board denies a motion to compel responses to interrogatories and sustains the objections to the interrogatories on various grounds, including relevancy, vagueness, over-breadth, and the provision of full and complete answers.

OPINION

This matter was initiated by the filing of a Notice of Appeal by the Houtzdale Municipal Authority ("Houtzdale") on September 23, 1985. Houtzdale is seeking review of a September 9, 1985 order from the Department of Environmental Resources ("Department") directing Houtzdale to take remedial measures to prevent the occurrence of giardiasis in customers served by Houtzdale. The present controversy concerns a motion to compel filed by Houtzdale requesting the Board to order the Department to fully and properly respond to interrogatories (specifically, Nos. 2, 3, 12, 17, 19, 20, 21, 28, 31, 32, 33, and 34) proffered by Houtzdale, to which the Department responded on December 5, 1985. The Department filed a response to Houtzdale's motion, and Houtzdale, in turn, filed a reply to the Department's response. For the

reasons set forth below, we are denying Houtzdale's motion. We will address each interrogatory separately.<sup>1</sup>

Interrogatory No. 2 requested the Department to identify any expert witness it expected to call and state the subject matter on which the expert would testify, while Interrogatory No. 3 requested that the Department state the substance of the facts and opinions in the expert's testimony and a summary of the grounds for the opinion. The Department's response stated that it had not yet made a decision regarding expert witnesses, but, when it did, the information requested in the two interrogatories would be provided to Houtzdale. The Department's response was proper and in accordance with Pa.R.C.P. 4007.4(1). Furthermore, the Department subsequently supplemented these responses on September 17, 1986. Therefore, Houtzdale's motion to compel is denied with respect to Interrogatories No. 2 and 3.

Interrogatory No. 12 requested the Department to "Please state the last date when a confirmed case of Giardiasis occurred in the area served by the Houtzdale Municipal Authority." The Department objected to this response, stating that the information was in the possession of Houtzdale. But, without prejudice to its objection, the Department stated it was not certain. It later provided the requested information by letter dated June 17, 1986. Because the Department fully and completely responded to this interrogatory, we deny the motion to compel with respect to Interrogatory No. 12.

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<sup>1</sup> Both parties have filed motions to limit issues. The Department, in its response to the instant motion, has alleged that the information requested by Houtzdale in Interrogatories No. 12, 17, 19, 20, 28, 30 and 31 is irrelevant in light of Houtzdale's failure to appeal the Department's May 18, 1984 order. We will not deal with that contention here, as the motions to limit issues will be the subject of a separate opinion and order.

Interrogatory No. 17 stated

Please detail the protocol or technique used by the testing laboratories to determine whether or not the objects found or allegedly found in the Houtzdale Municipal Authority system were giardia lamblia cysts.

The Department objected to this response, noting that Houtzdale already had copies of the documents setting forth this information, but without prejudice to its objections, the Department attached additional copies of the information. Houtzdale did not deny this in its reply to the Department's response, so we will deny the motion to compel. Universal Film Exchanges, Inc. v. Budco, Inc., 19 Bucks LR 3401 (1969).

Interrogatory No. 19 requested the Department to provide Houtzdale with the number of surface water supplies currently being operated without filtration in the Commonwealth. The Department objected to this interrogatory as being overly broad and not leading to the discovery of admissible or relevant evidence, but offered to make its water supply permit files available to Houtzdale. We believe that the Department's objection is appropriate. The request is overly broad in that "surface water supplies" encompasses individual and community users for domestic, industrial, agricultural and other uses, and the matter before the Board concerns public water supply for domestic purposes. We are also at a loss to understand how such information would be relevant to reviewing the propriety of the Department's order. For these reasons, we deny the motion to compel as it relates to Interrogatory No. 19.

The Department is requested in Interrogatory No. 20 to provide the number of surface water supplies without filtration where giardiasis outbreaks have occurred. The Department objected on the same grounds that it did in Interrogatory No. 19, but also provided the requested response.

Again, the term "surface water supplies" is a very broad one. This information is potentially admissible or relevant, but because the Department has provided a full and complete response, Houtzdale's motion to compel is denied.

Interrogatory No. 21 requests the Department to

Please state all the facts available to the Department of Environmental Resources which support the statement in Paragraph 6 of the Order that surface water supplies without filtration pose a potential health threat to users from giardia type organisms.

The Department objected to the term "all the facts available" as being overly broad because it is not limited in time or geography and potentially requires information not in the custody or control of the Department. It also objects on grounds of relevancy and admissibility. This information is potentially relevant and admissible, but, as phrased, the request is overly broad and vague, and we will sustain the Department's objections.

Interrogatory No. 28 states

Has the Department consulted any experts concerning the existence of giardia lamblia cysts in the Houtzdale Municipal Authority Water system?

If so, the interrogatory requires the Department to identify the expert and state the substance of its opinion. The Department has objected to this interrogatory on the grounds that Houtzdale already possessed the information and/or the Department provided it to Houtzdale. We sustain the Department's objections to this Interrogatory for the same reasons we denied Houtzdale's motion to compel regarding Interrogatory No. 17.

The Department is requested by Interrogatory No. 31 to

Please state the fact and substance contained in each and every document in the Department of Environmental Resources' files with respect to the Houtzdale Municipal Authority's alleged giardia

lamblia problem. (As an alternative to answering this question, the Department may make copies of all documents contained in its files concerning the giardia lamblia problem, and provide copies to counsel for the Houtzdale Municipal Authority. The Houtzdale Municipal Authority will be willing to reimburse the Commonwealth for any reasonable costs associated in reproducing the materials from the files.)

The Department objected to this interrogatory on the grounds that it was overly broad and would require the disclosure of privileged material, but without prejudice to its objections, stated it would make its files available to Houtzdale. The interrogatory is extremely broad, and the Department has agreed to furnish its records to Houtzdale as is proper under Pa.R.C.P. 4006(b); therefore, we will deny the motion to compel with respect to Interrogatory No. 31.

Interrogatory No. 32 required DER to

Please identify any and all internal memorandum prepared by any employees of the Department of Environmental Resources with respect to the alleged giardia lamblia problem and the Houtzdale Municipal Authority.

The Department raised the same objections as it did to Interrogatory No. 31, and the motion to compel with respect to Interrogatory No. 32 will be denied for the same reasons.

Houtzdale, in Interrogatory No. 33, requested the Department to specify any "other solutions or reasonable alternatives to those identified in the order." The Department objected to this inquiry as vague, overly broad and not reasonably calculated to lead to the discovery of admissible evidence. While this interrogatory could conceivably lead to the discovery of admissible evidence, it is vague and overly broad, and we will sustain the Department's objections.

Interrogatory No. 34 queries

Is the Department aware, and was it aware at the time of the issuance of the order of the trust indenture between the Houtzdale Municipal Authority and (sic) the County National Bank in Clearfield, which indenture restricts the municipality from spending sums for capital improvements on the Authority's water system.

The Department objects to this interrogatory on the grounds of relevancy, and we, too, believe the information sought by the interrogatory is irrelevant. Houtzdale's ability to expend monies to comply with the Department's order is not a valid defense to the issuance of the order. Ramey Borough v. Com., Depat. of Environmental Resources, 15 Pa.Cmwlth 601, 327 A.2d 604 (1974), aff'd 466 Pa.45, 351 A.2d 613 (1976).

Finally, in its reply to the Department's response, Houtzdale has, among other things,<sup>2</sup> alleged that Paragraphs 6, 10, 11, 16, 17, 18, and 19 of the Department's response should have been provided under the oath of a responsible party. We believe that the information set forth in Paragraphs 6, 10, 11, and 18 of the Department's response should have been made under oath of a responsible party, but since we are, in deciding Houtzdale's motion to compel, determining the sufficiency of the Department's responses to Houtzdale's interrogatories, we will disregard this deficiency.

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<sup>2</sup> Houtzdale has alleged that the Department's intransigence has imposed unnecessary litigation costs upon it and hindered the resolution of this matter. We would note, however, that the Board has devoted significant effort and resources in deciding a motion which was, in large part, unwarranted and which was filed over eight months after Houtzdale had received the Department's responses.

O R D E R

AND NOW, this 26th day of November, 1986, it is ordered that Appellant Houtzdale Municipal Authority's Motion to Compel is denied.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

**DATED:** November 26, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Winifred M. Prendergast, Esq.  
Eastern Region  
**For Appellant:**  
Robert P. Ging, Jr., Esq.  
Pittsburgh, PA

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COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

CHESTER COUNTY SOLID WASTE AUTHORITY :  
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 :  
 v. : EHB Docket No. 86-407-W  
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 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 2, 1986

OPINION AND ORDER

Synopsis

A notice of violation of bonding requirements for hazardous waste storage, treatment, and disposal, absent some action affecting the violator's rights or duties, is not an appealable action. 25 Pa. Code §§21.2(a) and 21.52(a).

OPINION

Chester County Solid Waste Authority (Appellant) is a municipal authority which owns and operates the Lanchester Landfill located in Lancaster and Chester counties. Appellant acquired the landfill from the Lanchester Corporation on September 19, 1984. The landfill is divided into three parts; a section for municipal waste, an abandoned quarry, and a hazardous waste disposal site.

On July 22, 1986, the Department of Environmental Resources issued a Notice of Violation to Appellant indicating it was in violation of certain bonding requirements necessary for site closure pursuant to 25 Pa. Code

§75.311. Appellant appealed this Notice of Violation to the Environmental Hearing Board on August 21, 1986. The DER filed a Motion to Dismiss, which is the focus of this opinion, asserting that the notice of violation was not a final action of the DER, and, hence was not subject to appeal to the Environmental Hearing Board. Sunbeam Coal Corporation v. DER, 18 Pa. Cmwlth Ct. 622, 304 A.2d 169 (1973).

The Appellant failed to respond to DER's motion to dismiss. Since Appellant failed to respond to the DER's motion to dismiss, the Board, as authorized by 25 Pa.Code §21.64(d), finds that the Appellant has admitted the facts alleged in DER's motion. Beltrami Enterprises, Inc. v. DER, 1985 EHB 443.

Actions of the DER are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa. C.S.A. §101, or "actions" under Section 1921-a of the Administrative Code, the Act of April 9, 1929, P.L.177, as amended, 71 P.S. §510-21 and 25 Pa. Code §21.2(a)(1). Sunbeam Coal Corporation, supra. See also Edward Vogel v. DER, August 25, 1986 (EHB Docket No. 86-333-R). Adjudications are those actions which affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of the party. Therefore, a DER action which affects the above mentioned rights of a party is an agency adjudication, and is appealable. Id.

The July 18, 1986 correspondence from DER is clearly a notice of violation and not an adjudication. First, the document is entitled a "notice of violation", as opposed to an order or penalty assessment. The Board realizes, however, that the title of a document is not necessarily determinative of its substantive effect. The Board also considers the substance of the document in determining whether correspondence from the DER is appealable. In the instant case, the July 18, 1986 letter does not

affirmatively direct remedial action or a payment of a penalty. The notice of violation states, "[f]acility owners or operators who do not submit bonds as required by Section 75.311 are subject to enforcement actions by the Department. Enforcement actions can include, but are not limited to, requiring facility owners or operators to cease using that portion of the facility which has interim status for treatment, storage, or disposal of hazardous waste." From a review of the language of the July 18, 1986 notice, it is evident that enforcement action was addressed only hypothetically and prospectively contingent upon failure of Appellant to remedy the identified violation. Edward Vogel v. DER, supra. The Board concludes that the July 18, 1986 DER correspondence was a "classic" notice of violation which is unappealable.

O R D E R

AND NOW, this 2nd day of December, 1986 it is ordered that DER's Motion to Dismiss the above-captioned appeal is granted, and the appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: December 2, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Winifred M. Prendergast, Esq.  
Eastern Region  
For Appellant:  
James E. McErlane, Esq.  
LAMB, WINDLE & McERLANE  
West Chester, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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M. DIANE SMITH  
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ANTHRACITE PROCESSING CO., INC. :  
 :  
 v. : EHB Docket No. 86-074-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 2, 1986

OPINION AND ORDER  
 SUR  
MOTION TO DISMISS

Synopsis:

Appeal of a Department of Environmental Resources' civil penalty assessment is dismissed because Appellant failed to post the required appeal bond or to prepay the penalty as required by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.22, and the Clean Streams Law, 35 P.S. §691.605(b).

OPINION

On February 11, 1986, Anthracite Processing Co., Inc. (hereinafter "Anthracite") filed an appeal with this Board from an assessment of a civil penalty by the Department of Environmental Resources (hereinafter "DER" or "Department"). The Department assessed a civil penalty against Anthracite in the amount of \$23,100.00 for alleged violations at Anthracite's surface mining operations. The assessment was served on Anthracite on January 15, 1986. The Department assessed the civil penalty pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1, et seq. (hereinafter "Surface Mining

Act"), 52 P.S. §1396.22; and Section 605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et seq., 35 P.S. §691.605(b). In the notice of assessment, the Department informed Anthracite that it must pay the assessed penalty within thirty days of receipt of the assessment, or if it wished to appeal the assessment, it must forward the proposed amount of the assessment to the Secretary of the Department for placement in an escrow account, or it must post an appeal bond with the Secretary in the amount of the proposed assessment. The notice of assessment warned Anthracite that procedures for appealing a civil penalty assessment set forth in Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b) must be followed or the right to appeal the civil penalty assessment will be waived.

On April 4, 1986, the Department filed a Motion to Dismiss this appeal on the ground that Anthracite had not posted an appeal bond or prepaid the penalty, as required by Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b).

In its response to the Department's motion Anthracite stated:

My letter of February 9, 1986, attempted to present the case that Anthracite Processing Co., Inc. is a bankrupt company devoid of liquid assets and incapable of paying a sizeable civil penalty and unable to pay for legal advise (sic)...

Anthracite asserted no other grounds in opposition to the Department's motion. The Board regards Anthracite's assertion as challenging the constitutionality of the civil penalties assessment procedures where an operator is financially unable to comply with the requirement.

Section 18.4 of the Surface Mining Act provides in pertinent part as follows:

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 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.

52 P.S. §1396.22

Section 605(b)(1) of the Clean Streams Law provides as follows:

(b) Civil penalties for violations of this act which are in any way connected with or relate to mining and violations of any rule, regulation, order of the department or condition of any permit issued pursuant to this act which are in any way connected with or related to mining, shall be assessed in the following manner and subject to the following requirements:

(1) The department may make an initial assessment of a civil penalty upon a person or municipality for such violation, whether or not the violation was wilful, by informing the person or municipality in writing within a period of time to be prescribed by rules and regulations of the amount of the penalty initially assessed. The person or municipality charged with the violation shall then have thirty days to pay the proposed penalty in full, or if the person or municipality wishes to contest either the amount or the fact of the violation, to forward the proposed amount to the department 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, and thereafter to file an appeal to the Environmental Hearing Board within the same thirty day period. The initial assessment shall become final if the amount of the appeal bond is not forwarded to the department or if no appeal is filed with the Environmental Hearing Board within thirty days of the written notice to the person or municipality of the initial assessment and thereafter the person or municipality charged with the violation and suffering the assessment shall be considered to have waived all legal rights to contest the fact of the violation or the amount of the penalty.

The Commonwealth Court has upheld the constitutionality of the requirements in 52 P.S. §1396.22 and 35 P.S. §605(b) of posting an appeal bond as a jurisdictional prerequisite to an appeal of a civil penalty assessment.

Boyle Land and Fuel Company v. Com., Environmental Hearing Board, 82 Pa.Cmwlth. 452, 475 A.2d 928 (1984). Thus, when a party is served with the notice of assessment of a civil penalty pursuant to 52 P.S. §1396.22 and 35 P.S. §605(b), an appeal of the assessment lies with this Board, but the filing of an appeal does not preserve the party's rights unless the party forwards the amount of the proposed penalty, or posts a bond in that amount with the Department. See Stahl v. DER, 1984 EHB at 828-829. However, as we noted in Ray Martin v. DER, 1984 EHB 821, inability to pre-pay the civil penalty or post an appeal bond in the amount of the penalty was not an issue in the Boyle case. Nonetheless, the Commonwealth Court stated in dicta that:

Of course, the requirement of bonds to secure the amount of anticipated delayed damages and costs pending the final disposition of an appeal are not uncommon in Pennsylvania. See, e.g.,



Section 1008 of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, added by Section 19 of the Act of June 1, 1972, P.L. 333, 53 P.S. §11008. As early as 1820, our Supreme Court held that the pre-payment of costs as a pre-condition of an appeal, was not unconstitutional, notwithstanding the fact that in certain cases this requirement may be so harsh as to deprive a poor man of his right of appeal. McDonald v. Schell, 6 Serg. & Rawle 239 (1820).

475 A.2d at 929-930.

The federal courts have also upheld the constitutionality of the pre-payment of civil penalties under 30 U.S.C. §1268(c), applying the reasoning of Matthews v. Eldridge, 424 U.S. 319, 335 (1976) See, e.g. U.S. v. Thompson Bros. Coal Co., Inc., 532 F.Supp. 979 (W.D. Pa. 1982). However, none of the cases have dealt squarely with the issue of whether the requirement was unconstitutional in circumstances where a litigant was unable to pay the penalty or post a bond. The U.S. District Court for the Eastern District of Kentucky stated in dicta in John Walters Coal Co. v. Watt, 553 F.Supp 838 (E.D.Ky. 1982) that:

While the court is aware that under some circumstances, the enforcement of the prepayment requirement 'might' force some operators to choose between contesting a violation or staying in business... this private interest is simply not sufficient to offset the government's interest in collecting these prepayment penalties.

553 F.Supp. at 840.

In any event, this Board has no jurisdiction to determine whether these two statutory provisions are unconstitutional in the present circumstance. St. Joe Minerals v. Goddard, 14 Pa.Cmwltth 624, 628-629, 324 A.2d 800. Consequently, for purposes of ruling on the Department's motion, we must presume that these two statutory provisions are constitutional.

Chemclene Corporation et al. v. DER, 1983 EHB 65. Since Anthracite has failed to file an appeal bond or post the proposed amount of the assessment with the Secretary of the Department, Anthracite has not perfected its appeal as required by the law. ORCT Corporation v. DER, 1984 EHB 941; Stahl v. DER, 1984 EHB 825; Martin v. DER, 1984 EHB 821. Therefore, DER's Motion to Dismiss is granted.

ORDER

AND NOW, this 2nd day of December, 1986, the appeal of Anthracite Processing Co., Inc. at EHB Docket No. 86-074-W is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: December 2, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Martin H. Sokolow, Jr., Esq.  
Central Region  
For Appellant:  
Fred R. Davis  
Anthracite Processing Co., Inc.

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC., et al. :  
 v. : EHB Docket No. 82-177-H  
 COMMONWEALTH OF PENNSYLVANIA : 82-219-H  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 and :  
 NESHAMINY WATER RESOURCES AUTHORITY : Issued: December 5, 1986  
 and PHILADELPHIA ELECTRIC COMPANY :

OPINION AND ORDER SUR  
 DEL-AWARE'S MOTION TO VACATE  
 AND RE-OPEN AND NORTH PENN AND  
 NORTH WALES WATER AUTHORITIES'  
 PETITION TO INTERVENE

Synopsis

A motion to vacate and reopen a 1984 adjudication on the basis of alleged changes in circumstances is a request for equitable relief which the Board has no power to grant. The Board treats it as a petition for reconsideration and denies it as untimely, since the Board has no jurisdiction to consider such a petition if filed beyond the 20 day period prescribed by 25 Pa.Code §21.122.

OPINION

The Board, in a voluminous adjudication, Del-Aware Unlimited, Inc., et al. v. DER, et al., 1984 EHB 178, addressed the Department of Environmental Resources' ("Department") issuance of various permits required to effectuate the Point Pleasant diversion, a project designed to provide water supply to portions of Bucks and Montgomery Counties and supplemental cooling water for the Limerick Nuclear Generating Station in Pottstown,

Montgomery County.<sup>1</sup> Del-Aware Unlimited ("Del-Aware") has now filed a motion with the Board, requesting us to vacate and reopen our June 18, 1984 adjudication. As grounds for its motion, Del-Aware has alleged that a pending water obstructions permit application for the modification of the Bradshaw reservoir, the approval by the Delaware River Basin Commission of the use of the Beechwood Mine Pool and the Still and Owl Creek Reservoirs near Tamaqua as a back-up cooling water source for Limerick Unit 1, and a new proposal to the North Penn and North Wales Water Authorities constitute significant changes in circumstance which would "render the prior decisions of the Board, totally obsolete and no longer viable." Reopening our prior decision is required, Del-Aware argues,

to prevent the dead hand of prior decisions from controlling future action, when such decisions have been shown to be or have emerged as unrelated to present or factual circumstances.

Philadelphia Electric Company ("PECO") has responded to Del-Aware's motion, arguing that Pa R.A.P. 1701 and the Board's own rule §21.122 prohibit the Board from exercising any jurisdiction to decide the motion. In the alternative, PECO suggests that even if the jurisdictional hurdle were cleared, Del-Aware has not alleged any grounds sufficient to reopen the prior adjudication. The Board has also received a Petition to Intervene from North Penn and North Wales Water Authorities which have had various obligations relating to the Point Pleasant diversion project imposed upon them by the Bucks County Court of Common Pleas. The two authorities have also requested

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<sup>1</sup> The Board's adjudication was affirmed by the Commonwealth Court in Del-Aware Unlimited, Inv. v. DER, \_\_\_ Pa.CmwltH \_\_\_, 508. A.2d 348 (1986). Cross-petitions for review of the Commonwealth Court's decision have been filed by Philadelphia Electric Company, the Department, and Del-Aware and are now pending before the Pennsylvania Supreme Court (No. 436 E.D. Allocatur Docket).

that they be permitted to supplement the answer filed by PECO. For the reasons set forth below, we deny Del-Aware's motion.

Reopening a judgment is generally recognized to be in the nature of an equitable proceeding. 12 Standard Pennsylvania Practice 2d §71.34. This Board, as an administrative agency, has only those powers specifically conferred upon it by the General Assembly. DER v. Butler County Mushroom Farm, 499 Pa. 507, 454 A.2d 1 (1982). The Board is empowered by §1921-A(a) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21(a) to

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

The Board is not a court of general jurisdiction and has not been endowed with broad equitable powers. Cf. Eva E. Varos et al. v. DER, 1985 EHB 892. Consequently, we have no authority to entertain a motion to reopen our prior decision.

We may, however, entertain petitions for reconsideration under 25 Pa.Code §21.122, and we will treat the instant motion as such. The Commonwealth Court has ruled that where time limits for requesting reconsideration are set forth in an agency's regulations, they have the same force as a statutory provision, and no petition for reconsideration filed outside of that time limit may be entertained by the agency. Mayer v. Unemployment Comp. Bd. of Review, 27 Pa.Cmwlth 244, 366 A.2d 605 (1976). Rule 21.122 requires that any petition for reconsideration must be filed within 20 days of the Board's rendering a decision. This motion was filed over two years after our adjudication which, based on the reasoning enunciated in Mayer,

supra, and Commonwealth, Dept. of Envir. Res. v. Wolford, 16 Pa.Cmwlth 254, 329 A.2d 304 (1974), deprives us of any jurisdiction to rule upon it.

Aside from the issue of docket management, placing time limits on the filing of petitions for reconsideration is necessary from a public policy standpoint. As Commonwealth Court stated in Mayer, the administrative process must end at some point. If it doesn't, the ensuing regulatory paralysis will cripple the agency, clog the docket of the adjudicative body, and destroy public confidence in the system. This matter has occupied hundreds of hours of the Board's time, and we will not devote any more in the absence of a proper appeal or motion in a matter before us.<sup>2</sup>

Because we are denying Del-Aware's motion on the basis of lack of jurisdiction, it is unnecessary for us to address the effect of Pa.R.A.P. 1701. Similarly, it is also unnecessary for us to decide the petition for intervention filed by North Penn and North Wales Water Authorities.

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<sup>2</sup> Del-Aware currently has several appeals relating to various aspects of the Point Pleasant project pending before the Board. Docket Nos. 86-028-G, 86-029-G, 86-030-G, 86-031-G, 86-032-G, 86-588-W, and 86-589-W.

O R D E R

AND NOW, this 5th day of December, 1986, it is ordered that  
Del-Aware's Motion to Vacate and Re-open the above matter is denied.

ENVIRONMENTAL HEARING BOARD

  
EDWARD GERJUOY, MEMBER

  
WILLIAM A. ROTH, MEMBER

Board Chairman Maxine Woelfling has recused herself from this Opinion and Order because of her involvement with the issue of whether an NPDES permit was required during her association with the Office of Chief Counsel, Department of Environmental Resources.

**DATED:** December 5, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**  
Louise S. Thompson, Esq.  
Eastern Region

**For Appellant:**  
Robert J. Sugarman, Esq.  
Philadelphia, PA

**For Neshaminy Water Resources:**  
Lois Reznick, Esq.  
Philadelphia, PA

**For North Penn and North Wales:**  
Jeremiah J. Cardamone, Esq.  
Ambler, PA

**For Philadelphia Electric:**  
Eugene J. Bradley, Esq.  
Philadelphia

and Troy B. Conner, Esq.  
Washington, DC

b1



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 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

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 SECRETARY TO THE BOARD

BOROUGH OF SOUDERTON :  
 :  
 v. : EHB Docket No. 86-121-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 8, 1986

OPINION AND ORDER  
 SUR  
MOTION TO DISMISS

Synopsis

The setting of specific effluent criteria which may be later modified but which must be currently complied with, and the requiring of a Toxics Reduction Evaluation constitute action by DER which is final and appealable before the Environmental Hearing Board.

OPINION

The above-captioned matter concerns the Borough of Souderton's (Appellant) appeal of a National Pollutant Discharge Elimination System (NPDES) permit issued to it on January 30, 1986 by the Department of Environmental Resources (DER). Appellant challenges the inclusion of discharge limitations for the toxic pollutants cadmium, silver, phenols, and bis (2 Ethyl Hexyl) phthalate. Appellant also appeals the inclusion of a discharge limitation for zinc and the inclusion of a requirement that it perform a Toxics Reduction Evaluation (TRE) for the previously mentioned toxic pollutants.

On May 27, 1986, DER filed a motion to dismiss the appeal on the



basis that the discharge limitations for cadmium, zinc, phenols and bis (2 Ethyl Hexyl) phthalate are not final, effective effluent limitations.<sup>1</sup> DER also would have the Board dismiss the appeal as it concerns the permit requirement to conduct a TRE on the basis that, "...it is very unlikely that this Board would find that the Department abused its discretion in requiring the submittal of a TRE study in lieu of achieving those limitations." On June 16, 1986, Appellant filed an answer to the motion to dismiss. Appellant supports its position that this matter is reviewable by the Board emphasizing that it is appealing the requirements listed in Part A and that they, "should not be included in the permit regardless of whether the Department might choose to change or modify the limitations at some point in the future." Appellant specifically points to Part C, Paragraph H of the NPDES permit which states inter alia, "...for purposes of compliance, effluent limitations listed in Part A of this permit apply unless changed by order, permit modification or other Department action." Appellant further argues that the limitations are final, DER's right to amend or modify notwithstanding, and that their existence requires Appellant to undertake certain activities, including the TRE.

The issue of whether a portion of a permit which is apparently modifiable is an appealable final action is apparently one of first impression before the Board. This being the case, the Board has tried to give extra scrutiny to DER's argument, despite the fact that DER states its case in a conclusory fashion and fails to give any case citations, statutory references, or any other legal support for its position. Nevertheless, the Board finds it must side with Appellant in this instance.

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<sup>1</sup> The Board assumes DER meant to include silver in the list as well, although it is not mentioned in the motion.

It certainly cannot be denied that the issuance of an NPDES permit itself is an appealable action. The Board has reviewed many such appeals over the years. See Lower Providence Township v. DER and County of Montgomery, EHB Docket No. 84-338-G (Issued August 7, 1986); Del-Aware Unlimited, Inc. v. DER, and Philadelphia Electric, 1985 EHB 478; Del-Aware Unlimited, Inc. et al. v. DER, and Neshaminy Water Resources Authority, and Philadelphia Electric Co., 1983 EHB 427; Masenzoha Rod and Gun Club et al. v. DER, 1981 EHB 244. Issuance of a permit by DER is a final and thus appealable action. Sunbeam Coal Corp. v. DER, 8 Cmwlt. Ct. 622, 304 A.2d 169 (1973), see also, Consolidated Coal Co. v. DER and J & D Mining Inc., 1983 EHB 339. Actions of DER are appealable if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa. C.S.A. §101, or "actions" under Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa. Code §21.2(a)(1). Sunbeam, supra.; Reitz Coal Co. v. DER, 1984 EHB 793. In order for an action of DER to be appealable to the Board, said action must affect the personal or property rights, privileges, immunities, duties, liabilities, or obligations of the litigant. 25 Pa. Code §§21.2(a) and 21.52(a); see also, DER v. New Enterprise Stone and Lime Co., Inc., 25 Cmwlt. Ct. 389, 359 A.2d 845 (1976). Both the setting of specific effluent criteria and the requiring that a TRE be performed, if final, appear to create or change the duties and obligations of Appellant. Both obligations would seem likely to result in a not insubstantial financial burden upon Appellant.

As to whether the specific effluent limitations questioned in the appeal are final, the Board can presently only examine the language of the permit. The permit begins on page one with the statement that Appellant's facility will be allowed a discharge, "...in accordance with the effluent

limitations, monitoring requirements and other conditions set forth in Parts A, B, and C." The effluent limitations are listed in Part A with references to Part C [pages 14(a) and 14(d)]. Also on page one of the permit, qualification No. 2 states:

Failure to comply with any of the terms or conditions of this permit is grounds for enforcement action; for permit termination, revocation and reissuance or modification; or for denial of a permit renewal application."

In Part C paragraph H(a), on page 14(b) the permit states:

For purposes of compliance, effluent limitations listed in Part A of this permit apply unless changed by order, permit modification or other Department action.

This permit is less than perfectly clear as to its operation and requirements. The discharge limitations for cadmium, silver, zinc, phenols, and bis (Ethyl Hexyl) phthalate listed in Part A on page 2(a) do not agree with those listed in Part C page 14(b). Although not clear, it appears that the stricter limitations listed in Part C are to take effect sometime after performance of the TRE. It also appears that DER might further change the requirements based on the results of the TRE. However, pending such possible and apparently not certain modifications, the limitations in Part A appear final, particularly since failure to meet them could result in an enforcement action. A deadline by which the limitations in Part C must be met is not included in the permit, although they still appear to be final requirements which must be met. The deadline appears to hinge upon the results of the TRE. The permit does provide a schedule on page 14(b) for completion of the TRE; the completed TRE was to be submitted September 1, 1986. The TRE requirement is one which Appellant is given no option but to perform. The obligation to meet the effluent limitations and perform the TRE have already

been created by the permit, if the requirements are found to be unreasonable their modifiability or a final compliance date could not affect the Board's decision.

