COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

TRI-COMMUNITY WATER AND SEWER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 86-322-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 13, 1987

OPINION AND ORDER

Synopsis

Sanctions may be imposed against an appellant when it fails to comply with Board orders. In cases where the Department of Environmental Resources has the burden of proof, it is appropriate to preclude the appellant from presenting its case-in-chief.

OPINION

On June 30, 1986, the Tri-Community Water and Sewer Authority (Tri-Community) initiated this matter when it filed a Notice of Appeal from a June 2, 1986 order issued by the Department of Environmental Resources (DER). DER's order instructed Tri-Community to upgrade its sewer system by undertaking those steps (bid announcements, contractor selection, etc.) necessary for the commencement of construction of a sewage collection and treatment system. DER's order specified dates by which certain steps had to be accomplished and further required that Tri-Community commence construction not later than October 1, 1986. Tri-Community appealed DER's order for the

sole reason that it considered the required compliance dates to be unrealistic.

On July 1, 1986 the Board issued a pre-hearing order which required Tri-Community to file its pre-hearing memorandum by September 15, 1986. On September 10, 1986, Tri-Community requested an extension until November 1, 1986 for the filing of its pre-hearing memorandum. The Board granted this extension in an order dated September 12, 1986. On October 30, 1986, the Board received another extension request in which Tri-Community asked that it be given until December 1, 1986 to file its pre-hearing memorandum. This request was granted by Board order on November 28, 1986.

On December 19, 1986, the Board received a withdrawal of appearance from William T. Schulick, solicitor for Tri-Community, and a separate letter from Mr. Schulick which stated that he was no longer solicitor for the Tri-Community Water and Sewer Authority.

On January 22, 1987, when no pre-hearing memorandum had been filed, the Board sent Tri-Community a detailed order recounting the case's history and threatening sanctions, pursuant to 25 Pa. Code §21.124, if Tri-Community failed to file its pre-hearing memorandum by February 6, 1987. This order was sent certified mail, return receipt requested, and was received by Tri-Community on January 24, 1987.

On February 9, 1987, Tri-Community filed yet another extension request and asked that it be given until April 6, 1987 to file its pre-hearing memorandum. The Board, in a letter dated February 17, 1987, stated that Tri-Community had failed, in its extension request, to state the reasons for another extension and that it failed to show that a copy was properly served on DER's counsel. The Board directed Tri-Community to submit within 10 days a proper extension request, which was to be served on DER as well. On February

24, 1987, Tri-Community responded by stating that it required the extension because it was in the process of finding a new solicitor and that it lacked funds. DER filed a response which vehemently opposed any further extensions and which stated that DER ". . .will no longer accept the delaying tactics of [Tri-Community]." Despite this opposition, the Board granted Tri-Community's request in an order dated March 16, 1987 but nonetheless warned Tri-Community that sanctions might be applied if no pre-hearing memorandum was filed by April 6, 1987. This order was sent certified mail, return receipt requested, and was received by Tri-Community on March 21, 1987. On April 16, 1987, with no pre-hearing memorandum having been filed, the Board sent a default notice which stated that if Tri-Community's pre-hearing memorandum was not filed with the Board by April 27, 1987, sanctions would be imposed. The letter was again sent certified mail, return receipt requested, and was received by Tri-Community on April 17, 1987

On April 29, 1987 the Board received yet another letter from Tri-Community which stated that, because of Mr. Shulick's resignation as solicitor, Tri-Community did not have the necessary factual or legal information needed to file a pre-hearing memorandum. The letter further suggested the needed information was in the hands of Mr. Schulick. Finally, Tri-Community requested the Board to advise it as to what to do. The Board finds the letter somewhat puzzling. It has been nearly 5 months since Mr. Shulick's resignation. Though it is apparently acting pro se, Tri-Community has been made well aware of its obligation to file a pre-hearing memorandum.

Its explanation notwithstanding, Tri-Community has failed to respond to the Board's orders. Appellants have the responsibility to diligently prosecute appeals before the Board. Springbrook Township v. DER, 1986 EHB 306. Because this is an appeal of a DER order requiring construction of sewage

facilities, DER bears the initial burden of proof, 25 Pa. Code §21.101(b)(5), and the Board ordinarily avoids imposing the sanction of dismissal. M. F. Fetterolf Coal Company v. DER, EHB Docket No. 86-228-R, (Opinion and Order issued February 25, 1987). Consequently, when and if a hearing on the merits is held in this appeal, Tri-Community will be precluded from presenting its case-in-chief. Tri-Community will be limited to the presentation of evidence such as normally would be offered in rebuttal, cross-examination of DER's witnesses and the filing of a post-hearing brief. Further, Tri-Community must file a statement within 10 days that it intends to go forward with this appeal. Absent the receipt of this statement, the Board may dismiss this appeal.

ORDER

AND NOW, this 13th day of May, 1987, it is ordered that Appellant Tri-Community Water and Sewer Authority is precluded from presenting its case-in-chief. It is further ordered that Tri-Community must submit, on or before the 27th day of May, 1987, a statement of its intent to go forward with this appeal. Failure to do so may result in dismissal of this appeal.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 13, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Donna J. Morris, Esqs.
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Peter E. Barbus, Chairman
Tri-Community Water & Sewage Authority
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HOWARD D. WILL, t/a
WILL'S CONSTRUCTION COMPANY :

v. : EHB Docket No. 86-247-R

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued May 19, 1987

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

Synopsis

The Board lacks jurisdiction to consider a petition for reconsideration of a Board order dismissing an appeal when such petition is filed more than 20 days after the date of issuance of the Board's order. Petitioners were not parties to the appeal and presented no reasons for reconsideration other than their belief that Appellant would represent their interests by prosecuting his appeal and their surprise that the appeal was dismissed. The petition was also reviewed in light of the standards for the grant of an appeal nunc pro tunc and found to be deficient.

OPINION

By notice of appeal filed May 5, 1986, Howard D. Will, t/a Will's Construction Company ("Will") challenged a bond forfeiture action by the Department of Environmental Resources ("DER"). For the reasons recounted in an opinion and order issued on January 30, 1987, the Board dismissed Will's

appeal for failure to prosecute and for failure to comply with Board orders.

On April 16, 1987, Daniel G. Visnic, Jr. and Joanne Visnic (together "Petitioners") filed a petition for reconsideration of the Board's January 30, 1987 dismissal order and a petition to intervene in the Will appeal. Petitioners learned on March 23, 1987 that Will's appeal was dismissed. Petitioners allege that they are co-guarantors of one of Will's forfeited bonds.[1] They further assert that while they were aware of Will's appeal of the bond forfeiture, they relied upon Will to represent their interests by his prosecution of the appeal.

With regard to petitions for reconsideration, Section 21.122(a) of the Board's rules of practice and procedure provides, in relevant part, that "[t]he Board may on its own motion or upon application from counsel, within 20 days after a decision has been rendered, grant reargument. . ." 25 Pa. Code §21.122(a) (emphasis added). Section 21.122(a) requires submission of a petition for reconsideration within 20 days of the rendering of a final decision by the Board, not the receipt of such a decision by a petitioner. SPEC Coals, Inc. v. DER, 1986 EHB 1140. Thus, the last day for the filing of a petition for reconsideration of the Board's order which dismissed Will's appeal was February 19, 1987. The instant petition for reconsideration was untimely by nearly 2 months.[2] The Board lacks jurisdiction to consider an untimely petition for reconsideration. Del-AWARE Unlimited, Inc., et al v. DER, et al, 1986 EHB 1179. Because we have denied the request to reinstate

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[1]Petitioners' standing to file a petition for reconsideration of a matter to which they were not parties may be open to question, but we need not decide this issue in light of our disposition of the petition.

[2]Even if we were to adopt the interpretation that the 20 day period for requesting reconsideration runs from the date of receipt of the decision, Petitioners' request would still be untimely, having been filed 24 days after they learned of the Board's order.

the appeal, it is not necessary to dispose of the petition to intervene.

Even if the Board were to construe Petitioners' request as a petition for the allowance of an appeal nunc pro tunc, the petition still must be denied. Petitioners have alleged no breakdown in Board procedures nor any action on the part of the Board which could be characterized as fraud or misrepresentation. Delta Mining, Inc. v. DER, 1986 EHB 383. Petitioners were aware of Will's appeal and, for whatever reasons, relied upon Will to protect their interests. Their misplaced reliance cannot, after the fact, justify the allowance of an appeal nunc pro tunc. Furthermore, though Will was repeatedly warned that failure to prosecute and failure to comply with Board orders might result in dismissal of his appeal, the Board has neither the obligation nor the authority to seek out and inform other parties whose interests may be affected by an appellant's failure to comply with our orders. Shirley Anderson v. DER, et al, 1986 EHB 632.

ORDER

AND NOW, this 19th day of May, 1987, it is ordered that the Petition for Reconsideration of Daniel G. Visnic, Jr. and Joanne Visnic at Docket No. 86-247-R is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 19, 1987

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XINE WOELFLING, CHAIRMAN

LLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

NAZARETH FAIRGROUNDS, INC. and BANK OF PENNSYLVANIA	:	
v.	:	**EHB Docket No. 82-268-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** May 20, 1987

OPINION AND ORDER

Synopsis

Appeal is dismissed as a sanction for failure to comply with the Board's orders and failure to prosecute.

ORDER

This matter was initiated on October 26, 1982 by the filing of a Notice of Appeal by Nazareth Fairgrounds, Inc. (Nazareth). Nazareth was seeking review of the Department of Environmental Resources' (Department) disapproval, 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, of a proposed revision to the official sewage facilities plan of Lower Nazareth Township (Township), Northampton County. The proposed revision related to sewage services for Nazareth's fairgrounds project in the township.

Pre-Hearing Order No. 1 was issued by the Board, and Nazareth was required to file its pre-hearing memorandum on or before January 12, 1983. Nazareth filed its pre-hearing memorandum and requested that this matter be consolidated with a related matter, Board of Supervisors of Lower Nazareth Township v. DER, EHB Docket No. 82-267-M. The Board granted this request in

an order dated February 25, 1983, and consolidated the matters under Docket No. 82-267-M.

The Department filed its pre-hearing memorandum on March 30, 1983, and a hearing on the merits was scheduled for September 15 and 16, 1983. During the course of the hearing on September 15, 1983, counsel stipulated to a continuance in order to permit the submission and evaluation of additional information. The Board thereafter requested Nazareth and the Township to submit status reports on or before October 30, 1984. When neither submitted the requested status report, a default letter requesting submission of the report by November 20, 1984 was sent to the parties. When the parties failed to respond to the default notice, the Board, on January 18, 1985, issued a rule upon Nazareth and the Township to show cause why their appeals should not be dismissed for failure to comply with the Board's orders.

Neither Nazareth nor the Township responded to the rule. However, the Board received a request on February 19, 1985 from the Bank of Pennsylvania (Bank), equitable owner of the Nazareth facility, to discharge the rule and allow it to intervene in the proceedings. A formal petition to intervene was filed by the Bank on April 23, 1985, and by order dated April 25, 1985, the Bank's request to intervene was granted.

The matter then languished until January 18, 1986, when the Board requested Nazareth, the Bank, and the Township to submit a status report on or before January 28, 1986. By letter dated January 20, 1986, Township notified the Board that it no longer wished to pursue the appeal. Nazareth did not respond, and the Bank, by letter dated January 28, 1986, requested the Board to schedule a hearing on the matter.

The Board, by order dated February 20, 1986, requested the submission of a status report on or before March 4, 1986. The parties failed

to respond, and the Board sent a default notice on April 8, 1986. The Bank responded by letter dated April 16, 1986. On May 14, 1986 the Board issued an order discontinuing Township's appeal, unconsolidating the matter, and requiring the submission of a pre-hearing memorandum by the Bank on or before June 16, 1986.

The Bank requested, and was granted, a 90 day extension for the filing of its pre-hearing memorandum. When the pre-hearing memorandum was not filed, the Board sent a default letter on Septermber 23, 1986. The Bank responded by indicating that it had transferred the property to Pennsylvania International Raceways (Raceways), by detailing various events relating to Township's sewage facilities planning which had occurred subsequent to the appeal, and by requesting that the appeal be placed "on hold." The Bank, although not withdrawing from the appeal, stated it would forward all correspondence to Raceways.

By order dated October 8, 1986, the Board continued this matter to January 9, 1987, in an effort to allow Raceways to determine whether it wished to pursue this appeal. The Board required the Bank to either forward the Board's October 8, 1986 order to Raceways or provide the Board with Raceways' address so that the Board could forward the order. The order also required Raceways to inform the Board of its intent on or before January 16, 1987 and warned that failure to do so would subject the matter to dismissal.

The Board never received Raceways' address from the Bank, nor was there any response to its order of October 8, 1986. On January 29, 1987, a rule was issued upon Nazareth and the Bank to show cause why the appeal should not be dismissed for failure to prosecute and failure to comply with the Board's orders. The rule was returnable on February 17, 1987, and, to this date, no response has been received by the Board.

The Board has gone to extreme lengths to accord due process of law in this matter to the Bank, Nazareth, and Raceways, which is not even a party of record. Nazareth has never afforded the Board the courtesy of withdrawing its appeal. Both Nazareth and the Bank have consistently disregarded the Board's orders. As we have often times stated, we will not continue a matter on our docket indefinitely while parties decide whether or not to pursue an appeal. Spring Brook Township v. DER, 1986 EHB 306. And, we are not charged with any responsibility to either ascertain or ferret out potentially interested or affected parties. We are sadly lacking in resources to devote to matters diligently pursued by parties and ready for hearing or disposition, much less matters such as this.

Consequently, the sanction of dismissal is more than justified under these circumstances.

ORDER

AND NOW, this 20th day of May, 1987, it is ordered that the Board's rule of January 29, 1987, is made absolute and the matter docketed at Docket No. 82-268-W is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 20, 1987

cc: **Bureau of Litigation**
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F & B COAL COMPANY (a/k/a B & F COAL COMPANY)	:	
v.	:	**EHB Docket No. 85-556-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued May 20, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. A party is deemed to have admitted the matters in a request for admissions where it fails to serve answers or objections to the request within 30 days. Since the Surface Mining Conservation and Reclamation Act requires that a permit be obtained before commencing coal exploration if over 250 tons of coal will be removed from the site, and appellant admitted that it conducted coal exploration without a permit, the Department is entitled to judgment as a matter of law.

OPINION

On December 26, 1985 F & B Coal Company (a/k/a B & F Coal Company) ("F&B") initiated this matter by filing a Notice of Appeal from a November 27, 1985 compliance order ("order") issued by the Department of Environmental

Resources ("DER"). DER alleged that F&B was conducting surface mining at its operation at a "pre-law refuse area" ("site") in West Carroll Township, Cambria County without first having obtained a permit from DER in violation of Section 4(a) of the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. and the rules and regulations adopted thereunder at 25 Pa. Code §86.1 et seq. DER alleges that, on November 27, 1985, F&B was moving removing and stockpiling coal refuse material at its site. DER directed F&B to cease its mining operations, although it acknowledged that F&B's permit application was being reviewed by it. F&B contends that the order was improper because it was merely engaged in coal exploration, rather than coal mining, and DER had issued to it an "exploration permit" or, alternatively, had waived the permit requirement.

On August 21, 1986 DER filed a motion for leave to conduct discovery via interrogatories and requests for admissions and simultaneously served these on F&B. The Board granted DER's motion on September 26, 1986. F&B never responded to the interrogatories and request for admissions. DER then filed a motion for summary judgment ("motion") on November 7, 1986, alleging, inter alia, that since F&B failed to serve upon DER responses to DER's request for admissions within 30 days, as required by Pa.R.C.P. 4014(b), the subject matter of the requests was deemed admitted. As a result, DER contends that there are no disputed issues of fact, and that it is entitled to judgment as a matter of law, pursuant to Pa.R.C.P. 1035.

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. The record shall be examined in a light favorable to the non-moving party and all doubts as to the existence of genuine factual issues must be resolved against the moving party. Herskovitz v. Vespicco, 238 Pa. Super. 529, 362 A.2d 394 (1976).