The ramifications of deciding in DER's favor here also militate against a decision to dismiss. To follow DER's apparent reasoning here would lead to the absurd result of requiring an Appellant to appeal each separate item of a DER order or permit as performance came due. Such a rule would mean the possibility of an endless number of appeals being taken from a DER order, limited only by the the number of requirements in each order. To accept such reasoning would all but eliminate the need for a timely appeal. A permittee could simply appeal the individual requirements of a permit as the need to meet them came due, thus eliminating the timeliness requirement. DER here seems to have missed the point since it is DER's "action" in setting the requirements which is appealed, not the simple fact that there are requirements. It is the date of the action (here the date of the permit with its attendant limits) from which the appeal period begins to run. The fact that DER has the power to modify the requirements does not affect the reasonableness of the requirements as they presently stand. Finally, it can reasonably be argued that if the Board dismissed the present appeal and Appellant later appealed modified effluent requirements set by DER, Appellant would be estopped from denying the contents of the permit as it presently stands or DER's right to even set the required limits.

O R D E R

AND NOW, this 8th day of December, 1986, for the above-stated reasons DER's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

**DATED:** December 8, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Vincent M. Pompo, Esq.  
Eastern Region  
**For Appellant:**  
Robert G. Bricker, Esq.  
Souder, Rosenberger, Lapp & Bricker  
Souderton, PA

mjf



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

THOMAS FITZSIMMONS

v.

COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES

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EHB Docket No. 85-073-W

Issued: December 10, 1986

OPINION AND ORDER SUR  
 COMMONWEALTH'S MOTION TO DISMISS AND  
 APPELLANT'S REQUEST FOR ALLOWANCE  
OF AN APPEAL NUNC PRO TUNC

Synopsis

The filing of an appeal bond or escrow in the amount of the Department of Environmental Resources' ("Department") proposed assessment of civil penalties within 30 days of receipt of the assessment is a jurisdictional requirement to contesting the assessment under §18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22 ("SMCRA") and §605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b) ("Clean Streams Law"). Failure to timely file the appeal bond/escrow necessitates dismissal of the underlying appeal.

The Department is not estopped from raising the issue of failure to timely file the appeal bond/escrow account 17 months after the appeal was filed because it is a jurisdictional issue which may be raised at any stage in the proceeding.

Allegations of hardship or injustice alone do not substantiate the allowance of an appeal nunc pro tunc. There must be some conduct on the part

of the Board which misled Appellant or some breakdown in the Board's operation which resulted in the untimely filing of the appeal bond or escrow.

#### OPINION

This matter arises from the appeal of a civil penalties assessment issued to Appellant Thomas Fitzsimmons ("Fitzsimmons") by the Department of Environmental Resources pursuant to §18.4 of SMCRA, 52 P.S. §1396.22 and §605(b) of the Clean Streams Law, 35 P.S. §691.605(b). The assessment stemmed from a cease and desist order issued to Fitzsimmons by the Department on January 31, 1984. The total penalty assessment was \$10,500, with \$5,000 assessed for mining without a license, \$3500 assessed for mining without a permit, and \$2000 assessed for mining without erosion and sediment controls. The Department issued the assessment on February 8, 1985, and it was received by Fitzsimmons on February 13, 1985. A timely notice of appeal was filed with the Board on March 11, 1985. A surety bond in the amount of \$10,000 was filed with the Board on April 1, 1985. After prehearing memoranda were filed and discovery conducted, the Department filed a motion for summary judgment. The Board, in an opinion and order dated March 17, 1986, granted the Department's motion with regard to establishing the violations complained of, but denied the motion with respect to the amount of the penalty.

The matter was then scheduled for a hearing as to the amount of the penalty on August 11, 1986. The Department filed a motion to dismiss on August 1, 1986, contending that the Board had no jurisdiction to hear the appeal because Fitzsimmons did not file the requisite appeal bond with the Board within 30 days of his receipt of the Department's assessment. Fitzsimmons filed an answer to the Department's motion on August 29, 1986, arguing that the Department was estopped from raising the issue that the appeal bond was not timely filed with the Board because the Department did

not raise the issue until eighteen months after the filing of the appeal. Appellant further contends that a Board memorandum transmitting the surety bond to the Department which states that the appeal was "perfected" with the filing of the bond provides justification for the timeliness of filing and, that in any event, there has been substantial compliance with the appeal bond requirement. In the alternative, Fitzsimmons requests the Board to allow the appeal nunc pro tunc. The Department replied to Fitzsimmons' request for allowance of an appeal nunc pro tunc and argued that Fitzsimmons had failed to allege sufficient grounds. For the reasons stated below, we grant the Commonwealth's motion, deny Fitzsimmons' request for allowance of an appeal nunc pro tunc, and dismiss this appeal.

Section 18.4 of SMCRA, 52 P.S. §1396.22, requires that a person post an appeal bond in the amount of a proposed civil penalty assessment or forward the amount of the penalty to be placed in an escrow account if he wishes to contest the penalty before the Board. That section of SMCRA further provides:

Failure to forward the money or the appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b), contains an analogous provision, and regulations implementing the requirements have been promulgated at 25 Pa.Code §86.202(c).<sup>1</sup>

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<sup>1</sup> This subsection provides that:

No appeal from a penalty assessment shall be deemed to be perfected unless a properly executed appeal bond or cash equal to the full amount of the assessed penalty is received by the Environmental Hearing Board within 30 days of appellant's receipt of the assessment.



The pre-payment requirement for appeals of civil penalties assessments under §18.4 of SMCRA and §605(b) of the Clean Streams Law has been held to be a jurisdictional pre-requisite. Boyle Land and Fuel Company v. Com., Env. Hearing Board, 82 Pa.Cmwlth 452, 475 A.2d 928 (1984), aff'd 507 Pa.135, 488 A.2d 1109 (1985). In other words, if an appellant fails to pre-pay the civil penalty, either through an escrow or an appeal bond, within 30 days of receiving notice of the assessment, the Board is deprived of any authority to hear the appeal of the assessment. Stahl v. DER, 1984 EHB 825 and Anthracite Processing Co., Inc. v. DER, EHB Docket No. 86-074-W (Opinion and Order issued December 2, 1986). More to the point, both the notice of appeal and the appeal bond/escrow must be filed with the Board within 30 days of the Appellant having received notice of the assessment. Fitzsimmons, admittedly, did not file his appeal bond with the Board until 46 days after he received the assessment.

Fitzsimmons urges the Board to hold that the Department is estopped from raising this issue because it did not do so until seventeen months after the appeal had been filed. Because pre-payment of penalties is a jurisdictional pre-requisite and jurisdictional issues may be raised at any time, the Department has not waived this issue. Commonwealth of Pennsylvania v. Yorktowne Paper Mills, Inc., 419 Pa.363, 214 A.2d 2031 (1965) and Eugene Petricca v. DER, EHB Docket No. 85-312-G (Opinion and Order issued April 9, 1986).

In the alternative, Fitzsimmons has requested the Board to allow this appeal nunc pro tunc. The Board will allow an appeal nunc pro tunc only where some conduct on the part of the Board misled an appellant or a breakdown in the Board's operations resulted in an untimely filing. C & K Coal Company v. DER, EHB Docket Nos. 86-346-W and 86-361-W (Opinion and Order

issued November 20, 1986). Fitzsimmons relies upon an April 2, 1985 memorandum from the Secretary to the Board to Charles Gummo of the Bureau of Mining and Reclamation stating:

This appeal was filed March 11, 1985, without the bond. Attorney Robert Hanak, Esquire, did file same bond on April 1, 1985. This appeal is now perfected with the Environmental Hearing Board.

(emphasis added)

Appellant argues that the fact the Board regarded the appeal to be perfected was indicative that the appeal was properly and timely filed. The term "perfect" is defined as "complete,..." in Black's Law Dictionary (4th Rev.ed.). The Board Secretary's memorandum only indicated that all the necessary information which must accompany the appeal had finally been received by the Board; the memorandum did not state that the Board could now exercise its jurisdiction to adjudicate the appeal. Indeed, there is no allegation that Fitzsimmons was even aware of this memorandum until after he had reviewed the Department's Motion to Dismiss, to which it was attached. And, in any event, there is no allegation that this memorandum, which was prepared 22 days after Fitzsimmons' appeal was filed, was responsible for his failure to submit the appeal bond.

The other grounds cited by Fitzsimmons as grounds for an appeal nunc pro tunc are equally unpersuasive. That the appellant will suffer hardship or injustice is irrelevant, In re Township of Franklin, 2 Pa.Cmwlth 496, 276 A.2d 549 (1971) and City of Pittsburgh v. Pennsylvania PUC, 3 Pa.Cmwlth 516, 284 A.2d 808 (1971). Nor is the negligence of Appellant or his counsel sufficient reason. Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth 478, 364 A.2d 761 (1976) and W. W. Grainger, Inv. v. Ruth, 192 Pa.Super. 446, 449, 161 A.2d 644, 646 (1960).

In light of our holding on the jurisdictional issue and the request for the allowance of an appeal nunc pro tunc, it is unnecessary for us to address the issue of whether Fitzsimmons substantially complied with the pre-payment requirement by posting a bond in the amount of \$10,000, rather than \$10,500.

O R D E R

AND NOW, this 10th day of December, 1986, it is ordered that the Department's motion to dismiss is granted, Appellant's request for the allowance of an appeal nunc pro tunc is denied, and the appeal docketed at EHB Docket No. 85-073-W is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
\_\_\_\_\_  
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\_\_\_\_\_  
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*William A. Roth*  
\_\_\_\_\_  
WILLIAM A. ROTH, MEMBER

DATED: December 10, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Joseph K. Reinhart, Esq.  
Gary A. Peters, Esq.  
Western Region  
For Appellant:  
Robert M. Hanak, Esq.  
Reynoldsville, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
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 (717) 787-3483

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T & T COMPANY :  
 :  
 v. : EHB Docket No. 86-536-  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 10, 1986

OPINION AND ORDER

Synopsis

The Board, pursuant to 25 Pa.Code §§21.52(c) and 21.124, dismisses an appeal where the Appellant fails to properly perfect its appeal after repeated requests from the Board.

OPINION

This matter was initiated by the filing of a letter with the Board by T & T Company ("T&T") on September 17, 1986. The letter expressed T&T's desire to appeal compliance and cessation orders issued by the Department of Environmental Resources ("Department"). Because T&T's letter contained little else than this statement and, therefore, did not comply with the requirements of 25 Pa.Code §21.51, the Board, on September 18, 1986, sent T&T an acknowledgement that it had received the appeal and requested that T&T submit a copy of the Department action from which it was appealing, the date T&T received notice of the action, a statement of reasons why T&T was

objecting to the Department's action and proof that the required persons had been notified.

When no response had been received within the allotted ten-day period, the Board, via certified mail on October 7, 1986, again requested the information. Although the certified mail receipt indicates T&T received the letter on October 9, 1986, the response still was not submitted to the Board.

The Board then, on October 27, 1986, issued a rule to show cause why the appeal should not be dismissed for failure to perfect in accordance with 25 Pa.Code §21.51. The rule was sent certified mail and was returnable on or before November 18, 1986. The rule stated that "Failure to either respond or provide the requested information shall result in dismissal of the appeal." Although the certified mail receipt indicates T&T received the rule on October 29, 1986, the Board has yet to receive the information necessary to perfect the appeal or a response to its rule. Because T&T is not represented by counsel, the Board has taken extra steps to assure that T&T received due process. However, the Board can only go so far, especially where a litigant fails completely to comply with the Board's rules. The Board has no choice but to dismiss this appeal as it threatened in its October 27, 1986 Rule to Show Cause.

O R D E R

AND NOW, this 10th day of December, 1986, upon consideration that T&T Company has failed to perfect its appeal in accordance with 25 Pa.Code §21.51, it is ordered, pursuant to 25 Pa.Code §§21.52(c) and 21.124, that the appeal docketed at 86-536 is dismissed.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: December 10, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For Appellant:  
Thomas F. Huff  
T & T Company  
R. D. 1, Box 136C  
Dayton, PA 16222

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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NEW JERSEY ZINC COMPANY :  
 :  
 v. : EHB Docket No. 80-022-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 10, 1986  
 :

OPINION AND ORDER

Synopsis

The Board dismisses an appeal of a National Pollution Discharge Elimination System (NPDES) permit as moot because the permit expired by operation of law when the renewal permit was issued by the Department of Environmental Resources (Department). Because the permit had expired, the Board could no longer grant any meaningful relief.

OPINION

This matter was initiated by the filing of a Notice of Appeal by New Jersey Zinc Company on February 1, 1980, seeking review of various terms and conditions of NPDES Permit No. PA 0012751, which was issued by the Department on January 16, 1980. A petition for supersedeas accompanied the appeal but was never ruled upon by the Board.

New Jersey Zinc filed its pre-hearing memorandum on April 7, 1980, and sometime thereafter it appears that the parties initiated settlement discussions. The settlement negotiations appeared to have been complicated by the participation of the Environmental Protection Agency (EPA). New Jersey Zinc informed the Board by letter dated August 13, 1981, that the

permit's expiration date had passed, but its terms and conditions would be continued by virtue of 25 Pa.Code §92.9 while the Department reviewed its application for a renewal of the permit. The Department was deferring action on the renewal application until the final promulgation of effluent guidelines and limitations for the zinc manufacturing category by EPA pursuant to §§301 and 304 of the Clean Water Act, 33 U.S.C. §1311 and 1314. Because of this, New Jersey Zinc requested a stay.

Because the appeal had remained inactive for an extended period of time, the Board, by letter dated February 3, 1983, requested a status report. New Jersey Zinc submitted a status report to the Board on February 18, 1983, again requesting that the appeal be kept inactive because of the pendency of its permit application. It also stated, "The Company is not in a position to withdraw the appeal at the present time, and it would appear to be a waste of resources to litigate issues that may be mooted by the issuance of the new NPDES permit."

The Board next issued an order requiring New Jersey Zinc to file a status report on or before September 24, 1984. The Board was informed by letter dated September 18, 1984, that the Palmerton facility was sold to the New Jersey Zinc Company, Inc. The Board received a letter dated October 17, 1984, from the New Jersey Zinc Company, Inc.,<sup>1</sup> again requesting that the matter be continued until after the issuance of the new permit.

The Board scheduled a pre-hearing conference on February 19, 1985, but canceled it when the parties jointly requested a continuance until October 15, 1985, on the representation that the Department anticipated issuing the new permit by September 30, 1985. Paragraph 6 of that motion

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<sup>1</sup> Hereinafter also referred to as "New Jersey Zinc."



stated:

Whatever action the Department takes on the pending permit application will moot the issues in the pending appeal, No. 80-022-W, at which time the appeal can be dismissed for mootness, by stipulation of the parties.

Expecting that the permit had issued, the Board requested a status report by order dated October 30, 1985. The parties then responded by requesting an additional 90 day continuance, on the supposition that the Department would issue the permit by the end of the year. The matter was then continued to February 13, 1986.

The Board requested another status report by letter dated February 20, 1986. The Department responded in a letter dated February 24, 1986, that although the new permit still was not issued, the appeal should be dismissed without prejudice. New Jersey Zinc, however, asserted in a March 11, 1986 letter that the matter should be continued until after the issuance of the permit.

The Board, growing weary of the delays, issued an order on March 14, 1986, continuing the matter until June 9, 1986, on the assumption that the matter would finally be resolved by that time. But, the matter was continued three more times.

The long-awaited renewal permit was finally issued on September 18, 1986.<sup>2</sup> The Department advised the Board in a letter dated October 25, 1986, that this matter should be dismissed as moot. New Jersey Zinc appealed the issuance of the renewal permit at Docket No. 86-579-W and requested that it be consolidated with this matter. We now deny New Jersey Zinc's request

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<sup>2</sup> The Board notes that this recitation of events was not atypical; numerous other NPDES permit appeals filed during this time period have languished on the docket while renewal permit applications were being reviewed by the Department.

for consolidation and dismiss this matter as moot.

The relevant regulation, 25 Pa.Code §92.9, provides that:

(a) All NPDES permits shall have a fixed term not to exceed five years.

(b) The terms and conditions of an expired permit are automatically continued pending the issuance of a new permit when the following conditions are met:

(1) the permittee has submitted a timely application for a new permit in accordance with §92.13 of this title (relating to reissuance of permits); and

(2) the Director is unable, through no fault of the permittee, to issue or deny a new permit before the expiration date of the previous permit.

(c) Permits continued under subsection (b) of this section shall remain effective and enforceable against the discharger until such time as the Director takes final action on the pending permit application.

Since the permit which is the subject of this appeal expired by operation of law on September 19, 1986, when the renewal permit was issued, there is no relief that we can grant at this docket. Paul C. Harman v. DER, 1984 EHB 834. Consequently, we must dismiss the matter as moot.

O R D E R

AND NOW, this 10th day of December, 1986, it is ordered that the appeal of New Jersey Zinc Company, Inc. docketed at 80-022-W is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: December 10, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Louise S. Thompson, Esq.  
Eastern Region  
For Appellant:  
William R. Bechdolt  
NEW JERSEY ZINC COMPANY, INC.  
Palmerton, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
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 SECRETARY TO THE BOARD

HOUTZDALE MUNICIPAL AUTHORITY :  
 :  
 v. : EHB Docket No. 85-391-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 15, 1986

OPINION AND ORDER  
 SUR  
MOTIONS TO LIMIT ISSUES

Synopsis

A motion to limit issues which seeks to preclude the Department from arguing that a filtration system is necessary to prevent giardia lamblia cysts from entering a water supply system because of the Department's alleged representations that super-chlorination/dechlorination was sufficient, is denied. Appellant was put on ample notice through the Department's two orders which were appealed and its pre-hearing memorandum that super-chlorination/dechlorination was not sufficient.

The Department's motion to limit issues is granted in part and Appellant is precluded from challenging the existence of giardia cysts in its system or the occurrence of giardiasis as a result of the cysts in users of its system, facts which were set forth in a 1984 order which Appellant failed to challenge before the Board. Appellant may, however, raise the issue of the continued existence of giardia in its system and whether, as a result, the requirements of subsequent orders regarding construction of a filtration system are an abuse of discretion.

## OPINION

This matter was initiated by the filing of a notice of appeal by the Houtzdale Municipal Authority ("Houtzdale") on September 23, 1985. Houtzdale is contesting a September 9, 1985 order from the Department of Environmental Resources ("Department") directing Houtzdale to undertake various measures to prevent the recurrence of giardiasis in users of its water supply system. The order was issued pursuant to §10(b) of the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. §721.10(b), §501 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.501, and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17. Another order relating to the giardiasis problem was issued by the Department to Houtzdale on March 31, 1986. Houtzdale also appealed that order, and the appeal was docketed at 86-242-W. Docket Nos. 85-391-W and 86-242-W were consolidated at Docket No. 86-391-W by order of the Board dated May 30, 1986.

The present controversy concerns cross-motions to limit issues. The Department requests that the Board prohibit Houtzdale from raising any issues contrary to the findings of fact contained in an order of the Department dated May 19, 1984, which Houtzdale never appealed to the Board. More specifically, the Department is alleging that Paragraphs 10, 11, 13-17, 20, 24, 28, 30, 33, 35-37, and 43 of Houtzdale's July 28, 1986 pre-hearing memorandum and Paragraphs 5, 6, 8, 9, and 12 of its January 16, 1986 pre-hearing memorandum are a prohibited collateral attack on the Department's May 19, 1984 order and should be stricken.

Houtzdale, on the other hand, is claiming that the Board should limit the issues in this matter to whether or not a super-chlorination/de-

chlorination system "will adequately protect the citizens of the Houtzdale Municipal Authority from the problems associated with the alleged giardia lamblia problem referred to in the Department orders." Houtzdale was prompted to file its motion, it alleges, when, in its supplement to its responses to Houtzdale's interrogatories the Department contended that 1) a super-chlorination/dechlorination system was not, in and of itself, sufficient to prevent giardiasis and could pose a long-term health threat to the system's users because the chlorine in the super-chlorination system would contribute to the formation of carcinogenic trihalomethanes, and 2) the construction and operation of a filtration system was the only effective permanent solution. Houtzdale argues that it relied upon the Department's assertions that chlorination/dechlorination would be an adequate long-term solution and the Department should be barred from arguing that filtration was necessary as a permanent solution. The Department responded to Houtzdale's motion, arguing that it has always represented the super-chlorination/dechlorination system as an interim measure. For the reasons set forth below, we deny Houtzdale's motion to limit issues and grant the Department's motion in part.

A close examination of the Department's orders of September 9, 1985 and March 31, 1986 and the Department's pre-hearing memorandum leads to the inescapable conclusion that the Department consistently believed super-chlorination/dechlorination to be an interim measure to control giardia and regarded filtration as the long-term, permanent solution. Findings of Fact F and N in the September, 1985 order state, respectively, that the feasibility study mandated by the May, 1984 order required consideration of filtration as an alternative control to be evaluated and that the feasibility study prepared for Houtzdale identified filtration as a feasible alternative. Furthermore, Finding of Fact M stated that filtration was the only acceptable

means to remove giardia cysts. The remedial measures contained in the order also highlight the chlorination/dechlorination system as an interim system until filtration is on line. Findings of Fact N, O, P, Q, R, S, and V of the March 31, 1986, order are similar to the 1985 findings in their recognition of interim and long-term measures to control giardia in the Houtzdale system. The Department's pre-hearing memorandum of August 25, 1986 reiterates these findings of the two orders in Paragraphs 14-18, 21, and 22. Houtzdale can hardly claim that the Department raised the issue of permanent/interim solutions for the first time in its September 17, 1986 supplemental responses to Houtzdale's interrogatories. Houtzdale also attempts to twist this issue by asserting that it detrimentally relied on the Department's representations regarding the effectiveness of chlorination/dechlorination. We are at a loss to see how this alleged detrimental reliance would operate to limit or preclude this issue. Further, the argument that because the Department's orders were concerned with protection of the public health from the effects of giardia lamblia contamination, the Department is prohibited from asserting the possible dangers resulting from excess chlorination is also absurd. The possibility of such danger from carcinogenic trihalomethanes formed as a result of excess chlorination certainly can be argued as support for the reasonableness of the Department's designation of chlorination/dechlorination as an interim measure. Houtzdale was on notice throughout that the Department regarded filtration as a long-term solution and for this reason, we deny Houtzdale's motion to limit issues.

The Department's motion is predicated on the time-honored principle that one who fails to appeal an order directed to it cannot collaterally attack that order in subsequent proceedings. Commonwealth v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977). The

Wheeling-Pittsburgh principle also extends to the findings of fact in an order. Commonwealth v. Williams, 57 Pa. Commw. 8, 425 A.2d 871 (1981) and Armand Wazelle v. DER, 1984 EHB 748. Otherwise, the prohibition on collateral estoppel would be rendered meaningless in large part. Houtzdale's use of creative syntax to sidestep this tenet does not persuade the Board. The simple fact remains that Houtzdale in Paragraph 2 of its reply to the Department's motion admits that it did not appeal the Department's May 18, 1984 order. As a result of its failure to appeal that order, Houtzdale is precluded from attacking the findings of fact contained in that order. We will now deal with each of Houtzdale's pre-hearing memoranda.

With regard to Paragraphs 5, 6, 8, 9, and 12 of the Statement of Facts in Houtzdale's January 16, 1986 pre-hearing memorandum, we will grant the Department's motion with respect to all but Paragraph 8. Paragraphs 5, 6, and 9 of the Houtzdale pre-hearing memorandum, read as follows:

5. The Department has no evidence of viable giardia cysts present in the Houtzdale system.

6. The Department has no evidence of giardia cysts, either viable or unviable, for more than two years prior to the issuance of the September 9, 1985 order.

\* \* \* \* \*

9. The best available technology is unable to determine whether giardia cysts are viable or unviable in a sampling program.

These three paragraphs are contrary to Findings of Fact D and J in the Department's May 19, 1984 order, which read as follows:

D. The Pennsylvania Departments of Health and Environmental Resources and the United States Environmental Protection Agency (hereinafter "EPA") have determined that the water supplied from water intakes on Moshannon Creek and Mountain Branch (lower intake) has contained *Giardia lamblia* and has been the cause of an outbreak of Giardiasis.

\* \* \* \* \*



J. Water samples taken and tested by EPA from the raw water of the Moshannon Creek intake and the lower intake on Mountain Branch were found positive for Giardia cysts.

These three paragraphs will be stricken from Houtzdale's January 16, 1986 pre-hearing memorandum, and Houtzdale will be precluded from challenging the existence of giardia lamblia cysts in the Houtzdale water supply system prior to the issuance of the May, 1984 order. Paragraph 12 of the Houtzdale pre-hearing memorandum alleged that:

12. There is not and has not been an imminent and substantial risk to the health of persons supplied by the Houtzdale system.

Paragraph 12 contradicts Finding of Fact I in the 1984 order which states:

I. The presence of Giardia cysts in the HMA water supply poses an actual and active health risk to the entire user population and constitutes a public nuisance.

Therefore, Houtzdale will be prohibited from arguing that no health risk is posed to the users of the Houtzdale system by the presence of giardia lamblia and Paragraph 12 will be stricken from its January 16, 1986 pre-hearing memorandum. Paragraph 8 of Houtzdale's January pre-hearing memorandum states "Giardia lamblia has a viable life of sixty (60) days." We will deny the Department's motion regarding this paragraph, as it is not contradictory to any of the findings of the 1984 order.<sup>1</sup>

Turning now to the July 28, 1986 Houtzdale pre-hearing memorandum, we will grant the Department's motion with respect to Paragraphs 10, 13-17, 28, 30, 33, 35, and 37 and portions of Paragraphs 20 and 24. We will deny it as it relates to Paragraphs 11, 36, and 43. We will address the paragraphs and their relationship to the Findings of Fact.

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<sup>1</sup> This statement in the January, 1986 Houtzdale pre-hearing memorandum contradicts Paragraph 11 of its July 28, 1986 pre-hearing memorandum which alleges that the cysts are viable 90 to 120 days.

Paragraphs 13, 14, 28, and 37, state as follows:

13. The Department does not have any scientific basis to support its contentions that the forty-three cases of giardiasis alleged to have been caused by water from the Houtzdale Municipal Authority system in fact was caused by giardia found in that system.

14. Samuel Heitzenrater, the Regional Sanitarian, will testify that the Department has conducted no tests of its own on any persons who were alleged to have contracted giardiasis, and that the only way the water supply was connected to any adverse health effects was epidemiologically.

\* \* \* \* \*

28. The 43 allegedly confirmed cases of giardiasis which the Department has used in the past as the basis for this action, could have been caused by other epidemiological sources than the water system of the Houtzdale Municipal Authority.

\* \* \* \* \*

37. The Department has never attempted to confirm the 43 cases of giardiasis upon which it based its original order.

The paragraphs dispute the existence of giardiasis cases caused by giardia in the Houtzdale system and, as such, are in conflict with Finding of Fact D, quoted above, and Finding of Fact E ("There have been 43 confirmed cases of Giardiasis") of the unappealed 1984 order. Houtzdale is precluded from arguing that 43 giardiasis cases existed among users of the Houtzdale system and were caused by giardia lamblia cysts in the Houtzdale system. Therefore, Paragraphs 13, 14, 28, and 37 will be stricken from the July 28, 1986 pre-hearing memorandum.

Paragraphs 10, 15, 16, 30, 33, and 35 allege:

10. Although limited sampling by the Department and the EPA has in the past identified giardia-like protozoans in the Moshannon and/or Mountain Branch, the Department cannot prove that said organisms were in fact giardia-lambliia.

\* \* \* \* \*

15. The Department cannot state that any of the giardia-like objects which it has found in any of its samples were viable giardia cysts.

16. The Department has failed to make any effort to identify the source of the alleged giardia-lamblia contamination, and rather than attempting to prevent what it believed to be an outbreak, the Department has insisted on treatment.

\* \* \* \* \*

30. The Department has treated sample results indicating "giardia cyst-like objects" as actually being giardia cysts.

\* \* \* \* \*

33. The methods used by the Department for detecting the presence of giardia in a water sample have not been scientifically accepted with respect to the precision, accuracy and sensitivity of the sampling techniques and methods.

\* \* \* \* \*

35. The Department has been unable to determine whether or not any of its samples ever showed viable cysts when the samples were tested for the presence of giardia.

To the extent they dispute the presence of giardia cysts in the Houtzdale system prior to the issuance of the 1984 order, they are inconsistent with Findings of Fact D and J, quoted above, in that unappealed from order.

Paragraph 17 of the July 28, 1986 pre-hearing memorandum states "There is no actual or imminent health risk, or threat to the health, safety, or welfare to any persons served by the Houtzdale Municipal Authority water supply." To the extent that statement contradicts Finding of Fact I, in that it disputes the existence of an actual or potential risk to the public health, safety, and welfare prior to the issuance of the 1984 order, the Department's motion to limit is granted.

Houtzdale has stated in Paragraph 20 of its July pre-hearing memorandum that:

20. The Department cannot show that the sources of supply are prejudicial to public health, and that the remedial actions which have been taken by Houtzdale will not be sufficient to eliminate any alleged threat of giardia contamination.

Again, to the extent that the first phrase in Paragraph 20 conflicts with Finding of Fact I in the 1984 order, Houtzdale cannot raise the issue. As to the latter phrase in the paragraph, because Houtzdale did not appeal Finding of Fact M ("Normal chlorine disinfection will not and did not kill the Giardia cysts."), it cannot now raise the issue that routine chlorination will eradicate giardia cysts.

Paragraph 24 of the Houtzdale July pre-hearing memorandum states:

24. There are currently no standards for giardia being present in public water systems and the Department cannot show that at the levels which its alleged in the past that contamination has existed, that any health threat is posed.

The former phrase in the paragraph is a legal issue, and we will deny the Department's motion. The latter phrase may be read to contradict Finding of Fact I and Houtzdale is precluded from contesting the issuance of a health threat prior to the issuance of the 1984 order.

Finally, Paragraphs 11, 36, and 43 of the July pre-hearing memorandum read:

11. The viable life period for giardia-lamblia is ninety to one hundred and twenty days.

\* \* \* \* \*

36. The Department has not linked the Houtzdale Municipal Authority water supply to any positive cases of giardiasis since the original 43 cases of alleged giardiasis in 1983 and early 1984.

\* \* \* \* \*

43. Giardia-cysts will not breed or procreate on

their own outside of a warm-blooded host, and in the absence of any host introducing giardia into the Houtzdale watersheds, the giardia which were present, according to DER in 1983 and 1984, can no longer be present.

We will deny the Department's motion regarding these three paragraphs, as we can see nothing which conflicts with the prior unappealed order.

In summary, we are precluding Houtzdale from challenging the existence of giardia lamblia cysts in its system or the occurrence of a public health problem caused by giardiasis in users of its system, conditions which led to the issuance of the May 19, 1984 order which Houtzdale failed to appeal. We wish to emphasize that we believe the continued presence or lack of presence of giardia lamblia in the Houtzdale system to be an issue which is not precluded by Houtzdale's failure to appeal the 1984 order and one that is relevant to the issue of whether the Department abused its discretion in requiring the ultimate construction of a filtration system for Houtzdale.

O R D E R

AND NOW, this 15th day of December, 1986, it is ordered that:

1) Appellant Houtzdale Municipal Authority's Motion to Limit Issues is denied; and

2) The Department's Motion to Limit Issues is granted in part and denied in part, subject to the qualifications in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

---

MAXINE WOELFLING, CHAIRMAN

DATED: December 15, 1986

cc: Bureau of Litigation  
Harrisburg, PA

For the Commonwealth, DER:

Winifred M. Prendergast, Esq.  
Eastern Region

For Appellant:

Robert P. Ging, Jr., Esq.  
Pittsburgh, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
 EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

C & K COAL COMPANY :  
 :  
 v. : EHB Docket Nos. 86-346-W  
 : 86-361-W  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 18, 1986

OPINION AND ORDER SUR  
MOTION FOR REHEARING AND RECONSIDERATION

Synopsis

The Board refuses to grant reconsideration of its opinion and order dismissing petitions for the allowance of appeals nunc pro tunc because Appellant has not alleged sufficient grounds under 25 Pa.Code §21.122 for reconsideration. In denying reconsideration, the Board distinguishes between its actions and the actions of the Department of Environmental Resources as they relate to grounds for the allowance of an appeal nunc pro tunc.