Because F&B never served DER with answers or objections to the request for admissions within 30 days, the matters which are the subject of the requested admissions are deemed to have been admitted, pursuant to Pa. R.C.P. 4014(b).[1] These admissions establish that on November 27, 1985, the date of DER's order, F&B was removing and stockpiling coal refuse material at its site; that between July 30, 1984 and November 27, 1985 F&B removed in excess of 250 tons of coal refuse material from its site; that between November 1, 1984 and November 27, 1985, F&B conducted surface mining at its site and that it removed coal refuse material from its site for reprocessing; that as of November 27, 1985, F&B had not received a permit pursuant to SMCRA; and, finally, that on or about March 17, 1986, F&B was issued a permit which authorized surface mining at its site. See DER First Request For Admissions, Paragraphs 1-6.

The removal of mineral material from a refuse pile which resulted from previous mining is surface mining under SMCRA and is, therefore, subject to SMCRA's provisions. Ginter Coal Company v. Environmental Hearing Board, 9 Pa. Cmwlth. 263, 306 A.2d 416 (1973). However, in this case, F&B claims it was merely exploring for coal and, therefore, exempt from SMCRA's permitting requirements. In the alternative, F&B claims that DER waived the permit requirement.

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[1]F&B filed its responses with the Board, rather than serving then upon counsel for DER, as required by Pa. R.C.P. 4014(b). Even giving F&B the benefit of the doubt because it is proceeding pro se, and considering its responses, we are led to the same result.

The requirements for conducting coal exploration are set forth at 25 Pa. Code § 86.131 et seq. Section 86.132 defines "coal exploration," in relevant part, as:

> "The field gathering of surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality of overburden and coal of an area, to establish the condition of an area before beginning mining activities . . ."
> 25 Pa. Code §86.132

Section 86.133 recognizes two types of coal exploration, that where coal will not be removed, except from boreholes or coreholes, and that where coal will be removed. This appeal involves coal exploration in which in excess of 250 tons were removed, and is therefore regulated under §86.133(e), which provides as follows:

> "Any person who intends to conduct coal exploration operation in which coal will be removed shall, prior to conducting the exploration, obtain a permit under this chapter; except that, prior to removal of any coal, the Department may waive the requirement for the permit to enable the testing and analysis of coal properties, if less than 250 tons is removed.

The Board finds no merit in F&B's claim that DER had issued an "exploration permit" (Notice of Appeal, Paragraph 3) or, alternatively, that DER waived the permit requirement. F&B presents no documentary evidence of either a permit or a waiver. And in any event, since in excess of 250 tons of coal was removed from the site, the existence of a waiver, whether express or implied, is of no import.

The absence of a permit, F&B's admission that its surface mining permit was not issued until March 17, 1986, Request For Admissions, Paragraph 6, and the fact that F&B was removing and stockpiling coal refuse material at its site, Request For Admissions, Paragraph 1, leads the Board to the inescapable conclusion that, on November 27, 1985, F&B was conducting

surfacing mining without a permit. Hence, DER acted properly in issuing its order.

The Board finds that there are no material facts in dispute and that DER is entitled to judgment as a matter of law. In light of the foregoing, summary judgment is granted in favor of DER.

ORDER

AND NOW, this 20th day of May, 1987, it is ordered that the Motion for Summary Judgment by the Department of Environmental Resources is granted and that the appeal of F & B Coal Company (a/k/a/ B & F Coal Company) is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 20, 1987

cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

ALBERT J. HARLOW, JR.	:	
	:	
v.	:	**EHB Docket No. 85-148-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued May 27, 1987

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION

SYNOPSIS

A petition for reconsideration of a Board order dismissing an appeal for failure to comply with Board orders is denied where petitioner fails to allege any grounds for reconsideration under Rule 21.122(a).

O P I N I O N

On April 28, 1987 the Board issued an order which dismissed the appeal of Albert J. Harlow, Jr. ("Harlow") for failure to comply with Board orders. On May 13, 1987, Harlow filed a timely petition for reconsideration. On May 18, 1987, the Department of Environmental Resources filed a letter in opposition to Harlow's petition.

Rule 21.122(a) of the Board's rules of practice and procedure provides that the Board may grant reconsideration where its decision rests on grounds the parties had no opportunity to brief or the crucial facts are

not as stated in the Board's decision. The only reason presented by Harlow for reconsideration was that he was negotiating a consent adjudication DER. DER acknowledges this, but asserts that Harlow had received a consent adjudication already executed by DER and Harlow's surety on or about February 27, 1987 and, therefore, had ample time to comply with the Board's order of November 26, 1986 to advise it of the status of the appeal on or before March 16, 1987.

In any event, it was Harlow's responsibility to comply with the Board's order of November 26, 1986. Because Harlow has failed to meet the requirements of §21.122(a), the Board denies his petition for reconsideration.

O R D E R

AND NOW, this 27th day of May, 1987, it is ordered the petition for reconsideration of Appellant Albert J. Harlow, Jr. at Docket No. 85-148-R is denied and the Board's order of April 28, 1987 is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 27, 1987

cc: **Bureau of Litigation**
Harrisburg, Pa.
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William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC.	:	
	:	
v.	:	
	:	EHB Docket No. 86-028-R
COMMONWEALTH OF PENNSYLVANIA	:	(Consolidated Appeals)
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	87-037-R
and	:	87-038-R
NESHAMINY WATER RESOURCES AUTHORITY	:	87-039-R
and PHILADELPHIA ELECTRIC COMPANY,	:	87-040-R
Permittees	:	87-041-R
and	:	
NORTH PENN and NORTH WALES WATER	:	
AUTHORITIES, Intervenors	:	Issued May 27, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

SYNOPSIS

An appellant is precluded from relitigating an issue in a permit extension when that issue had been adjudicated in the appeal of the original permit, even though new information pertinent to that issue has come to light since the adjudication was rendered. During the pendency of an appeal, an action which affords the requested relief renders an appeal moot. Issues over which neither the Board nor the Department have jurisdiction, or issues which are irrelevant, cannot be decided by the Board and, therefore, may be excluded. In order to have standing to pursue issues in an appeal, a party must be aggrieved and to be aggrieved, the party must have a substantial, immediate and direct interest in the subject matter and outcome of the appeal. An organization can gain representational standing where any one of its

members can show standing. Standing in one of several related but separate permits is insufficient to establish standing in the other related permits; standing must be shown in each individual permit. Issues which are relevant to an appeal, are not precluded, which fall within the scope of the Board's jurisdiction and in which an appellant has standing are proper for review.

O P I N I O N

A. INTRODUCTION

1. Preliminary Matters

The above-captioned matter at Docket No. 86-028-R involves seven consolidated appeals filed by Del-AWARE as part of its continued objection to the so-called Point Pleasant project. These appeals are taken from DER extensions of the expiration dates of five permits necessary for the construction of the project. The appeals at Docket Nos. 87-037-R, 87-038-R, 87-039-R, 87-040-R and 87-041-R (collectively, "the '87 appeals") are appeals of subsequent extensions of the same five permits. Four of the five permits which are the focus of the instant appeals were themselves the subject of a lengthy adjudication by the Board. Del-AWARE Unlimited v. DER, 1984 EHB 178 (hereinafter "Del-AWARE I"). This very complicated and geographically diverse 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, Del-AWARE I), requires numerous permits from DER.

Before considering the appeals and the underlying permits, a review of the parties is in order. In all of these appeals, Del-AWARE Unlimited, Inc. ("Del-AWARE") is the Appellant. All of the contested permits were issued by the Department of Environmental Resources ("DER"). For certain of the

appeals, the Neshaminy Water Resources Authority ("NWRA") is the permittee. For certain of the appeals, the Philadelphia Electric Company ("PECO") is either the permittee or an intervenor. PECO has petitioned to intervene in the appeals at Docket Nos. 87-037-R and 87-038-R. The North Penn and North Wales Water Authorities ("NP/NW") are intervenors in the appeals at Docket No. 86-028-R and have petitioned to intervene in the '87 appeals. NP/NW has also petitioned that the '87 appeals be consolidated with the appeals at Docket No. 86-028-R.

The matter before the Board in this opinion is a motion to dismiss which was originally filed by NP/NW in regard to certain of the appeals at Docket No. 86-028-R. PECO later joined in moving for dismissal. Although the motion for dismissal did not specifically include the '87 appeals, the issues of fact and law involved in those appeals are such, for the reasons presented later in this opinion, that the '87 appeals are included with the appeals at Docket No. 86-028-R.

Originally certain of the appeals at Docket No. 86-028-R were assigned to former Board Member Edward Gerjuoy. Certain other of these appeals and the '87 appeals were assigned to Board Chairman Maxine Woelfling. Upon objections raised by Del-AWARE, Chairman Woelfling recused herself from any participation in these matters because of a conflict created by her former position as DER's Director of the Bureau Regulatory Counsel. All of the above appeals have been reassigned to Board Member William A. Roth. Because there is a vacancy on the Board due to Board Member Gerjuoy's resignation, effective January 1, 1987, and because of Chairman Woelfling's recusal, the further handling of these appeals, as well as ultimate disposition, if appropriate, would of necessity be solely by Board Member Roth.

The parties were notified of this situation and invited to raise

objections, by March 16, 1987, to Board Member Roth's, sole handling of the appeals. In the meantime, objections to and a request for reconsideration of Chairman Woelfling's recusal were received. Chairman Woelfling affirmed her decision of recusal and the deadline for objections to Board Member Roth's sole handling was extended to March 31, 1986. Del-AWARE, PECO and NP/NW have responded with no objections. DER and NWRA did not respond. Accordingly, under the circumstances just outlined, the handling of these appeals solely by Board Member Roth meets the requirements of 25 Pa. Code §21.86, concerning final Board decisions.[1]

Portions of this opinion were drafted by Mr. Gerjuoy prior to his retirement from the Board. However, that draft did not include a consideration of the '87 appeals. Accordingly, this opinion is issued with modifications which reflect the effects of DER's latest actions, which are the subject of the '87 appeals.

2. The Permits and The Appeals

There are five permits which are the subjects of the instant appeals. These permits individually authorize the construction of various components of the project.

a) Permit No. ENC 09-81 - NWRA Permittee

Docket No. 86-028-R is an appeal of a December 20, 1985 letter from DER to NWRA, extending the time limit for completion of construction under Permit No. ENC 09-81. Under this permit, NWRA is authorized to construct,

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[1]This situation is not without precedent. Del-AWARE I, supra, was decided by only one Board member in a situation where only two Board member positions were filled and one Board member had recused himself. See also, F&S Coal Company v. DER, Docket No. 86-617-R, dismissal of appeal, issued March 26, 1987.

inter alia, a water intake structure on the Delaware River and an energy dissipater and outfall structure on the North Branch Neshaminy Creek. The permit was issued on February 8, 1982 and was set 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, 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 case. Thus, the extended expiration date of Permit No. ENC 09-81 was effectively set as September 24, 1986.

By order dated September 19, 1986, DER extended the expiration date of Permit No. ENC 09-81 to December 31, 1986, which extension was appealed by Del-AWARE at Docket No. 86-589-R.

By order dated December 30, 1986, DER once again extended the expiration date, this time to June 30, 1987, which extension was appealed by Del-AWARE at Docket No. 87-037-R. (DER's order also amended the permit; see discussion below.)

b) Permit No. WA 978601 - NWRA Permittee

Docket No. 86-029-R is an appeal of a January 7, 1986 DER order extending the time limit for completion of construction under NWRA's water allocation Permit No. WA 978601. This permit, which authorized acquisition of rights and use of water 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. WA 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 limits 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. WA 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. WA 978601 also was September 24, 1986.

By order dated September 19, 1986, DER extended the expiration date of Permit No. WA 978601 to December 31, 1986, which extension was appealed by Del-AWARE at Docket No. 86-588-R.

By order dated December 30, 1986, once again extended the expiration date, this time to June 30, 1987, which extension was appealed by Del-AWARE at Docket No. 87-038-R.

c) Permit No. ENC 09-51 - PECO Permittee

Docket No. 86-030-R is an appeal of a December 9, 1985 DER letter to PECO extending to December 31, 1986 the time limit for completing construction

under Permit No. ENC 09-51. Under this permit, PECO is authorized to construct a 6.7 mile water supply pipeline from the Bradshaw Reservoir to an outfall structure on the East Branch Perkiomen Creek. This permit had been issued originally on September 2, 1982 and was due to expire on December 31, 1985.

By order dated December 30, 1986, DER extended the expiration date of Permit No. ENC 09-51 to June 30, 1987, which extension was appealed by Del-AWARE at Docket No. 87-041-R.

d) Permit No. ENC 09-77 - PECO Permittee

Docket No. 86-031-R is an appeal of a December 9, 1985 DER letter to PECO which extended to December 31, 1986 PECO's time limit for constructing an outfall structure on the East Branch Perkiomen Creek, under Permit No. ENC 09-77. This permit originally had been issued on September 2, 1982, and apparently also was due to expire on December 31, 1985. This outfall structure is at the western terminus of the PECO pipeline authorized under Permit No. ENC 09-51, supra.

By order dated September 30, 1987, DER extended the expiration date of Permit No. ENC 09-77, this time to June 30, 1987, which extension was appealed by Del-AWARE at Docket No. 87-039-R.

e) Permit No. DAM 09-181 - PECO Permittee

Docket No. 86-032-R is an 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 Bradshaw 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.

By permit amendment, DER extended the expiration date to December 31, 1988, which extension Del-AWARE appealed at Docket No. 87-040-R.[2]

3. Del-AWARE I

On June 18, 1984 the Board issued its adjudication of Del-AWARE I, supra., which dealt with all of the above discussed permits, except for Permit No. WA 978601. That lengthy opinion dealt with the many issues raised by Del-AWARE in its challenge to the above permits. The Board concluded that DER properly issued the several permits except for certain aspects related to the two outfall permits. Del-AWARE I, supra., at 332.

With respect to Permit No. ENC 09-81, the Board remanded the permit to DER for action on two items: a) inclusion of a condition that no discharge from the outfall into the North Branch Neshaminy Creek may occur unless authorized by National Pollutant Discharge Elimination System (NPDES) permit; and b) if the resulting stream velocity cannot be reduced to 2 feet per second, performance of a balancing analysis of the need for the project versus the impacts of erosion on the receiving stream, after all possible mitigation of the erosive impacts. Del-AWARE I, supra., at 293, 332.

With respect to Permit No. ENC 09-77, the Board remanded the permit to DER for action on the same two items as for Permit No. ENC 09-81. However, the Board also remanded this permit for the inclusion of a requirement that

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[2]The above summary of the facts pertinent to these 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.

specified flow cutoff when the Bucks Road gauge reads 125 feet per second. Del-AWARE I, supra., at 294, 332.

The Board notes that Del-AWARE I did not order DER to actually issue NPDES permits. The Board merely ruled that DER's decision that NPDES permits were not required was erroneous.

Thus, with these exceptions, the Board completely upheld the four permits. Del-AWARE I has been completely affirmed on appeal in all respects. Del-AWARE Unlimited, Inc., et. al. v. DER, et. al., __ Pa. Cmwlth. __, 508 A.2d 348 (1986).

4. Del-AWARE II

On August 26, 1986, the Board issued an opinion and order in the then consolidated appeals at Docket No. 86-028-R, which we shall refer to as Del-AWARE II. Del-AWARE II preliminarily dealt with the instant motion to dismiss.

The claimed grounds for dismissal of this appeal are (i) the permit extensions were not appealable actions; (ii) Del-AWARE lacked standing; and (iii) Del-AWARE is precluded by res judicata and/or collateral estoppel from raising the issues in its appeal because they were fully adjudicated against Del-AWARE in Del-AWARE I.