OPINION

The Board, in an opinion and order issued November 20, 1986, dismissed Appellant C & K Coal Company's Petitions for Allowance of Appeals Nunc Pro Tunc in the above matters because Appellant had failed to allege any fraud or misconduct on the part of the Board which may have misled it into not filing timely appeals. C & K has filed a timely request for reconsideration, arguing that the Board should have regarded the Department of Environmental Resources' ("Department") alleged misleading actions as

grounds sufficient for the allowance of the appeals nunc pro tunc and should have taken testimony on the issue. For the reasons stated below, we deny C & K's request for reconsideration.

Rule 21.122(a) of the Board's rules of practice and procedure provides that reconsideration of a Board decision "will be taken only for compelling and persuasive reasons. . ." It further generally limits those reasons to circumstances where:

(1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.

(2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

Subsection (a)(2) is not applicable to this case, and the parties had ample opportunity to address the legal issue of what constitutes sufficient grounds for the allowance of an appeal nunc pro tunc. Although the Board's decision is entirely consistent with its prior precedent in this area, it will take this opportunity to address the issue of the Department's relationship to the Board as it relates to appeals nunc pro tunc.

C & K has cited numerous cases as providing authority for the Board's reconsideration of its refusal to allow C & K's appeals nunc pro tunc. The authority cited by C & K in no way contradicts the Board's rulings in this matter. Instead, C & K uses these precedents in support of a proposition that is fundamentally flawed, namely that the Department and the Board are a single entity and that actions of the Department which allegedly misled an appellant as to when to exercise its appeal rights are in essence



actions of the Board. The case of Wess v. Com., Dept. of Public Welfare, 75 Pa.Cmwlth 628, 462 A.2d 955 (1983) is cited by C & K as authority for this proposition.

In the Wess case, the Commonwealth Court held that it was improper for the Secretary of Public Welfare to deny a request by Wess for reconsideration of the Department of Public Welfare's Office of Hearings and Appeals' rejection of her appeal nunc pro tunc. Wess had alleged that an employee of the Department of Public Welfare, specifically her personnel officer, had misled her regarding the timing and procedure for appealing the termination of her benefits for a work-related injury. Commonwealth Court remanded the matter for a hearing on the allegation.

If the Board and the Department had the same legal relationship as the Secretary of Public Welfare and that agency's Office of Hearings and Appeal, C & K's request for reconsideration would have merit. That relationship does not exist. The Office of Hearings and Appeals is a bureaucratic entity within the Department of Public Welfare; the adjudicatory process described in Wess, supra, is the classic example of the process described in every administrative law course, the Administrative Agency Law, 2 Pa. C.S.A. Chapter 5A, and the General Rules of Administrative Practice and Procedure, 1 Pa.Code §31.1 et seq. - the adjudicatory function is exercised within the agency. The relationship between the Board and the Department does not fit this model.

With the creation of the Department in 1970, the General Assembly established a body independent of the Department to exercise the adjudicatory function. Cast Pennsboro Tp. Authority v. Com., Dept. of Environmental Resources, 18 Pa.Cmwlth 58, 334 A.2d 798 (1975). The Board was empowered by §1921-A(b) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as

amended, 71 P.S. §10-21(b) ("Administrative Code") to assume the adjudicatory functions formerly exercised by the various persons, departments, boards, and commissions which comprised the new Department. But, rather than being subsumed organizationally and functionally within the new agency, the Board was denoted a departmental administrative board by §201 of the Administrative Code, 71 P.S. §62. By virtue of §503 of the Administrative Code, 71 P.S. §183, departmental administrative boards

. . . exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected, but, in all matters involving the expenditure of money, all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected. . .

Because of this independence, employees of the Department are not authorized to act on behalf of the Board, and therefore, actions of the Department's employees cannot be the grounds for the allowance of an appeal nunc pro tunc.

C & K has also argued that it was improper for the Board to have reached its decision without taking testimony relating to the Department's actions which allegedly misled C & K into not filing timely appeals. Since such actions by the Department cannot constitute grounds for the allowance of an appeal nunc pro tunc, it was unnecessary for the Board to hold a hearing on the issue.

O R D E R

AND NOW, this 18th day of December, 1986, it is ordered that C & K Coal Company's Motion for Rehearing and Reconsideration is denied and the Board's opinion and order of November 20, 1986 is affirmed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: December 18, 1986

cc: **Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Michael E. Arch, Esq.  
Western Region  
**For Appellant:**  
Henry Ray Pope III, Esq.  
POPE, POPE AND DRAYER  
Clarion, PA

bl



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
 EDWARD GERJUOY, MEMBER  
 William A. Roth, Member

M. DIANE SMITH  
 SECRETARY TO THE BOARD

**FERO P. RICE** :  
 :  
 v. : **EHB Docket No. 86-520-R**  
 :  
**COMMONWEALTH OF PENNSYLVANIA** :  
**DEPARTMENT OF ENVIRONMENTAL RESOURCES** : **Issued: December 18, 1986**  
**and BENJAMIN COAL COMPANY, Permittee** :

OPINION AND ORDER

Synopsis

The above captioned appeal is dismissed for Appellant's failure to perfect his appeal in accordance with 25 Pa.Code §21.52 and §21.124.

OPINION

Appellant, Fero P. Rice (Rice) initiated this matter by filing a Notice of Appeal on September 3, 1986. Rice sought review of the release of bonds to Permittee, Benjamin Coal Company by the Department of Environmental Resources (DER). However, Rice's appeal was not perfected; the following information was missing: Rice's telephone number; copy of DER action appealed from; the date Rice received the DER action; and indication that Rice notified the permittee, the Bureau of Litigation, and the responsible DER official.

On September 9, and again on September 25, 1986, the Board sent Rice its standard "Acknowledgement of Appeal and Request for Additional Information." Attached to each request was the Board's standard Notice of

Appeal form as well as a copy of the Board's rules of practice and procedure. Each request afforded Rice 10 days from receipt to supply the requested information. The second request was sent by certified mail, return receipt requested. The return receipt indicates that Rice received it on September 29, 1986. Upon hearing no response from Rice to the second request and because Rice was acting pro se, the Board entered an Order dated October 14, 1986 which directed Rice to supply the necessary information to perfect his appeal or suffer dismissal. As of this date nothing has been received from Rice in response to the Board's October 14, 1986 order.

Under the provisions of 25 Pa.Code §21.52(c), "[T]he appellant shall, upon request from the Board, file the required information or suffer dismissal." Under the above outlined circumstances, the Board is justified in dismissing the instant appeal for failure to perfect. Central Western Pennsylvania Mining Corp. v. DER, 1985 EHB 817.

The Board is also justified in dismissing this appeal by reason of Rice's failure to comply with the Board's order of October 14, 1986. 25 Pa.Code §21.124 provides, in part:

"The Board may impose sanctions for failure to abide by a Board order...Such sanction may include the dismissal of any appeal..."

O R D E R

AND NOW, this 18th day of December, 1986, pursuant to 25 Pa.Code §21.52 and §21.124, the above captioned appeal is dismissed for failure to perfect.

ENVIRONMENTAL HEARING BOARD

  
MAXINE WOELFLING, CHAIRMAN

  
EDWARD GERJUOY, MEMBER

  
WILLIAM A. ROTH, MEMBER

DATED: December 18, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Western Region  
For Appellant:  
Fero P. Rice  
Marion Center, PA  
For Permittee:  
Carl A. Belin, Jr., Esq.  
BELIN, BELIN & NADDEO  
Clearfield, PA

rm



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

CITY OF SCRANTON, Appellant	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	EHB Docket No. 85-335-W
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
and	:	
DIAMOND COLLIERY COMPANY, Permittee	:	Issued: December 19, 1986

OPINION AND ORDER

Synopsis

Permittee's Motion for Summary Judgment is granted because the Board does not have jurisdiction over any genuine issue of material fact and Permittee is entitled to judgment as a matter of law. Scranton's 1965 zoning ordinance was not preempted by the enactment of the SMCRA. Permittee must, therefore, comply with the requirements of both SMCRA and the 1965 Scranton zoning ordinance. The DER, however, need not await the ultimate adjudication of the issue of compliance with Scranton's zoning ordinance in a parallel forum before reissuing a Surface Mining Permit.

OPINION

Diamond Colliery Company (Permittee) seeks to commence a coal mining operation upon a portion of approximately two hundred acres of land located in the West Mountain area of the City of Scranton. In 1982, Diamond Colliery Company (Permittee) advanced this goal by applying for two required permits; a mine drainage permit issued by the Department of Environmental

Resources (DER) in accordance with the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, No.418, as amended, 53 P.S. §1396.1 et seq. and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, No. 394, as amended, 35 P.S. §691.1 et seq.; and also a local zoning permit from the City of Scranton (Appellant) pursuant to the 1965 Zoning Ordinance of the City of Scranton, Section 7.404 (Special Use Permit).

Permittee's application for the mine drainage permit was granted by DER, and the permit was issued on September 12, 1982. This permit specified that mining activity must begin at the site in question within three years from the date of permit issuance. Appellant never appealed the issuance of this mine drainage permit. Permittee's application for the local zoning permit, however, was denied by the City of Scranton Board of Zoning Appeals on November 22, 1983.

Permittee appealed the denial of the local zoning permit to the Court of Common Pleas of Lackawanna County on December 9, 1983. (83 Civ 6169). Subsequently, on May 16, 1985, an Order was issued by the Common Pleas court reversing the decision of the Board of Zoning Appeals, and ordering the Board of Zoning Appeals to issue the local zoning permit. The City of Scranton appealed this decision to the Commonwealth Court of Pennsylvania on May 17, 1985 (1323 C.D. 1985). The issue in this appeal was whether the City of Scranton's local zoning laws permitted a four or five acre plot to be mined at the time of Permittee's application.

This protracted local zoning permit litigation prevented the Permittee from proceeding with its proposed mining operation until May 16, 1985. As noted above, the mine drainage permit, issued by the DER in September, 1982, was granted contingent upon the Permittee commencing mining



operations within three years from the date of the permit issuance. The Permittee applied for a reissuance of this permit on July 25, 1985, as it became evident that, in all likelihood, Permittee would not meet the three year condition.

The DER granted Permittee's application for reissuance, and issued a Surface Mining Permit to Permittee on July 25, 1985. <sup>1</sup> Appellant filed the instant appeal with the Environmental Hearing Board (Board) from the DER's permit reissuance on August 8, 1985, arguing that DER's permit reissuance was premature because Appellant's appeal of the local zoning permit was still pending before the Commonwealth Court. This allegedly premature permit reissuance, Appellant asserts, is an arbitrary and capricious agency action.

The Commonwealth Court, on December 9, 1985, quashed and dismissed Appellant's appeal from the Common Pleas order directing issuance of the local zoning permit. Appellant's Motion for Reconsideration filed with the Commonwealth Court was denied. Appellant now has a petition pending before the Supreme Court of Pennsylvania for review of the Commonwealth Court decision.

Permittee filed a Motion for Summary Judgment or to Dismiss the instant appeal, which is the focus of this Order, asserting that since the Environmental Hearing Board does not have jurisdiction to decide local zoning matters, Appellant's arguments in this appeal are irrelevant to the present tribunal. Moreover, since Appellant's appeal is essentially entirely based upon these irrelevant legal arguments, the Board should grant the Permittee Summary Judgment on all counts of the present appeal. In the alternative,

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<sup>1</sup>DER's mining permit scheme was modified in 1983. Under the new system, the mine drainage permit and its accompanying mining permits were replaced by a single, all-encompassing Surface Mining Permit.

Permittee argues that since Appellant failed to appeal the original issuance of the mine drainage permit, it has waived its right to contest the DER permit reissuance and this appeal should be dismissed.

Appellant admits in its Answer to Permittee's Motion for Summary Judgment or to Dismiss that its entire appeal is essentially based upon the argument that the DER permit reissuance was a premature action because the DER did not consider the pending Commonwealth Court appeal. See Permittee's Motion for Summary Judgment or to Dismiss, Paragraph 11, p.4. See also Appellant's Answer to Permittee's Motion for Summary Judgment or to Dismiss, Paragraph 11, p.1 (where Appellant admits to Permittee's characterization of its appeal). The Appellant also asserts, however, that there is a genuine issue of fact which remains to be resolved--namely, whether or not local zoning laws permit a four five acre site to be mined--thus prohibiting summary judgment.

The Board agrees with Permittee's arguments and grants summary judgment as to all counts of Appellant's Notice of Appeal. Before enunciating the rationale of the Board's decision, however, it is necessary to clarify the differences between the two permit schemes involved in this litigation.

Under the Surface Mining Conservation and Reclamation Act, a party seeking to partake in a mining operation must not only receive a surface mining permit from the DER (52 P.S. §1396.4), it must also comply with any local zoning ordinances (52 P.S. §1396.17(a)) promulgated pursuant to the Pennsylvania Municipalities Planning Code (MPC), the Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101 et seq. More specifically, SMCRA states, "[e]xcept with respect to ordinances adopted pursuant to... the 'Pennsylvania Municipalities Planning Code,' all local ordinances and enactments purporting

to regulate surface mining are hereby superseded. The Commonwealth by this enactment hereby preempts the regulation of surface mining as herein defined." 52 P.S. §1396.17(a). Thus, unless Scranton's zoning ordinance was adopted pursuant to the MPC, the provisions of the local zoning ordinance are preempted by SMCRA.

Scranton adopted the zoning ordinance in question in 1965, before the enactment of the MPC. Zoning Ordinance for the City of Scranton, File of the Council No. 5 1965. The Permittee applied for its local zoning permit under this 1965 zoning ordinance. The Pennsylvania Municipalities Planning Code, effective January 1, 1969, uniformly regulates local use and specifically empowers cities of the second class A to develop their own zoning ordinances as planning devices. 53 P.S. §10101. Scranton is a city of the second class A. The MPC also repeals prior enabling laws relating to zoning, yet preserves and continues the actual zoning ordinances promulgated under such prior enabling legislation. 53 P.S. 10103. See Gerstley et al. v. Cheltenham Township Commissioners, 95 Montg. 195 (1971). Thus, upon the effective date of the MPC, Scranton's zoning ordinance was preserved and continued; however, Scranton's zoning ordinance was thereafter considered as promulgated pursuant to the MPC. Id. See also Tritownship Citizens Association, et al. v. Clifford Strausbaugh, et al., 14 Adams L.J. 197 (1973). It follows that Scranton's 1965 zoning ordinance was not preempted by the passage of the MPC, but rather was specifically authorized by the MPC. Permittee must, therefore, comply with both the terms of Scranton's ordinance, and the requirements of SMCRA.

Scranton has an extensive local zoning permit scheme for surface mining operations. Zoning Ordinance for the City of Scranton, File of Council No. 5, 1965 (as amended in 1983) Article VI & VII, §§6.800 & 7.404. More

specifically, mining is not permitted unless approved as a special exception and the activity complies with all other conditions of the ordinance.

See, Zoning Ordinance Article VI, §6.800. In summary, Diamond must obtain two separate permits before commencing mining on its property; a surface mining permit issued by the DER, and a local zoning permit issued by the City of Scranton. These permits are separate and independent requirements for mining at the site in question and each has its own separate and independent path of appeal.

The EHB only has jurisdiction over appeals from DER agency actions, such as the issuance of a Surface Mining Permit, and is not a tribunal of general jurisdiction. 71 P.S. §510-20. See also, Bethlehem Steel Corp. v. DER, 390A.2d 1383, 37 Pa. Cmwlth 479 (1978). The Local Agency Law, the Act of April 28, 1978, P.L. 202, No. 53, 2 P.S. §752, on the other hand, provides that "any person aggrieved by an adjudication of a local agency... shall have the right to appeal therefrom to the court vested with jurisdiction..." 2 P.S. §752. The Common Pleas courts generally have jurisdiction over decisions of the Boards of Zoning Appeals. 42 P.S. §931(a). In conclusion, although SMCRA requires compliance with both DER and local zoning rules, local zoning ordinance adjudications are not reviewable by the EHB.

Pennsylvania Rule of Civil Procedure 1035 provides that summary judgment may be rendered where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Marlin L. Snyder v. DER, 1985 EHB 671. In ruling upon a motion for summary judgment, the Board is entitled to examine the pleadings, answers to interrogatories, and admissions of the parties. Id.

Appellant asserts in its Answer to Permittee's Motion to Dismiss that

there is one genuine issue of material fact in this appeal- namely, whether or not local Scranton zoning laws permit a four or five acre plot to be mined. See Paragraph g, Notice of Appeal. From the discussion above, however, it is evident that the Board does not have jurisdiction to interpret the particularities of local zoning laws. See also Township of Hilltown, 1980 EHB 215, 221. Since the Board does not have jurisdiction over the local zoning issue, any issue of fact relevant to the propriety of these zoning laws, such as whether a four or five acre plot may be mined, is not material to the instant appeal. Appellant fails to identify any other genuine issues of fact which are material to this dispute in its Answer to Permittee's Motion for Summary Judgment. Since there is no genuine issue of material fact, Permittee has satisfied the first prong of the inquiry of summary judgment.

The Board must now address whether Permittee is entitled to a judgment as a matter of law. The Appellant admits in its Answer to Permittee's Motion for Summary Judgment or to Dismiss Appeal that its entire appeal is essentially based upon the prematurity argument. Paragraph 11, Answer to Permittee's Motion for Summary Judgment or to Dismiss Appeal. More specifically, the Appellant argues that DER's reissuance of a Surface Mining permit to Permittee was premature because DER had a duty to consider the final determination of Appellant's pending appeal with the Commonwealth Court. Paragraph a, Notice of Appeal. This premature action by DER, Appellant argues, amounts to an arbitrary and capricious exercise of power by the DER because it did not consider local zoning ordinances or the health and safety of the local residents. Paragraphs b,c,d,e,& f, Notice of Appeal.

Appellant's legal arguments are incorrect, and Permittee is entitled to a judgment as a matter of law. As noted above, in addition to directing compliance with its own requirements, SMCRA provides that local zoning

ordinances enacted pursuant to the MPC must also satisfied. 52

P.S. §1396.17(a). Therefore, in the instant case, both SMCRA, and Scranton's 1965 zoning ordinance must be satisfied before Permittee can proceed with its mining operation. These two sets of requirements are separate and independent. Appellant is presently seeking review of the Scranton zoning ordinance before the Pennsylvania Supreme Court. The Appellant asserts that the DER should have delayed its decision regarding reissuance of Permittee's Surface Mining Permit under SMCRA until a final decision is rendered on the local zoning permit.

In Township of Hilltown, supra, the Board specifically addressed the issue of whether the DER must delay its decisionmaking until a relevant parallel proceeding is finally decided. The Board held that, "DER need [not] await the outcome of the Common Pleas Court proceeding before passing upon a permit... which might be affected by local zoning." Id. at 221. The Board hereby extends its holding in Hilltown to include appellate proceedings at the Commonwealth and Supreme courts within its scope. No arguments have been advanced, nor has the Board become cognizant of any reason, which would compel the Board to limit this holding in Hilltown to Common Pleas proceedings.

Finally, Appellant argues correctly that the DER has a duty to consider local zoning ordinances. The Board holds, however, that DER did consider local zoning ordinances when it reissued the permit specifically subject to compliance with the local zoning ordinances enacted pursuant to the MPC, as noted under paragraph 9 of the permit. And, Permittee is in compliance with those zoning ordinances as determined by the Lackawanna County Court of Common Pleas and the Commonwealth Court, determinations which have not been superseded pending the Pennsylvania Supreme Court's disposition

of Appellant's petition for review.

In conclusion, the Board finds that there is no genuine issue of material fact within the jurisdiction of the Board. Moreover, the Board holds that Scranton's local zoning ordinance was not preempted by the SMCRA. Furthermore, the Board holds that Permittee is entitled to a ruling as a matter of law. In doing so, the Board reaffirms its holding in Hilltown and extends it to judicial proceedings in the Commonwealth and Supreme courts. Wherefore, Permittee is granted summary judgment as to all counts of Appellant's Notice of Appeal, given Appellant's admission that its entire appeal is essentially based upon its prematurity argument.<sup>2</sup>

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<sup>2</sup> Since the entire appeal has been decided by summary judgment, it is not necessary for the Board to address Permittee's Motion to Dismiss for failure to appeal the original permit issuance.

ORDER

AND NOW, this 19th day of December, 1986, it is ordered that Diamond Colliery's Motion for Summary Judgment is granted and the City of Scranton's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: December 19, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Bernard A. Labuskes, Jr., Esq.  
Central Region  
For Appellant:  
John J. Minora, Esq.  
Scranton, PA  
For Permittee:  
Patrick J. Mellody, Esq.  
Scranton, PA

b1





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

LUCKY STRIKE COAL CORPORATION, and :  
 LOUIS J. BELTRAMI, Appellants :  
 :  
 v. : EHB Docket No. 80-211-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 19, 1986

OPINION AND ORDER

Synopsis

The Board, in its discretion, denies Appellants' Motion for View of Premises because Appellants neglected to advance their case via traditional legal procedures.

OPINION

The above captioned case arose when Lucky Strike Coal Company, and its president and Chairman of the Board, Louis J. Beltrami (Appellants), appealed a civil penalty assessment issued on December 15, 1980 by the Department of Environmental Resources (DER) for Appellants' alleged violation of its Water Quality Management Permit issued pursuant to section 307 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq.. More specifically, Appellants operate a coal sizing operation known as the Huber Colliery located in Ashley Borough, Luzerne County. DER asserts in its civil penalty assessment that as a result of Appellants' coal washing procedure, industrial waste was discharged into the waters of the Commonwealth in violation of the limitations in Appellant's permit. A hearing on the merits of this controversy was held before the Environmental

Hearing Board (Board) on November 19, 1984. Subsequent to the hearing, yet prior to adjudication, Board Member Anthony Mazullo--the member to whom this case was assigned for primary handling--resigned from the Board. Mr. Mazullo had participated in an on-site view of the premises in question prior to the hearing on the merits. The above captioned case was reassigned to Board Chairman Maxine Woelfling upon Mr. Mazullo's departure.

The Board set a post-hearing briefing schedule for the parties shortly after the hearing. The DER filed its post-hearing memorandum of law on April 16, 1985. The Appellants, on the other hand, requested several extensions for filing their post-hearing pleadings. Appellants, eventually, failed to file any post-hearing pleadings with the Board before the final deadline. The Board, in an Order dated March 24, 1986, indicated that, as a sanction for Appellants' failure to promptly file, it would not consider any post-hearing pleadings by Appellants.

On April 25, 1986 Appellants requested an on-site view be held by the Board prior to adjudication. This request was based on the fact that prior Board Member Mazullo had held a view, and that Appellants should have the opportunity to "explain" the site to the present Board members. Chairman Woelfling granted Appellants' request by a letter dated April 30, 1986. The DER, however, responded by indicating that it was not presented with a copy of Appellants' request for a view until April 28, 1986--thus, it was unable to respond before the Board granted this request. The Commonwealth filed a response in opposition to the Appellants' view request asserting that the Board should not let Appellants explain the conditions at the site during a view since Appellants neglected to present any defenses at trial or file their post-hearing pleadings. Moreover, DER noted that the conditions at the

site have changed a great deal since Mr. Mazullo's November, 1984 view.

On May 19, 1986 the Board issued an order concurring with DER's objections and rescinding its previous grant of a view. Appellants filed a Petition Requesting View of Premises on May 27, 1986, which is essentially a motion for reconsideration, and is the focus of the present Order. DER responded to Appellants' request by filing a Response to Petition Requesting View of Premises and New Matter again stating that Appellants should not be able to present evidence in the extraordinary method of a view when they had neglected to present evidence by the more proper procedures of hearing testimony and post-hearing pleadings. Moreover, the DER also characterized Appellants May 27, 1986 pleading as a motion for reconsideration of an interlocutory order which is unappealable.

The Board agrees with the arguments advanced by the DER, and therefore, once again denies Appellants' Petition for View of Premises. Board Rules of Practice and Procedure 21.98 states, "[t]he Board may upon reasonable notice and at reasonable times inspect any real estate including any body of water, industrial plant, building or other premises when the Board is of the opinion that such as a viewing would have probative value in any matter in hearing or pending before the Board." 25 Pa. Code §21.98. From the wording of this regulation it is obvious that the Board has absolute discretion when deciding whether to hold a view.

The Board recently granted a motion for view in the case of Penn Maryland Coals, Inc. v. DER, 83-188-W (Issued November 5, 1986). In Penn Maryland, as in the present case, former Board Member Mazullo had participated in a view of the contested premises prior to the hearing on the merits. Mr. Mazullo, who also presided at both hearings, however, resigned before issuing respective adjudications.

Despite these procedural similarities, the Board believes the present case is distinguishable from Penn Maryland and denies Appellants' request. The Board takes this position primarily due to Appellants' failure to advance any defense at the hearing, and its subsequent neglect to file post-hearing pleadings. The right to be heard by an administrative tribunal is a constitutional right which ought to be fully exercised. Appellant's failure to advance defenses, or meaningfully contest DER's case in chief at the hearing, is unfortunately, an opportunity foregone. Moreover, Appellants also neglected to file post-hearing pleadings to buttress its case. Now, after forgoing these traditional legal procedures, Appellants request the somewhat exceptional avenue of an on-site view in an attempt to "explain" its case. An on-site view is a supplemental evidentiary option available to clarify and further the Board's understanding of a case, not a method of delivering a case in chief. The Board holds that what a party neglects to prove via traditional legal procedures, it will not be allowed to prove by the extraordinary. Finally, the Board believes that an on-site view will provide little probative value to the ultimate adjudication of this case. The Board, therefore, in its discretion, denies Appellant's Motion for View. The Board also concurs with

DER's characterization of the Board's on-site view denial as being an interlocutory order. Generally, interlocutory orders are not reconsidered by the Board save exceptional circumstances. See Brdaric Excavating, Inc. v. DER, 85-202-M (Issued July 22, 1986); John F. Culp III v. DER, 1984 EHB 611; Chemical Waste Management, Inc. et al. v. DER, 1982 EHB 482. Appellant has failed to advance any exceptional circumstances which would justify deviation from this practice.

It should be noted that the Board reconsidered its initial approval of the on-site view because DER was not presented with a copy of Appellant's

Motion for View. Circumstances of this nature are distinguishable and require reconsideration.

ORDER

AND NOW, this 19th day of December, 1986, it is ordered that appellant's request for on-site view is denied.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

DATED: December 19, 1986

cc: **Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Timothy J. Bergere, Esq.  
Western Region  
Martin H. Sokolow, Esq.  
Central Region  
**For Appellant:**  
Edward E. Kopko, Esq.  
Pottsville, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

BRONIA SULTANIK :  
 :  
 v. : EHB Docket No. 86-191-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 23, 1986

OPINION AND ORDER  
 SUR  
MOTION TO DISMISS APPEAL

Synopsis

A letter from the Department of Environmental Resources which on its face clearly and finally rejects a proposed sewage facilities plan revision is an appealable action over which the Environmental Hearing Board has jurisdiction.

OPINION

On April 7, 1986, Bronia Sultanik ("Appellant") filed an appeal with this Board from a letter dated March 20, 1986, in which the Department of Environmental Resources ("DER") found a "Module for Land Development" submitted by Worcester Township ("Township") to be "inadequate." Township had submitted the planning module, prepared by Appellant, on December 4, 1985, requesting approval of a revision to the Township's official sewage plan pursuant to §5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5 ("Sewage Facilities Act"), and 25 Pa.Code §71.16. The plan revision was prepared in

order to accommodate a subdivision for approximately 277 single family dwellings which is proposed by Appellant.

On August 22, 1986, DER filed a motion to dismiss on the grounds that the March 20, 1986 letter did not constitute an appealable final action or adjudication of DER. Thus, DER claims the Board lacks jurisdiction to review the March 20, 1986 letter. In its memorandum of law in support of the motion, DER characterizes the March 20, 1986 letter as merely setting forth information concerning capacity needed by DER to make the sewage planning determination, not as a final determination itself. In this vein DER refers the Board to Sandy Creek Forest, Inv. v. DER, \_\_\_ Cmwltth.Ct. \_\_\_, 505 A.2d 1091 (1986). In Sandy Creek the Commonwealth Court affirmed a Board decision finding that a DER letter setting forth the requirements of the regulations concerning the information that must be submitted to DER with requests for planning approvals for new subdivisions is not a final action. "A letter from an agency stating what the law requires is not a final action or adjudication and is not appealable." Sandy Creek, supra, at 1093. DER argues that the letter presently in question merely represented DER's lack of the proper information required and sought a resubmittal accompanied by additional information so that a final determination could subsequently be made.

Appellant, as might be expected, strongly disagrees with DER on this question. Appellant distinguishes Sandy Creek, supra, and describes the letter as a refusal by DER to approve a revision to an official sewage facilities plan. Appellant points to numerous cases where the Board has taken subject matter jurisdiction over such actions. Lower Providence v. DER and County of Montgomery, EHB Docket No. 84-338-G (Issued August 7, 1986); Butera v. DER, 1981 EHB 53; Dover Township Board of Supervisors et al. v.

DER, 1980 EHB 124; Diehl v. DER, 1979 EHB 105; Eagles' View Lake, Inv. v. DER, 1978 EHB 44. The Board here finds it must agree with Appellant.

Throughout the pleadings of both parties to this appeal Township's submittal to DER of December 4, 1985 has been referred to as a request for a revision to its official sewage facilities plan. The Board's own examination of the submitted materials confirms that it is indeed a request for a revision to Township's official plan. Once it has been established that the plan revision contains all the information required by 25 Pa.Code §§71.14 and 71.16, DER is required by §71.16(c) to either approve or disapprove the proposed plan revision within 120 days. See, Butera v. DER, 1981 EHB 53. If a plan revision is disapproved, DER is required to send a written notice, together with a statement of reasons for such disapproval, to each municipality included in the plan. DER's only other option after receiving a complete request is to inform the municipality within 120 days of submittal that an extension of time is necessary to complete the review. 25 Pa.Code §71.16(d).

In its letter of March 20, 1986, DER informed Township that DER had "received and reviewed the 'Module for Land Development' submitted as a revision to Township's official sewage facilities plan for the above referenced proposal as required by the Pennsylvania Sewage Facilities Act." The submittal was found inadequate by DER because the sewerage facilities intended for use, the Upper Gwynedd-Towamencin Municipal Authority, were allegedly "overloaded and the plan revision request is not consistent with their Wasteload Management Corrective Plan and Schedule or current Annual Report submitted in accordance with DER's Chapter 94 Municipal Wasteload Management Rules and Regulations." As authority for this decision the letter cites 25 Pa.Code §§94.14 and 71.16(e)(5). Nothing in the March 30, 1986



letter indicates that the planning module was in any way incomplete; rather, the letter simply indicates the proposed revision would be incompatible with the overload situation at the Upper Gwynedd-Towamencin plant, grounds for disapproval of the revision under the cited regulations.