Del-AWARE has responded to these motions to dismiss. DER, though given the opportunity to do so, chose not to formally respond. There was some oral argument on these motions, at a hearing on May 28, 1986. In Del-AWARE II, the Board deferred its rulings on the pending motions to dismiss. However, Del-AWARE was ordered to detail those factual allegations which, according to Del-AWARE, warranted Del-AWARE's standing to prosecute each of the permit extension appeals, including pertinent names and addresses

of persons who were Del-AWARE members when the appeals were filed. Del-AWARE was also ordered to make specific factual allegations demonstrating that DER did not have good cause to extend these permits. In addition, Del-AWARE was required to list the specific issues (other than those already mentioned) which Del-AWARE believed were not precluded from litigation by Del-AWARE I. Del-AWARE was also ordered to list the aspects in which the present permits which are the subject of the 86-028-R were deficient because they failed to incorporate features required by Del-AWARE I and should not have to be relitigated under principles of issue preclusion.

All parties responded to the Board's directions enumerated in Del-AWARE II's Order (See Del-AWARE II, pps. 24 and 25). Therefore, we now rule on the motion to dismiss and on other pending issues deferred by Del-AWARE II. At this stage of these proceedings, these motions to dismiss must be treated as requests for judgment on the pleadings in favor of the Permittees (though the Permittees have not so characterized these motions) under Pa.R.C.P. 1034. Thus, any well pleaded allegation by Del-AWARE must be taken as true. Thomas Merton Center v. Rockwell International Corp., 280 Pa. Super. 213, 421 A.2d 688 (1980).

B. STANDING - SUBSTANTIAL INTEREST

We only will discuss the "substantial interest" segment of standing in this section. The remaining segments are discussed in section D, infra. Del-AWARE has raised so many issues which either cannot be relitigated or are not relevant to this appeal that it is simpler to defer the "causation" element of standing until after we have pared down the number of issues.

In previous Del-AWARE Board orders, much has been written regarding the "substantial interest" prong of the three-pronged standing test that was

articulated in William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 183, 346 A.2d 269 (1975). That case held that to have standing, a party must be "aggrieved" and that to be aggrieved, the party must have a "substantial," "immediate" and "direct" interest in the subject matter of the appeal.

Obviously, the Board must determine a means to deal with the "substantial" interest test in dealing with a citizens organization. Consequently, on numerous occasions the Board has accepted representational standing if any one of the organization's members is suffering harm sufficient to satisfy the test in William Penn, supra. American Bookseller's Association v. Rendell, 332 Pa. Super. 537, 481 A.2d 919,927 (1984); Del-AWARE, et. al. v. DER, et. al., 1984 EHB at 265. In fact, the Board, in the instant series of appeals has agreed to make a finding of "substantial interest" if Del-AWARE can produce even one member who makes sufficient use of a public waterway of a sort that is distinguishable from the use made by the general public. Del-AWARE v. DER et. al., 1985 EHB at 487; Concerned Citizens Against Sludge, 1983 EHB 442.

We now shall examine the "substantial interest" test in the context of each of the five permit appeals before us. In the appeals related to Permit No. ENC 09-81 (Docket Nos. 86-028-R, 86-589-R, and 87-037-R), the Board is persuaded that through representational standing Del-AWARE has met the "substantial interest" test. David Windholz is the Del-AWARE member through whom this test is satisfied. The construction of the outfall authorized by this permit will affect the North Branch Neshaminy Creek, which abuts 500 yards of Mr. Windholz's property. His residence occupies 400 feet of this property, with the balance of the footage taken up by his sporting goods business. The ownership of riparian property adjacent to an affected stream

has been repeatedly held to be sufficient to satisfy this "substantial interest" test. Committee to Preserve Mill Creek v. Secretary of Health, 3 Pa. Cmwlth. 200, 281 A.2d 461 (1971); Concerned Citizens of Rural Ridge v. DER, 1979 EHB 201. It is alleged that Mr. Windholz enjoys extensive recreational use of the stream due to its proximity and that his customers use the creek to fish for catfish and bass. These allegations concerning Mr. Windholz are sufficient to give him and, therefore, Del-AWARE a "substantial interest" in the outcome of this permit appeal.

In the appeal of Permit No. WA 978601 (Docket Nos. 86-029-R, 86-588-R, and 87-038-R), which authorized NWRA to acquire water from the surrounding Delaware River and other waters, the Board was unable to find even one Del-AWARE member who merited a finding of "substantial" interest in the outcome of the appeal. The Del-AWARE members listed in its supplemental pre-hearing memorandum did not satisfy the "substantial interest" test in connection with this permit. The members listed were either concerned about increased utility rates, not an issue of concern to DER (See infra), or that they would have to become customers of NP/NW. The Board fails to see to how any of these concerns meet the "substantial interest" test.

The Board rejects Del-AWARE's suggestion that a party found to have "substantial interest" in some or all of the other appeals of permits authorizing various components of the Point Pleasant Project will suffer impacts sufficient for a finding of "substantial interest" in the outcome of this permit appeal. Even a cursory examination of the geographical area covered by the Point Pleasant project reveals that a party adversely affected by the construction of, for example, the outfall structure on the East Branch Perkiomen Creek, under the Permit ENC 09-77 need not be adversely affected by the acquisition of water rights under Permit WA 978601.

In its discussion of the appeals of Permit No. ENC 09-51 (Docket Nos. 86-030-R and 87-041-R), Permit No. ENC-09-77 (Docket Nos. 86-031-G and 87-039-R), and Permit No. DAM 09-181 (Docket Nos. 86-032-R and 87-040-R), Del-AWARE asserts that a member with "substantial interest" in any one of these permit appeals has such an interest in all three. As PECO correctly notes in its renewed motion to dismiss, this is an attempt by Del-AWARE to ". . . blur the permitting actions and to treat them as a single claim of alleged harm." PECO Supplemental Motion to Dismiss (October 27, 1986) at 4. Del-AWARE argues that Permit No. ENC 09-51 (the PECO water supply line) is related to Permit Nos. ENC 09-77 (East Branch Perkiomen Creek outfall) and DAM 09-181 (Bradshaw Reservoir), and suggests that since they form a chain in the project, Del-AWARE's members' standing arguments should be evaluated in connection with all three at the same time. Again, the geography renders this argument invalid and Del-AWARE must find a member with "substantial interest" for <u>each</u> permit to satisfy this prong of the standing test. Further, the Board finds no legal support for the proposition that one can simply transfer or interchange the relationship of a Del-AWARE member to one permit appeal, which may be sufficient for a finding of "substantial interest," to <u>another</u> permit appeal. We must and will examine the "substantial interest" segment of standing for each of these permit appeals on each appeal's own factual allegations.

In the appeal of Permit No. ENC 09-51 (Docket Nos. 86-030-R and 87-041-R), which authorized PECO to build a water supply line between the Bradshaw Reservoir and the East Branch Perkiomen Creek, the Board finds "substantial interest" on the part of Del-AWARE, through three of its members. Richard McNutt is a property owner residing within 150 yards of the site of the pipeline. His proximity to the construction and resultant blasting for

the pipeline confers upon Del-AWARE "substantial interest" in the outcome of this appeal. The same degree of interest in the outcome of this permit appeal can be found in the case of Chuck Yarmiak and Patricia Godfrey, whose residence and property lie 300 yards from the pipeline site. Their proximity to the noise and other environmental effects of the waterway's construction certainly confer an interest greater than the interest of the average member of the general public.

In the appeal of Permit No. ENC 09-77 (Docket Nos. 86-031-R and 87-039-R), which authorized PECO to construct an outfall structure on the East Branch Perkiomen Creek, the Board is persuaded that Del-AWARE, by its members has a "substantial interest" in the outcome of this permit appeal. The Board did not so find on the basis of the situation of Amelia Cortz, one of the Del-AWARE members alleged to have a "substantial interest" in this appeal. Although she owns property that fronts on the stream and which is contiguous to the outfall structure, she fails to meet the "substantial interest" test, as she lives upstream from the water line outfall. However, Mark and Judy Dornstreich do have a "substantial interest" in this permit appeal. They are riparian property owners in close proximity to the stream and allege that they make extensive recreational use of the stream.

In the appeal of Permit No. DAM 09-181 (Docket Nos. 86-032-R and 87-040-R), which authorized PECO to construct the Bradshaw Reservoir, the Board finds that Del-AWARE has not met the "substantial interest" test through its members. Member Kathleen Criste lives one quarter mile away from the Bradshaw Reservoir site. She allegedly makes use of and depends upon groundwater supplies near her residence. Although we have deferred discussion of causation, nevertheless, we can assert here that this bare allegation of groundwater use relates to a harm too speculative to warrant a finding of

"substantial interest". Ms. Criste also is allegedly concerned with potential flooding. The pleadings, however, do not specify whether she lives upstream or downstream from the dam. Without more factual specificity, her "substantial interest" claim is very speculative and will not suffice.

In summary, Del-AWARE has met the "substantial interest" part of the standing test with respect to the appeals of Permit Nos. ENC 09-81, ENC 09-51 and ENC 09-77. It has not met the test with regard to Permit Nos. WA 978601 or DAM 09-181.

C. ISSUES PERTINENT TO THESE APPEALS

1. Precluded Issues

In Del-AWARE II, the Board carefully discussed the issue preclusive effects of its previous rulings. The Board agreed with Del-AWARE's contention that the principles of res judicata articulated in Bethlehem Steel v. DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978), had not been satisfied in the instant appeals, because the later appeals related to the extension of the permits and, therefore, there was no identity of "the thing sued for."

But, as Del-AWARE II noted, issue preclusion can be invoked when the circumstances warrant collateral estoppel, even though res judicata is unwarranted. The Board in Del-AWARE II then adopted the criteria for issue preclusion by collateral estoppel formulated in Restatement 2nd Judgements, §27 (1982) to govern the Board's rulings concerning issue preclusion in the instant appeals. Del-AWARE II, pps. 11-19.

Against this background, we turn now to the issues raised in Del-AWARE's supplemental pre-hearing memorandum to evaluate whether they are barred by the principle of issue preclusion. Some of the issues raised pertain to a specific permit while others pertain to the Point Pleasant

Project as a whole. Those pertaining to a specific permit will be so identified, to the extent that Del-AWARE's pleadings allow.

a) Harm to American Shad Species (Permit No. ENC 09-81)

Del-AWARE alleges that it has been established that the Point Pleasant Area is a spawning pool for American shad and that the construction by NWRA of the water intake structure will entrain and impinge fish larvae and adversely affect this species. For reasons thoroughly explained in Del-AWARE II, this issue is precluded by this Board's decision in Del-AWARE I, (pps. 299-300).

b) Contravention of DRBC Good Faith Agreement

Del-AWARE alleges that this project contravenes the Delaware River Basin Commission's (DRBC's) interim adoption of the so-called "Good Faith Agreement" which establishes legal restrictions on the Delaware River water and ". . . requirements for enhanced storage, all of which have an adverse impact on riparians, fishermen, and recreational users . . ." Del-AWARE Supplemental Pre-Hearing Memorandum at 8. Del-AWARE alleges that the diversion will operate to the harm of the very people that the DRBC is trying to protect. Once again, Del-AWARE fails to plead with factual specificity in this context. It omits many facts, including the date the Good Faith Agreement was adopted, upon whom it was binding and if it applied and was binding upon the Acts under which these permits were issued. Without this factual support the Board must presume that the Good Faith Agreement was considered previously and the Board must hold that this allegation also is precluded by Del-AWARE I. From the information pleaded by Del-AWARE it appears that Del-AWARE is trying to litigate a matter relating to the granting of the original permits.

c) Inducement of Growth (Permit WA 978601)

Del-AWARE alleges that NWRA's diversion of Delaware River waters would have an adverse impact on area residents by having the effect of inducing growth. Once again, this issue is precluded by Del-AWARE I. Del-AWARE I, supra, at 328.

d) Increased Utility (Water) Costs

Del-AWARE alleges in numerous places that the NWRA construction would be harmful to its members by producing higher utility user costs. This issue is simply a rephrasing of the "less-expensive alternative" issue discussed at length in Del-AWARE I, supra at 307-323,330. This less costly alternative issue was fully litigated in Del-AWARE I and formed part of the extensive pool of contentions raised by Del-AWARE that the Board rejected in reaching its final adjudication. Therefore, this alternatives issue is precluded.

e) PECO's Reluctance to Introduce New Alternatives

Next, Del-AWARE alleges that PECO has been reluctant to produce reasonable alternatives, especially regarding use of Schuykill River Water. Several alternatives proposed by PECO were explored. These included the shifting of Schuykill Waters from the Philadelphia area for PECO's use in this project. This issue is therefore precluded. The alternatives suggested by Del-AWARE in its supplemental pre-hearing memorandum were, in fact, new. These alternatives relate back to the original project permits and would be irrelevant to their extensions.

f) New DRBC Evidence

Del-AWARE argues that the DRBC has more information at its disposal regarding the Delaware River Water diversion that could not have been anticipated at the time of the hearings in Del-AWARE I. Del-AWARE, therefore, claims that this new DRBC evidence must be re-evaluated. Del-AWARE admits, the available DRBC information was considered when the Board wrote Del-AWARE I. The alleged availability of "new" information, in the context of these appeals of construction permit extensions, is not sufficient reason to reopen this matter for hearing this new -- doubtless soon to be "old" -- information. As the Board in Del-AWARE II explained:

> "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 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 was closed." Del-AWARE II, supra, at 18.

g) Washout of May 21, 1983 (Permit No. ENC 09-81)

In its supplemental pre-hearing memorandum, Del-AWARE alleges that NWRA through its contractors and engineers, pursuant to Permit No. ENC 09-81 failed to take proper precautions in constructing the hillside water intake project at Point Pleasant. According to Del-AWARE, this alleged negligence caused a massive washout on May 21, 1983, which severely damaged several residences and adjacent land. Del-AWARE further pleads that since May 21, 1983, no new plan has been submitted although, according to Del-AWARE, both DER and the NWRA acknowledge that the washout demonstrates the need for the redesign of both the pipeline and the construction methodology. Del-AWARE argues that, under the circumstances just described, to simply renew the

permit and allow construction resumption, that construction now being a new event, without redesign and modified methodology would be unconscionable.

We are not persuaded that this is not a precluded issue. The alleged washout occurred more that a year before the Board issued Del-AWARE I. Del-AWARE's pleadings are at best vague as to where this washout occurred. For example, in paragraph (ii) of its notice of appeal, Del-AWARE alluded to ". . . environmental risks associated with construction on the hillside, which caused work to be suspended after a disastrous washout . . ." In paragraph 15 of its pre-hearing memorandum, Del-AWARE alluded to a ". . . washout which occurred on May 21, 1983 . . ." which, it alleged, would require design changes. Finally, at page 17 of its supplemental pre-hearing memorandum, Del-AWARE asserts that NWRA failed ". . . to take proper precautions in constructing the project on the hillside at Point Pleasant . . ." which contributed to a ". . . massive washout on May 21, 1983, which substantially damaged several residences and irreparably altered the natural topography, adversely affecting the entire area."

We again restate that, in Del-AWARE I, the Board upheld this permit in all respects excepts for issues related to the outfall to the North Branch Neshaminy Creek. Del-AWARE omits many facts, including those members of Del-AWARE who residences were damaged. Without this factual support, the Board must presume that construction aspects of the permit were considered previously and the Board must hold that this allegation also is precluded by Del-AWARE I.

However, even if this issue is not precluded, Del-AWARE has not shown, through its supplemental pre-hearing memorandum, even one member who has standing to raise this issue. Even though Del-AWARE draws the Board's attention to Frank Plichta and Joe and Sheryl Leeb, the vagueness of the

location of the alleged washout, together with the lack of assertions as to how this affected Plichta and the Leebs, do not establish an interest which is substantial, immediate and direct. Accordingly, this issue is precluded from this appeal.

h) Pipeline Construction Effects (Permit ENC 09-51)

In Del-AWARE I, the Board completely upheld DER's issuance of this permit. The Board must presume that construction aspects of the permit were considered previously and the Board must hold that this allegation also is precluded by Del-AWARE I.

2. Board's Scope of Review

In raising its allegations, Del-AWARE seemingly has not recognized that the Board only has jurisdiction to review matters over which DER exercises authority. The Board's sole role is to determine if DER has abused its discretion or has arbitrarily exercised these DER powers. Warren Sand and Gravel, v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), particularly at 569-570.

a) Increased Utility (Electric) Costs

In numerous places, Del-AWARE's supplemental pre-hearing memorandum raises the issue of its members' increased utility user costs if the permit appeals are not granted. This issue is initially raised in connection with the alleged "substantial interest" of Del-AWARE's members in the outcome of the appeals of Permit No. WA 978601. The issue is raised again in Del-AWARE's discussion of increased electric rates due to pass through construction costs. The issue of increased rates to users also is raised in connection with

alleged "new" adverse impacts on area residents. And, finally, the issue of increased utility rates to Del-AWARE members is raised in a duplicative discussion of alternatives which were allegedly available in considering a water diversion project in this geographical area.

It is conceivable that the question of higher or even exorbitant user rates to Del-AWARE members as a result of this project merits extensive probing, but not by this Board. Rather, this is an issue that should be left to the Pennsylvania Public Utility Commission ("PUC"). The fact that this issue falls within the scope of review of the PUC has been reiterated countless times in the caselaw.

In Pennsylvania Public Utility Commission v. Philadelphia Electric Company, 501 Pa. Super. 153, 460 A.2d 734 (1983), a case which happened to pertain to Limerick's construction, responsibility for excessive user rates was placed in the PUC's hands. The Court said, "[The PUC] is responsible not only for assuring just and reasonable rates, 66 Pa. C.S.A. §1301, but also for overseeing maintenance of adequate, efficient and continuous service, 66 Pa. C.S.A. §1501".

Clearly from the statutes and the caselaw, the PUC, and not this Board, is the proper tribunal to review Del-AWARE's allegation that increased electric rates will result from the Point Pleasant Project. This issue is outside the scope of the instant appeals.

b) Limerick II Is Not In The Public Interest

Del-AWARE also alleges, by virtue of evidence prepared by the DRBC and the Governor's Energy Council, that the construction of Limerick II is not in the public interest, and more importantly, that there is no public need for Limerick II. The Board finds PECO right on point in its response to this

allegation embodied in its renewed motion to dismiss:

> "The need for additional or replacement electric generating capacity to serve the consumers of the Philadelphia Electric Company system and the Pennsylvania-New Jersey-Maryland interconnection (PJM) is primarily a matter for determination by the Pennsylvania Public Utility Commission (PUC) and federal energy agencies."

See Renewed Motion Of PECO at 21 (October 27, 1986), from DER Environmental Assessment Report and Findings-Point Pleasant Water Supply Project, at 28 (August 1982) (DER Exh. 2)

The legislature gave the PUC the power to deal with load capacity in 66 Pa.C.S.A. §1315, which states, in relevant part, that:

> "...the cost of construction . . . of a facility undertaken by a public utility . . . shall not be made a part of the rate base nor otherwise included in the rates . . . until such time as the facility is used and useful to the public."

The newly codified 66 Pa.C.S.A. §1323 (enacted in 1986) makes it obvious that it is the PUC, and not this Board, that is empowered to safeguard the public in this context. §1323 states, in relevant part, as follows:

> (a) Excess capacity costs. -- Whenever a public utility claims the cost of an electric generating unit in its rates for the first time, and the commission finds that the unit results in the utility having excess capacity, the commission shall disallow from the utility's rates, in the same proportion as found to be excess capacity . . .
>
> * * * * *
>
> (3) For the purposes of this section, a rebuttable presumption is created that a unit or units . . . shall be determined to be excess unless found to be needed to meet the utility's customer demand plus a reasonable reserve margin in the test year or the year following the test year . . .
>
> (emphasis added)

The above notwithstanding, the Board recognizes that DER does have a role in the safeguarding of the public interest. With respect to DER's role in

this context, all alleged environmental incursions caused by the Point Pleasant Project, the authorizing permits for which are the subject of the instant appeals were dealt with in Del-AWARE I and dismissed, with the exception of (i) erosive effects on the streams, (ii) the pollutional effects of discharges and (iii) flooding on the East Branch Perkiomen Creek. Del-AWARE I, supra., at 330,331. The Board decided in Del-AWARE I that these environmental incursions were within DER's discretion and could be controlled by: (i) limiting stream velocities, (ii) requiring NWRA and PECO to obtain NPDES permits and (iii) specifying a flow cutoff for the East Branch Perkiomen Creek. Thus, to reexamine Article I, §27 of the Pennsylvania Constitution, which refers to DER's role in safeguarding the public in this opinion, would be the equivalent of relitigating issues fully litigated and decided in Del-AWARE I.

3. Issues Pertaining to NP/NW As Permittee

Del-AWARE, by its own admission, states that there has been no transfer of permittee rights from NWRA to NP/NW. Yet, Del-AWARE insists on raising various issues regarding NP/NW as if NP/NW were the present holder of NWRA permit rights. Among other things, Del-AWARE raises NP/NW's allegedly unreliable work record and its failure to present less costly alternatives. Del-AWARE, therefore, alleges that there will be new and different impacts on Bucks County than those outlined in Del-AWARE I (which, in fact, gave no thought to NP/NW as permittee). According to Del-AWARE, such impacts must be examined in the instant appeal. The fact remains that NP/NW is not before this Board as a permittee. When, if or until NP/NW achieves permittee status, the issue is excluded from these appeals.

4. Other Excluded Issues

a) NWRA's Investigation and Results

Del-AWARE raises other irrelevant or otherwise excludable issues under the heading that DER did not have "good cause" to extend the permits as defined by the Board in Del-AWARE II, supra, at 21-23. One such issue is that prior to the permit extension grants that are the subject of the instant action, NWRA conducted an investigation with DER's knowledge which demonstrated that the original project approvals had been secured with the aid of false and misleading information. Del-AWARE goes on to state that this alleged misinformation primarily consisted of the fact that Bucks County's water needs were falsified and that this fact was being withheld so the project could appear to be cloaked in the public interest.

The Board finds this entire argument to be without legal merit. Del-AWARE failed to plead the argument and facts pertinent thereto in such a manner as to create a foundation for a reviewable legal issue. As such, the pleadings are deficient in setting forth any solid legal claim upon which the Board could grant relief. As it is written in Del-AWARE's supplemental pre-hearing memorandum, it is a purely speculative and emotional claim. It will have to suffice to say that a careful reading of Del-AWARE II would reveal that this is not what the Board intended when it gave Del-AWARE the opportunity to demonstrate that DER did not have "good cause" to extend the permits.

b) Bradshaw Reservoir Amended Plans

Del-AWARE alleges with considerable outrage that PECO intends to reduce by two-thirds the size of the Bradshaw Reservoir (authorized by Permit No. DAM 09-181). The Board holds that this issue is not relevant to the instant permit extension dispute. We must presume that DER will see to it that the reservoir is built to permit specifications. When, if and until PECO formally seeks and secures an amendment to its original permit, incorporating a reduction in the reservoir size, Del-AWARE will be able to appeal that amendment. Until such time, this possible design modification of the Bradshaw Reservoir is not before us. Once again we stress that, with this discussion, supra, there comes no implication as to the appealability or merits of any DER amendments to the Bradshaw Reservoir design.

c) Governor Casey's Campaign Statements Regarding The Project

Del-AWARE alleges that Governor Casey went on record during his campaign stating that this whole project required major intensive review to determine if the project was proper and in the public interest. These allegations, whether correct or not, offer absolutely no reason for the Board to alter Del-AWARE I's adjudication of the propriety of these permits. DER is not empowered to deny a permit on the basis of representations made during a political campaign. If the new administration reviews the Point Pleasant project and decides to alter the previous course of action through permit modifications or revocations, those actions will be reviewable by the Board. In the meantime, however, the permits remain in force and the sole issue before us is whether DER abused its discretion in extending these permits.

d) PECO's Operational Record

Del-AWARE argues that PECO's permits should be revoked primarily on the alleged basis of poor operational practices at other PECO nuclear facilities. While these indeed are serious allegations, consideration of them is reserved to the Nuclear Regulatory Commission ("NRC") under the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011, et seq. It was not an abuse of DER's discretion to not take into account these allegations of Del-AWARE's concerning PECO's operational history. The Board excludes this issue from this appeal.

e) Higher East Perkiomen Flows Will Prevent Stream Crossings

Del-AWARE alleges that the construction permit granted PECO to construct a water supply line will result in higher flows in the East Branch Perkiomen Creek, and these resultant water levels occurring in the stream will prevent tractors and other farm equipment from crossing the stream. While we seriously question this contention, Del-AWARE does not have standing to raise this issue, since it has not listed among its members anyone who crosses the stream with their equipment. As we understand Pennsylvania law, Del-AWARE does not have the right to act as a private attorney general, protecting the public from harm. Pennsylvania Game Commission v. DER, Ganzer Sand & Gravel, Inc. and Hammermill Paper Company, 1985 EHB 1, at 9-13, aff'd, 92 Pa. Cmwlth. __ , 509 A.2d 877 (1986), at 882-884. Del-AWARE has standing to raise only those issues which individually meet the William Penn test. Del-AWARE cannot be allowed to use the fact that one of its contentions meets the William Penn test as a bootstrap for introducing a host of issues irrelevant to the issue that legitimately earned Del-AWARE its standing. This contention is irrelevant to this appeal. Furthermore, it appears to be a variation of the flooding issue

which the Board thoroughly considered in Del-AWARE I. Evidence in support of this contention will not be admitted should this appeal reach a hearing on the merits.

5. Issues Not Excluded From These Appeals

We are now in a position to list those few issues out of the myriad of issues raised by Del-AWARE which cannot be excluded from these appeals at this stage of the proceedings.

a) Velocity/Stream Erosion Control As Mandated By Del-AWARE I

This issue remains germane to certain of these appeals for the reasons that follow. In Del-AWARE I there was extensive discussion of Del-AWARE's contention that the effect of the diverted Delaware River water on the erosion of both the North Branch Neshaminy Creek and the East Branch Perkiomen Creek would be significant. Del-AWARE I, supra, at 282-293. Del-AWARE ultimately prevailed on this issue and the Board ordered that, through conditions to be inserted in Permit Nos. ENC 09-81 and ENC 09-77, the velocity of the diverted water in the two streams would have to be controlled. The Board remanded consideration of the issue to DER consistent with 25 Pa. Code, §§105.14-16. The Board then ordered that once appropriate velocity levels were established, they either be incorporated into the permit, or, if after its investigation DER found velocity regulation unnecessary, a justification of the reasons be made available.

In the appeals pertaining to Permit No. ENC 09-81 (Docket Nos. 86-028-R and 86-589-R) and to Permit No. ENC 09-77 (Docket Nos. 86-031-R), Del-AWARE alleges that extensions were granted without any consideration of this remanded issue. Neither DER nor PECO has denied this allegation which, in

any event, must be accepted as true in our consideration of the Permittee's motion to dismiss. In these three appeals, therefore, Del-AWARE has raised an issue that falls within the scope of these appeals. Nearly a year and a half after Del-AWARE I was issued, DER assuredly should have incorporated a velocity control condition into Permit Nos. ENC 09-81 and ENC 09-77, or should have made available its balancing analysis.

With the issuance of the latest extensions of Permits Nos. 09-81 and 09-77 (Docket Nos. 87-037-R and 87-039-R, respectively), however, DER has included its decision on the remanded velocity/stream erosion control issue. The general rule with regard to mootness, which we are constrained to follow, is that a case will be dismissed as moot when an event occurs while the appeal is pending which renders it impossible for the requested relief to be granted. Cox v. City of Chester, 76 Pa. Cmwlth. 446, 464 A.2d 613 (1983); Paul C. Harman v. DER, 1984 EHB 834. Because DER has issued its remand decision, there is no relief the Board can grant, with respect to this issue, in the appeals at Docket Nos 86-028-R, 86-031-R and 86-589-W. Accordingly, these appeals, with respect to this issue, may be dismissed as moot.

What would remain before the Board, in the appeals of Permit Nos. ENC 09-81 and ENC 09-77, at Docket Nos. 87-037-R and 87-039-R, respectively, would be the sole issue of whether DER's remand decision properly comports with the Board's order in Del-AWARE I.

b) DER's Failure to Comply With §638 of the Water Allocations Act

Del-AWARE makes an argument that relies on §638 of the Water Allocations Act, the Act of June 24, 1939, P.L. 842, as amended, 32 P.S. §631 et seq. regarding NWRA's alleged lack of timeliness in its commencement and completion of construction. Section 638 specifies that four years is the

maximum time period for the water "taking" by the Permittee, unless a proper extension is granted. Del-AWARE's discussion in this connection pertains to Permit No. WA 978601. In particular, its contention is that the permit was null and void because the project was not completed by the time specified in the original permit. It is alleged that since the original permit issuance date was November 1, 1978 and since no extension has been applied for under the Water Allocations Act, NWRA's time for taking has expired.

This issue would fall within the scope of these appeals for the following reasons. This is a genuine issue, never previously litigated in this matter. Moreover, it seems appropriately connected with the "good cause" issue that the Board held would not be precluded under Del-AWARE II (i.e. that there was good cause for DER to withhold these extensions). Del-AWARE II, supra, at 21.

c) NPDES Permit Conditions Mandated by Del-AWARE I

In Del-AWARE I, the Board ordered that conditions be incorporated into Permit Nos. ENC 09-81 and 09-77 to the effect that no discharges may occur through the outfalls authorized by those permits unless such discharges were authorized by NPDES permits issued by DER. These conditions were to prevent the possibly polluting effects of the water diverted from the Delaware River to the North Branch Neshaminy Creek and the East Branch Perkiomen Creek. Del-AWARE I, supra, at 266-281,330. In the appeals of Permit Nos. ENC 09-81 (Docket Nos. 86-028-R and 86-589-R) and ENC 09-77 (Docket No. 86-031-R), Del-AWARE alleges that DER has ignored the Board's order and has yet to include the conditions in the permits. As with the velocity/erosion control issue discussed, supra, Del-AWARE has raised an issue that falls within the scope of these appeals. Nearly a year and a half after Del-AWARE I was issued,

DER assuredly should have incorporated the NPDES related permit conditions into Permit Nos. ENC 09-81 and ENC 09-77.

With the issuance of the latest extensions of Permits Nos. ENC 09-81 and ENC 09-77 (Docket Nos. 87-037-R and 87-039-R, respectively), however, DER has included the ordered NPDES permit condition. As with the case of the velocity/stream erosion issue, supra, there is no relief the Board can grant, with respect to this issue, in the appeals at Docket Nos 86-028-R, 86-031-R and 86-589-R. Accordingly, with respect to the NPDES permit issue, these appeals may be dismissed as moot.

What would remain before the Board, in the appeals of Permit Nos. ENC 09-81 and 09-77, at Docket Nos. 87-037-R and 87-039-R, respectively, would be the sole issue of whether DER's condition properly comports with the Board's order in Del-AWARE I.

d) Bucks Road Gauge Cutoff Flow Mandated by Del-AWARE I

In Del-AWARE I, the Board ordered that a condition be incorporated into Permit No. ENC 09-77 to the effect that flow from the outfall be suspended when the gauge at Bucks Road reaches 125 cubic feet per second, which would serve to prevent flooding along the East Branch Perkiomen Creek. Del-AWARE I, supra, at 293, 332. In the appeal of Permit No. ENC 09-77 (Docket No. 86-031-R), Del-AWARE alleges that DER has ignored the Board's order and has yet to include the condition in the permit. Neither DER nor PECO has denied this allegation which, in any event, must be accepted as true in our consideration of the Permittee's motion to dismiss. In this appeal, therefore, Del-AWARE has raised an issue that would fall within the scope of the appeal. Nearly a year and a half after Del-AWARE I was issued, DER assuredly should have incorporated the flow cutoff condition into Permit ENC 09-77.

With the issuance of the latest extension of Permits No. ENC 09-77 (Docket Nos. 87-039-R), however, DER has included the ordered Bucks Road gauge cutoff condition. As were the cases of the velocity/stream erosion and NPDES issues, supra, there is no relief the Board can grant, with respect to this issue, in the appeal at Docket No. 86-031-R. Accordingly, this appeal may be dismissed as moot.