DER's reliance on Sandy Creek Forest, Inc. v. DER, Cmwltth.Ct.\_\_\_\_, 505 A.2d 1091 (1986) appears misplaced. The appellant in Sandy Creek did not properly seek to get approval for its proposed subdivision. Sandy Creek Forest, Inc. merely requested DER to declare that no revision to the township's official sewage facilities plan would be necessary to accommodate the proposed subdivision. No actual request for planning approval, a plan revision or supplement was ever submitted. Sandy Creek Forest, Inc. v. DER, 1985 EHB 516. DER's written response in Sandy Creek simply set forth the regulatory requirements for requests for planning approvals for new subdivisions. Thus, the court in Sandy Creek found no appealable action to be present. In the instant case, we find DER's depiction of the plan revision request as inadequate to be a subterfuge for its disapproval of the request because of the violations of the wasteload management regulations at the sewage treatment plant which would receive the flows from the proposed subdivision. As such, DER's letter of March 20, 1986 is a final, appealable action over which the Board properly has subject matter jurisdiction. Butera v. DER, supra.

ORDER

AND NOW, this 23rd day of December, 1986, it is ordered that DER's Motion to Dismiss is denied. The Commonwealth shall file its pre-hearing memorandum on or before January 8, 1987.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
\_\_\_\_\_  
MAXINE WOELFLING, CHAIRMAN

DATED: December 23, 1986

cc: **Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Vincent M. Pompo, Esq.  
Eastern Region  
**For Appellant:**  
Jeffrey T. Sultanik, Esq.  
PEARLSTINE, SALKIN, HARDIMAN & ROBINSON  
Philadelphia, PA

bl



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
 EDWARD GERJUOY, MEMBER  
 William A. Roth, Member

M. DIANE SMITH  
 SECRETARY TO THE BOARD

**P.G.W. ASSOCIATES**

**v.**

**COMMONWEALTH OF PENNSYLVANIA  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES  
 ANGERMAN ASSOCIATES, INC., Permittee**

:  
 : **EHB Docket No. 86-635-R**  
 :  
 : Issued December 23, 1986  
 :  
 :

**OPINION AND ORDER  
 SUR  
PETITION FOR SUPERSEDEAS**

**Synopsis**

Appellant's Petition for Supersedeas is denied for nonconformance with 25 Pa. Code §21.77. The petition lacks particularity in the facts pleaded, lacks citations of legal authority cited as the basis for the grant of the supersedeas, inadequately explains failure to support factual allegations by affidavits and fails to state grounds sufficient for the granting of a supersedeas.

**OPINION**

Appellant P.G.W Associates ("PGW") initiated this matter on November 19, 1986 when it filed a Notice of Appeal from the issuance of Well Permit No. 37-129-22923 ("Permit") by Appellee Department of Environmental Resources ("DER"). The permit was issued to Angerman Associates, Inc. ("Permittee"). In its Notice of Appeal, PGW included a "Request for Supersedeas" which the Board deems to be a Petition for Supersedeas ("Petition"). PGW seeks to stay the permit issuance, which petition is the subject of this opinion and order.

On November 28, 1986 the permittee filed with the Board an Answer and Motion to Dismiss Appeal and Deny Appellant's Request for Supersedeas. As is the usual Board practice, both PGW and DER were notified of this filing and advised to file objections by December 18, 1986. On December 11, 1986 DER filed an answer to the Board and indicated that it had no objections to permittee's motions. However, DER provided what is purported to be a summary of the Board's rules of practice and procedure regarding supersedeas petitions and concluded that the Board's requirements were not met. On December 16, 1986, PGW filed a letter which requested a hearing and summarized its position.

The Board's rules of practice and procedure regarding supersedeas petitions are presented at 25 Pa. Code §21.75 et. seq. Rule 21.77 specifies the contents of a petition for supersedeas as follows:

§21.77. Contents of petition for supersedeas.

(a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:

(1) Affidavits, prepared as specified in 231 Pa. Code Rules 76 and 1035(d) (relating to definitions and motion for summary judgement), setting forth facts upon which issuance of the supersedeas may depend.

(2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

(b) A petition for supersedeas shall state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas.

(c) A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings, or sua sponte, without hearing, for one of the following reasons:

(1) Lack of particularity in the facts pleaded.

(2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.

(3) An inadequately explained failure to support factual allegations by affidavits.

(4) A failure to state grounds sufficient for the granting of a supersedeas.

(d) The Board, upon motion or sua sponte, may direct that a prehearing conference be held.

The Board finds PGW's petition lacking particularity as well as adequate support. In addition, the petition fails to state grounds sufficient for the granting of a supersedeas.

PGW, at Paragraph 6 of its Notice of Appeal, presented the following in support of its petition:

6. Appellant request the Environmental Hearing Board to grant Supersedeas for the following reasons:

- (a) The Appellant is likely to prevail on the merits in that:
  - (1) The gas exploitation rights to this property are currently in dispute before the Court of Common Pleas;
  - (2) That the issued building permit and septic permit qualify as a pre-existing building under the Oil & Gas Act; and
  - (3) That the permit is defective in that it fails to consider the minimizing environmental harm to surface lands as required by Article I, Section 27 of the Pennsylvania Constitution.
- (b) That Appellant will suffer imparable [sic] harm if Supersedeas is not granted in that:
  - (1) The harm sought to be prevented is placement of facilities which will present a danger to the household which is permitted on the site; and
  - (2) The construction of the facilities will destroy natural trees and landscaping on the site which could only be replaced at exorbitant cost.

The Board finds that PGW's request for supersedeas has not plead facts with particularity as required by the Board's rules, supra. No supporting affidavits have been provided, as required by Rule 21.77(a). The Board takes note that PGW, in its filing of December 16, 1986 explains the lack of affidavits as follows:

". . .The facts upon which Appellants request relief are contained with specificity in the Notice of Appeal. These facts are supported not by an Affidavit by Appellant, but by a certified listing of docketing entries and characterizations as set forth by the Permittee in his request to Deny Supersedeas. This information is contained in the explanation of Permittee as the action of the Court of Common Pleas of Westmoreland County. The Appellant requests a hearing and determination by the Board on the issue as to the competing uses of land. That is whether the Department of Environmental Resources may issue

a permit which will preclude currently planned development of the persons property. . ."

This explanation by PGW is insufficient for the Board to conclude that PGW has filed a proper petition. The factual allegations in PGW's notice of appeal are not supported by affidavits. Citations of legal authority to form a basis for the grant of a supersedeas are not provided. Furthermore, the references to a court proceeding in PGW's latest filing, if indeed relevant, are not its pleadings but the permittee's.

In a petition for supersedeas, the petitioner, PGW in this case, has the burden to show that it meets the Board's criteria for a supersedeas. Armond Wazelle v. DER, 1984 EHB 865. In addition to the deficiencies noted above, PGW has in no way indicated to the Board pleadings as to why it believes it is likely to prevail on the merits, why it will be irreparably harmed, and why there will be no injury to the public or other parties. On the basis of the foregoing, it is the Board's conclusion that all of the grounds for denial per Rule 21.77(c), supra, have been met.

O R D E R

AND NOW, this 23rd day of December, 1986, PGW's Petition for  
Supersedeas is denied for nonconformance to 25 Pa. Code §21.77.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: December 23, 1986

**cc: Bureau of Litigation**

Harrisburg, PA

**For the Commonwealth, DER:**

Joseph K. Reinhart, Esq.

Western Region

**For Appellant:**

William Gleason Barbin, Esq.

Johnstown, Pennsylvania

**For Permittee:**

George A. Kotjarapoglus, Esq.

Greensburg, Pennsylvania

rm



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
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MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

OLD HOME MANOR, INC. :  
 :  
 v. : EHB Docket No. 82-006-G  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 24, 1986

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

By Edward Gerjuoy, Member

Syllabus

The Appellant has appealed a DER order requiring reclamation measures on a number of sites previously mined by the Appellant. The Appellant also has appealed a later order which, for three of these sites, ordered cessation of mining until there had been compliance with the terms of the first order. The Board has sustained these appeals in some respects, and dismissed them in others, while ruling as follows. DER's evaluation of any distinct component of OHM's reclamation activities at a particular site (e.g., backfilling to AOC at that site) is to be based on the statutes and regulations in effect at the time DER is made aware that the aforesaid component of OHM's reclamation activities has been completed to OHM's (though of course not necessarily to DER's) satisfaction. However, a permittee who fails to reclaim promptly risks the possibility that the statutory and/or regulatory reclamation standards will be made more rigorous by the Legislature and/or the Environmental Quality Board. DER is permitted to



adopt enforcement policies in the absence of regulations, provided DER can justify its adoption of these policies and provided these new enforcement policies are not obviously proscribed by existing statutory and/or regulatory language. Within the confines of the Statutory Construction Act, there is no reasonable construction of the language of the old Surface Mining Conservation and Reclamation Act, ("SMCRA") 52 P.S. §1396.1 et seq. (the version in effect before October 10, 1980) which can imply that post-mining slope grades approximately equal to the pre-mining grades would be in violation of old SMCRA requirements. For those sites whose AOC grading were to be evaluated by the standards in effect prior to October 10, 1980, DER did not meet its burden of justifying AOC policies more rigorous than the (prior to October 10, 1980) statutory and regulatory language describing contouring requirements. Thus, insofar as the Order required OHM to perform new backfilling and grading on the site covered, e.g., by mining permits MP 615-4 and 615-4(A), the Order was an abuse of DER's discretion.

It is not reasonable for DER (and the public it serves) to wait indefinitely for reclamation of a previously mined area because the operator who did the mining hopes to do additional mining on the site at some unspecified future date. An improperly graded depression 2250 to 5000 square feet in area, even though much less than one percent of the properly graded and backfilled area on a reclaimed mining site, is not necessarily a de minimus failure to fully meet reclamation requirements. DER's order requiring regrading of this 2250 to 5000 square foot depression area was not an abuse of DER's discretion even though the regrading will force this appellant to damage trees planted on the site by the landowner. DER's order requiring Appellant to tear down an allegedly hazardous bridge across a

stream did not estop DER from ordering reclamation of the site covered by MP 615-22 even though the Appellant, in order to gain access to the MP 615-22 site, would have to cross the stream.

The standard mining permit condition requiring that backfilling be done concurrently with the progress of the stripping operation "to the highest degree possible" must be interpreted as requiring concurrent backfilling to the highest degree possible "unless clearly impractical." It is not practical for a mine operator to reclaim an area he reasonably expects to re-mine. A mine operator who, eight months previously, has filed a non-frivolous application to mine limestone in an area the operator previously has mined for coal should be allowed to defer commencing reclamation of the area until DER has acted on the limestone mining application. Once the limestone mining application has been refused, however, the operator is obliged to reclaim without further delay. Under the SMCRA, it is reasonable for DER to require a mine operator who has lost his coal mining license to obtain DER's permission before the operator removes a coal stockpile on a site in an attempt to comply with a DER order requiring proper disposition of that stockpile; in the absence of a showing that DER refused such permission, however, an order by DER requiring disposal of the coal stockpile in accordance with regulations is not an abuse of DER's discretion.

## INTRODUCTION

On December 23, 1981, DER issued an administrative order (the "Order") addressed to William C. Leasure ("Leasure") and Old Home Manor, Inc. ("OHM") ordering Leasure and OHM to remedy various alleged violations at a number of surface mining sites which had been operated by OHM under some sixteen mining permits (not counting permit amendments) from DER. The Order was appealed by OHM at the above-captioned docket number, and by Leasure at Docket No. 82-007-G. OHM and Leasure each also filed petitions for supersedeas of the Order. The hearings on these petitions were consolidated, although the appeals were not; these consolidated hearings included ten days of testimony, during the period April 13 - June 3, 1982.

On April 11, 1983, the Board denied OHM's petition for supersedeas of the Order, except for a single clause in the Order; Leasure's petition was granted, except for a limited number of the sites referred to in the Order. Old Home Manor and W. C. Leasure v. DER, 1983 EHB 396. Thereafter, the parties commenced extensive settlement discussions, which resolved many but not all of the disputed issues; the parties' agreements on various issues, and on various undisputed facts, have been embodied in stipulations which have been made part of the record (see infra). Eventually a single day of hearing on the merits of the OHM and Leasure appeals was held,<sup>1</sup> on February 7, 1985. At this consolidated hearing on the merits the parties stipulated (Bd. Ex.1)<sup>2</sup> that the record for the hearing on the merits included all

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<sup>1</sup> The transcript for this single day of hearings will be denoted as Tr II.

<sup>2</sup> Exhibits ("Ex.") will be identified as follows: Bd. denotes Board Exhibits; DER Exhibits have the prefix "C", i.e., Ex.C1 is DER's first exhibit; OHM Exhibits have the prefix "P" (for "petitioner"), i.e., Ex.P2 is OHM's second exhibit.

evidence introduced during the aforementioned ten days of hearings on their petitions for supersedeas ("supersedeas hearings").<sup>3</sup> The consolidated hearing on the merits also involved the appeal of the Order which had been filed by Manor Mines, Inc. ("MMI") at Docket No. 82-005-G. This 82-005-G appeal already has been adjudicated. Manor Mines, Inc. v. DER, Docket No. 82-005-G (Adjudication, October 8, 1986). The consolidated hearing on the merits and the instant Adjudication also pertain to OHM's appeal at Docket No. 84-121-G, which on November 29, 1984, was consolidated with the original OHM appeal at 82-006-G, under the 82-006-G docket number; the 84-121-G appeal was from a DER compliance order ("Order II") dated March 5, 1984, alleging OHM's failure to comply with certain paragraphs of the originally appealed-from December 23, 1981 Order.

Both parties have filed post-hearing briefs, although only after many mutually agreed-upon requests for extensions of time; in fact, OHM's post-hearing brief was not filed until July 14, 1986. Therefore, we now can and do proceed to adjudicate, without undue delay on the Board's part. Before so doing we add that Leasure's contentions in his appeal at 82-007-G differ from OHM's contentions in the above-captioned appeal only as follows: For various reasons, Leasure claims that DER has no jurisdiction over Leasure, and had no right to address the Order to Leasure. In other respects, particularly with respect to DER's allegations of violation of the surface mining statutes and regulations at the sites and the reclamation requirements imposed by the Order, OHM's and Leasure's contentions are identical. Moreover, Leasure was one of OHM's principal witnesses during the hearings, identified himself as the president of OHM (Tr.13), and throughout

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<sup>3</sup> The transcripts for these ten days of supersedeas hearings were consecutively paginated, and will be denoted simply as Tr.

has been represented by the same counsel as OHM. Therefore, this Adjudication of OHM's appeal also serves as an adjudication of those contentions of Leasure's 82-007-G appeal which are identical with OHM's contentions in the instant appeal; to be specific, those identical contentions have been identically litigated and adjudicated in the instant OHM 82-006-G and Leasure 82-007-G appeals. When we adjudicate the 82-007-G appeal, we will not discuss these "identical" contentions of Leasure's, which have been fully adjudicated herein.

Before continuing, we add for the record that this Adjudication does respond to all contentions by the parties which are pertinent to the 82-006-G appeal and which the Board deemed to have some merit. Contentions pertinent to this 82-006-G appeal which are not responded to in this already overly long Adjudication were deemed wholly without merit, and herewith are rejected. Also, in general any arguments not pursued by the parties in their post-hearing briefs have been deemed waived. Robert Kwalwasser v. DER, Docket No. 84-108-G (Adjudication, January 24, 1986); Equipment France, Inc. v. Toth, 476 A.2d 1366 (Pa.Super.1984); Schneider v. Albert Einstein Medical Center, 390 A.2d 1271 (Pa.Super.1978).

#### FINDINGS OF FACT

##### General

1. The Appellant in this consolidated appeal is Old Home Manor ("OHM"), a Texas corporation licensed to do business in Pennsylvania; OHM's Pennsylvania address is R. D. #2, Homer City, PA 15748.
2. The Appellee is the Commonwealth of Pennsylvania Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law, the Act of June 22,

1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17, and the Rules and Regulations of the Environmental Quality Board adopted thereunder.

3. OHM's principal business is coal mining (Tr.13).

4. William C. Leasure ("Leasure") is the president of OHM (Tr.13).

5. On December 23, 1981, DER issued an administrative order (the "Order") to OHM; this Order is the subject of the appeal originally docketed at 82-006-G.

6. The Order was concerned with the following mine drainage permits and mining permits which had been issued to OHM:

<u>Mine Drainage Permit No.</u>	<u>Mining Permit No.</u>	<u>Township/County</u>
3971BSM2	*615-1(A5)	Brushvalley Township Indiana County
3971BSM2	615-4 & 615-4(A)	Brushvalley Township Indiana County
3971BSM2	615-6 & 615-6(A)	Brushvalley Township Indiana County
3973SM8	615-10 & 615-10(A)	Buffington Township Indiana County
3971BSM2	615-12 615-12(A) & 615-12(A2)	Brushvalley Township Indiana County
3474SM10 and Amendments	615-17(A3), 615-17(A4), 615-17(A6), 615-17(A7), & 615-17(A8)	Fairfield and Ligonier Townships, Westmoreland County
3973SM8	615-22	Buffington Township Indiana County

3974SM43	*615-28	Brushvalley Township Indiana County
3974SM24	*615-31, *615-31(A4), & *615-31(A5)	Green Township Indiana County
3474SM1(T)	615-35	Fairfield Township Westmoreland County
3977SM10	*615-40	Montgomery Township Indiana County
3977SM11	*615-41(C)	Washington Township Indiana County
3474SM10	615-42	Ligonier Township Westmoreland County
3474SM10	615-44 & 615-44(A)	Ligonier Township Westmoreland County
*Special Reclamation Project No. 47		Brushvalley Township Indiana County
39(a)77SM3	Special Reclamation Project No. 445	White Township Indiana County

\* Asterisked items no longer are at issue in this appeal; see Finding of Fact 7, infra.

7. The parties have stipulated that the following OHM mining permit areas no longer are at issue in this proceeding: Special Reclamation Project 47; MP 615-1(A5); MP 615-28; MP 615-31, 31(A4) and 31(A5); MP 615-40; and MP 615-41(C). (Bd.Ex.1)

8. The Order made various findings, to the general effect that OHM had violated the CSL, SMCRA and regulations pertaining thereto at the mining sites listed in Finding of Fact 6.

9. The Order required OHM to commence reclamation and correction of all illegal (according to the findings in the Order) conditions on the various sites within seven days of receipt of the Order.

10. The Order set forth a site-specific schedule for completion of

the aforesaid ordered reclamation and correction (this schedule is reproduced infra, under the appropriate mining permit headings).

11. In general, OHM's appeal of the Order challenged DER's findings and the correction schedule DER had ordered.

12. In December 1979, Leasure had a meeting with Anthony Ercole ("Ercole"), who at the time of the meeting and when he testified at the hearing was Director of DER's Bureau of Mining and Reclamation. (Tr.16, 890)

13. At this meeting all the mining sites which are the subject of this Adjudication were discussed. (Tr.16-19, 891-3)

14. One of the topics of discussion at this December 1979 meeting was Leasure's belief that many of the sites were ready for bond release. (Tr.16-18, 892)

15. Thereafter, in the spring and summer of 1980, all the mining sites which had been discussed at the December 1979 meeting were inspected by DER, including inspections by Ercole himself. (Tr.893-4)

MP 615-4 and 4(A)

16. On the mining site covered by MP 615-4 and 4(A), the Order imposed the following correction schedule:

a. OHM shall backfill and grade the site to its approximate original contour by August 15, 1982, and shall revegetate the site so as to establish the permanent vegetative cover required by the conditions of the mine drainage permit and by the Regulations of the EQB at 25 Pa. Code, Chapters 77 and 102, by September 15, 1982.

b. During and after reclamation all surface water shall be controlled by the implementation and maintenance of erosion and sedimentation from the site. These controls shall be implemented by February 1, 1982.

c. The backfilling equipment necessary to complete the reclamation by the stated date shall be placed on the site on April 15, 1982, and shall



be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

17. OHM completed its coal removal activities at this site prior to December 1979. (Tr.43)

18. MP 615-4 and 4(A) require that backfilling be to approximate original contour ("AOC"). (Ex.C13, C21-C, C22, C22-A)

19. As of February 7, 1985, conditions on the areas covered by MP 615-4 and 4(A) remained as described during the supersedeas hearings. (Bd. Ex.1)

20. OHM completed its backfilling activities at this mine in 1975-76. (Tr.50, 59-60)

21. OHM did not file completion reports for MP 615-4 and 4(A) until some time after December 9, 1980, the date on those completion reports. (Ex.C24, C25)

22. These completion reports asserted that OHM had properly backfilled and graded, but had not yet completed planting. (Ex.C24, C25)

23. These completion reports stated that OHM had affected all the acres permitted under MP615-4 and 4(A). (Ex.C24, C25)

24. Well before October 10, 1980, DER was aware that OHM had completed its backfilling activities at this site.

25. There are large rocks in the site, especially on its north and northeast slopes. (Tr.1315, 45-46)

26. The graded slopes are steeper than DER normally regards as acceptable to meet its AOC standard. (TR.II 48, 64)

27. The slopes do not blend in with the rest of the terrain. (Tr.1318-19, Tr.II 51, Ex.C23-H, C48)

28. Some surfaces above the slopes are rough, with depressions and

rocks. (Tr.1327, Tr.II 51, Ex.C23-H)

29. The rocks mentioned in Finding of Fact 25 are numerous, and sometimes are as high as three and one half feet. (Tr.1323-26, Tr.II 45-52, Ex.C23, C23-C, C23-F, C23-K)

30. According to DER, in order for this site (or other similarly graded sites which are the subject of this appeal) to be acceptably AOC, the slopes would have to be made less steep and blended into the surrounding terrain, and large rocks would have to be removed or buried. (Tr.1318-19, Tr.II 48, Tr.II 53-4, Ex.C48)

31. DER's decision, that the slopes on this site (and on other sites which are the subject of this appeal) were not acceptably AOC, was based on visual observation. (Tr.II 59-60)

32. DER presented no quantitative measurements of the steepness of the slopes on this site (or of any slopes on any sites which are the subject of this appeal).

33. DER's decision, that the slope on this site (and on other sites which are the subject of this appeal) were not acceptably AOC, was not based on any observations of the pre-mining contours. (Tr.II 59-64)

34. DER does not believe that the decision as to whether the backfilled slopes on this site (or on any site which is the subject of this appeal) are acceptably AOC requires a knowledge of the pre-mining slope contours. (Tr.II 60-64)

35. Leasure testified that, on visual observation, the post-mining slopes on this site were about the same as the pre-mining slopes. (Tr.49, 57-8)

36. There was testimony suggesting that DER's decision--that the post-mining slopes on this site (and on other sites which are the subject of

this appeal) were too steep--was based on departmental guidelines as to what constitutes acceptable AOC. (Tr.II 61-63)

37. DER presented no evidence to justify its use of these AOC guidelines, for this site or any other site which is the subject of this appeal.

38. DER's post-hearing brief offered no justification for the use of such AOC guidelines, for this site or any other site which is the subject of this appeal.

39. There are no erosion and sedimentation problems on this site. (Tr.1319, 1340)

40. There was no testimony that the depressions and rocks on the surfaces above the slopes (see Finding of Fact 28) were accumulating water, or causing other problems.

41. As of June 1982, there was inadequate or no vegetation on the regraded slopes and on other areas of the site. (Tr.1317-19, 1326, Ex.C23-D, C23-E, C23-F, C23-H)

42. Leasure agreed that--assuming revegetation is needed--the September 15, 1982 revegetation date specified in Finding of Fact 16a is reasonable. (Tr.54)

43. Erosion and sedimentation controls would be needed on the site if new backfilling to AOC were performed. (Tr.1319-20)

**MP 615-6 and 6(A)**

44. On the mining site covered by MP 615-6 and 6(A), the Order imposed precisely the same correction schedule as has been stated in Findings of Fact 16a-16c for MP 615-4 and 4(A).

45. The site included within MP 615-6 and 6(A) consists of two sections, a 14 acre area and an approximately five acre area. (Tr.1361-3)

46. The 14 acre area has been fully reclaimed and no longer is at issue in this appeal. (Bd.Ex.1)

47. As of February 7, 1985, conditions on the five acre area remain as described during the supersedeas hearings. (Bd.Ex.1)

48. OHM completed its coal removal activities at this site well before December 1979. (Tr.613)

49. The conditions on the permits covering this site require that the mined site be backfilled to AOC. (Ex.C13, C26, C26-A)

50. As of the supersedeas hearings, the five acre section had not been backfilled; in fact a pit and an exposed highwall still remained. (Tr.615, 1361)

51. Once the area was regraded and topsoil spread, erosion and sedimentation controls (in the form, e.g., of collection ditches and sedimentation ponds) would be needed to catch sediment that might be washed off the area before vegetative growth was established. (Tr.1363)

52. Since the site had not been backfilled, it obviously also had not been satisfactorily revegetated.

53. Standard Condition Three accompanying the permit asserts:

No silt, coal mine solids, rock debris, dirt and clay shall be washed, conveyed or otherwise deposited into the waters of the Commonwealth.

(Ex.C13, C26, C26-A)

54. On August 30, 1982, DER released 100% of the bond pertaining to MP 615-6 and 6(A), including that portion of 615-6 and 6(A) associated with the unreclaimed five acres; on October 22, 1982, however, DER notified OHM that this bond release had been in error because the five acres had not been reclaimed. (Bd.Ex.1, Ex.C44-a)

55. DER has reserved the right to argue that the bond release

described in Finding of Fact 54 was improper. (Bd.Ex.1, Ex.C44-b)

56. On June 27, 1975, DER issued a permit (the "deep mine permit") authorizing MMI to operate an underground mine on the site covered by MP 615-6 and 6(A). (Bd.Ex.2)

57. On June 9, 1977 DER, at MMI's request, approved a one-year extension of the deep mine permit. (Bd.Ex.2)

58. This June 9, 1977 letter included the paragraph:

Our regulations allow us to give only a one year extension to a mine drainage permit. So if the Manor Mine No. 4 is not placed in operation by June 27, 1978, Permit 3974305 will become null and void, and it will be necessary for you to get a new permit before starting the mining operation.

(Bd.Ex.2)

59. Neither OHM nor MMI presented any evidence to show that additional extensions of the deep mine permit had been requested, or that a new permit had been applied for.

60. As of April 13, 1982, operations under the deep mine permit had not begun. (Tr.65)

61. Leasure also is the president of MMI. (Tr.337)

62. Leasure testified that the five unreclaimed acres were not backfilled and revegetated because those five acres were expected to be the location of the deep mine's face and entry; had those five acres been backfilled and revegetated, they merely would have had to be torn up again when the deep mining operations began. (Tr.64, 74-5, 83-4)

63. The deep mine was not put into operation because it seemed economically disadvantageous to do so. (Tr.65)

MP 615-12, 12(A) and 12(A2)

64. On the mining site covered by MP 615-12, 12(A) and 12(A2), the Order imposed the following correction schedule:

a. OHM shall backfill and grade the site to approximate original contour by April 15, 1983, and shall revegetate the site so as to establish the permanent vegetation required by the conditions of the mine drainage permit and by the Regulations of the EQB at 25 Pa. Code Chapters 77 and 102, by May 15, 1983. All surface water on the site shall be controlled so as to prevent accelerated soil erosion and sedimentation.

b. The backfilling equipment necessary to complete the reclamation by the stated dates shall be placed on the site on August 15, 1982, and shall be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

65. As of February 7, 1985, conditions on this site remain as described during the supersedeas hearings, except that the highwall in the north/northeast portion of this permit area has been fully reclaimed and is no longer at issue. (Bd.Ex.1)

66. OHM completed its coal removal activities at this site prior to December 1979. (Tr.102-3)

67. MP 615-12, 12(A) and 12(A2) require backfilling to AOC. (Ex.C13, C21-C, C28, C28-A, C28-B)

68. Regrading of the slopes on the site was completed before July 14, 1980. (Tr.1384, 1387-8)

69. OHM completed its revegetation of the site in June 1981; there was no planting by OHM after that date. (Tr.679)

70. As of February 4, 1985, there was a wholly unreclaimed open pit and exposed highwall on the southwest portion of the permit area. (Tr.1385)

71. The unreclaimed open pit area mentioned in Finding of Fact 70 was not reclaimed because it included an abandoned deep mine opening which,

according to Leasure, would provide a useful source of dry air for various drying applications he had in mind. (Tr.103-4)

72. Leasure testified that in the fall of 1979 he had advised Ercole of his intention to leave unreclaimed the aforementioned areas around the abandoned deep mine opening, and that Ercole stated he had no objection to this plan. (Tr.103, 113)

73. Ercole denied having made any commitment to Leasure about his or DER's willingness to allow Leasure to leave unreclaimed the intended drying applications area mentioned in Finding of Fact 71. (Tr.902-3)

74. The size of the unreclaimed open pit area is about one-quarter of of an acre. (Tr.1401)

75. OHM's testimony did not take issue with the time schedules specified in Finding of Fact 64.

76. DER offered no evidence tending to show that E&S controls on the site were inadequate.

77. There are numerous large rocks on the site, especially on the southern slopes. (Tr.1387, Ex.C29-C, C29-G through C29-L)

78. The graded slopes are steeper than DER normally regards as acceptable to meet its AOC standard and do not blend in with the rest of the terrain. (Tr.1387, Tr.II 54 and 64, Ex.C48)

79. The tops of the slopes are flat, i.e., benched or terraced, rather than more or less continuously sloping, as DER believes AOC requires. (Tr.1387, Tr.II 54, Ex.C48)

80. There was no testimony that completion reports covering any portion of this site had been filed by OHM.

81. Other (than Ercole) DER personnel were aware of Leasure's intention (see Finding of Fact 72) to use the unreclaimed area around the

abandoned deep mine opening as a drying facility. (Tr.1413)

82. Leasure did not claim that any DER personnel other than Ercole had approved or otherwise endorsed Leasure's aforesaid intentions (see Finding of Fact 73).

83. OHM has admitted that it never submitted a formal application for post-mining use of the open pit area as a drying facility. (OHM post-hearing brief, p.39)

84. Concerning this site (and other sites which are the subject of this appeal), Ercole and Leasure were equally believable witnesses.

85. Leasure testified that the post-mining and pre-mining contours on this site were "generally the same." (Tr.106-7)

86. Cross sections along three selected (by OHM) lines on the site show very similar pre-mining and post-mining contours. (Tr.650-57, Ex.P42)

87. OHM's witness Robert Cochran ("Cochran") testified that the aforementioned cross sections are "representative." (Tr.655-6)

88. No quantitative evidence was offered to back up this "representative" assertion by Cochran.

89. DER did not directly refute the testimony summarized in Findings of Fact 85-87; in particular, DER did not offer its own pre-mining and post-mining slope comparisons.

90. Cochran admitted that as of April 20, 1982 the slopes on the northern and eastern portions of the site had not been planted. (Tr.658,677)

**MP 615-10 and 10(A)**

91. On the mining site covered by MP 615-10 and 10(A), the Order imposed the following correction schedule:

- a. OHM shall backfill and grade the site to approximate original contour by April 15, 1982, and shall revegetate the site so as to establish



the permanent vegetative cover required by the conditions of the mine drainage permit and by the Regulations of the EQB at 25 Pa. Code, Chapters 77 and 102, by May 15, 1982.

b. During and after reclamation all surface water shall be controlled by the implementation and maintenance of erosion and sedimentation controls so as to prevent accelerated soil erosion and sedimentation from the site. These controls shall be implemented by February 1, 1982.

c. The backfilling equipment necessary to complete the reclamation by the stated date shall be placed on the site within seven (7) days of receipt of this Order and shall be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

92. As of February 7, 1985, conditions on this site remain as described during the supersedeas hearings. (Bd.Ex.1)

93. DER's Mine Conservation Inspector Donald L. Wissinger ("Wissinger") testified that portions of the site required revegetation. (Tr.1472)

94. Wissinger testified the inadequate vegetation was causing erosion. (Tr.1472-3)

95. There are erosion ditches on the site. (Ex.C32-B, C32-C)

96. Cochran admitted that the site had not been entirely revegetated. (Tr.624)

97. The photographic Ex.C32 was taken on May 17, 1982; the photographic Exs.C32-A, C32-B, C32-C were taken in September, 1981. (Tr.1473-4)

98. There are numerous apparently bare areas in the foreground of Ex.C32.

99. There was no testimony about the duration of winter in early 1982, or about what amount of vegetative growth should have been expected on

the areas depicted by Ex.C32.

100. OHM completed its coal removal activities on this site prior to 1976. (Tr.87, 626)

101. OHM had filed completion reports for this site before June 12, 1979. (Ex.P50)

102. A DER inspection report for this site, dated June 12, 1979, states "Original permit and amendment are backfilled approx. A.O.C." (Ex.P50)

103. In the center of the MP615-10 area there is a depression; Wissinger estimated that its dimensions were about five feet deep, 75 to 100 feet long and 30 to 50 feet wide. (Tr.1486-7, Ex.C32)

104. Wissinger believes this depression resulted from sliding along the toe of the spoil. (Tr.1481, 1487)

105. MP 615-10 comprises 20.0 acres; MP 615-10(A) comprises 13.2 acres (Ex.C31, C31-A).

106. An acre equals 43,560 square feet.

**MP 615-22**

107. On the mining site covered by MP 615-22, the Order imposed the following correction schedule:

a. OHM shall submit to the Department a bond and permit fee for that portion of the mining site which is located within one hundred (100) feet of Mardis Run, by January 15, 1982. This bond shall be calculated in accordance with the Department's current bonding rate for support areas, i.e. at one thousand dollars (\$1,000.00) an acre, and the permit fee shall be calculated at fifty (50) dollars per acre.

b. This portion of the site shall be restored to approximate original contour and stabilized so as to prevent any further deposition of silt and ground materials to Mardis Run, by February 1, 1982.

c. The site shall be backfilled and graded to

approximate original contour by August 15, 1983, and shall be revegetated so as to provide the permanent vegetative cover required by the conditions of the mine drainage permit and by the Regulations of the EQB at 25 Pa. Code, Chapters 77 and 102, by September 15, 1983.

d. During and after reclamation all surface water shall be controlled so as to prevent accelerated soil erosion and sedimentation from the site by the installation and maintenance of erosion and sedimentation controls. These controls shall be installed by February 1, 1982.

e. The backfilling equipment necessary to complete the reclamation by the stated dates shall be placed on the site on April 15, 1982 and shall be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

108. As of February 7, 1985, conditions on this site remain as described during the supersedeas hearings. (Bd.Ex.1)

109. Conditions on this site have been unchanged since at least October 20, 1980. (Tr.1516, 1519)

110. Coal removal activities on this site ended about 1978. (Tr.114-124)

111. There is an open pit on this site, as well as an exposed highwall. (Tr.1517, Ex.C34-D, C34-E, C34-I)

112. There are spoil piles on the site, some of which have slid toward an unnamed tributary to Mardis Run. (Tr.1517, 1521-2, Ex.C34-B, C34-F)

113. This site is bordered on one side by the aforementioned unnamed tributary, and on another side by Mardis Run itself. (Tr.1520)

114. Wissinger estimates that 10 to 15 acres of this site have not been backfilled to AOC. (Tr.1531)

115. Some of the slopes have had slides almost entering the unnamed tributary. (Tr. 1519)

116. OHM admitted that this site has not been backfilled to AOC, and has not been revegetated. (Tr.117)

117. OHM admitted that there is an open pit on the site. (Tr.118)

118. Spoil has been placed within 100 feet of Mardis Run. (Tr.693)

119. OHM did not contest that portion of the Order which required a bond for the area that OHM had affected within 100 feet of Mardis Run. (Tr.125, 681-2)

120. Although OHM did not agree, gullies and silt depositions are observable on the site. (Tr.692, 1518-1524, Ex.C34, C34-A, C34-G, C34-H, C34-J)

121. Originally, OHM accessed the site via a bridge over Mardis Run. (Tr.114)

122. This bridge was washed out during a flood in July 1977. (Tr.114)

123. OHM then built a replacement bridge over Mardis Run. (Tr.114)

124. OHM tore down this replacement bridge under orders from DER. (TR.115, Ex.C2)

125. OHM admitted that its failure to build a second replacement bridge was influenced by considerations pertinent to a pending lawsuit against OHM by residents in the neighborhood of Mardis Run. (Tr.123-4)

**MP 615-35**

126. On the mining site covered by MP 615-35, the Order imposed the following correction schedule:

a. OHM shall backfill and grade the site to its approximate original contour by April 15, 1982, and shall revegetate the site so as to establish the permanent vegetative cover required by the conditions of the mine drainage permit and by the Regulations of the EQB at 25 Pa. Code, Chapters 77 and 102 by May 15, 1982.

b. During and after reclamation all surface

water shall be controlled by the implementation and maintenance of erosion and sedimentation controls so as to prevent accelerated soil erosion and sedimentation from the site. These controls shall be implemented by February 1, 1982.

c. The backfilling equipment necessary to complete the reclamation by May 15, 1982 shall be placed on the site within seven (7) days of receipt of this Order, and shall be operated thereafter, at a minimum, for eight (8) hours a day, five days a week, until the completion of all reclamation.

127. As of February 7, 1985, conditions on this site remain the same as described during the supersedeas hearings, except that (Bd.Ex.1):

a. The entire eastern section of the permit, consisting of approximately 30 acres, has been fully reclaimed and is no longer at issue in this proceeding.

b. The western portion of the permit area has been backfilled and graded.

128. The western portion of this site is 20 to 25 acres in size, and mining was completed thereon before November 1979. (Tr.300, 1002-3)

129. Topsoil has not been placed on the western portion of this site, nor has it been revegetated. (Tr.782, 1005, 1100)

130. Erosion is occurring along the haul road on the western portion of the site. (Tr.1005, 1011, 1103-4, Ex.C10)

**MP 615-17, 17(A3), 17(A4), 17(A6), 17(A7) and 17(A8)**

131. On the mining site covered by MP 615-17 and the above-listed amendments thereto, the Order imposed the following correction schedule:

a. OHM shall dispose of all acid-forming refuse materials on the site in such a manner as to prevent pollution of the waters of the Commonwealth, and in accordance with the Regulations of the EQB at 25 Pa. Code §§77.92(f)(3) and 99.36, by January 15, 1982.

b. The site shall be backfilled and graded to approximate original contour by August 15,

1983, and shall be revegetated so as to provide the permanent vegetative cover required by the conditions of the mine drainage permit and by the Regulations of the EQB at 25 Pa. Code Chapters 77 and 102, by September 15, 1983.

c. During and after reclamation, all surface water shall be controlled so as to prevent accelerated soil erosion and sedimentation from the site by the installation and maintenance of erosion and sedimentation controls. These controls shall be installed by February 1, 1982.

d. The backfilling equipment necessary to complete the reclamation by the stated dates shall be placed on the site by April 15, 1983 and shall be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

132. On March 5, 1984, DER issued a compliance order to OHM ("Order II"); this Order II originally was appealed at Docket No. 84-121-G.

133. For the site covered by MP 615-17 and the above-listed amendments thereto, Order II required OHM to comply immediately with the requirements specified in Findings of Fact 131a-131d, and directed OHM to cease mining at the site for its past failure to comply.

134. As of February 7, 1985, the conditions at this site remain the same as described during the supersedeas hearings. (Bd.Ex.1)

135. Conditions on the site have not changed significantly since November 1980. (Tr.1147-8)

136. OHM completed its coal removal activities at this site in November 1979. (Tr.298-9)

137. There is an unreclaimed pit and high wall on the site. (Tr.1148-9, 1182, Ex.C16-D, C16-F, C16-H)

138. Five acres of the site are covered with a coal stockpile. (Tr.1157)

139. E&S controls in place on the site are sufficient to control

accelerated erosion, as DER admits. (Tr.1154-5, DER post-hearing brief, footnote 4)

140. Nevertheless, on some portions of the site the effects of previous accelerated erosion, e.g., erosion gulleys, remain to be corrected. (Tr.1155)

141. OHM admits that this site has not been backfilled or revegetated. (Tr.277-8, OHM post-hearing brief p. 57)

142. A chemical analysis of water taken from an impoundment next to the coal stockpile (Finding of Fact 138) was acidic. (Tr.1169-70)

143. There are 2000 to 2500 tons of coal in the stockpile. (Tr.279)

144. The coal in the stockpile is an acid-forming material. (Tr.1155)

145. OHM admits that the stockpile contains acid-forming material. (Tr.279)

146. This site and the sites covered by MP 615-42, 615-44 and 615-44A, lie above minable limestone deposits. (Tr.252)

147. OHM has purchased from the landowners the right to mine limestone in the area of this site and in the area of the sites covered by MP 615-42, 615-44 and 615-44(A). (Tr.252-261, Ex.P32, P34 and P36)

148. The deeds granting OHM the right to mine limestone in the areas referred to in Finding of Fact 147 contain the clause:

It is expressly understood and agreed that the Limestone hereby conveyed shall only be mined or quarried and removed in conjunction with the strip mining of the coal underlying the land herein described and under no circumstances will the mining and removal be otherwise.

149. OHM owns or controls essentially all limestone deposits beneath the areas encompassed by MP 615-17 and amendments, MP 615-42, MP 615-44 and MP 615-44(A). (Tr.261-2)

150. On or about April 19, 1981, OHM submitted to DER an application to amend Mine Drainage Permit MDP 3474SM10--the mine drainage permit under which mining permits MP 615-17 and amendments, MP 615-42, MP 615-44 and MP 615-44(A) were issued (see Finding of Fact 6)--to allow the removal of limestone. (Ex.C4)

151. This April 9, 1981 application was denied on March 26, 1982, in part because OHM allegedly had failed to provide sufficient data and information to enable DER to determine the hydrogeologic consequences of the proposed mining. (Ex.C4).

152. OHM appealed this permit amendment denial to the Board, at Docket No. 82-106-G.

153. Thereafter, OHM did submit additional information concerning its limestone mining application to DER, which on January 20, 1984, again denied the application.

154. This January 20, 1984 denial also was appealed by OHM, at Docket No. 84-076-G.

155. The Board consolidated the 82-106-G and 84-076-G appeals under the 84-076-G docket number.

156. Under the new SMCRA regulations effective July 31, 1982, mining activities under MDP 3474SM10 could not continue past March 31, 1983 unless OHM timely submitted a repermitting application. 25 Pa. Code §86.14.

157. OHM did timely submit such a repermitting application.

158. DER denied this repermitting application on April 19, 1985.

159. The April 19, 1985 denial letter also informed OHM that henceforth no mining was permitted under MDP 3474SM10, and that reclamation of all hitherto unreclaimed areas affected under MDP 3474SM10 must begin immediately.



160. OHM did not appeal this April 19, 1985 letter from DER.

161. On November 20, 1986 the Board dismissed the consolidated appeal at 84-076-G (see Finding of Fact 155) as moot, without prejudice as to the merits of any future limestone mining application by OHM, on the grounds that amendment of the MDP 3474SM10 application to allow limestone mining was not possible once the underlying MDP 3474SM10 permit had been voided by DER's unappealed April 19, 1985 letter.

162. OHM's application to mine limestone was not frivolous, i.e., was not undertaken merely to provide OHM with an excuse for not completing reclamation of the areas which had been affected under MDP 3474SM10.

163. The limestone mining application included all the areas encompassed within MP 615-17 and amendments, MP 615-42, MP 615-44 and MP 615-44(A). (Tr.1196, 1232, 1259)

164. Ercole testified that in his opinion a mine operator should not be expected to reclaim an area which would have to be redisturbed under another valid mining permit. (Tr.931-2)

165. Ercole also testified that in his opinion OHM should not have been ordered to reclaim the area covered by the limestone mining application until there had been "final" action on OHM's appeal of DER's denial of that application. (Tr.941-2)

166. Ercole did not officially review, and therefore did not officially approve (or reject) the Order which is the major subject of this appeal. (Tr.944)

167. Excluding the coal stockpile (see Finding of Fact 138), at least 20 acres on this site are unreclaimed. (Tr.1149, 1191-3)

168. OHM secured its rights to mine limestone in the area of this site, and in the area of the sites covered by MP 615-42, 615-44 and 615-44(A),

in 1974 (Ex.P32, P34, P36)

169. OHM testified that it no longer has a surface coal mining license. (Tr. 279-80)

170. The record does not indicate when OHM lost its surface coal mining license.

171. There is nothing in the record to indicate that DER has forbidden OHM to remove the coal in the stockpile from the site.

MP 615-42

172. On the mining site covered by MP 615-42, the Order imposed the following correction schedule:

a. OHM shall submit to the Department a bond and permit fee for that portion of the site which is within one hundred (100) feet of Township Road 741, by January 15, 1982. This bond shall be calculated at the Department's current bonding rate for support areas, i.e. at one thousand dollars (\$1,000) an acre, and the permit fee shall be calculated at fifty dollars (\$50.00) per acre.

b. All acid-forming refuse materials on the site shall be disposed of in such a manner as to prevent pollution to the waters of the Commonwealth, and in accordance with the Regulations of the EQB at 25 Pa. Code §§77.92(f)(3) and 99.36, by January 15, 1982.

c. Any water impoundments in the mining pits on the site shall be pumped to collection basins and shall be treated, before discharge, so as to ensure that the water quality meets the effluent criteria set forth in the conditions of the mine drainage permit and in the Regulations of the EQB at 25 Pa. Code §§77.92(c), 95.21, and 99.33.

d. The site shall be backfilled and graded to its approximate original contour by April 15, 1983, and shall be revegetated so as to establish the permanent vegetative cover required by the conditions of the mine drainage permit and the Regulations of the EQB at 25 Pa. Code Chapters 77 and 102, by May 15, 1983.

e. During and after reclamation, all surface

water on the site shall be controlled so as to prevent accelerated soil erosion and sedimentation by the implementation and maintenance of sedimentation and erosion control measures, including an adequate highwall diversion ditch. These measures shall be installed by February 1, 1982.

f. The backfilling equipment necessary to complete the operation by the stated date shall be placed on the site on August 15, 1982, and shall be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

173. Order II (see Finding of Fact 132) required OHM to comply immediately with the requirements specified in Findings of Fact 172a-172f, and directed OHM to cease mining at the site for its past failure to comply.

174. Findings of Fact 134 and 136 apply equally well to this site.  
(Tr.295, Bd.Ex.1)

175. On approximately seven acres of this site, there is an open pit with an unreclaimed highwall. (Tr.1207, 1219, Ex.C18-B)

176. The requirements specified in Findings of Fact 172e and 172f have been complied with by OHM, and are no longer at issue. (DER post-hearing brief, p.50)

177. Water has accumulated in the pit mentioned in Finding of Fact 175. (Tr.1207-1212, 1221, Ex.C18, C18B)

178. The proper way to eliminate water accumulation in a pit is by pumping the water out of the pit to treatment ponds and then backfilling the area. (Tr.1212)

179. OHM admits that this site has not been wholly backfilled or revegetated. (Tr.283, OHM post-hearing brief p.57)

180. On the floor of the pit on this site there is an exposed rider

coal seam lying along the main Pittsburgh coal seam. (Tr.1207, 1221,  
Ex.C18-A)

181. DER never sampled the exposed rider seam coal to determine if it  
was acid-forming. (Tr.1239)

182. When sampled by DER, the water in the pit had a pH exceeding 6.  
(Tr.1236-7)

183. Nevertheless, the exposed material in the pit is acid-forming.  
(Tr.1215-1217)

184. OHM has affected the 100 foot barrier area of Township Road 741  
mentioned in Findings of Fact 172a. (Tr.285-6, 1220-1)

**MP 615-44 and 44(A)**

185. On the mining site covered by MP 615-44 and 44(A), the Order  
imposed the following correction schedule:

a. OHM shall submit to the Department a bond  
and permit fee for those portions of the mining  
site which are within one hundred (100) feet of  
the unnamed tributary to Hannas Run and one  
hundred (100) feet of Township Road 982, by  
January 15, 1982. The bond shall be calculated  
at the current bonding rate for support areas  
i.e. at one thousand dollars (\$1,000.00) an  
acre, and the permit fee shall be calculated  
at fifty dollars (\$50.00) per acre.

b. All acid-forming refuse materials on the  
site shall be disposed of in such a manner as  
to prevent pollution of the waters of the  
Commonwealth, and in accordance with the procedures  
outlined in the Regulations of the EQB at 25 Pa.  
Code §§77.92(f)(3) and 99.36, by January 15,  
1982.

c. The site shall be backfilled and graded  
to approximate original contour by August 15,  
1982, and shall be revegetated so as to establish  
the permanent vegetative cover required by the  
conditions of the mine drainage permit and by  
the Regulations of the EQB at 25 Pa. Code, Chapters  
77 and 102, by September 15, 1982.

d. During and after reclamation of the site, all surface water shall be controlled by the implementation and maintenance of erosion and sedimentation controls, including an adequate highwall diversion ditch, so as to prevent accelerated soil erosion and sedimentation from the site. These controls must be implemented by February 1, 1982.

e. The backfilling equipment necessary to complete the reclamation by the stated date shall be placed on the site within seven (7) days of receipt of this Order, and shall be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

186. Order II (see Finding of Fact 132) required OHM to comply immediately with the requirements specified in Findings of Fact 185a-185e, and directed OHM to cease mining at the site for its past failure to comply.

187. Findings of Fact 134 and 136 apply equally well to this site.  
(Tr.299-300, Bd.Ex.1)

188. OHM has affected land within 100 feet of an unnamed tributary to Hannas Run mentioned in Finding of Fact 185a. (Tr.1249, 1255)

189. OHM has affected land within 100 feet of Township Road 982.  
(Tr.273-4, 1249-50)

190. DER admits that the terms of Finding of Fact 185b were unnecessary, and that this portion of the Order no longer is at issue in this litigation. (DER post-hearing brief, p.34)

191. OHM admits that this site has not been backfilled or revegetated. (OHM post-hearing brief p.57)

192. There are two open pits with highwalls on this site. (Tr.1245, 1247, 1259-60, Ex.C20-D, C20-E)

193. There is a diversion ditch along the unnamed tributary which has been breached and is not functioning, and which allows sediment to be washed

into the stream area. (Tr.1246-8, 1257)

194. A pond located on the site has an improperly constructed spillway, which is eroding. (Tr.1247-8, 1250-1, Ex.C20-A, C20-C)

195. Continued erosion of the spillway could result in a sudden large discharge of water, which then might be hazardous to homes along the unnamed tributary. (Tr.1250-1)

196. The record does not indicate precisely how many acres on this site remain unreclaimed.

197. The total area included within MP 615-44 and 615-44(A) is 61 acres. (Ex.C19, C19-A)

198. Probably not more than half of these 61 acres require additional backfilling. (Tr.457-8)

199. The total area included within MP 615-4 and 615-4(A) is 29.4 acres. (Ex.C22, C22-A)

200. As interpreted by DER, Finding of Fact 16a would have required OHM to regrade the major portion of the area within MP 615-4 and 615-4(A). (Findings of Fact 23-30, Tr.1318-19)

201. OHM did not challenge the time limit set in Finding of Fact 16a for completion of backfilling and regrading of the area under MP 615-4 and 615-4(A).

202. Reclamation activities, including backfilling and regrading, are difficult to accomplish during the winter months, and even in the spring months before May. (Tr.242-6)

#### Special Reclamation Project 445

203. On the site identified as Special Reclamation Project 445, the Order imposed the following correction schedule:

a. OHM shall backfill and grade the site to its approximate original contour by August 15, 1983, and shall revegetate the site so as to establish the permanent vegetative cover required by the conditions of the mine drainage permit and by the Regulations of the EQB at 25 Pa. Code, Chapters 77 and 102, by September 15, 1983. All surface water on the site shall be controlled so as to prevent accelerated soil erosion and sedimentation from the site.

b. The backfilling equipment necessary to complete the reclamation by the stated dates shall be placed on the site on May 15, 1982, and shall be operated thereafter, at a minimum, for eight (8) hours a day, five (5) days a week, until the completion of all reclamation.

204. As of February 7, 1985, this site has been backfilled and graded, so that the backfilling and grading of this site no longer is at issue. (Bd.Ex.1)

205. As of February 7, 1985, other than as stated in Finding of Fact 204, conditions on this site remain the same as described during the supersedeas hearings. (Bd.Ex.1)

206. DER now admits that the only remaining issue at this site is revegetation. (DER post-hearing brief, p.37)

207. During the supersedeas hearings, OHM admitted that revegetation

had not been completed at this site. (Tr.188)

208. During the supersedeas hearings, OHM admitted that this site had not been fully backfilled and graded. (Tr.186-7)

209. OHM has admitted that the August 15, 1983 date set in Finding of Fact 203a for completion of backfilling and grading was reasonable. (Tr.187)

210. OHM completed its coal removal activities at this site prior to December 1979. (Tr.18, 178, Ex.P1)

### DISCUSSION

Our adjudication of this matter is to determine whether the Order (and Order II) was an abuse of DER's discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975); Ohio Farmers Insurance Co. v. DER, Docket No. 80-041-G, 1981 EHB 384, aff'd 457 A.2d 1004 (Pa.Cmwlth.1983). In the context of the present appeal an arbitrary exercise by DER of its duties or functions would be an abuse of its discretion as well, so that we can and will focus on the "abuse of discretion" clause in the Warren standard. The burden of showing that the Order (and Order II) was not an abuse of discretion falls on DER. 25 Pa.Code §21.101(b)(3). Concentrating for the moment on the major subject of this Adjudication, namely the appeal of the Order, this burden obviously is twofold. First DER must show that reclamation requirements were violated at each of the OHM mining sites which still are in dispute. If this initial burden is met, DER then must further show that the measures the Order imposes for abatement of the violations are appropriate. Evidently our decision as to whether or not this twofold burden has been met will have to be rendered site-by-site. As our Findings of Fact already have made evident, the



Order--encompassing 17 pages and concerned with 16 mining permits--cannot be evaluated intelligently on any basis which is not site specific.

A. Applicable Versions of SMCRA and Pa.Code

Before we can proceed to this site-specific examination of the Order, however, we first must determine what statutes and regulations apply to this matter; unless we come to a decision about this issue, we scarcely can decide whether the various terms of the Order were within DER's discretion. Obviously this matter will be adjudicated on the basis of the statutes and regulations mentioned in Finding of Fact 2. But statutes and regulations (notably, for the purposes of this appeal, the SMCRA and regulations thereto) change over the years. The specific question before us is which version of the SMCRA and regulations thereto are applicable to this appeal.

To clarify the relevance of the just-stated question, consider, e.g., Finding of Fact 16a, which requires OHM to backfill and grade the sites covered by MP 615-4 and 4(A) to AOC. As spelled out in more detail infra, the criteria for deciding whether backfilling is AOC stem from sections of the SMCRA which were amended effective October 10, 1980, as well as from regulations (notably in 25 Pa.Code Chapter 87) that became effective July 31, 1982. Our Findings of Fact, supra, indicate that--on all sites which are the subject of this adjudication--mining was completed before January 1, 1980. OHM therefore argues that, at least insofar as this Adjudication is concerned, only the "old" SMCRA (the version which was in effect before October 10, 1980), not the "new" SMCRA (the version effective after October 10, 1980), is applicable. OHM argues similarly that 25 Pa.Code Chapter 87 is not relevant to this appeal. According to OHM, use of the new SMCRA and/or Chapter 87 under the the facts of this appeal would be a prohibited retrospective

application of presently effective laws and regulations.

OHM is challenging application of the new SMCRA and Chapter 87 to revegetation requirements and to erosion and sedimentation ("E&S") controls, as well as to the AOC backfilling standard. With respect to these reclamation requirements, the differences between the new and the old versions of the SMCRA and regulations thereto may be summarized as follows.

#### Backfilling to AOC

Both the old and the new SMCRA require that reclamation include "contouring." "Contouring" is defined as follows in the statute:

Old SMCRA: "Contouring" shall mean reclamation achieved by beginning at or beyond the top of the highwall and slope to the toe of the spoil bank at a maximum angle not to exceed the approximate original contour of the land, with no depressions to accumulate water and with adequate provision for drainage.

New SMCRA: "Contouring" shall mean reclamation of the land affected to approximate original contour so that it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with no highwall, spoil piles or depressions to accumulate water and with adequate provisions for drainage.

Neither statute explicitly defines the phrase "AOC" used in these definitions of "contouring." Prior to July 31, 1982, the backfilling regulations were contained in 25 Pa.Code Chapter 77; those regulations, which were repealed on July 31, 1982 when the present 25 Pa.Code Chapter 87 became effective, did not shed any additional light on the meaning of "AOC." The new regulations do flesh out the definition of "contouring" in the new SMCRA, but do not go beyond that definition. Specifically, 25 Pa.Code §87.144 reads:

(a) The final graded slopes shall approximate premining slopes, or any lesser slopes approved by

the Department based on consideration of soil, climate, or other characteristics of the surrounding area.

(b) Postmining final graded slopes need not be uniform, but shall approximate the general nature of the premining topography.

### Revegetation

The old SMCRA required mine operators to adopt a planting program "to permanently restore vegetation to the land affected." The new SMCRA requires a reclamation plan which, inter alia, will:

establish on the areas proposed to be affected a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area of land to be affected and capable of self-regeneration and plant succession at least equal in extent of cover to the natural vegetation of the area.

The former Chapter 77 very specifically detailed many very specific planting procedures, including lists of approved plants and trees, presumably necessary "to permanently restore vegetation to the land affected." For instance, §77.11 states "No species may occupy more than 50% of any operation." The new regulations (§§87.147-87.156) replace the former detailed planting procedures with operational requirements and performance standards. For instance, §87.155 reads:

§87.155. Revegetation: standards for successful revegetation.

(a) When the approved postmining land use is cropland:

(1) The standards for successful revegetation shall be based upon crop productivity or yield.

\* \* \* \* \*

(b) When the approved postmining land use is other than cropland:

(1) The standards for successful revegetation shall be determined by ground cover.

## E&S Controls

Neither the old nor the new SMCRA offers any explicit description of required E&S controls. Regulations governing erosion controls are to be found in 25 Pa.Code Chapter 102, which became effective in 1972 and is still effective, although many of the original 1972 sections of Chapter 102 have been amended over the years. The present Sections 102.2 and 102.3 specifically state in language that has been unchanged since 1972:

The provisions of this chapter impose requirements on earth-moving activities which create accelerated erosion and which require planning and implementation of effective soil conservation measures.

The purpose of this chapter is to control accelerated erosion and the resulting sedimentation of waters of this Commonwealth, thereby preventing the pollution of such waters from sediment and from fertilizers, pesticides, and other polluting substances carried by sediment.

"Accelerated erosion" is defined in Section 102.1, in language dating from 1977 at least, as (in effect) erosion which because of man's activities exceeds natural erosion. Sections 102.21-24, whose language also dates from 1977 at least, requires maintenance of E&S controls to prevent accelerated erosion until the site has been stabilized. In addition, the new Chapter 87 contains some provisions bearing on erosion controls. For example, §87.146 reads:

When rills or gullies deeper than nine inches form in areas that have been regraded and planted, the rills and gullies shall be filled, graded, or otherwise stabilized and the area reseeded or replanted according to §§87.147-87-156 (relating to revegetation). The Department shall specify that rills or gullies of lesser size be stabilized and the area reseeded or replanted if the rills or gullies are disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

## Retrospectivity

Now, with the foregoing summary of the pertinent differences between the old and new SMCRA and regulations thereto in mind, we return to OHM's argument that under the facts of this appeal use of the new SMCRA and/or Chapter 87 to decide whether the Order was an abuse of DER's discretion would be a prohibited retrospective application of presently effective law. This retrospectivity argument was first used by OHM in connection with its petition for supersedeas; the Board rejected the argument "as a basis for granting OHM a supersedeas." OHM and Leasure, supra. The argument must be reexamined here, however, because OHM's burdens in the supersedeas proceedings and in the instant hearing on the merits were so different, and because OHM now has refined its argument and has explained how application of the new SMCRA to OHM would differ from application of the old SMCRA (a difference not spelled out in OHM's brief in support of its supersedeas petition). DER's post-hearing brief, though baldly stating that DER "believes the existing mining conditions are governed by the current statutory and regulatory provisions," does not furnish any arguments, legal or otherwise, in support of this belief. DER's brief in opposition to supersedeas argued that "determining whether a statute is being applied retroactively requires analysis of the specific facts involved."

We think this last quotation from DER's brief in opposition to supersedeas more correctly states the law than does DER's post-hearing brief. OHM accurately points out that the Statutory Construction Act, 1 Pa. C.S.A. §1926, embodies a presumption against giving retrospective effect to any statute:

No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.

On the other hand, a statute (in this case the new SMCRA)

does not operate retrospectively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.

Gehris v. Comm. Dept. of Transportation, 471 Pa.210, 369 A.2d 1271 (1977);

Comm. Dept. of Labor and Industry, Bureau of Employment Sec. v. Pennsylvania

Engineering Corp., 54 Pa.Cmwlth.376, 421 A.2d 521 (1980). Moreover, as we stated in OHM and Leasure, 1983 EHB 396:

[F]rom Commonwealth v. Barnes and Tucker, 455 Pa.392, 319 A.2d 871 (1974), it appears incapable that it is lawful for a statute to require present (after enactment of the statute) remedial measures for environmental damage having its genesis in actions taken prior to enactment of the statute.

Quite recently, in the context of a petition for supersedeas, the Board has examined a retrospectivity argument very similar to the argument which OHM is making in the instant appeal. WABO Coal Company v. DER, Docket No. 85-416-W (Opinion and Order, January 24, 1986). On the reasoning of WABO, and on the basis of the other holdings cited supra, especially Gehris and Barnes and Tucker, we believe the correct answer to the question before us--namely, what versions of the SMCRA and regulations thereto are applicable to this matter--is as follows.