What would remain before the Board in the appeal of Permit No. ENC 09-77, at Docket Nos. 87-039-R, would be the sole issue of whether DER's condition properly comports with the Board's order in Del-AWARE I.

Del-AWARE raises many other poorly pleaded, meritless, and unsupported issues -- many without relation to any permit extension appeal. In the already lengthy preceding discussion, the Board has dealt with only a few of Del-AWARE's allegations which cannot be relitigated in these appeals on issue preclusive grounds. It would be unduly repetitive for us to detail our reasons for dismissing each and every one of the issues Del-AWARE seeks to raise. Suffice to say that any of Del-AWARE's proffered issues which have not been discussed explicitly in this opinion herewith are excluded as precluded by Del-AWARE I, or as irrelevant, or too speculative to merit serious consideration.

D. STANDING - IMMEDIATE AND DIRECT INTEREST

Thus far the Board has held that Del-AWARE through its members has a substantial interest in all of the permit appeals except those of Permits Nos. WA 978601 and DAM 09-181. The Board has explicitly deferred analysis of the "immediate" and "direct" components of the William Penn test. The Board has also examined all the issues raised by Del-AWARE from the standpoints of issue

preclusion, relevance, jurisdiction, etc. The results of this examination left the Board with but four issues which fall within the scope of these appeals.

Therefore, we now proceed to evaluate the "immediate" and "direct" elements of Del-AWARE's standing to pursue these appeals, remembering that the "direct" and "immediate" elements of standing pertain to causation. Penn stands for the proposition in this context, that if a direct causal connection is established, standing will be granted unless the alleged harm is not immediate (i.e. unless the alleged harm is a remote consequence of the challenged action.) William Penn, supra., at 282-284; Del-AWARE v. DER, et. al., 1985 EHB 478, at 489. The issues which remain within the scope of these appeals are in the nature of alleged harms to Del-AWARE's interests. We must examine each of these issues for their "immediateness" and "directness".

As to the velocity/stream erosion issue, the Board finds a causation element sufficient to grant standing to raise issues pertaining to Permit Nos. ENC 09-81 and ENC 09-77. David Windholz, a riparian property owner who the Board found, supra, had a "substantial interest" in the outcome of the appeals of Permit No. ENC 09-81, also has a causal connection with this issue sufficient to grant Del-AWARE standing. In Del-AWARE I, the Board decided that control of the water velocity in the North Branch Neshaminy Creek was required to prevent erosion of the stream's channel. Such erosion would directly and immediately affect Mr. Windholz's interest in recreational uses of the streams. As his interest relates to the permit which authorizes NWRA to build an outfall structure on the North Branch, its operation could cause changes to the stream in an area abutted by Mr. Windholz's property. Likewise, Mark and Judy Dornstreich, riparian owners and recreational users

along the East Branch Perkiomen Creek, have a similar immediate and direct interest in the outcome of the appeals of Permit No. ENC 09-77. Through these members, Del-AWARE has gained representational standing with regard to the velocity/erosion control issue on both permits.

The issue of overdue "taking" in violation of §638 of the Water Allocations Act has remained in this appeal. The challenged action here (the failure to complete construction resulting in a "taking" under the Act, in a timely fashion) involves an alleged harm, the "directness " and "immediateness" of which, is immaterial. Because the Board was unable to find even one Del-AWARE member with a "substantial interest" in the appeals of Permit No. WA 978601, the causation aspect will likewise fail (see discussion of substantial interest, supra, Section B). Therefore, although the Board found this issue itself to be appropriately within the scope of this appeal, Del-AWARE cannot meet the three Penn standing tests, and for this reason, this otherwise potentially relevant issue must be excluded by the Board. Del-AWARE simply lacks standing to raise it.

The final reviewable issues are DER's action with regard to inclusion of conditions regarding the NPDES permit in Permit Nos. ENC 09-81 and ENC 09-77 and the Bucks Road gauge cutoff flow in Permit No. ENC 09-77. Del-AWARE meets the meets the "immediateness" and "directness" test (i.e. causation) through David Windholz (Permit No. ENC 09-81, NPDES issue) and Mark and Judy Dornstreich (Permit No. 09-77, NPDES and flow cutoff issues). These riparian owners and recreational users of the respective streams can be immediately and directly affected by the water quality of the streams. Further, the Dornstreichs have can be immediately and directly affected by flooding of the East Branch Perkiomen Creek. Thus, through these members, Del-AWARE had demonstrated representational standing to pursue these issues.

E. SUMMARY

Del-AWARE has shown representational standing to pursue the appeals related to Permit Nos. ENC 09-81 and ENC 09-77. The issues remaining in the appeals of these two permits are threefold: 1) whether DER's remand decision on the velocity/stream erosion issue properly comports with the Board's order in Del-AWARE I (Permit Nos. ENC 09-81 and ENC 09-77); 2) whether DER's insertion of conditions regarding the NPDES permit properly comports with Del-AWARE I (Permit Nos. ENC 09-81 and ENC 09-77); and 3) whether DER's insertion of the Bucks Road gauge cutoff flow properly comports with Del-AWARE I (Permit No. ENC 09-77 only).

The appeals of Permit Nos. DAM 09-181 (Docket Nos. 86-032-R and 87-040-R) and WA 978601 (Docket Nos. 86-029-R, 86-588-R and 86-038-R) are dismissed for lack of standing. The appeals related to Permit No. ENC 09-51 (Docket Nos. 86-030-R and 87-041-R) are dismissed because all issued raised by Del-AWARE are precluded on the basis of Del-AWARE I.

The appeal of Permit No. ENC 09-81 at Docket No. 87-037-R remains before the Board with respect to the issues just mentioned. The appeals at Docket Nos. 86-028-R and 86-589-R are dismissed as moot.

The appeal of Permit No. ENC 09-77 at Docket No. 87-039-R remains before the Board with respect to the issues just mentioned. The appeal at Docket No. 86-031-R is dismissed as moot.

We conclude by noting that the foregoing opinion and conclusions have been based upon Del-AWARE's pleadings as submitted. Possibly these pleadings might have been improved, so as to warrant retention of appeals other than the 87-037-R and 87-039-R appeals. But we already have given Del-AWARE numerous opportunities to amend its original pleadings. Del-AWARE II gave Del-AWARE

very explicit instructions concerning the form and content of the pleadings Del-AWARE was given another opportunity to file. The length of this opinion, and the number of issues raised by Del-AWARE we have had to exclude, testify to Del-AWARE's failure to follow our instructions. In all fairness to our own heavily burdened time, as well as to the other parties in these appeals, it appears to us inappropriate to give Del-AWARE any more opportunities to rehash its already twice or thrice rehashed melange of issues. In the future, this consolidated appeal will involve only the appeals docketed at 87-037-R and 87-039-R, and the issues therein will be limited to the three issues which survived after application of the full William Penn standing test.

O R D E R

AND NOW, this 27th day of May, 1987, it is ordered as follows:

1. The seven appeals which have been consolidated at Docket No. 86-028-R are unconsolidated.

2. The appeals of Permit No. WA 978601 at Docket Nos. 86-029-R, 86-588-R and 87-038-R are dismissed, consistent with the foregoing opinion, for lack of standing.

3. The appeals of Permit No. DAM 09-181 at Docket Nos. 86-032-R and 87-040-R are dismissed, consistent with the foregoing opinion, for lack of standing.

4. The appeals of Permit No. ENC 09-51 at Docket Nos. 86-030-R and 87-041-R are dismissed, consistent with the foregoing opinion, due to preclusion of issues by Del-AWARE I.

5. The appeals of Permit No. ENC 09-81 at Docket Nos. 86-028-R and 86-589-R are dismissed, consistent with the foregoing opinion, due to preclusion of issues by Del-AWARE I, issue irrelevancy or mootness.

6. The appeal of Permit No. ENC 09-77 at Docket No. 86-031-R is dismissed, consistent with the foregoing opinion, due to preclusion of issues by Del-AWARE I, issue irrelevancy or mootness.

7. The appeal of Permit No. ENC 09-81 at Docket No. 87-037-R remains before the Board with respect to whether DER properly comported with the Board's order in Del-AWARE I with regard to the issues of:

a) velocity/stream erosion control in the North Branch Neshaminy Creek; and

b) condition regarding the NPDES permit.

8. The appeal of Permit No. ENC 09-77 at Docket No. 87-039-R remains before the Board with respect to whether DER properly comported with the Board's order in Del-AWARE I with regard to the issues of:

a) velocity/stream erosion control in the East Branch Perkiomen Creek;

b) condition regarding the NPDES permit; and

c) condition regarding the Bucks Road gauge cutoff flow.

10. NP/NW is granted leave to intervene in the remaining appeals at Docket Nos. 87-037-R and 87-039-R.

11. PECO is granted leave to intervene in the remaining appeal at Docket No. 87-037-R.

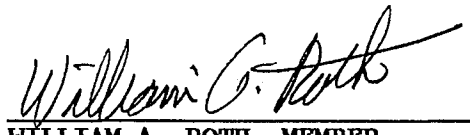
12. The two remaining appeals are hereby consolidated at Docket No. 87-037-R.

13. The parties may engage in discovery without leave of the Board for a period of 60 days from the date of this order, but any such discovery must be relevant to one of the issues listed in paragraphs 7 and 8; any party which attempts to engage in discovery outside these boundaries risks sanctions under the Board's rules and Rule 4019 of the Pennsylvania Rules of Civil

Procedure.

14. This order does not preclude a motion for summary judgment by any party after the aforementioned discovery period has passed.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: May 27, 1987

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JAKE C. SNYDER	:	
	:	
v.	:	**EHB Docket No. 86-610-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, and ED MIKEL COAL COMPANY, PERMITTEE	:	Issued May 27, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

SYNOPSIS

The Board lacks jurisdiction to hear an untimely appeal, even when it is filed 1 day beyond the expiration of the 30 day appeal period. The date of receipt of an appeal by the Board, rather than the Department of Environmental Resources, is determinative of timeliness.

OPINION

Appellant Jake C. Snyder (Snyder) initiated this matter on October 30, 1986 when he filed a notice of appeal from the Department of Environmental Resources' (DER) proposed Stage II bond release pertaining to a mining site of Permittee Ed Mikel Coal Company. On May 11, 1987 DER filed a motion to dismiss this appeal, alleging that the Board lacked jurisdiction over this appeal because Snyder filed his appeal 31 days after he received

notice of DER's proposed bond release. For the reasons stated below, we grant DER's motion.

Snyder, in paragraph 2 of his notice of appeal, stated that he received notice of DER's proposed bond release on September 29, 1986. For an appeal to be timely, it must be received by the Board within 30 days of the appellant's receipt of notice of the DER action. The Board has no jurisdiction to hear appeals filed after the 30 day period. 25 Pa. Code §21.52(a); Commonwealth v. Joseph Rostosky, 26 Pa. Cmwlth. 478, 364 A. 2d 761 (1976). Thus, Snyder would have had to file his appeal no later than October 29, 1986 in order for it to be timely. Snyder's appeal, however, was filed on October 30, 1986, 31 days after he, by his own admission, received notice of DER's action.

In his answer to DER's motion to dismiss, Snyder stated that ". . . I particularly cannot understand how Katherine S. Dunlop's 'Notice of Appearance' as counsel could have been dated October 28, 1986 . . . if the Board hadn't been notified of my appeal by that date." Though DER may have received a copy of Snyder's notice of appeal before the Board did, such filing with DER is not the equivalent of filing with the Board and cannot operate to establish the Board's jurisdiction. Appalachian Industries, Inc. v. DER, EHB Docket No. 86-521-W (Opinion and order issued May 11, 1987).

ORDER

AND NOW, this 27th day of May ,1987, it is ordered that the appeal of Jake C. Snyder is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 27, 1987

cc: **For the Commonwealth, DER:**
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ERIE SEWER AUTHORITY	:	
	:	
v.	:	EHB Docket No. 86-600-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued June 3, 1987

OPINION AND ORDER
SUR
PETITION TO INTERVENE

Synopsis

A petition to intervene is denied where a petitioner alleges its interest in the appeal, but fails to allege either how that interest might be prejudiced if its petition were denied, or how its interests are inadequately represented by the existing parties to the appeal.

OPINION

This matter was commenced by the filing of a Notice of Appeal on October 27, 1986 by Appellant Erie Sewer Authority ("Erie") from the renewal of NPDES Permit No. 0026301, which was issued by the Department of Environmental Resources ("DER") on September 24, 1986.

The basis for Erie's appeal rests on two issues. First, Erie contends that Paragraph 3 of Part A of the reissued permit flies in the face of EPA regulation 40 CFR 133.103(a), which permits certain removal requirements to be waived in cases of publicly owned treatment plants such as the Erie plant. Second, Erie notes that effluent limits established in Part A-1 of the

permit recognize that Erie's facility is a joint municipal industrial waste treatment facility and that removal credits were given for Hammermill Paper Company's ("Hammermill") own on-site treatment. However, Erie appeals ". . . the lack of a provision which defines the influent values to be utilized for determination of removals accomplished as being 'the weighted average of the values obtained for the municipal waste sampled at the influent channel to the wastewater treatment plant, and the industrial waste (Hammermill) sampled at the influent to the clarifiers constructed at the Hammermill Paper site.'" (Para. 3(b) of Erie's Notice of Appeal.)

On February 17, 1987 Hammermill filed a Petition to Intervene ("petition") in this appeal with the Board, which is the subject of this opinion. In its petition, Hammermill avers it is a part owner of Erie's wastewater plant, that it provides 50% of the wastewater by volume and characteristic for treatment at the plant, and that Hammermill is subject to an agreement with the EPA which incorporates the appealed-from NPDES permit. Hammermill further alleges that any modification of the NPDES permit will impact on its plant's operation, that Appellant consents to the intervention by Hammermill and that its intervention will not prejudice any party.

DER filed its response in opposition to the petition on March 11, 1987. DER disputes Hammermill's assertions as to its wasteload contributions to the plant. DER takes issue with Hammermill's statement that it contributes over 50% of the volume of the wastewater at the plant and alleges instead that it contributes only between 16-35%. Further, DER disputes the fact that the agreement between Hammermill and the EPA incorporates the total NPDES permit, including the section appealed herein, and states that this agreement terminated six months after Hammermill fulfilled its construction. In addition, DER asserts that Hammermill's intervention will cause delay and

inject confusion into the proceedings. Finally, DER objects to Hammermill's intervention, pointing out numerous procedural and substantive inadequacies in Hammermill's petition.

The Board concurs with DER and must deny Hammermill's petition . Hammermill failed to supply the Board with the information required by 25 Pa. Code §21.62(a) which reads as follows:

> Petitions for leave to intervene any in proceeding before the Board shall be filed prior to the initial presentation of evidence in such proceeding and shall set forth the specific grounds for the proposed intervention, the position and interest of the petitioner in the proceeding and a statement of the reasons why said interest is or maybe inadequately represented in such proceeding.
>
> (emphasis added)

Hammermill failed to allege in its petition how its interests would be detrimentally affected if its petition was denied. Further, Hammermill failed to identify in its petition how its interests were inadequately represented by the existent parties to the appeal. For example, although it is alleged that any modification of the appealed-from NPDES permit would impact on its plant's operation, Hammermill omits any explanation as to the manner in which this impact would be felt or why it would be impacted at all by the permit modification. Furthermore, the petition gives no indication as to the evidence which Hammermill would present at a hearing on the merits, as is required by 25 Pa.Code 21.62(d). The Board, however, can only rule on allegations as they have been presented by the parties and, on that basis, cannot grant Hammermill leave to intervene.