A permittee receives no guarantee from DER that the statutes and regulations in effect when the permit was granted will not be amended (or supplemented by altogether new statutes and regulations) before operations under the permit are completed. Activities under the permit after former statutes or regulations are modified are governed by the new statutes or regulations; if the permittee does not believe it can continue operations under the new statutes or regulations, it is free to discontinue operations

and relinquish its permit. Therefore, returning now to the instant appeal, OHM must expect that DER's evaluation of any distinct component of OHM's reclamation activities at a particular site (e.g., backfilling to AOC at that site) will be based on the statutes and regulations in effect at the time DER is made aware that the aforesaid component of OHM's reclamation activities has been completed to OHM's (though of course not necessarily to DER's) satisfaction. Correspondingly, DER cannot expect that merely because its Order was issued on December 23, 1981, the new SMCRA and regulations thereto will be applicable to reclamation activities which--DER knew before October 10, 1980--OHM had completed, apparently to OHM's satisfaction. On the other hand, if when evaluated via the rule just enunciated OHM had not satisfactorily completed a distinct component of its required reclamation activities before October 10, 1980, so that OHM was in violation of its reclamation obligations under the old SMCRA, then after October 10, 1980 OHM surely continued to be in violation under the at least equally rigorous standards of the new SMCRA; thus on December 23, 1981 OHM lawfully could be ordered to abate the violations under the authority of the new SMCRA. WABO, supra. A permittee who fails to reclaim promptly risks the possibility that the reclamation standards will be made more rigorous by the Legislature, after experience has shown that the former standards were insufficient to guarantee satisfactory reclamation. Similar considerations, sufficiently obvious that their explicit statement is not required, pertain to the applicability of regulations, particularly the regulations in 25 Pa.Code Chapter 87. Because Chapter 87 did not become effective until July 31, 1982, it could not be the basis for the Order issued December 23, 1981. The March 5, 1984 compliance order to OHM, originally appealed at Docket No. 84-121-G, legitimately could refer to Chapter 87 requirements, however, assuming--as

that March 5, 1984 order alleges--that OHM violations had continued past July 31, 1982.

It also must be remembered that DER is permitted to adopt enforcement policies in the absence of regulations, provided DER can justify its adoption of those policies. Western Hickory Coal Co. v. DER, Docket No. 82-141-G, 1983 EHB 89, aff'd 485 A.2d 877 (Pa.Cmwlth.1984); Preston Heckler v. DER, Docket No. 81-036-M, 1985 EHB 264. Moreover, under the statute creating DER, 71 P.S. §510.17, effective January 19, 1971, DER has broad powers to prevent and abate conditions which are detrimental to the public health, including any condition which is declared to be a nuisance by any law administered by DER. Thus, irrespective of the holdings in the preceding paragraph, it is not per se unlawful for DER to adopt and apply enforcement policies which go beyond the regulations in force at the time, provided those new enforcement policies are not obviously proscribed by existing statutory and/or regulatory language, and provided DER can meet its burden of justifying those policies. As we stated in Coolspring Township v. DER, Docket No. 81-134-G, 1983 EHB 151: "Where there exists an applicable regulatory scheme, duly promulgated by the Environmental Quality Board, there is a presumption that the regulatory scheme does meet the objectives of the underlying statute." Such a regulatory scheme does exist in the instant appeal, and has existed (though eventually superseded by the currently effective regulations) since well before October 10, 1980. At any time pertinent to the instant appeal, therefore, there is a presumption that the regulations in effect at the time met the objectives of the SMCRA and 71 P.S. §510-17, including protection of the public health, safety and welfare. But this presumption is rebuttable, and we allow appellants to attempt to rebut it. Coolspring, supra. DER, should it seek to justify enforcement policies which go beyond



the regulations in force at the time (without any inconsistency with those regulations of course), is entitled to the same privilege.

Our Adjudication of this matter will be guided by the principles set forth in the preceding two paragraphs.

**B. MP 615-4 and 4(A)**

We must decide whether any or all of the Order's terms quoted in Findings of Fact 16a-16c constituted an abuse of DER's discretion. In particular, we must decide whether OHM should have been ordered to:

a(1) Backfill and grade to AOC by August 15, 1982.

a(2) Revegetate by September 15, 1982.

b. Implement erosion and sedimentation controls by February 1, 1982.

c(1) Place backfilling and equipment on the site by April 15, 1982.

c(2) Operate said equipment for five days a week until reclamation is completed.

We will examine these issues seriatim. For each such issue we first must decide: (i) whether there had been a failure to satisfactorily reclaim warranting an Order to OHM, and if so then (ii) whether the actually issued Order was a proper exercise of DER's discretion.

**Backfilling to AOC**

The record shows that OHM completed its backfilling activities at this site in 1975-76 (Finding of Fact 20). There is no explicit statement in the record as to when DER first became aware of the fact that OHM had terminated its backfilling activities at this mine site. OHM's completion reports for the sites covered by MP 615-4 and 615-4(A), asserting backfilling and grading (but not planting) had been completed, were not prepared by OHM until December 9, 1980, and thus could not have been filed with DER before

that date. The filing of such a completion report is the natural signal to DER that a surface mine operator has completed backfilling to the mine operator's satisfaction; moreover, it is only reasonable--and consistent with our discussion of retrospectivity, supra--that the mine inspector who evaluates the completion report should do so on the basis of the statutes and regulations in effect at the time. Therefore, were the completion reports prepared December 9, 1980 the only relevant evidence as to when DER became aware that OHM had completed backfilling, we would hold that the new SMCRA effective October 10, 1980 sets the standard for OHM's compliance with backfilling requirements at this site.

On the other hand, Anthony Ercole, Director of DER's Bureau of Mining and Reclamation, testified (Findings of Fact 12-15): (i) that he discussed all the mining sites which are the subject of this Adjudication with Leasure in December, 1979; (ii) that one of the topics of discussion was Leasure's belief that many of the sites were ready for bond release; and (iii) that thereafter, in the spring and summer of 1980, all the mining sites which had been discussed were inspected by DER, including inspections by Ercole himself. This testimony carries the unavoidable implication that--even though the completion reports were not filed until after December 9, 1980--DER must have been aware well before October 10, 1980 that OHM had completed its backfilling activities at the site (Finding of Fact 21).

We stress that we are accepting the just-stated implication only under the specific somewhat peculiar facts of this appeal, in particular the facts testified to by Ercole. DER is not required to mind read; in general it is up to the mine operator to make sure that DER is aware that the mine operator has completed backfilling, via the filing of a document, e.g., a completion report, unmistakably asserting backfilling activities have ceased

and now await DER's approval. But with this caution, we have concluded that in this appeal, for this MP 615-4 and 4(A) site, the decision as to whether OHM had satisfactorily backfilled to AOC must be based on the statutes, regulations and (if justifiable) DER policies pertinent to AOC backfilling which were in effect prior to October 10, 1980.

DER's testimony concerning the status of the backfilling on these MP 615-4 and 4(A) permit areas can be summarized as follows: The backfilled slopes are unacceptably steep by DER's standards and do not blend in with the surrounding terrain; the surfaces above the slopes are rough, with depressions and rocks; the slopes contain large rocks, sometimes as high as three and one half feet. We have believed this testimony, which is supported by photographs (Findings of Fact 26-29). DER's decision that the backfilled slopes were unacceptably steep was reached without any comparisons with the grades of the pre-mining slopes (Findings of Fact 31-34). Leasure testified that the post-mining slopes are about the same as the pre-mining slopes. As explained supra, the version of the SMCRA in effect prior to October 10, 1980, namely the old SMCRA, only required that the post-mining slopes not exceed the pre-mining slopes; the regulations in effect before October 10, 1980, namely those in 25 Pa.Code Chapter 77, did not amplify this requirement. We conclude that DER's decision that the post-mining grades of the slopes were too steep to be AOC must be justified (if at all) on the basis of DER policies in effect before October 10, 1980; within the confines imposed by the Statutory Construction Act, there is no reasonable construction of the language of the old SMCRA which can imply that post-mining grades approximately equal to the pre-mining slopes would be in violation of old SMCRA contouring requirements. 1 Pa. C.S.A. §1903(a).

There is testimony suggesting that DER's decision that the

post-mining slopes were too steep to be AOC was based on departmental guidelines, i.e., on a DER policy. Such a policy could be reasonable; for example, it well may be that post-mining slopes which are steeper than some maximum grade are likely to manifest erosion and sedimentation problems. But DER made no attempt to justify such a policy, in its testimony or in its post-hearing brief. There were no erosion and sedimentation problems on this site. Therefore we further conclude that DER--if its decision that the post-mining slopes were unacceptably steep indeed was based on policies in effect before October 10, 1980, not statutes or regulations--did not meet its burden of justifying use of such policies in the face of the plain language of the SMCRA concerning contouring requirements.

DER's other objections to the backfilling on this site are deficient for much the same reasons as have just been discussed in connection with the slope grades. We agree that the slopes do not blend in with the surrounding terrain; that the surfaces above the slopes are rough and show depressions ; and that the slopes contain large rocks. However, the old SMCRA and Chapter 77 say nothing about blending, rough surfaces above the slopes, or rocks. The old SMCRA does forbid depressions, but the language seemingly refers to the regraded contours only; in any event, there was no testimony that the depressions on the surfaces above the slopes were accumulating water. We can hypothesize many reasons for adopting policies imposing blending, roughness or rock-frequency requirements, but DER offered no testimony or arguments in support of such policies. Consequently we hold that insofar as the Order required OHM to perform new backfilling and grading (Finding of Fact 16a), the Order was an abuse of DER's discretion, because DER did not meet its burden of showing: either (1) that OHM had not met the statutory and regulatory AOC requirements in effect before October 10, 1980; or (2) that

enforcing DER's interpretation of the AOC requirements was justified. We make this holding rather reluctantly, especially with respect to the rocks which have been dumped profusely on the slopes (see, e.g., Ex.C23-K). We think there are good reasons to believe such rocks make post-mining uses of the land (e.g., farming) much more difficult; we also think that any reasonably intelligent mine operator (and Leasure's testimony showed he is far from unintelligent) should know that a primary purpose of reclamation is to make the land fit for desirable post-mining uses. But we must decide this matter on the record before us; on that record we do not see how we can hold otherwise than stated supra concerning the backfilling and grading requirement quoted in Finding of Fact 16a.

### Revegetation

We turn next to the revegetation requirement quoted in Finding of Fact 16a. On the testimony, especially the photographs admitted into evidence, it is clear that OHM had not satisfactorily revegetated the site by June 1982 (Finding of Fact 41); nor had the site been satisfactorily revegetated by February 1985 (Finding of Fact 19). Moreover, the revegetation obviously was inadequate even under the old SMCRA or under the version of 25 Pa.Code Chapter 77 which was in effect prior to July 31, 1982, because some of the backfilled slopes had essentially no vegetation cover (Ex. C23-D, 23-K). We conclude that insofar as revegetation of this site is concerned, DER met its burden of showing there had been a failure to satisfactorily revegetate warranting a revegetation Order to OHM. The next question is whether the revegetation Order, as written, was within DER's discretion. Evidently, the answer to this question is "Yes." DER merely imposed a minimal requirement on OHM, namely that by September 15, 1982, OHM must meet the permanent vegetative cover requirements of its permit and of

regulations in effect at the time the Order was issued (Finding of Fact 16a); the September 15, 1982 deadline date was reasonable (Finding of Fact 42). In sum, we uphold the Order's revegetation requirements for this site, as stated in Finding of Fact 16a.

Finally, in connection with this site, we examine the terms of the Order quoted in Findings of Fact 16b and 16c. Since there had been no erosion and sedimentation problems on the site prior to the Order (Finding of Fact 39), and since we have decided DER should not have required new backfilling (which would have needed erosion and sedimentation controls, Finding of Fact 43), we see no justification for the portion of the Order quoted in Finding of Fact 16b. Similarly, since no new backfilling is required, there is no basis for the portion of the Order quoted in Finding of Fact 16c. Those portions of the Order quoted in Findings of Fact 16b and 16c were an abuse of DER's discretion.

This completes our discussion of MP 615-4 and 4(A).

### C. MP 615-6 and 6(A)

The parties have stipulated that, insofar as this appeal is concerned, only an approximate five acre area remains in dispute. As of February 7, 1985, this five acre site had not been revegetated or even backfilled; in fact a pit and an exposed highwall remained on the site. The Order required OHM to backfill to AOC, to revegetate, to install E&S controls which would prevent accelerated soil erosion, and to install and steadily operate backfilling equipment on the site (Findings of Fact 16a-16c and 44). DER's Mine Conservation Inspector testified that E&S controls would be needed after backfilling to catch sediment that might be washed off the area before the revegetative growth had been established. This testimony was not rebutted, and the Board finds it believable (Finding of Fact 51). As we have

explained (supra, section A), 25 Pa.Code Chapter 102--which was in effect when the Order was issued and remains in effect today--requires the maintenance of E&S controls to prevent accelerated erosion. Moreover, the mine permit's standard conditions forbid the deposition into the waters of the Commonwealth of silt or other materials washed off the site (Finding of Fact 53). OHM has not argued that the various deadline dates specified for completion of reclamation at the site (see Findings of Fact 16a-16c) are unreasonable. We find it reasonable (and OHM has not argued that it is unreasonable) to require that backfilling equipment necessary to complete the reclamation be operated steadily until reclamation activities needing such equipment are completed.

On the considerations of the preceding paragraph, for the five unreclaimed acres on this site which still are the subject of this appeal, DER's Order to OHM cannot be considered an abuse of DER's discretion, unless OHM has a (not yet considered) valid defense to the Order. One such possible defense is concerned with DER's release of the bond on the site. The parties have stipulated that on August 30, 1982, DER released the entire bond on this site; on October 22, 1982, however, DER notified OHM that this bond release had been in error because the aforementioned five acres had not been reclaimed. On these facts, DER's release of the bond cannot be construed to be an admission that reclamation of the five acres was unnecessary, or to carry any implication that the Order was ill-considered with respect to those five acres. In short, DER's release of the bond has no probative value whatsoever insofar as this appeal is concerned.

OHM also has offered the defense that it should not have been ordered to reclaim the five acres because the highwall on those five acres was expected to be the face and entry for an underground coal mine, which MMI

intended to operate. On June 27, 1975, MMI had received a permit authorizing MMI to operate an underground mine on the site. On June 9, 1977, DER extended this deep mine permit for one year at MMI's request; the letter extending the permit notified MMI that no further extensions could be granted and that the permit would expire by operation of law unless the deep mine was placed in operation by June 27, 1978.<sup>4</sup> The deep mine was not placed in operation by June 27, 1978; indeed it had not been put into operation as of April 13, 1982, for economic reasons. We are by no means convinced that the grant to MMI of a valid deep mine permit is any excuse for the failure to reclaim the intended deep mine site by OHM, an entirely different corporate entity. Even granting that this excuse may be legitimate, however, the fact is that after June 27, 1978, the permit had expired, without extension and without replacement by a new permit. Furthermore, because Leasure was simultaneously the president of MMI and OHM (Findings of Fact 4 and 61), OHM cannot claim convincingly that it was unaware the June 27, 1975 permit has lapsed by operation of law on June 27, 1978 because the mine had not been put into operation; DER's June 9, 1977 letter to Manor Mines was unmistakably

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<sup>4</sup> These just-stated facts about the underground coal mine are a recapitulation of Findings of Fact 56-58, which in turn are taken almost verbatim from a DER affidavit which has been admitted into this record as Bd.Ex.2. As explained in our previously mentioned companion adjudication (to this Adjudication) at Docket No. 82-005-G (Manor Mines, supra), that affidavit was filed with the Board after these consolidated hearings were closed, as an adjunct to DER's post-hearing brief in the MMI appeal at 82-005-G. Because MMI, OHM and Leasure have been represented by the same counsel throughout the entire proceedings in these appeals of MMI, OHM and Leasure (at Docket Nos. 82-005-G, 82-006-G and 82-007-G respectively), because neither MMI, OHM nor Leasure has objected to introduction of the aforementioned affidavit into the record of any of these three appeals, because OHM's and Leasure's post-hearing briefs (wherein objection could have been raised) were filed long after DER filed the aforementioned affidavit, and because the affidavit is fully backed up by documents from DER's files which were attached to the affidavit, we have seen no reason to exclude the affidavit from the record in either of these three appeals.



explicit in this regard. OHM's brief argues that the five acres should be left unreclaimed until OHM (or MMI) does get a valid new permit. But these five acres now have been in their presently unreclaimed state since before December 1979 (Finding of Fact 48). It is not reasonable for DER (and the public it serves) to wait indefinitely for reclamation of a previously mined area because the operator who did the mining hopes to do additional mining on the site at some unspecified future date.

We conclude that OHM does not have a valid defense to the terms of the Order, insofar as the five unreclaimed acres on the site of MP 615-6 and 6(A) are concerned. The terms of the Order relevant to these five acres were not an abuse of DER's discretion.

**D. MP 615-12, 12(A) and 12(A2)**

The issues before us for these mining permits are much the same as the issues a-d we discussed in connection with mining permits 615-4 and 4(A) [see section B supra]. OHM has not taken issue with the various deadline dates for reclamation of this site specified in the Order (Finding of Fact 75). DER offered no evidence tending to show that erosion and sedimentation controls on the site were unsatisfactory (Finding of Fact 76). The last sentence in Finding of Fact 64a, requiring that surface water on the site be controlled "so as to prevent accelerated soil erosion and sedimentation," is no more than a restatement of the general requirement--embodied in 25 Pa.Code §§102.2-102.4 (dating from 1977 at least, see section A supra)--that earth-moving activities must not create accelerated erosion and sedimentation. As discussed in section C supra, if that portion of the Order

embodied in<sup>5</sup> Finding of Fact 64a which requires backfilling was not an abuse of discretion, then Finding of Fact 64b--requiring that backfilling equipment necessary to complete the reclamation be operated steadily until such equipment no longer is needed for reclamation--was not an abuse of discretion. Conversely, if Finding of Fact 64a concerned with backfilling was an abuse of DER's discretion, then Finding of Fact 64b also was an abuse of discretion.

Therefore, referring once again to the issues a-c stated at the outset of section B, for the instant mining permits MP 615-12, 12(A) and 12(A2) we need only discuss whether OHM should have been ordered to:

- a(1) Backfill and grade to AOC; and
- a(2) Revegetate.

In particular, as to the requirement a(1), DER claims that backfilling and AOC grading have been unsatisfactory on two distinct portions of the site:

- (i) The open pit area mentioned in Findings of Fact 70-74.
- (ii) Various slopes mentioned in Findings of Fact 77-79.

#### The Open Pit Area

We will concentrate first on the open pit area. Leasure does not deny that the open pit area was unreclaimed as of February 7, 1985. Thus, much as in section C supra, absent some (hitherto unconsidered) valid defense, Findings of Fact 64a and 64b could not be an abuse of DER's discretion insofar as the open pit area is concerned. OHM's would-be defenses to the just stated conclusion are varied. OHM argues first that it should not

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<sup>5</sup> Henceforth we shall avoid repetition of the long and awkward phrase "that portion of the Order embodied in." In other words, henceforth mention of, e.g., Finding of Fact 64b means that reference is being made to that portion of the Order embodied in Finding of Fact 64b.

have been ordered to reclaim this open pit area because Ercole and other DER personnel "had concurred" (language of OHM post-hearing brief, p.39) in OHM's plan to use the unreclaimed open pit areas as a drying facility. Apparently, OHM is arguing here that DER's personnel's actions have estopped DER from ordering OHM to reclaim the open pit area. However, Ercole denies the concurrence attributed to him by OHM (Finding of Fact 72); moreover, Leaseure did not assert that any DER employees other than Ercole had endorsed his plan (Finding of Fact 82). Estoppel is an affirmative defense, in which the claimant of estoppel has the burden of proof. Pa. Rules of Civil Procedure Rule 1030; Melvin D. Reiner v. DER, Docket No. 81-133-G, 1982 EHB 1983 at 206. Consequently (see Finding of Fact 84), OHM has not met its burden of proving the underlying facts necessary to set forth an estoppel claim; of course, in so ruling we need not and do not express any opinion on the legal validity of this estoppel defense of OHM's, had the necessary facts been established.

OHM has admitted that it never submitted a formal application to use the open pit area as a drying facility, which DER could have formally denied or approved; such an application is required by the SMCRA, 52 P.S. §1396.4(a)(2)(I), since October 10, 1980 at least. OHM's estoppel defense having been ruled out, the existence of this SMCRA statutory requirement seemingly conclusively justified DER's insistence that the open pit area be reclaimed. OHM attempts to meet this inference from §1396.4(a)(2)(I) with the argument (OHM post-hearing brief, p.39) that by not advising OHM to submit the aforesaid §1396.4(a)(2)(I) application, DER waived the requirement. This is a frivolous argument, however, for which OHM cites no authority; OHM is presumed to know the law, and DER does not have any duty to act as OHM's counsel. Other defenses by OHM to DER's Order to reclaim the open pit area--e.g., that OHM's failure to reclaim the open pit area was a de minimis violation because

the area encompasses only one quarter of an acre (Finding of Fact 74)--are equally frivolous. Findings of Fact 64a and 64b were not an abuse of DER's discretion insofar as the open pit area on this site is concerned. For reasons explained in section A supra, the standards for successful reclamation of this open pit area will be the standards in effect when OHM informs DER that reclamation has been completed.

### The Slopes

On the other hand, DER's order that the slopes mentioned in Findings of Fact 70-74 be backfilled and regraded to AOC does seem to have been unjustified for essentially the same reasons as were stated in reaching the conclusion that requiring OHM to backfill and regrade the MP 615-4 and 4(A) site was an abuse of discretion (see section B supra). In view of Finding of Fact 68, taken together with Findings of Fact 12-15, we once again conclude that OHM's regrading of the slopes is to be measured against the pre-October 10, 1980 AOC standards, although--because OHM apparently has not filed a completion report for this site--the evidence that DER must have known before October 10, 1980 that OHM had completed regrading of this site is more equivocal than was the case for the MP 615-4 and 4(A) site of section B. Once again, DER's decision that the slopes on this site were not acceptably AOC was not based on observations of the pre-mining contour (Finding of Fact 33) or on quantitative measurements of the steepness of the slopes (Finding of Fact 32). Once again Leasure testified that the post-mining and pre-mining contours were "generally the same." Moreover, for this site OHM actually offered quantitative testimony, in the form of purportedly representative cross sections (along three selected lines) tending to show that the pre-mining and post-mining contours were approximately the same (Findings of Fact 86 and 87). Although the representativeness of these cross

sections hardly was established by the record OHM made, the fact remains that DER did not directly refute OHM's cross sections, nor offer pre-mining and post-mining contour comparisons of DER's choosing. Although DER argues that the backfilling has introduced impermissible benches, there was no testimony that these benches had been introduced on the regraded slopes; rather, DER was objecting to the flat areas on the tops of the slopes. DER did not show that those flat areas did not resemble the original contours atop the slopes; DER's own Ex.C48 does not rule out flat tops to the slopes, though Ex.C48 indicates the slopes should blend into the tops, e.e., should not meet the tops at sharp angles. We have pointed out supra, however, that the old SMCRA and Chapter 77 say nothing about blending. In sum, DER did not meet its burden of justifying Finding of Fact 64a, insofar as Finding of Fact 64a required OHM to backfill and regrade to AOC the already backfilled and regraded slopes on the site; for those slopes, DER's Order was an abuse of discretion. Correspondingly, for reasons explained earlier in this section D, Finding of Fact 64b also was an abuse of discretion insofar as the slopes (not the previously discussed open pit area) on this site are concerned.

#### Revegetation

We now turn, finally, to the revegetation requirement embodied in Finding of Fact 64a, summarized earlier in this section D as requirement a(2). Evidently this requirement was quite justified for the wholly unreclaimed open pit area. Furthermore, as of April 20, 1982, the slopes on the northern and eastern portion of the site had not been replanted, as OHM's own witness admitted (Finding of Fact 90). Therefore the revegetation requirement embodied in Finding of Fact 64a was not an abuse of discretion, for the slopes on this site as well as for the open pit area. As explained previously, the standards by which DER may judge whether there has been

successful completion of revegetation will be the standards in effect when OHM informs DER that revegetation has been completed, even if those standards are more rigorous than those in effect today or when MP 615-12(A) and 12(A2) were issued.

**E. MP 615-10 and 10(A)**

We begin our discussion of this site by considering that portion of the Order which is encompassed in Finding of Fact 91a. As on sites considered supra (see, e.g., section D), OHM has been ordered to:

- a(1) Backfill and grade to AOC; and
- a(2) Revegetate.

DER's evidence that the site required revegetation was furnished solely by DER's Mine Conservation Inspector Donald L. Wissinger. Wissinger testified that only "portions" of the site had been adequately revegetated, and that failure to revegetate was causing erosion. The only "real" evidence in support of Wissinger's testimony consists of four photographs of the site, one (Ex.C32) taken May 17, 1982 and three (Ex.C32-A, C32B, C32-C) taken in September 1981. There unquestionably are erosion ditches on the site; there are numerous apparently bare areas in the foreground of Ex.C32. Because Ex.C32 may have been taken not long after the cold weather had ended, and because there was no testimony about the amount of vegetative growth that should have been expected at the time, the significance of these bare areas in the foreground of Ex.C32 is dubious. On the other hand, OHM's engineer Cochran did admit that the site had not been entirely revegetated. All in all, therefore, we conclude that DER did meet its burden of showing additional revegetation of this site is required. As previously, the standards for successful completion of revegetation legitimately may be the standards in effect when OHM informs DER (as we hope it ultimately will

inform DER) that revegetation in compliance with the terms of Finding of Fact 91a has been completed. Hencefore, in this Adjudication, we assume that this last holding is understood and need not be repeated.

DER claims that OHM has failed to backfill and grade to AOC in the following locations:

(i) A depression in the center of the MP 615-10 area; and

(ii) The regraded slopes, especially along the toe of the western slopes on the site.

DER's testimony that the slopes had not been graded to AOC was similar to--and therefore had deficiencies similar to--DER's testimony concerning the AOC issue on sites already discussed supra (see sections B and D). OHM completed its coal removal activities on this site prior to 1976, and had filed completion reports before June 12, 1979. Therefore, much as in section B supra, we conclude that DER did not meet its burden of showing that the slopes on this site had not been graded to AOC. OHM did not attempt to bolster this conclusion with purportedly representative cross sections (as it did attempt for the slopes on MP 615-12, 12(A) and 12(A2), see section D), but the conclusion is bolstered for this instant site by Finding of Fact 102. DER correctly argues that it is not bound by a June 1979 inspection report, whose author did not testify; DER is entitled to rely preferably on Wissinger, who inspected the site after 1979 and did testify. The Board is empowered to entertain hearsay evidence, however. 25 Pa.Code §21.107(a). This evidence, to the effect that a DER inspector thought in 1979 that the site had been graded to AOC doesn't prove the site had been so graded, but--in the absence of quantitative comparisons of pre-mining and post-mining slopes--does support the thesis that Wissinger's decision that the slopes were not AOC was quite subjective and therefore questionable. We conclude that

except for the depression area discussed immediately infra, the backfilling and grading requirements in Findings of Fact 91a and 91c were an abuse of DER's discretion.

### The Depression Area

In the center of the MP 615-10 area there is a depression, clearly visible in Ex.C32. Wissinger estimated the dimensions of this depression as 5 ft. deep by 75 to 100 ft. long, and by 30 to 50 ft. wide; he stated his belief that the depression had been caused by sliding along the toe of the spoil. OHM did not rebut this testimony of Wissinger's. Depressions are forbidden under the definition of contouring in the "old" version of the SMCRA, quoted supra (see section A). Although there was no testimony that this depression could "accumulate water" (part of the aforesaid definition of contouring), any depression five feet deep and 2250 to 5000 square feet in area certainly seems capable of accumulating considerable water. Furthermore, although 2250 or even 5000 square feet is much less than one percent of the 33 acres included under MP 615-10 and 10(A) [we take judicial notice of the fact that an acre is about 44,000 sq. ft.], we are and always have been very reluctant to hold that any unreclaimed area possibly capable of causing environmental damage is de minimis, i.e., not important enough to warrant a reclamation order. In King Coal Co. v. DER, Docket No. 83-112-G, 1985 EHB 104, we refused to hold that an unreclaimed 1000 square foot area out of 10 acres affected necessarily was de minimis; 1000 square feet is a smaller fraction of 10 acres than 5000 square feet in 33 acres. OHM argues that even if this depression area is not regarded as de minimis, regrading should not be required because the regrading will damage trees planted by the landowner of the area covered by these mining permits. This argument is not to the point, however; if OHM's original failure to properly reclaim means



that OHM now will have to indemnify the landowner for damages produced during OHM's remedial reclamation, that is a penalty OHM has brought on itself. DER is entitled to demand and obtain compliance with reclamation requirements. For all the foregoing reasons we hold that insofar as the depression is concerned, DER's order requiring regrading (and of course ultimately replanting of this area) was not an abuse of discretion. Since some regrading will be necessary for this depression area, Finding of Fact 91c also was not an abuse of discretion, for reasons explained at the outset of section D, supra.

We turn to Finding of Fact 91b, which is identical with Finding of Fact 16b, discussed in section B supra. There we ruled that Finding of Fact 16b was an abuse of discretion, because no new backfilling was required on the site covered by MP 615-4 and 4(A), and because no erosion and sedimentation problems had been demonstrated on that site. In the instant MP 615-10 and 10(A) site, some regrading will be required (as explained in the immediately preceding paragraph); furthermore, erosion is occurring on the site (Finding of Fact 95). OHM argues that this erosion need not be "accelerated" erosion, but the Board disagrees; we do not believe that gullies of the sort shown in, e.g., Ex.C32-B, are "natural", i.e., are of the sort which would have been expected in the absence of OHM's mining activities. As was the case for Finding of Fact 64a (recall the remarks at the outset of section D supra), the language of Finding of Fact 91b is quite consistent with the regulations in 25 Pa.Code Chapter 102. We conclude that Finding of Fact 91b was not an abuse of DER's discretion.

This concludes our discussion of the site covered by MP 615-10 and 10(A).

**F. MP 615-22**

OHM's post-hearing brief did not specifically address DER's contentions concerning this site. However, the following discussion of Findings of Fact 107a-107e has taken into account OHM's general arguments--reiterated throughout its post-hearing brief and already examined in this Adjudication in connection with sites discussed supra--re retrospectivity and the criteria for AOC (see section A, supra).

The almost totally uncontested evidence concerning this site (Findings of Fact 108-120) seemingly fully justifies Findings of Fact 107a-107e. OHM did dispute the need for E&S controls, but the photographic evidence of erosion on the site is unmistakable (Finding of Fact 120). In short, just as discussed in section C supra, we must conclude that Findings of Fact 107a-107e were not an abuse of DER's discretion unless OHM has a (not yet considered) valid defense to those portions of the Order. The defense offered by OHM at the hearing was that the bridge originally used by OHM to cross Mardis Run had been washed away during a flood in July 1977, and that a replacement bridge built by OHM had been torn down under order of DER. Therefore, OHM argues, it was cut off from the mine site through no fault of its own, and should not be held responsible for not having completed reclamation. Put this way, OHM seems to be arguing that it was prevented from completing reclamation by "force majeure" although OHM never made this legal basis explicit. Elsewhere, OHM appeals to argue that because DER ordered the replacement bridge torn down, DER was estopped from issuing Findings of Fact 107a-107e.

The foregoing defense was not addressed in OHM's post-hearing brief, and therefore can be deemed waived. Kwalwasser, supra (see the Introduction to this Adjudication, supra). Whether waived or not, however, the defense is meritless. OHM did not demonstrate (as it was its burden to do) that no

acceptable bridge could be built across Mardis Run. OHM merely testified that it had built a bridge which DER had ordered OHM to remove as hazardous. Moreover, and most tellingly, OHM admitted that its failure to build another bridge had involved considerations pertinent to a pending lawsuit against OHM. Thus, OHM's inability to reach the mine after the original bridge was washed away cannot be ascribed either to "force majeure" or to DER. The Findings of Fact 107a-107e were fully within DER's discretion.