ORDER

AND NOW, this 3rd day of June, 1987, it is ordered that Hammermill Paper Company's Petition to Intervene in the above captioned appeal is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 3, 1987

cc: **Bureau of Litigation**
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Erie, PA
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Hammermill Paper Company

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CONCERNED RESIDENTS OF THE YOUGH, INC. :
:
v. : EHB Docket No. 86-513-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: June 4, 1987
and MILL SERVICE, INC., Permittee

OPINION AND ORDER
SUR
MOTION TO DISMISS OBJECTIONS AND
COMPEL MORE SPECIFIC ANSWERS
TO INTERROGATORIES

Synopsis

Mill Service's Motion to Dismiss Objections and To Compel More Specific Answers to Interrogatories is denied. CRY withdrew its objections to all but three of the interrogatories and will be directed to respond to the others. As to the three remaining interrogatories, Mill Service's motion is denied as CRY responded sufficiently by referring Mill Service to a paragraph of a consent order and agreement executed by DER and Mill Service. CRY's relevancy objection, however, is meritless as the information requested by Mill Service is directly related to the grounds for CRY's appeal.

OPINION

This action was commenced by the filing of a Notice of Appeal on September 14, 1986 by the Concerned Residents of the Yough, Inc. ("CRY") from the Department of Environmental Resources' ("DER") issuance of permits to Mill

Service, Inc. ("Mill Service") to construct and operate a residual waste disposal facility known as "Impoundment No. 6" in Yukon, Pennsylvania.

The instant matter arises out of a discovery dispute between the parties. On October 9, 1986, Mill Service served interrogatories and a request for production of documents upon CRY. CRY responded on December 5, 1986, after Mill Service had filed a motion for sanctions with the Board. On February 17, 1987, Mill Service pursuant to Pa.R.C.P. 4006(a)(2), 4019(1)(i), and 4019(c)(5) filed its motion to dismiss objections and to compel more specific answers to interrogatories ("motion"). Mill Service withdrew its motion for sanctions and requested that the Board strike CRY's objections to interrogatories 8, 36, 37, 38, 39 and 40 and compel answers to these interrogatories. CRY, in its response, which was received by the Board on March 9, 1987, waived its objections to interrogatories 8, 36 and 37 and indicated that it will answer them, but maintained its objections to

interrogatories Nos. 38, 39 and 40.[1] Therefore, the Board denies that portion of the motion dealing with Mill Service's request to strike CRY's objections to interrogatories Nos. 8, 36 and 37.

Mill Service also requested that the Board order CRY to respond specifically and completely to interrogatories Nos. 7, 8, 9, 10, 11, 13, 14, 15, 18, 21, 22, 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40. CRY, in its response, indicated it would respond as requested, except with respect to interrogatories Nos. 38, 39 and 40, to which it preserved its objections. Therefore, the Board denies the portion of Mill Service's motion relating to having the Board to compel CRY to more specifically answer its interrogatories Nos. 7, 8, 9, 10, 11, 13, 14, 15, 18, 21, 22, 31, 32, 33, 34, 35, 36 and 37.

---

[1] There are 2 conflicting paragraphs in CRY's Response to the motion: read as follows:

> "Regarding interrogatories 36 and 37, in which CRY is asked to identify all pollutants in the Yukon area groundwater that it attributes to Mill Service. CRY will be happy to answer that interrogatory and to forward that information to the Permittee. Results of private well tests will also be forwarded as these results are obtained....
>
> * * * * *
>
> C.R.Y. hereby petitions the Board to revise the order as submitted by Mill Service. CRY is in full agreement to forward information to answer interrogatories as requested by Mill Service. CRY is in agreement to the dismissal of Interrogatory 8 but requests the Board to uphold the objections made by CRY in interrogatories 36, 37, 38, 39, and 40."

Even though CRY states its desire to preserve its objection to Interrogatories 36 and 37, it seems clear in the preceding paragraph that it intends to respond, and not object, to these Interrogatories.

INTERROGATORIES 38, 39, 40

The only remaining interrogatories in this discovery dispute are Nos. 38, 39, and 40. These interrogatories read as follows:

> " 38. Does Appellant claim that Mill Service is the sole source of pollutants contained in the Yukon ground water?
>
> 39. If the answer to the preceding Interrogatory is in the affirmative, please identify the factual basis for Appellant's determination that acid drainage from abandoned coal mines is not polluting the Yukon area ground water?
>
> 40. If the answer to Interrogatory 38 is in the negative, please identify:
>
> (a) The percentage of pollutants contained in the Yukon ground water which you attribute to Mill Service's Yukon operations;
>
> (b) The scientific tests, data or facts which support your conclusions."

CRY contends that these interrogatories are irrelevant by virtue of a paragraph contained in a consent order entered into by Mill Service and DER on May 24, 1985 (consent order). That provision states:

> "20. For purposes of this Consent Order, it shall be presumed, as a rebuttable presumption of law, that Mill Service shall be liable without proof of fault, negligence, or causation of all damages, contamination, and pollution within 2500 feet of the Yukon Facility. Such presumption may only be overcome by clear and convincing evidence that Mill Service did not contribute in any way to the damage, contamination or pollution."

Mill Service responds with two arguments. First, that this presumption can only be utilized by DER in actions arising out of a breach of the consent order. Secondly, Mill Service contends that these interrogatories are indeed relevant. Mill Service alleges that CRY's responses will facilitate the preparation of an appropriate defense. If CRY asserted,

as it did in its Notice of Appeal, that Mill Service was the sole source of groundwater pollution in the Yukon Facility area and offer a basis for its assertion, Mill Service continues, it could prepare its case accordingly.

The Board agrees with Mill Service only insofar as its relevancy argument is concerned. Mill Service's interrogatories are relevant, at a minimum, to the issues raised by CRY in its Notice of Appeal, including the alleged leakage of hazardous waste from the adjacent Impoundment No. 5, the alleged violation of 35 P.S. §6018.403(9), Mill Service's alleged violations of its NPDES permit, and the alleged violation of 25 Pa. Code §75.421(a)(3). The material requested in Mill Service's interrogatories Nos. 38-40 certainly falls into this category.

However, the Board will not compel CRY to respond to interrogatories 38, 39 or 40, because it has already done so. Rule 4006(b) of the Pa. R.C.P., incorporated by reference into the Board's Rules through 25 Pa. Code §21.111(c), states:

> (b) Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of that party's records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer would be substantially the same for the party serving the interrogatory as for the party served, a sufficient answer to such an interrogatory shall be to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect those records and to make copies, compilations, abstracts or summaries, provided that a copy of any compilations, abstracts or summaries so made shall forthwith be furnished to the party producing the records.
> (emphasis added)

Based on the foregoing, therefore, CRY's response to Mill Service's interrogatories by the mere reference to a document was sufficient. The Board

has routinely allowed responses to interrogatories that have consisted of only a direction to the propounder to a specific document. See Greater Greensburg Sewage Authority v. DER, EHB Docket No. 86-321-R (Opinion and order issued January 22, 1987); Tenth Street Building Corporation v. DER, EHB Docket No. 85-068-R (Opinion and order issued March 27, 1987). Consequently, the Board will deny Mill Service's motion as to Interrogatories Nos. 38, 39 and 40.

ORDER

AND NOW, this 4th day of June, 1987, it is ordered that Mill Service's Motion to Dismiss Objections and Compel More Specific Answers to Interrogatories is denied. It is further ordered that CRY shall respond to interrogatories Nos. 7, 8, 9, 10, 11, 13, 14, 15, 18, 21, 22, 31, 32, 33, 34, 35, 36 and 37 on or before July 6, 1987.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 4, 1987

cc: **Bureau of Litigation**
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Kirkpatrick & Lockhart
Pittsburgh, PA

dk

BENJAMIN COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 84-266-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 8, 1987

OPINION AND ORDER
SUR
MOTIONS FOR SUMMARY JUDGMENT

Synopsis

Pursuant to §315(a) of the Clean Streams Law, 35 P.S. §691.315(a), mine operators are responsible for pollutional discharges that emanate from their permit areas regardless of whether their actions have or have not resulted in a worsening of the discharges.

OPINION

This appeal was filed by Benjamin Coal Company (Benjamin) on July 30, 1984. Benjamin was seeking review of a June 29, 1984 Department of Environmental Resources' (DER) compliance order (HR 84-67) requiring Benjamin to treat or abate a discharge emanating from its mine site in Brady Township, Clearfield County which is authorized under Permit No. 4570BSM16.

On September 24, 1986 DER filed, with Benjamin's concurrence, a Joint Motion for Continuance stating that the parties wished to stipulate to all critical facts in this matter and, thus, forego an evidentiary hearing. The Board, by order dated September 26, 1986, canceled hearings in this matter and ordered that stipulations and supporting briefs be submitted to the Board.

On October 20, 1986 Benjamin submitted the stipulations of fact and a Motion for Summary Adjudication. Benjamin filed a supporting brief on November 21, 1986. DER filed its Motion for Summary Adjudication and a brief in support thereof on December 4, 1986.

The stipulated facts are few and uncomplicated. There is a discharge emanating directly from within Benjamin's permitted mining area. The discharge is pollutional in that, absent treatment, it does not meet either the effluent limitations set forth in 25 Pa. Code §87.102 or the conditions of Benjamin's permit. The site was previously mined, and the discharge pre-existed Benjamin's mining. Benjamin mined through the recharge area for the discharge. In addition, the parties stipulated that:

> "Benjamin contends that the water quality of the discharge has not been degraded or adversely affected as a result of its mining and [f]or the purpose of resolving the motions for summary adjudication, it must be presumed that Benjamin's contention is correct."

Although captioned as Motions for Summary Adjudication, the Board will treat the parties' respective pleadings as motions for summary judgment. 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. Robert C. Penoyer t/a D. C. Penoyer & Co. v. DER, EHB Docket No. 82-303-M (issued March 19, 1987).

The legal issues presented by this appeal are neither new nor particularly novel. Benjamin's statement of the case reads:

> Where a permittee neither causes or otherwise affects a pre-existing discharge which does not meet the effluent standards and which emanates from the permit area, is that permittee guilty of a violation of 25 Pa Code § 87.102 or of Section 315(a) of the Clean Stream Law for which it can be ordered to treat the discharge to the effluent standards?
> (Benjamin's brief at p. 2)

DER made no objection to this characterization of the case, and the Board

finds it accurate. Unfortunately for Benjamin, the answer is a clear, yes.

Both Benjamin and DER admit that this case is on all fours with the Board's decision in William J. McIntire Coal Co. v. DER, 1986 EHB 172. Both parties also agree that the McIntire decision supports the position of DER. Benjamin, however, suggests that McIntire was decided incorrectly because it seeks to establish a rule that eliminates causation as a basis for liability. Benjamin argues it should not be liable since it did not cause or adversely affect the discharge. McIntire, inter alia, involved an appeal of a DER order to collect and treat a discharge which failed to meet DER effluent requirements. McIntire had mined a previously mined site of which it was not the owner. The discharge in question had existed prior to McIntire's operation. McIntire contended that it had neither caused nor degraded the discharge and, therefore, should not be liable for treatment, much as Benjamin now argues. In a well reasoned adjudication drafted by then Board Member Edward Gerjuoy, the Board held that pursuant to §315(a) of the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, as amended, 35 P.S. §691.315(a) (CSL), mine operators are responsible for pollutional discharges emanating from their mine sites regardless of whether they have caused the discharges, and regardless of whether their actions have worsened the discharges. McIntire, supra; See also, Adam Greece d/b/a Cherry Run Fuel Co. v. DER, 1980 EHB 135, and Robert C. Penoyer, supra.

As DER notes, McIntire, supra, is hardly a revolutionary case. The McIntire decision points out that its reasoning dates back to at least the Pennsylvania Supreme Court's decision in Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed 415 U.S. 903. In Harmar a coal company was ordered to treat the entire drainage from its mine, even though a substantial portion of the drainage consisted of fugitive water from adjacent

inactive mines previously operated by another miner. The state Supreme Court made it clear that pursuant to §315(a) of the CSL that it was the location of the discharge, not its cause, that determined liability. Harmar, supra. Where, as here, the discharge emanates from the operator's site, the operator is required to treat it. Harmar, supra. In response to the operator's argument that the imposition of liability was unfair, the court stated:

> If the operator of a mine need not treat these discharges, pollution will not end and the general public will be subjected to either the continued degradation of its surface waters or be forced to subsidize the coal industry by paying for treatment of this polluted water through its taxes... The public interest is not served if the public, rather than the mine operator, has to bear the expense of abating pollution caused as a direct result of the profit-making, resource-depleting business of mining coal.

Id., 452 Pa. at 101, 306 A.2d at 321. The state Supreme Court also found that such an interpretation of the CSL presented a reasonable exercise of the state's police power. Harmar, supra.

The Pennsylvania Supreme Court expanded and reemphasized the reasoning begun in Harmar in the case of Commonwealth v. Barnes and Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974)(B.&T. I). As in Harmar, a mine operator was held liable for a post-mining pollutional discharge, much of which was generated from adjacent mines, notwithstanding that it had operated and closed the mine in full compliance with applicable law. Subsequently, in the related case of Commonwealth v. Barnes and Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977), appeal dismissed 434 U.S. 807 (B.&T. II), it reiterated the holding that it is not the cause of polluted water itself, but the source of the discharge of polluted water which is decisive. In other words, if a discharge is coming from an operator's mine site, §315(a) of the CSL imposes liability upon the operator for treatment, since the operator is "allowing" a discharge from its mine. B.&T. II, supra; See 35 P.S. 691.315(a).

The Board has repeatedly followed the reasoning of the Pennsylvania Supreme Court in Harmar and B.&T. I and II. In Hawk Contracting, Inc. & Adam Eidemiller, Inc. v. DER, 1981 EHB 150 the Board upheld a DER order requiring that Hawk treat three separate discharges found on its site. The Board, citing Harmar and the B&T decisions, ruled that even if all of the flow of each of the discharges did not arise on Hawk's site, but merely passed through it, Hawk was liable for their treatment because they discharged from Hawk's site. Hawk, supra. Pursuant to §315(a) of the CSL, responsibility may be placed upon a mine operator to abate discharges of AMD or other pollutants emanating from a mine site or other real property, regardless of the conduct of the operator in the operation of the mine. Hawk, supra; See also, Penoyer, supra; John E. Kaites et al. v. DER, 1985 EHB 625; and Adam Greece, supra. Given this precedent, we have no choice but to hold for DER.

ORDER

AND NOW, this 8th day of June , 1987, it is ordered that Benjamin Coal Company's Motion for Summary Adjudication is denied, the Department of Environmental Resources' Motion for Summary Adjudication is granted, and Benjamin Coal Company's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 8, 1987

cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOA

JAMES E. MARTIN	:	
	:	
v.	:	EHB Docket No. 85-120-R
	:	85-156-R
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued June 12, 1987

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

Department of Environmental Resources' motion to limit issues is granted. Testimony relating to forfeited bonds subsequently released will be excluded at the hearing on the merits of a bond forfeiture appeal because it is moot. Evidence relating to appellant's claim of insolvency will also be excluded, as financial impossibility is not a defense to a bond forfeiture action. Evidence pertaining to alleged criminal conduct of certain DER employees is irrelevant in reviewing the propriety of a bond forfeiture and will be excluded.

OPINION

This action originated from the filing of a Notice of Appeal on April 12, 1985 by James E. Martin (Martin) from the Department of Environmental Resources' (DER) forfeiture on March 13, 1985 of bonds relating to four mine drainage permits issued to Martin.

The instant matter arises from a motion to limit issues filed by DER

on May 7, 1987. Martin responded to this motion on May 27, 1987 and DER filed a partial response to Appellant's answer to DER's motion to limit issues on June 2, 1987.

MOOTNESS

DER alleges that, during the course of this appeal, certain collateral bonds for mining permits within two of Martin's mine drainage permits were released. Therefore, DER contends, evidence relevant to bond forfeiture actions involving the to released collateral should be excluded, as the issue of forfeiture as to these bonds is moot.

Although Martin, in his answer, takes issue with the fact that one of the substitute bonds had been forfeited by DER [1], Martin essentially agrees that evidence with respect to these now released bonds should be excluded.

In a situation where an appeal is pending and it is impossible for the Board to grant the requested relief, such as the reversal of a bond forfeiture, the appeal becomes moot. James E. Martin v. DER, 1986 EHB 313, citing Cox v. City of Chester, 76 Pa. Cmwlth 446, 464 A.2d 613 (1983). Consequently, the Board will exclude any evidence relating to any bonds which have been released by DER. [2]

---

[1]Martin, while agreeing that certain issues may be moot contends that the issue of entitlement to attorney's fees is not moot. Martin asserts in his response to DER's motion that he may be entitled to recover attorney's fees for bringing this appeal. However, the issue of attorney's fees is not now before the Board.