**G.. MP 615-35**

In view of Findings of Fact 127a and 127b, the backfilling and grading requirements of the portions of the Order encompassed in Findings of Fact 126a and 126c no longer are before us. Indeed, DER's post-hearing brief's contentions address only the revegetation requirement in Finding of Fact 126a and the E&S control requirement in Finding of Fact 126b. OHM's post-hearing brief did not address these DER contentions; in fact, OHM's post-hearing brief did not discuss MP 615-35 at all. Thus our remarks in the very first paragraph of section F, supra, concerning our adjudication of the disputed issues connected with the MP 615-22 site, are equally pertinent to our adjudication of DER's contentions about the instant MP 615-35 site.

Findings of Fact 128-130 suffice to justify the revegetation and E&S control requirements in Findings of Fact 126a and 126b for the western portion of the site. OHM offered no credible defense to those portions of the Order. We conclude, much as in section F, supra, that--insofar as the western portion of the site is concerned--the revegetation and E&S control requirements encompassed in Findings of Fact 126a and 126b were not an abuse of DER's discretion.

**H. MP 615-17, 17(A3), 17(A4)1, 17(A6), 117(A7) and 17(A8)**

Findings of Fact 137-145 fully justify those portions of the Order

encompassed in Finding of Fact 131a-131d, except for the requirement (in Finding of Fact 131c) that E&S controls be installed by February 1, 1982. In view of Finding of Fact 139, installation of E&S controls should not have been ordered, although repair of previous erosion damage (see Finding of Fact 140) was required. Therefore, as discussed in previous sections of this Adjudication (e.g., section C, supra), with the exception of the E&S controls installation requirement in Finding of Fact 131c those portions of the Order encompassed in Findings of Fact 131a-131d were not an abuse of DER's discretion unless OHM has a (not yet considered) valid defense to the Order.

OHM has offered two defenses: it claims that it is unable to comply with Finding of Fact 131a through no fault of its own, and it claims that Findings of Fact 131b and 131d were an abuse of DER's discretion because those portions of the Order would prevent OHM from mining limestone on the site. OHM has not offered a defense to Finding of Fact 131c, which for the purposes of this Adjudication has been adequately discussed in the preceding paragraph. We first examine OHM's defense to Findings of Fact 131b and 131d.

#### OHM's Limestone Mining Application

OHM's defense to Findings of Fact 131b and 131d is comprised in the argument that it should not have been required to backfill the unreclaimed areas of this site because such backfilling would bury limestone deposits which DER knew OHM intended to mine. OHM had the right to mine those limestone deposits (Findings of Fact 146-149), and did file an application to mine those deposits on April 9, 1981, before the Order was issued (Finding of Fact 150). That application was denied by DER on March 26, 1982, and the denial was appealed to the Board by OHM at Docket No. 82-106-G (Findings of Fact 151 and 152). Very recently, after a course of events summarized in Findings of Fact 153-160, the Board has dismissed this 82-106-G appeal as

moot, but without ruling on the actual merits of OHM's application to mine limestone and DER's rejection thereof.<sup>6</sup>

On the record before the Board, therefore, DER issued Findings of Fact 131b and 131d even though DER knew that OHM had applied to mine the limestone in an area underlying the entire site covered by MP 615-17 and amendments (Finding of Fact 163). Although DER did deny the limestone mining application three months after the Order was issued, and this denial eventually was sustained by the Board, we believe the record justifies the finding that OHM's application to mine limestone was not frivolous, i.e., was not undertaken merely to provide OHM with an excuse for not completing reclamation of the areas which had been affected under MDP 3474SM10. The question before us is whether the existence of this non-frivolous but ultimately denied OHM application should have led DER to refrain from issuing Findings of Fact 131b and 131d.

The answer to this question is not obvious and surely is very dependent on the specific facts of this appeal for this site. The standard conditions which accompanied the coal mining permits OHM received for this site state: "Backfilling shall be done concurrently with the progress of the stripping operation to the highest degree possible." (Ex.C13, Standard Condition 15) OHM has admitted that the site is not reclaimed, and it

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<sup>6</sup> Findings of Fact 153-160 have been taken from the record made in the consolidated appeal at Docket No. 84-076-G (see our Opinion and Order of September 24, 1986 at that docket number). Although some of those Findings are matters of public record, and others probably can be taken as established in this litigation by issue preclusion (collateral estoppel by the judgment at 84-076-G of litigation between the same parties as the instant appeal, even though our final judgment, dismissal as moot, did not reach the merits of all disputed issues), we need not pursue these justifications for Findings of Fact 153-160; these Findings have been included herein to bring the reader up to date, but have not been relied on in the instant Adjudication. We are entitled to take judicial notice of Findings of Fact 152 and 161, on which we have relied.

appears that the failure to reclaim includes at least 20 acres (Findings of Fact 141 and 167). OHM completed its coal removal activities at this site in November, 1979 (Finding of Fact 136). On these just-stated facts, it scarcely can be maintained that OHM performed its backfilling "concurrently with the progress of the stripping operation." But this last phrase from Special Condition 15 is qualified by the added clause "to the highest degree possible." The word "possible" obviously must be intended to be read as "possible unless clearly impractical," because with sufficient dedication of men, equipment and money any degree of reclamation always is "possible." Thus the question before us can be reduced to the more limited question: "Should DER have considered it "practical" for OHM to reclaim the unreclaimed areas of this site while OHM was awaiting action on its limestone mining application?"

Ercole's testimony at the supersedeas hearing clearly manifests his belief that reclamation of areas which soon would be redisturbed by mining under a new permit should not be regarded as "practical" (Findings of Fact 164-167). Ercole's testimony also makes it clear that if the question of whether to issue the Order had been put to him, he would not have approved that portion of the Order which required OHM to backfill and revegetate this site. At the time he testified, Ercole was Director of DER's Bureau of Mining and Reclamation, a very senior DER position (Finding of Fact 12). Thus Ercole's opinions on the question before us are entitled to very great weight. On the other hand, we are not bound by Ercole's opinions; we--not Ercole--have the responsibility of deciding whether DER abused its discretion in issuing Findings of Fact 131b and 131d.

On the instant facts we are inclined to agree with Ercole's implicit opinion (see Findings of Fact 164 and 165) that DER should have permitted OHM

to defer commencing reclamation on this site for some reasonable amount of time, pending action on OHM's limestone mining application. How long OHM should have been allowed to defer reclamation depends on when OHM should have been expected to regard the limestone mining application as denied. We do not agree with Ercole that OHM should have been allowed to defer commencing reclamation until all OHM's appeals of DER's denial of OHM's limestone mining application had been exhausted. OHM's appeal of DER's March 28, 1982 denial of OHM's original limestone mining application was not dismissed by this Board until November 20, 1986 (Finding of Fact 161), and this dismissal (because it didn't reach the actual merits of the limestone mining application) forecloses neither renewed application and appeals of DER denials thereof, nor appeals of our rulings to the Commonwealth Court and beyond. OHM could not reasonably expect that it would be allowed to leave this site unreclaimed essentially indefinitely, certainly for years and years, while appeals of DER refusals to allow limestone mining on the site slowly wended their ways through this Board and the courts. OHM--having submitted its limestone mining application to DER more than eight months before the order was issued (Finding of Fact 150)--reasonably could expect that the time constraints in the Order would be sufficiently flexible that OHM, without fear of penalty, could delay embarking on reclamation until DER did act on the limestone mining application. Once DER had denied the limestone mining application, however, OHM's obligation to reclaim without delay must be considered to have begun. OHM was entitled to appeal, of course, and to pursue its appeals up to the highest courts. But in so pursuing its appeals, OHM must regard itself at risk of penalties for having failed to obey a lawful DER order, should OHM's appeals be dismissed. The Legislature has instructed us not to equate an appeal to a supersedeas, 71

P.S. §510-21(d). As we have previously stated, quoting the Pennsylvania Supreme Court, litigation should be "carried out on the polluter's time, not the public's." DER v. Bethlehem Steel Corporation, 469 Pa.578, 367 A.2d 222 (1976); William Fiore v. DER, Docket No. 83-160-G, 1983 EHB 528.

Our conclusion from the foregoing discussion is that DER legitimately could issue Findings of Fact 131b and 131d before acting on OHM's limestone mining application, if the time constraints in those Findings of Fact were sufficiently flexible that OHM, without fear of penalties, could delay embarking on reclamation until DER did act on the limestone mining application. Finding of Fact 131d required OHM to install its backfilling equipment on the site no later than April 15, 1983, more than a year after DER's March 26, 1982 denial of OHM's original limestone mining application. Finding of Fact 131b required reclamation to be completed no later than August 15, 1983, more than 16 months after the application was denied. OHM has not contended that these just-stated time periods were unreasonably short, and there is nothing on the record to support such a contention. Indeed, the time periods for compliance specified in Findings of Fact 131b and 131d are much longer than were specified, e.g., in Findings of Fact 16a and 16c or Findings of Fact 91a and 91c; moreover, OHM did not object to Finding of Fact 91c, wherein OHM was given only one week to install backfilling equipment.

Therefore we reject OHM's limestone mining defense, and rule that Findings of Fact 131b and 131d were not an abuse of DER's discretion. We reiterate that this ruling is very fact dependent, and stress the following additional points. First, the preceding discussion--wherein we have been willing to seriously review Findings of Fact 131b and 131d in the light of OHM's intent to mine limestone--has been consistent with our earlier



discussions in sections C and D supra, of similar OHM intents. In section C, because OHM should have known its deep mine permit had expired, we refused to seriously review the terms of the Order requiring reclamation of five unreclaimed acres in the light of OHM's stated intent to use those acres for a deep mine entry. In section D, because OHM never had submitted an application, we refused to seriously review the terms of the Order requiring OHM to reclaim an open pit in the light of OHM's stated intent to use the open pit area as a drying facility. In the case of Findings of Fact 131b and 131d, OHM--some eight months before the Order was issued--had filed a non-frivolous application to mine limestone, on which DER had not yet acted. Second, we by no means necessarily would have concluded that Findings of Fact 131b and 131d were an abuse of DER's discretion even if OHM's limestone mining application had been approved, not disapproved, on March 26, 1982. OHM completed its coal mining activities in November 1979, but did not file its limestone mining application until April 1981. In the meantime at least 20 acres on this site had been left unreclaimed. As we have remarked, OHM was required to backfill concurrently to the highest degree possible unless clearly impractical. It surely is arguable that these just-stated facts are inconsistent with quite practical concurrent backfilling, even recognizing OHM's reasonable desire to avoid reclaiming areas it later would have to redisturb. We may ask, for example, why OHM did not submit a limestone mining application long before it had completed its coal mining activities on the site, so that OHM's receipt of a limestone mining permit would have enabled backfilling to proceed concurrently after simultaneous removal of coal and limestone; after all, OHM had secured its limestone mining rights as early as 1974 (Finding of Fact 168). We have not had to rule on such issues, however, since DER refused OHM's limestone mining application.

We now finally can return to OHM's defense to Finding of Fact 131a. OHM argues that it cannot comply with Finding of Fact 131a because OHM no longer has a coal mining license, whereas extraction of coal from the stockpile would be coal mining under either the old or new SMCRA (see the definition of "surface mining" in the old or new versions of 52 P.S. §1396.3). The record does not indicate when OHM lost its surface mining license, but in any event the coal can be buried on the site without violating the SMCRA, as OHM admits (post-hearing brief, p.85). Thus OHM's claim that it cannot lawfully comply with Finding of Fact 131a must be rejected on these grounds alone. OHM further argues, however, that since the coal already has been mined and now resides in a stockpile, burying the coal on the site would be more environmentally hazardous than merely removing it from the site, so that insofar as DER's Order is forcing OHM to bury the stockpiled coal, that Order is an abuse of discretion. Perhaps so, if OHM's loss of its license really is preventing OHM from lawfully removing the stockpiled coal from the site, but we do not so read the facts of this appeal. In the first place, it is not clear that the SMCRA is an absolute bar to OHM's removal of the coal stockpile. The definition of surface mining in 52 P.S. §1396.3 also includes surface activities connected with reclamation of the site; OHM has not maintained that its loss of its surface mining license prevents it from reclaiming this site and the other sites which are the subject of this Adjudication. As a matter of fact, the Commonwealth Court specifically has ruled that under the SMCRA loss of a surface mining license does not make reclamation efforts unlawful. Morcoal Co. v. DER, 479 A.2d 1303 (1983). Although Morcoal does not speak precisely to the issue of removing a coal stockpile, we believe the logic of Morcoal clearly implies that the coal stockpile removal by OHM would be a reasonable

way for OHM--the former possessor of a coal mining license--to comply with the terms of Finding of Fact 131a (which seeks to ensure environmentally sound reclamation of the site), unless DER explicitly has refused to give OHM permission to effect such removal. We recognize DER's interest in totally precluding the unlicensed mining of coal, and so would agree that the SMCRA legitimately might require OHM, now no longer the possessor of a surface mining license, to secure DER's permission to remove the stockpile. Whether DER's refusal to give OHM such permission would have been an abuse of DER's discretion is not a matter we need rule on, however. There is nothing in the record to indicate that DER refused such permission, or has otherwise forbidden OHM to remove the stockpile from the site. Nor do we read the language of Finding of Fact 131a as requiring OHM to dispose of the stockpile on the site; Finding of Fact 131a merely requires OHM to comply with applicable regulations for on-site disposal if OHM disposes of the stockpile on site. Therefore, we reject this just-discussed defense of OHM's to Finding of Fact 131a, and rule that Finding of Fact 131a was not an abuse of DER's discretion.

The foregoing completes our discussion of Findings of Fact 131a-131d. Before concluding this section of this Adjudication, however, we still must rule on the propriety of Order II as applied to this site (see Finding of Fact 133). From the analysis, supra, of the propriety of Findings of Fact 131a-131d, it is evident that--except for the portion of Order II requiring compliance with the E&S installation clause in Finding of Fact 131c--the portion of Order II requiring OHM to comply with Findings of Fact 131a-131d was not an abuse of discretion; we so rule without further discussion. Order II included a cessation order, however, directing OHM to cease mining on the site. Because OHM long since had ceased mining on the

site (Finding of Fact 136), this cessation order was gratuitous and could result in the mandatory imposition of penalties on OHM under circumstances wherein--in our opinion--the Legislature did not intend mandatory penalties, since there was no mining activity for OHM to cease. 52 P.S. §1396.22.

Black Fox Mining and Development Corp. v. DER, Docket No. 84-114-G, 1985 EHB 172. Insofar as it pertained to this site, the cessation order portion of Order II was an abuse of discretion.

#### I MP 615-42

In view of Finding of Fact 176, we no longer are concerned with the propriety of Findings of Fact 172e and 172f. OHM's post-hearing brief does not address Finding of Fact 172a, whose propriety is quite justified by Finding of Fact 184. OHM argues that Findings of Fact 182 and 183 do not support Finding of Fact 181. In the abstract, this argument of OHM's is correct. At the time the Order was issued, however, the regulation 25 Pa.Code §77.92(f)(3) was effective; this regulation defined all rider coal seams to be acid-forming materials. Irrespective of Findings of Fact 182 and 183, therefore, DER had to find that the exposed rider material in the pit was acid-forming (Findings of Fact 180 and 181). Although 25 Pa.Code §§77.92(f)(3) and 99.36 now have been rescinded, the presently effective regulations also require that exposed coal seams be treated as if acid-forming, and indeed in essentially the same fashion as Finding of Fact 172b requires. 25 Pa.Code §87.145. We conclude that Finding of Fact 172b was not an abuse of discretion. As for Finding of Fact 172c, it clearly is justified by Findings of Fact 177 and 178.

We turn, therefore, to Finding of Fact 172d. Based on our discussion of the reclamation requirement in section I, supra, we may infer that in the absence of a defense, Finding of Fact 172d is justified by our

Findings, notably Findings of Fact 175 and 179. OHM's defense for this site is the same limestone mining defense as was thoroughly examined in section H. By the reasoning in section H, therefore, we conclude that Finding of Fact 172d was not an abuse of discretion, unless the April 15, 1983 and May 15, 1983 deadline dates specified in Finding of Fact 172c (for completing respectively the backfilling and revegetation of this site) were too short. OHM has not argued that April 15, 1983, more than a year after the limestone mining application was denied on March 26, 1982, was too soon to complete backfilling of this site. Judging by the other deadline dates the Order allowed for backfilling, it does not seem to us that April 15, 1983 is unduly soon for this site, which apparently requires rather less backfilling than the site considered in section H, where August 15, 1983 was the deadline date (compare Findings of Fact 168 and 175). The terms of the Order typically allow a month for completion of revegetation once backfilling and regrading has been completed (see, e.g., Findings of Fact 16a, 91a and 107c); OHM has not objected to this typical interval. We hold that Finding of Fact 172d was not an abuse of DER's discretion.

Before terminating our discussion of this site, there again remains Order II to be considered. As in section I, supra, we immediately can rule that insofar as Order II required compliance with the terms of Findings of Fact 172a-172d, Order II was not an abuse of discretion; of course, we need not and do not rule on the portions of Order II requiring compliance with Findings of Fact 172e and 172f, which no longer are in dispute and on whose propriety we therefore have not ruled. Insofar as Order II required cessation of mining on this site, it was an abuse of discretion.

J. MP 615-44 and 44(A)

In view of finding of Fact 190, we need not rule on the propriety of

Finding of Fact 185b. Findings of Fact 188 and 189 establish the propriety of Finding of Fact 185a. Findings of Fact 193-195 establish the propriety of Finding of Fact 185d. Findings of Fact 191 and 192 establish the need for reclamation of this site, so that the requirements imposed by Findings of Fact 185c and 185e were not an abuse of DER's discretion, excepting once again (see sections H and I, supra) the possibility that the time limits imposed in those Findings of Fact were unreasonable (recall Findings of Fact 150, 151, 162 and 163). As in sections H and I, supra, though OHM has argued that DER should not have issued Findings of Fact 185c and 185e at all, OHM has not specifically addressed the question of whether the compliance time deadlines in those Findings of Fact were unreasonable. Therefore, we could regard this specific issue as having been waived. Kwalwasser, supra; Equipment Finance, supra. However, because the whole issue under present discussion--namely when OHM should have been required to commence compliance with those terms of the Order involving sites pertinent to OHM's limestone mining application--largely is a question of first impression (as our lengthy discussion in section H supra has indicated), in sections H and I we have dealt with the time limits in Findings of Fact 131b, 131d and 172d on their merits. We see no reason to depart from this precedent for Findings of Fact 185c and 185e. So proceeding, we find that the seven day deadline set in Finding of Fact 185e was an abuse of discretion. Once we have decided (see section H supra) that OHM should have been permitted to defer compliance with the Order at least until DER had ruled on OHM's limestone mining application (i.e., at least until March 26, 1982 when DER originally rejected the application), it clearly was an abuse of discretion for DER to require the placing of backfilling equipment on the site within seven days of receipt of the Order, a deadline which actually preceded March 26, 1982 by nearly three

months. Having so ruled, we may substitute our discretion for DER's. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975). For reasons further elaborated below, we believe and rule that the seven day deadline in Finding of Fact 185e should have been from the day OHM learned that DER had rejected the limestone mining application (i.e., from about March 26, 1982).

Voluminous though this record is, it still is difficult to justify Findings of Fact from which the reasonableness or unreasonableness of the August 15, 1982 time limit for backfilling and grading set in Finding of Fact 185c can be inferred. We note, however, that the same deadline date was set in Finding of Fact 16a, for backfilling and grading 29.4 acres affected under MP 615-4 and 615-4(A) (Findings of Fact 23 and 199). It appears from the record that--as DER has interpreted the requirement of grading to AOC--OHM would have had to regrade the major portion of those 29.4 acres (Finding of Fact 200). On the instant MP 615-44 and 615-44(A) site probably not more than about 30 acres require backfilling and regrading (Finding of Fact 198). OHM, though objecting vigorously to the requirement that it regrade the MP 615-4 and 615-4(A) site (recall section B, supra), did not challenge the August 15, 1982 time limit for regrading set in Finding of Fact 16a. Although the limestone mining application issue did not bear on the MP 615-4 and 615-4(A) site, so that OHM reasonably could have been expected to commence complying with Finding of Fact 16a immediately after December 23, 1981 (when the Order was issued), the record and common experience suggests that regrading of any site will proceed much more slowly during the winter months than during the months from April to August (Finding of Fact 202). Weighing the Findings summarized in this paragraph, we conclude it is more probable than not that the backfilling and reclamation required by Finding of Fact 185c could be accomplished between March 26, 1982 and August 15, 1982. We already have

ruled (see section I, supra) that after completion of backfilling and regrading a month is a reasonable deadline for revegetation. In other words, Finding of Fact 185c was not an abuse of discretion. We add that in so ruling (and in substituting our discretion for DER's as to the deadline date for complying with Finding of Fact 185e) we are assuming that OHM reasonably could be expected to place the necessary backfilling equipment on this MP 615-44 and 615-44(A) site within a week or so of receipt of DER's March 26, 1982 rejection of the limestone mining application. This assumption seems reasonable because, as remarked previously (in section H, supra), OHM did not object to the seven day time limit from receipt of the Order specified in Finding of Fact 91c, which Finding of Fact has been ruled to have been within DER's discretion (recall section E, supra).

Our rulings on the terms of Order II pertinent to this MP 615-44 and 615-44(A) now follow as previously (sections H and I, supra). Since Finding of Fact 185b no longer is at issue, we can ignore that portion of Order II requiring compliance with Finding of Fact 185b. If Order II had required compliance with Finding of Fact 185e by its specified deadline date of seven days after receipt of the December 23, 1981 Order, Order II would have been an abuse of discretion in that regard, for reasons amply discussed supra. Order II was issued on March 5, 1984, however (Finding of Fact 132). By that time, indeed by any time within a week or so after March 26, 1982, compliance with the backfilling equipment requirement of Finding of Fact 185e reasonably could have been expected by DER, for reasons explained at the end of the preceding paragraph. Therefore, since Order II merely required immediate placement of backfilling equipment on the site, Order II was not an abuse of discretion. The cessation order portion of Order II pertinent to this site was an abuse of discretion.



#### K. Special Reclamation Project 445

OHM's post-hearing brief has not addressed this site. In view of Findings of Fact 205 and 206, the only remaining issue at this site is the propriety of the revegetation requirement in Finding of Fact 203a. In view of Finding of Fact 207, as well as the fact that the site had not yet been fully backfilled and graded at the time of the supersedeas hearings (Finding of Fact 208), DER cannot be faulted for having required OHM to revegetate this site. As explained in section J, supra, allowing a month for revegetation after the completion of backfilling and grading is reasonable. Thus, recalling Finding of Fact 209, it is clear that the revegetation requirement in Finding of Fact 203a was not an abuse of DER's discretion.

This completes our discussion of whether or not DER abused its discretion in issuing the Order and in issuing Order II, for all the sites which are the subject of this Adjudication, namely those sites which remained at issue after the filing of the stipulation admitted into evidence as Board Exhibit 14.

#### CONCLUSIONS OF LAW

1. Our adjudication of this matter is to determine whether the Order was an abuse of DER's discretion or an arbitrary exercise of its duties or functions.
2. The burden of showing that the Order was not an abuse of discretion falls on DER.
3. Conclusions of Law 1 and 2, supra, apply also to the Order II.
4. A permittee receives no guarantee from DER that the statutes and regulations in effect when the permit was granted will not be amended (or supplemented by altogether new statutes and regulations) before operations under the permit are completed.

5. DER's evaluation of any distinct component of OHM's reclamation activities at a particular site (e.g., backfilling to AOC at that site) should be based on the statutes and regulations in effect at the time DER is made aware that the aforesaid component of OHM's reclamation activities has been completed to OHM's (though of course not necessarily to DER's) satisfaction.

6. A permittee who fails to reclaim promptly risks the possibility that the reclamation standards will be made more rigorous by the Legislature and/or the Environmental Quality Board, after experience has shown that the former statutory and/or regulatory standards were insufficient to guarantee satisfactory reclamation.

7. DER is permitted to adopt enforcement policies in the absence of regulations, provided DER can justify its adoption of those policies.

8. DER can adopt and apply enforcement policies which go beyond the regulations in force at the time, provided those new enforcement policies are not obviously proscribed by existing statutory and/or regulatory language, and provided DER can meet its burden of justifying those policies.

9. The filing of a completion report is the natural--and ordinarily the only reliable-- signal to DER that a surface mine operator has completed backfilling to the mine operator's satisfaction; DER is not expected to mind read the fact that the mine operator considers his backfilling obligations completed.

10. Under the very special facts of this appeal, however, the decision as to whether OHM had satisfactorily backfilled the MP 615-4 and 615-4(A) site to AOC must be based on the statutes, regulations and (if justifiable) DER policies pertinent to AOC backfilling which were in effect prior to October 10, 1980, even though the completion reports for this site

were not filed until after December 9, 1980.

11. Within the confines imposed by the Statutory Construction Act, there is no reasonable construction of the language of the old SMCRA (the version in effect before October 10, 1980) which can imply that post-mining slope grades approximately equal to the pre-mining grades would be in violation of old SMCRA contouring requirements.

12. For the MP 615-4 and 615-4(A) site, DER did not meet its burden of justifying AOC policies which went beyond the statutory and regulatory language concerning contouring requirements which were in effect prior to October 10, 1980.

13. Insofar as the Order required OHM to perform new backfilling and grading on the MP 615-4 and 615-4(A) site, the Order was an abuse of DER's discretion.

14. The revegetation requirement stated in Finding of Fact 16a was not an abuse of DER's discretion, but Findings of Fact 16b and 16c were an abuse of DER's discretion.

15. DER's release of the bonds on the MP 615-6 and 6(A) site, an action which DER later notified OHM had been taken in error (according to DER), cannot be construed to be an admission that it was unnecessary to reclaim the five acres still in dispute on this site.

16. It is not reasonable for DER to wait indefinitely for reclamation of a previously mined area because the operator who did the mining hopes to do additional mining on the site at some unspecified future date.

17. For the still unreclaimed five acre area on MP 615-6 and 6(A), the terms of the Order were not an abuse of DER's discretion.

18. Estoppel is an affirmative defense, in which the claimant of

estoppel has the burden of proof.

19. On the facts of this appeal, OHM has not met its burden of showing the underlying facts needed to put forth an estoppel defense to the requirements stated in Findings of Fact 64a and 64b, for the one quarter acre open pit area mentioned in Findings of Fact 70-74.

20. Conclusion of Law 19 carries no implication as to the legal validity of OHM's proffered estoppel defense, had the necessary facts needed to put forth the estoppel defense been established.

21. For the aforementioned one quarter acre open pit area on the site covered by MP 615-12 and Amendments, the Order was not an abuse of discretion.

22. For the remaining portion of the site covered by MP 615-12 and Amendments, the Order was an abuse of discretion insofar as Finding of Fact 64b and the backfilling and grading requirements in Finding of Fact 64a are concerned.

23. For the same remaining portion of the MP 615-12 and Amendments site, the revegetation requirement in Finding of Fact 64a was not an abuse of discretion.

24. DER met its burden of showing that additional revegetation of the MP 615-10 and 10(A) site is required.

25. Except for an area of depression in the center of the MP 615-10 and 10(A) site, the backfilling and grading requirements in Findings of Fact 91a and 91c were an abuse of discretion.

26. For the aforementioned area of depression on the MP 615-10 and 10(A) site, the backfilling and grading requirements in Findings of Fact 91a and 91c were not an abuse of discretion.

27. Finding of Fact 91b was not an abuse of discretion.

28. An improperly reclaimed area of 2250 or even 5000 square feet in the center of a 33 acre site is not a de minimis failure to fully meet reclamation requirements.

29. DER's order to regrade the aforementioned 2250-5000 square feet area is not an abuse of discretion even though the regrading will force OHM to damage trees planted on the site by the landowner.

30. DER's order requiring OHM to tear down an allegedly hazardous bridge across Mardis Run did not estop DER from ordering reclamation of the MP 615-22 site even though OHM, in order to gain access to this site, would have to cross Mardis Run.

31. A party's contentions made during the hearing on the merits, but not addressed in the party's post-hearing brief, may be deemed waived.

32. The requirements in Findings of Fact 107a-107e were not an abuse of DER's discretion.

33. For the western portion of the MP 615-35 site, the revegetation requirement in Finding of Fact 136a was not an abuse of DER's discretion.

34. For the western portion of the MP 615-35 site, Finding of Fact 126b was not an abuse of DER's discretion.

35. OHM's application to mine limestone on the sites encompassed by MP 615-17 and Amendments, MP 615-42, 615-44 and 615-44(A) was not frivolous.

36. Standard Condition 15 of OHM's permit, reading "Backfilling shall be done concurrently with the progress of the stripping operation to the highest degree possible" must be interpreted as requiring concurrent backfilling to the highest degree possible unless obviously "impractical."

37. It is not "practical" for a mine operator to reclaim an area he reasonably expects to re-mine in the reasonably near future.

38. Since OHM's limestone mining application was filed well in

advance of (specifically, eight months before) DER's order to reclaim the sites mentioned in Conclusion of Law 35, DER's Order should have allowed OHM to delay commencing reclamation until DER had acted on OHM's limestone mining application.

39. It is not reasonable to allow OHM to delay commencing reclamation until there has been final action by this Board and the courts on OHM's appeal of DER's rejection of OHM's limestone mining application.

40. Once DER had denied the limestone mining application, OHM's obligation to reclaim without delay began.

41. The requirements in Findings of Fact 131b and 131d, including the deadline dates therein, were not an abuse of DER's discretion, but the installation of E&S controls requirement in Finding of Fact 131c was an abuse of discretion.

42. Under the logic of Morcoal, supra, removing the coal stockpile on the MP 615-17 and Amendments site is a reasonable way for OHM to comply with Finding of Fact 131a, assuming OHM--which no longer possesses a coal mining license--has DER's permission to effectuate such removal.

43. Because OHM no longer has a coal mining license, under the SMCRA it is reasonable for DER to require OHM to secure DER's permission to remove the aforementioned coal stockpile to some off-site location.

44. Because there is nothing on the record to show DER refused such permission, Finding of Fact 131a was not an abuse of DER's discretion.

45. For the various sites encompassed under MP 615-17 and Amendments, MP 615-42, MP 615-44 and MP 615-44(A), DER's March 5, 1984 compliance order (Order II) requiring compliance with the terms of the December 23, 1981 Order was not an abuse of discretion, except for the portion of Order II requiring compliance with the E&S installation

requirement stated in Finding of Fact 131c, and except for portions of Order II requiring compliance with portions of the Order which no longer are at issue, on whose merits we have not ruled.

46. This Adjudication has not ruled on the merits of portions of Order II requiring compliance with portions of the Order which no longer are at issue.

47. It was an abuse of DER's discretion to issue the portion of Order II requiring cessation of mining on sites where mining had long since ceased.

48. Under the regulations in effect at the time, the rider coal seam on MP 615-42 was an acid-forming material by definition; the presently effective regulations also require that exposed coal seams be treated as if acid-forming.

49. Findings of Fact 172a-172d were not an abuse of DER's discretion.

50. Findings of Fact 185a, 185c and 185d were not an abuse of DER's discretion.

51. It was an abuse of discretion for DER to require OHM to install backfilling equipment on the MP 615-44 and 44(A) site within seven days of receipt of the December 23, 1981 Order, long before DER was to rule on OHM's limestone mining application.

52. When DER has abused its discretion, the Board may substitute its discretion for DER's.

53. The seven day deadline in Finding of Fact 185e should have been from the day OHM learned that DER had rejected OHM's limestone mining application.

54. The revegetation requirement in Finding of Fact 203a was not an

abuse of DER's discretion.

55. This adjudication of OHM's appeal also serves as an adjudication of those contentions of Leasure's 82-007-G appeal which are identical with those contentions of OHM's adjudicated herein.

56. A statute does not operate retrospectively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment.

#### ORDER

WHEREFORE, this 24th day of December, 1986, it is ordered as follows:

1. The appeal originally at 82-006-G, of the DER Order issued December 23, 1981, is sustained in part and dismissed in part. Specifically, for the various sites which still are in dispute and which have been the subject of discussion, supra, we hold:

a. MP 615-4 and 4(A)

(i) The appeal of the backfilling and grading requirement stated in Finding of Fact 16a is sustained.

(ii) The appeal of the revegetation requirement stated in Finding of Fact 16a is dismissed.

(iii) The appeals of the requirements stated in Findings of Fact 16b and 16c are sustained.

b. MP 615-6 and 6(A)

(i) This appeal is dismissed as moot, except insofar as it pertains to the approximately five acre area discussed in section C of the accompanying Adjudication.



(ii) For this five acre area, the appeal of the terms of the Order pertinent to this site is dismissed on the merits.

c. MP 615-12 and Amendments

(i) For the unreclaimed one quarter acre open pit area on this site, the appeal is dismissed.

(ii) For the remaining portion of this site, the appeal of the backfilling and grading requirements stated in Finding of Fact 64a is sustained, but the appeal of the revegetation requirement stated in Finding of Fact 64a is dismissed.

(iii) For the remaining (after subtraction of the one quarter acre open pit area) portion of this site, the appeal of Finding of Fact 64b is sustained.

d. MP 615-10 and 10(A)

(i) The appeal of the revegetation requirement in Finding of Fact 91a is dismissed.

(ii) Except for a 2250 to 5000 square foot area of depression in the center of this site, the appeals of the backfilling and grading requirements in Findings of Fact 91a and 91c are sustained.

(iii) For this area of depression, the appeal of the backfilling and grading requirements in Finding of Fact 91a is dismissed.

(iv) The appeal of the requirements stated in Finding of Fact 91b is dismissed.

e. MP 615-35

(i) The appeals of Findings of Fact 107a-107e are dismissed.

f. MP 615-35

(i) For the entire 30 acre eastern portion of this site,

the appeal is dismissed as moot.

(ii) For the remaining western portion of the site, the appeal of Finding of Fact 126a is dismissed as moot, except for the revegetation requirement therein.

(iii) For the western portion of the site, the appeal of the revegetation requirement in Finding of Fact 126a is dismissed on the merits.

(iv) For the western portion of the site, the appeal of Finding of Fact 126b is dismissed.

(v) The appeal of Finding of Fact 126c is dismissed as moot.

g. MP 617 and Amendments

(i) The appeals of Findings of Fact 131a, 131b and 131d are dismissed.

(ii) The appeal of Finding of Fact 131c is sustained, except insofar as Finding of Fact 131c required OHM to repair previous erosion damage.

h. MP 615-42

(i) The appeals of Findings of Fact 172e and 172f are dismissed as moot.

(ii) The appeals of Findings of Fact 172a-172d are dismissed on the merits.

i. MP 615-44 and 44(A)

(i) The appeal of Finding of Fact 185b is dismissed as moot.

(ii) The appeals of Findings of Fact 185a, 185c and 185d are dismissed on the merits.

(iii) The appeal of Finding of Fact 185e is sustained insofar as the initiating date for the seven day deadline therein in concerned; the seven day deadline should have been from the day OHM learned that DER had rejected its limestone mining application.

(iv) In all other respects, the appeal of Finding of Fact 185e is dismissed on the merits.

j. Special Reclamation Project 445

(i) The appeal of the revegetation requirement stated in Finding of Fact 203a is dismissed on the merits.

(ii) In all other respects, the appeals of Findings of Fact 203a and 203b are dismissed as moot.

2. The appeal originally at 84-121-G, of the DER compliance order issued March 5, 1984 (Order II), is dismissed in part and sustained in part. Specifically, for the permit sites listed in that compliance order, namely MP 615-17 and Amendments, MP 615-42, MP 615-44 and MP 615-44(A), we hold:

a. The appeal of the portion of Order II requiring compliance with the terms of DER's December 23, 1981 Order is dismissed on the merits, except for the portion of Order II requiring compliance with the E&S controls installation requirement stated in Finding of Fact 131c, and except for the portions of Order II requiring compliance with those portions of the December 23, 1981 Order whose appeals have been dismissed as moot in paragraph 1, supra, of this Order.

b. The appeal of the portion of Order II requiring compliance with the E&S controls installation requirement stated in Finding of Fact 131c is sustained on the merits.

c. The appeal of the order to cease mining on these permit sites is sustained on the merits.

d. The appeal of those portions of Order II requiring compliance with those portions of the December 23, 1981 Order whose appeals have been dismissed as moot in paragraph 1, supra, also are dismissed as moot.

3. Unless otherwise stated, the various portions of OHM's appeals have been sustained and dismissed on the merits.

4. For any sites which have not been mentioned in this Order, OHM's appeal of DER's December 23, 1981 Order is dismissed as moot.

**ENVIRONMENTAL HEARING BOARD**

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*Edward Gerjuoy*

**EDWARD GERJUOY, MEMBER**

*William A. Roth*

**WILLIAM A. ROTH, MEMBER**

**DATED:** December 24, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA

**For the Commonwealth, DER:**

Dennis Strain, Esq.  
Bureau of Litigation  
Diana J. Stares, Esq.  
Western Region

**For Appellant:**

Gregg M. Rosen, Esq.  
ROSEN & MAHFOOD  
Pittsburgh, PA

and

Michael Caldron, Esq.  
Indiana, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD  
221 NORTH SECOND STREET  
THIRD FLOOR  
HARRISBURG, PENNSYLVANIA 17101  
(717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
EDWARD GERJUOY, MEMBER  
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
SECRETARY TO THE BOARD

FRANCONIA TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF ENVIRONMENTAL RESOURCES  
and HIRAM HERSHEY, Intervenor

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EHB Docket No. 85-083-M

Issued: December 26, 1986

OPINION AND ORDER

Synopsis

Rescission by DER of a previously issued order relieves the opposing party of any duties under the order. Since there is no relief the Board can grant, the controversy should be dismissed as moot.

OPINION

On August 17, 1982, Hiram Hershey (Intervenor) submitted to the Department of Environmental Resources (DER) a private request for revision of Franconia Township's (Appellant) official sewage facilities plan in order to incorporate Mr. Hershey's private sewage treatment facility serving the Pear Tree Village Development, a subdivision owned by Mr. Hershey. Mr. Hershey's request was submitted pursuant to the Sewage Facilities Act, the Act of January 24, 1966, P.L.(1965) 1535, as amended, 35 P.S. 750.1 et seq., and 25 Pa.Code §71.17.

The DER issued an Order on February 22, 1985, requiring Franconia Township to incorporate the facility at Pear Tree Village into its plan.

Franconia Township appealed this DER Order on March 21, 1985. Shortly thereafter, Hershey's petition for Intervention was granted by the Board. Appellant timely filed its pre-hearing memorandum as requested by the Board. DER and intervenor, however, failed to timely file their pre-hearing memoranda, despite additional requests by the Board. The Board issued an Order on July 25, 1986 imposing sanctions upon both Intervenor and the DER for their failure to comply with a request of the Board. Appellant filed a Motion for Additional Sanctions on September 25, 1986 requesting a default judgment in Appellant's favor. In light of our disposition of this motion, it is unnecessary to decide the motion for sanctions.

The DER, on September 30, 1986 issued an order to Appellant rescinding its February 22, 1985 order directing revision of Appellant's sewage facilities plan. Subsequent to this rescission, the DER filed a Motion to Dismiss, which is the focus of the present Order, arguing that DER's rescission of its February 22, 1985 order mooted the appeal. Both Appellant and Hershey failed to respond to DER's Motion to Dismiss.

The Board agrees with DER's arguments. Since DER rescinded its Order directing Appellant to revise its sewage facilities plan, Appellant is no longer subject to the terms of the revision order. Therefore, there is no relief which this Board can grant. See Marlin L. Snyder v. DER, 1985 EHB 369; Thomas Coal Company, 1985 EHB 441 (where vacating of compliance orders by DER resulted in dismissal by mootness). The above-captioned case is dismissed.

ORDER

AND NOW, this 26th day of December, 1986, it is ordered that the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
\_\_\_\_\_  
MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*  
\_\_\_\_\_  
EDWARD GERJUOY, MEMBER

*William A. Roth*  
\_\_\_\_\_  
WILLIAM A. ROTH, MEMBER

DATED: December 26, 1986

cc: **Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Louise S. Thompson, Esq.  
Eastern Region  
**For Appellant:**  
Philip R. Detwiler, Esq.  
Blue Bell, PA  
**For Permittee:**  
Thomas M. Garrity, Esq.  
Norristown, PA

bl



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN

EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

EDWARD S. SWARTZ, Appellant	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	EHB Docket No. 82-211-H
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
VERNELL, INC., Permittee	:	Issued: December 26, 1986

OPINION AND ORDER

Synopsis

Appeal seeking cancellation of DER issued permits is mooted when permits are rendered void by operation of law.

OPINION

On August 17, 1982, Edward Swartz (Appellant) filed a timely Notice of Appeal and Petition for Supersedeas with the Environmental Hearing Board (Board) from a Department of Environmental Resources (DER) issuance of mining and mine drainage permits to Vernell, Inc. (Permittee) on August 7, 1982 for the operation of a limestone quarry in Lower Swatara Township, Dauphin County. The proposed quarry was to be located on land immediately adjacent to the Indian Echo Caverns, a tourist attraction featuring an extensive underground limestone cavern which is owned and operated by the Appellant. Appellant seeks cancellation of the permit because activities associated with mining will allegedly be disruptive to the environment and his business.

The language of the mining permit specifically requires compliance with all the terms and regulations of the Surface Mining Conservation and



Reclamation Act,(the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1) and, more particularly, the conditions of 25 Pa. Code §77.1 et seq. These regulations state, in part, that mining permits will become null and void unless activity is commenced at the mining site within two years from the date of the permit issuance, or an extension is granted. 25 Pa. Code 77.102 (6). Alternate Energy Store, Inc. v. DER, 1985 EHB 821. The mine drainage permit, on the other hand, 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 also requires compliance with DER rules and regulations. The regulations in effect at the time of the permit issuance stated that the mine drainage permit would also become null and void if no activity had commenced at the site. 25 Pa. Code 99.21. Manor Mines Inc. v. DER, Docket No. 82-005-G (October 8, 1986).

Permittee agreed not to begin operation at the mining site until the Board rendered a decision on the merits of this appeal. Permittee and Appellant attempted unsuccessfully to reach a settlement agreement. Permittee, on September 30, 1983, filed a Motion to Quash the instant appeal asserting that Appellant was collaterally estopped from contesting the issuance of the instant permits because similar issues were litigated between the same parties at a prior time regarding a different permit. Swartz v. DER and Vernell, Inc., 1979 EHB 144. The Board received responses to this Motion to Quash from the DER and Appellant.

Thereafter, there was essentially no activity at this docket for over 1 1/2 years. During this period of silence, Permittee filed with DER for an extension of its mining and mine drainage permits. In a letter dated May 4, 1984, the DER granted Permittee its extension. The contents of this letter is unclear as to whether both the mining and mine drainage permits were extended,

or rather just the mine drainage permit. Both permit numbers are referenced in the letter; however, the substance of the correspondence only acknowledges extension of the mine drainage permit. In any event, the originally issued permits expired on August 6, 1984, while the extension ended on August 6, 1985. This extension date passed, however, without Permittee either commencing mining at the site or requesting any further extensions of either permit.

The DER filed a Motion to Dismiss for Mootness on October 1, 1986, which is the focus of this order. In this Motion DER asserts that since the permits legally terminated by lapse of time, Appellant essentially received the relief requested in its Notice of Appeal, and, therefore, this case should be dismissed as moot. Both Appellant and Permittee failed to respond to DER's Motion to Dismiss for Mootness. Failure to respond operates as an admission by the silent party of all facts alleged in the pleading. Beltrami Enterprises, Inc. v. DER, 1985 EHB 443.

The Board agrees with DER's arguments and dismisses this case for mootness. As noted above, DER regulations provide that both mining and mine drainage permits will become null and void unless activity is commenced at the mine site within two years from the date of permit issuance, or an extension is granted. 25 Pa. Code §§77.102 (6) and 99.21. Although an extension was granted for at least one of the permits, the extension date has passed without the commencement of mining or a grant of additional extensions.

Permittee admits, by neglecting to respond to factual allegations in DER's Motion, that it failed to either begin operation at the site within two years, or secure an extension beyond August 6, 1985. Permittee's mining and mine drainage permits, therefore, became void by operation of law. Manor Mines, Inc. v. DER, 82-005-G (Issued October 8, 1986)(mine drainage permit);

Alternate Energy Store v. DER, 1985 EHB 821(mining permit). The Board is able to grant no further relief to Appellant. Marlin L. Snyder v. DER, 1985 EHB 369. This appeal is, therefore, dismissed as moot. In light of our disposition of this motion, it is unnecessary to decide the Motion to Quash.

ORDER

AND NOW, this 26th day of December, 1986, this appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*

MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*

EDWARD GERJUOY, MEMBER

*William A. Roth*

WILLIAM A. ROTH, MEMBER

DATED: December 26, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Donald A. Brown, Esq.  
Kimberly K. Smith, Esq.  
Central Region  
For Appellant:  
Scott A. Fleischauer, Esq.  
SHUMAKER AND WILLIAMS  
Harrisburg, PA  
For Permittee:  
Gary Gilbert, Esq.  
LAUCKS AND MONROE  
York, PA

b1



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

MAXINE WOELFLING, CHAIRMAN  
 EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

ROBERT CURLEY, et al., NORTH :  
 BRANCH CONCERNED CITIZENS and :  
 MIDDLETOWN TOWNSHIP BOARD OF SUPERVISORS :  
 :  
 v. : EHB Docket No. 81-119-W\*  
 : (Consolidated with 81-121-W)  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 : Issued: December 26, 1986

OPINION AND ORDER

Synopsis

The Board will not carry matters indefinitely on its dockets. Appellants have a responsibility to diligently prosecute appeals before the Board.

OPINION

The above-captioned appeal was filed by North Branch Concerned Citizens (NBCC) on August 8, 1981. NBCC sought review of the Department of Environmental Resources' (DER) approval of the disposal of two waste streams from the E. I. Dupont DeNemours & Company's Towanda plant at the Clymar Sanitary Landfill owned by Clyde Wilson (Owner). On August 13, 1981 a petition to intervene was filed by the Middletown Township Board of Supervisors (MTBS) which the Board subsequently granted. On September 3, 1981, NBCC requested a continuance for discovery. The Board granted NBCC an

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\* The "W" in the docket denotes Paul E. Waters, former Chairman of the Environmental Hearing Board.

extension to October 8, 1981 to file its pre-hearing memorandum. On September 18, 1981, after a request for a further continuance by the parties, the Board granted another extension to October 19, 1981 and ordered the consolidation at the above-captioned docket number of this appeal and Docket No. 81-121-W. The appeal docketed at 81-121-W involves an original appeal by MTBS of the same DER actions challenged above.

On November 18, 1981, the Board sent a default letter notifying the parties that the required pre-hearing memoranda had not been filed and ordered the parties to comply by November 30, 1981. After a request for a general continuance, the Board, on December 3, 1981, granted a continuance to January 8, 1982. On February 9, 1982, the Board sent a status request to the parties asking for a response by February 19, 1982. MTBS responded on February 16, 1982, asking for another general continuance pending the outcome of a third appeal at EHB Docket No. 81-185-M (Clyde Wilson d/b/a Clymar Sanitary Landfill v. DER). The appeal at Docket No. 81-185-M involved Owner's appeal of a DER closure order. NBCC was an intervenor in the appeal at 81-185-M. On September 22, 1982, the Board sent another status request to the parties calling for a response by October 4, 1982. On November 4, 1982, DER responded stating that the parties were awaiting an adjudication in 81-185-M. The Board issued an adjudication in Docket No. 81-185-M on September 22, 1983 (1983 EHB 223). On November 8, 1984, the Board, citing inactivity in the above-captioned matter, requested the parties to notify the Board by November 26, 1984 as to whether they wished to withdraw the appeal or to keep it active. On November 14, 1984, MTBS's attorney notified the Board he was awaiting a decision by his clients as to the direction they wished to pursue. On November 23, 1984, MTBS responded saying they did not wish the appeal to be dismissed.

The Board issued an amended order and clarification in Docket No. 81-185-M on May 1, 1985. This order, inter alia, calls for Owner to meet all DER rules and regulations, and post a \$25,000 bond before he may himself again operate the landfill. At present the landfill is closed and MTBS/NBCC's July 15, 1985 and May 19, 1986 status reports indicate the property is up for sale. On July 8, 1985, the Board sent a status request calling for a response by July 17, 1985. On July 18, 1985, MTBS responded stating that although an order of the Board dated May 1, 1985 had resulted in the continued closure of the landfill, MTBS wished to keep this appeal open because the permit for the landfill had not been fully revoked. On January 16, 1986, the Board sent a status request to the parties requiring a response by January 28, 1986. Receiving no response to its latest request, the Board sent a default letter threatening sanctions if compliance did not occur by February 28, 1986. MTBS responded on February 27, 1986, with a copy of its July 18, 1985 letter and again stated that, absent DER's complete revocation of the permit, it wished the appeal to remain open.

On May 13, 1986, the Board issued a Rule to Show Cause why the appeal should not be dismissed for inactivity and failure to properly respond to status requests. In response, MTBS sent copies of its last two correspondences to the Board and stated that "Appellant" had in fact responded to each of the Board's status requests. It appears that at some unknown point the attorney for MTBS began representing NBCC, although no entry of appearance of such was ever made in this matter. Having learned of this, but still feeling that this matter was not properly progressing, the Board on August 25, 1986, sent a second Rule to Show Cause for failure to prosecute. As of the present date, the Board has received no response to its second Rule to Show Cause. A rule to show cause is the equivalent of a Board order, a violation of which may

result in sanctions under the Board's rules of practice and procedure. 25 Pa.Code §21.124. Thus, because of MTBS/NBCC's failure to respond to the Board's August 25, 1986 Rule to Show Cause and for the reasons set forth below, the Board dismisses the above-captioned appeals.

Appellants have a responsibility to diligently prosecute appeals before the Board. Springbrook Twsp. v. DER, EHB Docket No. 84-122-M (Issued May 8, 1986). The Board will not carry matters indefinitely on its dockets. Glah Bros., Inc. and FSI Corp. v. DER, EHB Docket No. 82-026-M (Issued June 18, 1986). The docket in this matter has been virtually inactive for over four years, save for status reports. Final disposition in the related case at EHB Docket No. 81-185-M took place almost a year and half ago. The parties should have either sought settlement or gone forward in this matter by this point. The Board appreciates MTBS/NBCC's wish to maintain the right to challenge the DER actions in question. However, as this matter now stands, the Board cannot justify the continued use of already overtaxed Board resources to continually monitor this appeal and grant endless continuances. In light of the lack of substantive activity in this matter and its apparent mootness, this matter is here dismissed for failure to prosecute.

ORDER

AND NOW, this 26th day of December, 1986, for the above-stated reasons, this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

*Maxine Woelfling*  
MAXINE WOELFLING, CHAIRMAN

*Edward Gerjuoy*  
EDWARD GERJUOY, MEMBER

*William A. Roth*  
WILLIAM A. ROTH, MEMBER

**DATED:** December 26, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Donald A. Brown, Esq.  
Central Region  
**For Appellants:**  
Gerald C. Grimaud, Esq.  
Tunkhannock, PA

Robert Curley  
Montrose, PA

b1





COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

WEST FREEDOM MINING COMPANY :  
 :  
 v. : EHB Docket No. 85-033-W  
 : 85-034-W  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 30, 1986

OPINION AND ORDER

Synopsis

The Board dismisses two appeals where the Appellant has failed to prosecute its appeal and failed to respond to the Board's orders relating to prosecution of the appeals.

OPINION

Docket No. 85-033-W was initiated by the filing of a Notice of Appeal on January 31, 1985, by the West Freedom Mining Corp. ("West Freedom") seeking review of a January 22, 1983, compliance order relating to West Freedom's Logan #2 Mine. The matter was originally assigned to Member Edward Gerjuoy. Subsequently, West Freedom retained different counsel and so informed the Board by letter dated May 7, 1985. The Board thereafter issued an order on May 9, 1985, requesting a status report from West Freedom in order to determine whether it wished to actively pursue its appeal in light of West Freedom's involvement in bankruptcy proceedings.

When West Freedom failed to timely respond to the Board's May 9, 1985 order, the Board ordered West Freedom to submit its pre-hearing memorandum within 15 days of the date of the order or face sanctions. The

Board granted West Freedom an extension to August 20, 1985 to file its pre-hearing memorandum. West Freedom filed its pre-hearing memorandum on August 26, 1985, and the Department of Environmental Resources ("Department") filed its pre-hearing memorandum on September 10, 1985. By order dated September 20, 1985, hearing dates of January 5-8, 1987 were reserved.

Docket No. 85-034-W was initiated by the filing of a Notice of Appeal by West Freedom on January 31, 1985, seeking review of a Department compliance order of January 2, 1985, alleging violations of a consent order and agreement between West Freedom and the Department. The same sequence of events described above for Docket No. 85-033-W occurred at Docket No. 85-034-W. On October 17, 1985 the Board issued an order consolidating the two matters at Docket No. 85-033-W.

The matter was reassigned to Chairman Maxine Woelfling on January 24, 1986, and the hearing was rescheduled for July 30-31, 1986. The Board held a telephone conference call with the parties on July 24, 1986, in which it was informed that West Freedom was securing new counsel. The hearing was canceled. When West Freedom's counsel failed to apprise the Board of the status of the matter, the Board, by order dated August 12, 1986, requested it to provide a status report on or before September 2, 1986. The request was sent to counsel of record and Russell Haller, President of West Freedom.

When no status report was received, the Board issued a default notice on September 15, 1986. The Board was informed by counsel of record by letter dated September 25, 1986 that it was no longer representing West Freedom. No notice of appearance was ever filed by new counsel. Growing impatient, the Board issued a rule on October 2, 1986 to West Freedom to show cause why its appeal should not be dismissed for lack of prosecution. The rule was sent via certified mail to West Freedom's president. West Freedom

has never responded to the rule.

Because of the Appellant's disregard for the Board's orders throughout the course of these proceedings, we have no choice but to dismiss this appeal for lack of prosecution and failure to comply with the Board's orders. That appellant is involved in proceedings before the Bankruptcy Court does not excuse it from its obligation to comply with the Board's rules of practice and procedure.

**O R D E R**

AND NOW, this 30th day of December, 1986, it is ordered that the appeals of West Freedom Mining Company docketed at 85-033-W and 85-034-W are dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

*Edward Gerjuoy*

**EDWARD GERJUOY, MEMBER**

*William A. Roth*

**WILLIAM A. ROTH, MEMBER**

**DATED:** December 30, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER**  
Timothy J. Bergere, Esq.  
Western Region  
**For Appellant:**  
Russell Haller, President  
West Freedom Mining Corp.  
Worthington, PA 16262

mjf



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

M. DIANE SMITH  
 SECRETARY TO THE BOARD

GLENWORTH COAL COMPANY :  
 :  
 v. : EHB Docket No. 86-221-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES :  
 Issued: December 30, 1986

OPINION AND ORDER  
 SUR  
 PETITION TO DISMISS

Synopsis

An appeal of a Department of Environmental Resources ("DER") order which has been superseded by a subsequent DER order, and, thus, rendered null and void, must be dismissed as moot.

OPINION

The above captioned appeal was filed by Glenworth Coal Co., Inc. ("Appellant") on April 21, 1986. Appellant was seeking review of a compliance order issued by the Department of Environmental Resources ("DER") on April 9, 1986. The order required Appellant to submit a full and complete permit application for its coal breaker facility located in North Manheim Township, Schuylkill County. The order further required Appellant to submit the application within 15 days of receipt of the order or to begin reclamation of the site on the sixteenth day after receipt. In its notice of appeal Appellant argued that the order was arbitrary and capricious in that DER lacked authority to establish deadlines for the submission of permit applications.

Although both parties to this appeal have filed their pre-hearing memoranda, the Board shall not reach the merits of this appeal. On October 10, 1986, DER filed a Motion to Dismiss claiming that this appeal had become moot. DER argues that the April 9, 1986 Order, which is here appealed, was superseded in its entirety by an amended order issued by DER to Appellant on June 10, 1986. Pursuant to the June 10, 1986 Order, Appellant was given until July 31, 1986 to submit a permit application. Thus, DER argues that the present appeal is from an order that no longer exists. After an examination of the June 10, 1986 order, the Board finds it must agree with DER.

Despite a copy of DER's Motion to Dismiss,<sup>1</sup> as well as a notice from the Board requiring that any objection to said motion be received by the Board no later than November 6, 1986, both having been served upon Appellant through its counsel, Appellant has failed to respond or object to said motion in any way. The Board's Rules of Practice and Procedure at 25 Pa.Code §21.64(d) provide:

Any party failing to respond to a complaint, new matter, petition or motion shall be deemed in default and at the Board's discretion, sanctions may be imposed in accordance with §21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such pleading or motion as admitted.

Since appellant did not respond to DER's Motion to Dismiss, the Board deems Appellant, pursuant to 25 Pa. Code §§21.64(d) and 21.124 to have admitted all relevant facts set forth in DER's motion. Mears Enterprises, Inc. v. DER, EHB Docket No. 83-200-M (Issued May 5, 1986); Silver Spring Township v. DER, 28 Cmwlth Ct. 302, 368 A2d 866 (1977).

The Board's own examination confirms DER's characterization of the

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<sup>1</sup> As indicated in the certificate of service attached to DER's motion.

June 10, 1986 Order; it does supersede the here appealed from April 9, 1986 Order. Thus the April 9, 1986 Order is null and void. When, during the course of an appeal, events occur that render it impossible to grant any relief, the appeal must be dismissed as moot. Silver Spring, supra.; Highway Auto Service v. DER, 1980 EHB 10, aff'd 64 Pa.Cmwlth. 160, 439 A.2d 238 (1982). The Order of April 9, 1986, having been superseded, no longer has any legal effect. Thus, the Board is no longer in a position to grant any relief as to the action appealed. Silver Spring, supra. Therefore, the Board finds it must dismiss the above captioned appeal.

O R D E R

AND NOW, this 30th day of December, 1986, the appeal of Glenworth Coal Co., at EHB Docket No. 86-221-W is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

  
MAXINE WOELFLING, CHAIRMAN

  
EDWARD GERJUOY, MEMBER

  
WILLIAM A ROTH, MEMBER

DATED: December 30, 1986

cc: Bureau of Litigation  
Harrisburg, PA  
For the Commonwealth, DER:  
Bernard A. Labuskes, Jr., Esq.  
Central Region  
For Appellant:  
Edward E. Kopko, Esq.  
Law Offices of James J. Curran  
Pottsville, PA 17901

mjf



COMMONWEALTH OF PENNSYLVANIA  
 ENVIRONMENTAL HEARING BOARD  
 221 NORTH SECOND STREET  
 THIRD FLOOR  
 HARRISBURG, PENNSYLVANIA 17101  
 (717) 787-3483

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 EDWARD GERJUOY, MEMBER  
 WILLIAM A. ROTH, MEMBER

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MARY LOUISE COAL COMPANY :  
 :  
 v. : EHB Docket No. 86-271-W  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: December 30, 1986

OPINION AND ORDER

Synopsis

An appellant's failure to respond in any way after the Board's issuance of two Notices of Default and a Rule to Show Cause is grounds for dismissal of its appeal pursuant to 25 Pa. Code §21.124.

OPINION

The above captioned appeal was filed on May 26, 1986 by the Mary Louise Coal Co. ("Appellant"). Appellant sought to appeal a May 5, 1986 letter from the Department of Environmental Resources ("DER") denying Appellant's surface mining application (No. 1785013). DER denied the application on the basis that mining at the proposed site posed an unacceptable risk to adjacent private water supplies and that Appellant had failed to demonstrate that the proposed alternative water supply, drilling wells topping the Middle Kittanning Aquifer, would meet the criteria for a replacement water supply.

On May 29, 1986 the Board issued its Pre-Hearing Order No. 1, directing Appellant to file its pre-hearing memorandum on or before August 12,

1986. Having not received Appellant's memorandum, the Board on August 22, 1986 issued a default notice informing Appellant that unless there was compliance with the Board's Pre-Hearing Order No. 1 by September 2, 1986, the Board might apply sanctions pursuant to 25 Pa. Code §21.124. Said default notice stated that sanctions could include dismissal of the appeal or a default adjudication. On September 22, 1986, still not having received Appellant's pre-hearing memorandum, the Board issued a second default notice informing Appellant that if the memorandum was not received by October 3, 1986, the Board would apply sanctions. Then, on October 17, 1986, again not having received Appellant's pre-hearing memorandum, the Board issued a rule to show cause why the appeal should not be dismissed for lack of prosecution. The rule was returnable to the Board on or before November 7, 1986. No response was received. Said rule and the earlier default notices were each mailed to Appellant by certified mail, return receipt requested, to the address Appellant gave the Board in its notice of appeal. The Board has received each receipt, indicating Appellant received each of the Board's communications.

As of the date of this Opinion and Order the Board has not received Appellant's pre-hearing memorandum. The Board has not received any communication whatsoever from Appellant since its notice of appeal. In an appeal of this nature the appellant bears the burden of proof. 25 Pa. Code §21.101(c)(1). Appellant has made no effort to go forth with this burden. An appellant has the responsibility to resolve or litigate its appeals. Independent Trading Co. v. DER, EHB Docket Nos. 80-119-M and 80-165-CP-W (November 10, 1986). An appellant's failure to prosecute its appeal is grounds for dismissal. Blake Becker, Jr. v. DER, 1984 EHB 553; Neshaminy Enterprises International v. DER, 1983 EHB 475. Thus, the Board hereby dismisses the above captioned appeal for failure to respond to the Board's



Notices of Default and Rule to Show Cause, and for failure to prosecute. 25 Pa. Code §21.124; Delaware County Regional Water Control Authority v. DER, EHB Docket No. 81-116-M (July 18, 1986); Conemaugh Township v. DER, EHB Docket No. 79-061-B (October 1, 1986). The Board notes that any one of said reasons alone could constitute grounds for dismissal.

**O R D E R**

AND NOW, this 30th day of December, 1986 for the above stated reasons this appeal is dismissed.

**ENVIRONMENTAL HEARING BOARD**

*Maxine Woelfling*

**MAXINE WOELFLING, CHAIRMAN**

*Edward Gerjuoy*

**EDWARD GERJUOY, MEMBER**

*William A. Roth*

**WILLIAM A. ROTH, MEMBER**

**DATED:** December 30, 1986

**cc: Bureau of Litigation**  
Harrisburg, PA  
**For the Commonwealth, DER:**  
Bernard A. Labuskes, Jr., Esq.  
Central Region  
**For Appellant:**  
Mary Louise Carson, President  
Mary Louise Coal Company  
Madera, PA 16661

mjf