[2]Certain other bonds were substituted by Martin upon DER's finding of reduced bond liability. DER maintains that evidence pertaining to these substituted bonds should not be excluded.

ACTIONS OF DER EMPLOYEES

In Paragraph 51 of Martin's amended pre-hearing memorandum, Martin alleges that DER officials sought bribes from Martin and his failure to comply with their requests led to a course of conduct that "tainted DER's conduct towards [Martin], including these bond forfeiture actions."

DER argues that evidence relating to this conduct should be excluded from the upcoming hearing. DER continues that even if these allegations were true, they do not constitute a valid defense in a bond forfeiture action. Martin objects strenuously in his answer to the exclusion of this evidence. He states, instead, that evidence of DER's discrimination against him and the pattern of this discrimination is relevant to the overall issue of the reasonableness of DER's action with respect to these appeals.

The Board finds the language in Martin's pleading with respect to this issue to be muddled and confusing. The Board's sole role is to determine if DER has abused its discretion or has arbitrarily exercised its powers. Del-AWARE v. DER, EHB Docket No. 86-028-Rs (Opinion & Order issued May 27, 1987), at p.20, quoting Warren Sand and Gravel v. DER, 20 Pa. Cmwlth 186, 341 A. 2d 556 (1975). This issue is irrelevant as a defense to a bond forfeiture proceeding, and outside the scope of the Board's review. Further, as DER correctly asserts in Paragraph 21 of its motion, even if the acts of DER employees as set forth by Martin were correct, DER would not be estopped from forfeiting bonds for Martin's failure to comply with the Surface Mining and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1, et seq., The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et seq, and his permits. In Lackawanna Refuse Removal, Inc. v. DER, 65 Pa. Cmwlth 372, 442 A. 2d 423 (1982) the Commonwealth

Court held that even if agents of DER had been mistakenly indulgent or lax in enforcing the laws, DER would not be estopped from performing its duty of enforcing a statute. Martin's allegations of impropriety and DER's response merit a similar holding. The Board rules that evidence pertaining to the conduct of individual DER employees will be excluded from the hearing on the merits.

EVIDENCE OF INSOLVENCY

In Paragraph 52 of Martin's amended pre-hearing memorandum, Martin asserts that DER's unreasonable delays in approving permit applications precipitated his insolvency and the initiation of Chapter 11 Bankruptcy proceedings. DER contends, however, that Martin has not yet filed for relief under the United States Bankruptcy Code, 11 U.S.C. §101-1330, The Bankruptcy Reform Act of 1978 (P.L. No. 95-598), The Bankruptcy Amendments and Federal Judgeship Act of 1984 (P.L. 98-353), and that even if he had, financial impossibility is not a recognized defense to a bond forfeiture action.

Martin, however, argues in his answer that, although he has not filed for relief under the Bankruptcy Code,[3] he was rendered insolvent by DER's action in this matter. He contends that although insolvency is not itself a defense, when coupled with actions of DER which have contravened the law, the bond forfeiture action must be reversed.

As the Board has held many times "[l]ack of funds is... no defense to a bond forfeiture action for defaulted performance". See Orville Richter,

---

[3]Martin alleges that the actual holder of the license and the permittee on the collateral bond, the James E. Martin Coal Company, has applied for relief under the U.S. Bankruptcy Code. Since Martin and not the James E. Martin Coal Company, is the appellant herein, we will not address this contention.

d/b/a Richter Trucking Co. v. DER, 1984 EHB 43. Therefore, all evidence relating to Martin's insolvency will be excluded from this proceeding.

ORDER

AND NOW, this 12th day of June, 1987, it is ordered that the Department of Environmental Resources' (DER) motion to limit issues is granted.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 12, 1987

cc: **Bureau of Litigation**
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Western Region
For Appellant:
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dk

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NE WOELFLING, CHAIRMAN

AM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

FR&S, INC. :
:
v. : EHB Docket No. 83-093-M
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: June 16, 1987

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

By the Board

Synopsis

The Board, in reviewing an appeal of the Department of Environmental Resources' (Department) denial of a solid waste management permit and closure order, first denies a motion for the recusal of the Board Chairman. In addition to being untimely and being filed by an attorney not of record, the motion for recusal is nothing more than a poorly disguised effort to compel the issuance of a draft proposed adjudication by a former Member. The Board is under no legal obligation to adopt recommendations of a Member sitting as a hearing examiner in a particular matter.

Appellant's contention that a permit had been issued to it is also rejected by the Board. Although a permit had been prepared and signed, but never dated, the permit never left the Department's offices. Applying the Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq., the Board held that the permit would have had to be sent out from the Department's offices and/or physically delivered to the applicant. No evidence of either was produced by

the appellant, which possessed the burden of proof on this issue, since it was asserting the existence of the permit.

Having ruled that no permit was issued, the Board assigned the burden of proof regarding the permit denial to the appellant. The Board held that the appellant sustained its burden on the issue of hydrogeologic suitability of the site for use as an unlined landfill. However, appellant did fail to demonstrate its compliance with various other design requirements and, most importantly, failed to demonstrate its ability or intention to comply with the law. The Department could, under §503(c) of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.503(c) (the Solid Waste Management Act) deny a permit even if all applicable permitting requirements were met and the applicant had no existing violations, if the applicant exhibited an inability or lack of intention to comply with the law, as was evidenced by appellant's repeated violations of the Department's regulations and the orders of the Board and Commonwealth Court.

INTRODUCTION

This matter was initiated by FR&S, Inc. (FR&S) on May 10, 1983, when FR&S filed a Notice of Appeal seeking review of an April 11, 1983 order from the Department. The Department's order denied FR&S' application for a permit under the Solid Waste Management Act because of FR&S's failure to demonstrate that the site could be operated in accordance with the applicable statutes and regulations, because the site was hydrogeologically unsuitable for the operation of an unlined landfill, because of existing violations at the site, and because FR&S lacked both the ability and the intention to comply with the laws of the Commonwealth. The order also directed FR&S to close the site by

April 16, 1983, and undertake various remedial measures to insure compliance with the Solid Waste Management Act, the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law), and the rules and regulations adopted thereunder.

Subsequent to the issuance of the Department's order, but prior to the filing of its Notice of Appeal, FR&S filed an application for a supersedeas of the Department's order in the Commonwealth Court; an order was issued by the Commonwealth Court on April 14, 1983, imposing a supersedeas until a hearing was held by the Court. The supersedeas hearing was held before the Honorable David W. Craig on May 3, 5, 23, and 25, 1983, and an order was issued by Judge Craig on June 10, 1983, denying the supersedeas, but permitting his April 14, 1983 order to remain in effect for 30 days. Judge Craig further ordered that if FR&S filed a petition for supersedeas with the Board in that 30 day period, his supersedeas order would remain in effect until the Board made a decision on FR&S' supersedeas petition.

A petition for supersedeas was filed with the Board by FR&S on July 8, 1983, and hearings on the petition commenced on August 15, 1983. By an August 15, 1983 agreement of the parties, the supersedeas hearings were merged with the hearings on the merits. The combined hearings commenced on October 11, 1983, and culminated on August 15, 1984, involving 39 days of testimony.

The Board vacated the June 10, 1983 Commonwealth Court supersedeas on June 13, 1984 and ordered FR&S to cease accepting refuse. The Board's order was precipitated, inter alia, by FR&S' conduct in ordering a Department inspector off the site. FR&S requested reconsideration of the Board's order, and, on August 6, 1984, the Board issued an order reinstating the supersedeas and directing FR&S to address 20 items relating to the operation of the landfill. Included in this order were requirements to cover exposed areas,

grade slopes, and truck leachate off the site. The Board again vacated its supersedeas order on August 15, 1984 as a result of FR&S' pumping leachate onto an unpermitted area and interfering with a Department inspector as the inspector was attempting to collect leachate samples.

Briefs were filed by the parties and the matter was ready for adjudication on April 19, 1985.[1] Anthony J. Mazullo, Jr., the Board Member to whom this matter was assigned for primary handling, resigned from the Board on January 31, 1986. This adjudication by the Board is based on a draft proposed adjudication prepared by Mr. Mazullo.

FINDINGS OF FACT

1. Appellant is FR&S, a Pennsylvania corporation with an address at P. O. Box 23, Birdsboro. (Ex.A-4)

2. Appellee is the Department, the agency authorized to administer and enforce the Clean Streams Law and the rules and regulations adopted thereunder and the Solid Waste Management Act and the rules and regulations adopted thereunder.

3. FR&S is solely owned by Landfill Associates which, in turn, is owned by Donald Peifer (65%), relatives of Peifer (15%) and friends of Peifer (20%). (Supplemental Answer to Department Interrogatory 19)

4. The President of FR&S is an employee, Joseph Francowiak. (Deposition of Joseph Francowiak)

5. The Vice President of FR&S is Reverend Clyde Huber, who has admitted he knows nothing about the management and operation of a landfill. (Interrogatories 9 and 10)

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[1] Replies and supplements to these briefs, as well as motions to strike and answers thereto, were filed subsequent to this date.

6. The board of directors of Landfill Associates is composed of Peifer, his son Jonathan, Joseph Francowiak, and David and Gail Hart. (Interrogatory 14)

7. Donald Peifer was listed as "Authorized Agent" in FR&S's application for a solid waste management permit and was responsible for the day-to-day operations of the landfill from the time of filing of the permit application for the site until cessation of the operations. (N.T. 505-506, 594-595, and Ex.A-4)

8. At the time FR&S originally filed its permit application, the site was owned by FR&S, Landfill Associates and A.V.M. Nursery Corporation. (Ex.A-4)

9. The site is located in Exeter Township, Berks County. (Ex.A-4)

10. The site is bounded on the south and southeast by Lincoln Road, on the west by Red Lane Road, on the north by various privately owned parcels of real estate and U.S. Route 422, and on the east by various privately owned parcels of real estate and South Center Road (Legislative Route 241). (Ex.A-2)

11. The site is located approximately 1000 feet north of the Schuylkill River.

12. Three intermittent streams north of the site flow in a southerly/southwesterly direction and converge at a point near the northwest corner of the site where they are picked up by a stormwater diversion ditch constructed to carry water around the existing landfill. (N.T. 166, 223, 244, and 1455)

13. An uncontrolled dump into which uncovered refuse, tires, appliances and barrels have been deposited is located north of the FR&S site on the southside of U. S. Route 422. It is drained by one of the three intermittent streams. (N.T. 682, and Ex.A-75, A-76, and A-77)

14. The Pagoda Motorcycle Club occupies a parcel of land northwest of the site which is used for motorcycle races. Motorcycles ride through the intermittent streams, causing sedimentation. (N.T. 680-681 and 2260)

15. Residences in the area north of the site have malfunctioning sewage disposal systems which overflow into the intermittent streams. (N.T. 223 and 244)

16. The Smith Trailer Park is located along Lincoln Road immediately east of the site. It has a population of approximately 130 and has an overflowing waste disposal system. (N.T. 223, 254, 683, 3378, and 3781 and Ex.A-206)

17. Also east of the FR&S site and contiguous with the trailer park is an abandoned landfill which is unrelated to FR&S. It occupies a flat area which has been excavated and filled with trash. Because there was no provision for leachate handling, the area is filled with leachate which seeps to the surface. (N.T. 683, 2284-2285, 3778, and 3781 and Ex.A-60 and A-206)

18. There are five or six homes along Red Lane with malfunctioning septic systems which run into the drainage area upgradient of the FR&S site. (N.T. 250)

19. Trailers with malfunctioning septic systems running into the diversion ditch are located on the Johnson property, east of the FR&S site and north of the abandoned landfill. (N.T. 250 and 1271 and Ex.A-60)

20. The Robert and Brenda Smith property is west of the trailer park and on the north side of Lincoln Road, between Lincoln Road and the landfill. It has a malfunctioning septic system which discharges to Lincoln Road and down it to the intermittent stream on the north side of Lincoln Road and south of the FR&S site. (N.T. 255 and 704-705)

21. The Smith property was used for automobile and truck repair.

It was occupied by automobiles, trucks, discarded paint cans, air conditioners, disassembled vehicles, refrigerators, an abandoned trailer and other litter, little of which were serviceable. (N.T. 256, 705, and 1497 and Ex.A-125 through A-129)

22. The Smith property has visible staining over large portions of the surface and slag scattered over the surface and under the surface of the ground. (N.T. 703, 704, and 754 and Ex.A-134)

23. On the south side of Lincoln Road, across from the Smith trailer park and the FR&S site, is an area known as Furnace Hill. It was used as a dump site from 1850 on by the E and G Brooks Iron Company and the Birdsboro Corporation (the Brooks landfill). Foundry sand, machine shop oil, slag and oil drainings from the Birdsboro Machine Shop were dumped on this site and on the north side of Lincoln Road, in the vicinity of the Smith property and the entrance to the FR&S site. (N.T. 257, 259, 380, and 2990-2992 and Ex.A-22)

24. The Brooks landfill also was used to dump garbage and is filled with leachate which discharges by seeps into the intermittent stream on the south side of Lincoln Road. (N.T. 683-684, 689, and 2990-2992 and Ex. A-116, A-117, and A-118)

25. Property owned by Ralph and Mary Jett is west of the Robert and Brenda Smith property and the FR&S site. It was formerly used for a grocery store and gasoline station. When the buildings on the property were demolished in 1982, the gasoline storage tanks were not removed. (N.T. 265, 268-269, and 270 and Ex.A-23)

26. The Jett property is east of an intermittent stream and Monitoring Wells (MW) 23 and 24. The septic tank on the Jett property periodically overflows. (N.T. 264, 685, and 1571)

27. The Furnace Hill area was also the site of some 30 homes which

were removed, together with the buildings on the Jett property, because of unsanitary conditions. (N.T. 260, 261, and 684-685). Many of the buildings did not have bathrooms or facilities for handling wastewater, and many of the residences freely drained wastewater into the rear yards or adjoining properties. (N.T. 260, 261, and 684-685 and Ex.A-22 at pages 34-35)

28. Surface water flows across the Furnace Hill area and the Brooks landfill to the Jett property area, the FR&S site and then to the intermittent stream. (N.T. 263-264 and 1571)

29. The Brooks landfill on the north side of Lincoln Road also discharges its mounded leachate by a seep which comes to the surface on the south side of Lincoln Road and flows across the Jett property to the intermittent stream. (N.T. 702-703 and 1571 and Ex.A-130 and A-131)

30. On the south side of Lincoln Road, bordering on both sides of the intermittent stream as it proceeds to the Schuylkill River, are a number of existing industrial activities and evidence of previous industrial activities, all of which, by topography, drain toward the intermittent stream. (N.T. 688 and 2936-2940)

A. Property at one time owned by the E. G. Brooks Iron Company, and then the Colorado Fuel and Iron Company, was used for the manufacture of pig iron, and there is evidence of that activity in the form of old slag and slag banks. (N.T. 272-273 and 688)

B. The Rodney Hoffman coke facility borders on Lincoln Road at the intersection with the intermittent stream. Substantial quantities of coke are stored on it. (N.T. 686 and 1017 and Ex.A-115)

C. A railroad crosses the intermittent stream south

of Lincoln Road before the Schuylkill River. An area used for dumping during the iron operation, a number of abandoned vehicles, steelwork, drums, containers, sludge piles, foundry sand, recycling lagoons, residual slag, cast iron material and various types of exposed refuse are deposited in the area between the river and the railroad. (N.T. 689 and Ex.A-115)

D. The John Fadler facility, which takes foundry sand from the Birdsboro Corporation, washes it in a silting basin and recovers metal, borders on the stream. A heavy sludge-like material is mixed with fine foundry sand and drains to the intermittent stream. (N.T. 273, 692-693, and 695 and Ex.A-120 and A-124.

31. The intermittent stream is not a source of water supply. (N.T. 699)

32. FR&S commenced its landfilling activities in 1968. (N.T. 3501)

33. The Department of Health, the Department's predecessor, issued an interim permit (No. 100346) under the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, as amended (now repealed), to FR&S on April 24, 1970 as part of a program to regulate existing unpermitted sites. The interim permit expired on December 31, 1970. (N.T. 275-276 and Ex.A-24)

34. The Department of Health examined FR&S's regular permit application in late 1970 and determined that the site was unsuitable for use

as a landfill. (Ex.C-77)

35. FR&S operated the landfill without a permit from 1971 to 1976, although it did submit various permit applications which were rejected by the Department for a number of environmental and technical reasons. (N.T. 276-277)

36. The Department and FR&S entered into a Consent Order and Agreement on February 3, 1977, which required FR&S to submit an application for a solid waste management permit on or before February 1, 1978.

37. In November, 1976, FR&S retained Edward J. Gaydos, P.E. and the firm of Edward J. Gaydos, Inc., consulting engineers, to investigate the existing landfill and to prepare and submit a permit application for the existing landfill and an expansion, encompassing a total of 50 acres. (N.T. 93)

38. Although a permit application was submitted to the Department on February 1, 1978, it was inadequate. The Department granted FR&S an additional 90 days in which to address the inadequacies in its permit application.

39. FR&S submitted additional information on July 3, 1978, but the Department found it to be again inadequate.

40. In a letter dated September 14, 1978, the Department denied the permit application for nine reasons and informed FR&S that it must cease landfilling operations in accordance with Paragraph 9 of the 1977 Consent Order and Agreement. (Ex.A-10)

41. FR&S did not appeal the September 14, 1978 permit denial to the Board.

42. When FR&S failed to cease its operations, the Department sought injunctive relief from the Commonwealth Court (No. 2252 C.D. 1978) on

September 22, 1978.

43. On October 17, 1978, FR&S resubmitted the permit application with all related materials to John B. Moyer, Regional Environmental Director of the Department, requesting that the application be reconsidered and responding specifically to the nine items assigned as reasons for denial in the Department's letter of September 14, 1978. (Ex.A-10)

44. On October 22, 1978, the Honorable David W. Craig granted the Department's request for injunctive relief and required that FR&S cease dumping or discharging polluting liquids or leachate into the unnamed tributary of the Schuylkill River and then specified how FR&S was to control the leachate. The court ordered FR&S, inter alia, to collect the polluting liquids or leachate, to prevent their discharge into the unnamed tributary, to store the polluting liquids or leachate in tanks or lagoons, and to remove the polluting liquid or leachate by tank truck to an approved treatment plant. The 1978 Commonwealth Court order also required FR&S to allow representatives of the Department on FR&S's property at any time, to give the Department advance notice of any pond or tank emptying operations and to provide all information necessary to process the permit application within ten days. In the matter of permit application review, the order said, "[I]n the event of rejection, all operations at said site shall cease." (Ex.A-53)

45. On October 14, 1978, FR&S, through its consulting engineer, resubmitted its application for a water quality management permit, which was originally submitted on February 1, 1978.

46. The Department denied FR&S's permit application on September 29, 1979 for the stated reason that FR&S had failed to submit the required collateral bonds on satisfactory forms.

47. During the course of a January 18, 1980 telephone conference

with the Honorable David W. Craig, the Department agreed to review the permit application and FR&S agreed to submit the required information and bonds.

48. On September 25, 1980, the Department, after failing to receive cooperation from FR&S, filed an Application to Enforce Order with the Commonwealth Court seeking, inter alia, an order directing FR&S to cease operations. The Department claimed that FR&S had not cured its defective application.

49. Commonwealth Court issued an order on November 7, 1980, amending its previous order of October 28, 1978 and directing that FR&S, on or before November 14, 1980, deliver a collateral bond in the amount of $407,000 and to post cash or equivalent in the amount of $18,000 on or before December 8, 1980. (Ex.A-86). FR&S complied with the bonding order. (N.T. 445-486)

50. The Department prepared Water Quality Management Permit No. 0678204, authorizing the construction of a leachate treatment system by FR&S. The permit was signed by George L. Parks, Regional Water Quality Manager. (Ex.A-91)

51. The Department prepared Solid Waste Management Permit No. 100346, authorizing the operation of a solid waste disposal and/or processing facility by FR&S and imposing various conditions. The permit was signed by Donald A. Lazarchik, P.E. (Ex.A-90)

52. The Wernersville Regional Office never issued a solid waste management permit to FR&S. The Director of that office, John Moyer, who had the authority to issue the permit, did not issue a solid waste permit to FR&S. (N.T. C.C. 113)

53. Donald Peifer admitted that he had never received a permit or a letter stating that FR&S had a permit after October 20, 1978. (N.T. 546)

54. FR&S has never physically produced any permits allegedly issued to it.

55. On February 25, 1982, the permit review functions of the Department's Wernersville Regional Office were transferred to its Norristown Regional Office.

56. The review of the FR&S application by the Norristown Regional Office was begun in summer, 1982 and concluded in April, 1983. The permit review staff assigned to this matter included the solid waste facilities section chief, a hydrogeologist, an engineer, a soils scientist and a solid waste inspector, each having several years experience in the review of solid waste permit applications. (N.T. 3602-3603)

57. The Norristown Regional Office reviewed all submitted data contained in the application, conducted field visits and observed the operation of the existing site, and took and analyzed water and soil samples from the existing site. The total time expended on this review was over 100 hours and included six on-site visits, over ten off-site visits, and the taking of 80 water samples and numerous soil samples. (N.T. 3602-3603)

58. Although the Department afforded FR&S the opportunity to submit additional information in support of its permit application, FR&S, during a meeting with DER at the site on March 24, 1983, informed the Department that no additional information would be submitted. (N.T. 3638-3639 and 3648-3649)

59. The Department denied FR&S' solid waste management permit application in an April 11, 1983 order because the site was hydrogeologically unsuitable for use as an unlined landfill and FR&S had failed to demonstrate that the site would be operated in accordance with applicable requirements. In addition, the permit was denied because of existing violations at the site and because the Department had determined that FR&S lacked both the ability

and intention to comply with environmental laws.

60. The April 11, 1983 order also required the cessation of operations on April 16, 1983 and the submission of a closure plan to the Department.

61. A timely appeal of the Department's permit denial and the closure order was filed with the Board by FR&S.

62. The FR&S site was inspected on March 24, 1983 by Michael Maiolie, a Department solid waste specialist. Maiolie found: 1) leachate seeps from the north side (Ex.C-21 and C-22) that ponded in the Cat-of-Nine-Tails Pond (Ex.C-23) which is unlined (N.T. 1583 and 1871); 2) leachate seeps into the area known as the North Pond (N.T. 1854 amd 1871 and Ex.C-24 through C-30); 3) leachate seeps from the south leachate pond into the stream as it exits the FR&S property (N.T. 1871 and 1872 and Ex.C-31 and C-32); and 4) erosion of soil from the steep side slopes (N.T. 1871), in violation of 25 Pa.Code §§75.24(c)(2)(i) and (xviii) and §§75.26(o) and (p). (Ex.C-37)

63. FR&S has never trucked leachate off of the site as required by the 1978 Commonwealth Court order. (N.T. 575 and 4505)

64. Leachate treatment facilities were not adequate to collect and treat the leachate. Leachate ponds overflowed into the stream channel or seeps from the ponds had been discharged into the stream, in violation of 25 Pa.Code §75.25(o)(7). (N.T. 1878)

65. A final, uniform, two foot layer of cover was lacking on some of the side slopes around the site, in violation of 25 Pa.Code §§75.24(c)(2)(xxi) and (xxii). Some of these areas had bits of vegetation and some trees which indicated that they had not been worked in a while. (N.T. 1866-1868 and Ex.C-33 to C-36)

66. Several of the slopes at the landfill exceeded the required 3:1 ratio in violation of 25 Pa.Code §75.24(c)(2)(iii) and §75.26(o). The steeper the slope, the more possibility there is of erosion and the more difficult it is to establish vegetation. Steepness can also affect the stability of the slope and cause slumping of the bottom. (N.T. 583 and 1873-1875)

67. Failure to properly care for the slopes caused erosion problems in violation of 25 Pa.Code §75.26(o). A large amount of the side slopes around the site were lacking proper vegetation and this was contributing to the problem. There was siltation in the stream bed as it left the property. (N.T. 1879-1880 and Ex.C-11, C-13, and C-19)

68. Photographs taken on March 24, 1983 showed sedimentation of the stream which flowed past FR&S on the south side of Lincoln Road. (N.T. 2038-2040)

69. FR&S did not use adequate cover material at the site in violation of 25 Pa.Code §§75.24(c)(2)(ix),(xi) and (xii). A large number of stones (rocks greater than 10 inches in diameter) were being used or mixed in with the cover material, and leachate was mixed with crushed shale to produce cover material. Leachate was pumped out of the south leachate pond into a channel flowing into the landfill's borrow area. (N.T. 166 and 1875-1877 and Ex.C-19)

70. FR&S failed to submit quarterly or annual groundwater monitoring reports in violation of 25 Pa.Code §75.24(b)(4)(i). (N.T. 1877-1878)

71. Piles of sludges were deposited on the FR&S site, despite FR&S' not having received prior Department approval for disposal of sludges, as is required by 25 Pa.Code §75.26(s). (N.T. 565, 597, 1863, and 1880)

72. An inspection of the FR&S site was conducted by Maiolie on May 11, 1983. Requirements relating to prior approval of sludge disposal, final cover, surface water management, adequacy of cover material, vegetative cover, erosion and leachate management were again violated by FR&S. FR&S continued not to submit groundwater monitoring reports. (N.T. 1882 and 1885-1888 and Ex.C-38)

73. In addition, Mr. Maiolie observed that, in violation of 25 Pa.Code §§75.24(c)(2)(xi) and 75.26(1), the previous day's working face had not been covered with the required six inches of daily cover, as was evident from refuse showing. (N.T. 1887-1888)

74. An inspection of the FR&S site was conducted on June 29, 1983. Requirements relating to slopes, cover material, prior approval of sludge disposal, erosion control, and submission of groundwater monitoring reports were again violated. (N.T. 1891-1892 and 1894 and Ex.C-39)

75. Leachate was flowing out of a standpipe on the north side of the landfill into a surface water impoundment. Leachate was also being pumped from the south leachate pond and discharged on top of the landfill. (N.T. 1890 and 1893)

76. Intermediate cover had not been applied on the tops and sides of the south edge of the progressing lift, in violation of 25 Pa.Code §§75.24(c)(2)(xi) and 75.26(n). (N.T. 1894)

77. FR&S failed to place intermediate cover on areas not being worked and at a substantial distance from the working face. (N.T. 2056 and 2057)

78. The Department conducted an inspection on July 21, 1983, during which it again found violations of requirements relating to leachate treatment, slopes, cover material, groundwater monitoring, daily and

intermediate cover, and disposal of sludges without prior approval. Leachate was being circulated from the treatment pond back into the landfill. (N.T. 1894-1897 and Ex.C-40)

79. An inspection of the FR&S site was conducted on September 8, 1983, during which violations of requirements relating to slopes, cover, and leachate treatment were again found. (N.T. 1899 and 1900 and Ex.C-41)

80. Leachate was still being pumped from the treatment pond to the top of the landfill where it was pooling. (N.T. 1900)

81. FR&S refused to provide Mr. Maiolie, the Department inspector, with copies of the landfill's daily operational records, in violation of 25 Pa.Code §75.26(q). (Ex.C-41)

82. FR&S had placed a leachate collection pipe along the north side of the landfill off the toe of the slope without prior Department approval. (N.T. 1898)

83. The Department conducted an inspection on October 18, 1983, during which violations of the requirements relating to slopes, daily operational records, cover material, prior approval of sludge disposal, daily cover, and leachate treatment were again found. (N.T. 1900-1903 and Ex.C-42)

84. The Department conducted an inspection on December 7, 1983, during which violations of requirements relating to operational records, surface water management, slopes, cover material, leachate treatment, and disposal of sludges without prior approval were noted. (N.T. 1907-1909 and Ex.C-44)

85. Litter was being blown a considerable distance, in violation of 25 Pa.Code §75.26(j) and (k). (Ex.C-44)

86. Mr. Maiolie conducted another inspection of the site on March 1, 1984. Violations of requirements relating to operational records, daily

and intermediate cover, surface water management, slopes, cover material, groundwater monitoring, and disposal of sludges without prior approval were again found. (N.T. 1909 amd 1911-1914 and Ex.C-45)

87. Mr. Maiolie also observed on March 1, 1984, that the area of the landfill north of the Metropolitan Edison right-of-way had been stripped down to bedrock. While driving to the site, he also noticed odors along the intersection of Route 82 and Lincoln Road. (N.T. 1911-1912)

88. Mr. Maiolie also observed on March 1, 1984, that there were two substantial leachate seeps flowing near the southwest side of the landfill to the old borrow area in the southwest corner of the landfill. A leachate collection line had been installed there without Department approval. (N.T. 1912)

89. The Department conducted another inspection on April 9, 1984. There were again violations of requirements relating to operational records, surface water management, slopes, cover material, groundwater monitoring, leachate management and treatment, intermediate cover, and disposal of sludges without prior approval. (N.T. 3255-3256 and Ex.C-68)

90. In addition, on April 9, 1984 refuse was being deposited on the northern side of the southwest borrow area and a steel pipeline was run along the diverted stream channel around the southwest borrow area to an impoundment in the area where equipment was stored. (N.T. 3253-3254)

91. Erosion from the western borrow area was entering the stream. (N.T. 3256)

92. Solid waste was being spread and compacted in layers not exceeding two feet deep, and solid waste was being pushed over the edge on the north side of the borrow area where a compactor could not reach it, in violation of 25 Pa.Code §75.26 (b). (N.T. 3255 and 3256)

93. An inspection of the site was conducted on May 1, 1984, during which violations of Department requirements relating to operational records, surface water management, slopes, cover material, leachate management, daily and intermediate cover, and disposal of sludges without prior approval were again found. (N.T. 3257-3260 and Ex.C-69)

94. Filling was still occurring in the southwest borrow area and had proceeded south in that area. (N.T. 3257)

95. A site visit was conducted by former Member Anthony J. Mazullo, Jr. on June 18, 1984. (N.T. 4189)

96. Mr. Maiolie conducted an inspection of the site on August 8, 1984 and discovered a leachate impoundment on top of the landfill in an area which had not received refuse for a while. He also noted the presence of refuse on the entire surface of the landfill. Leachate was pooled in four areas and very strong odors emanated from the landfill. (N.T. 5008-5010 and Ex.C-318)

97. Mr. Maiolie visited the site on August 14, 1984 and found violations of requirements relating to surface water management, slopes, cover material, daily and intermediate cover, and vegetative cover. (N.T. 5043-5045, 5061-5062, and 5063-5064)

98. FR&S was permitted to re-open under certain conditions by the Board's order of August 6, 1984.

99. The August 6, 1984 Board order was read to FR&S over the telephone at 10:00 A.M. on August 6, 1984. (N.T. 5005)

100. The Board's order stated that, upon receipt, FR&S was to cease discharging leachate into the South Pond. On August 9 and 14, 1984 Maiolie observed leachate seeps continuing to flow into that pond. (N.T. 5057)

101. FR&S was required by the Board to commence operations on a

daily basis to conform all side slopes of the active fill area to the prescribed degree consistent with applicable regulations. (N.T. 5057)

102. On August 8, 1984 work had not been done to bring the final slopes of the landfill into conformity, and there were still slopes in excess of 33 percent. (N.T. 5048)

103. The Board's order required FR&S to continue to complete the installation of the perimeter leachate collection system. As of August 8, 1984 no additional work had been done on that system. (N.T. 5058)

104. The Board's order required FR&S to remove the South Pond and any soil which was in contact with the leachate and put it in a fill area. As of August 8, 1984, the South Pond had not been removed. (N.T. 5058)

105. On August 6 and 8 the South Pond was fairly low, and there was little leachate in it. (N.T. 5059)

106. On August 14 the South Pond was again full of leachate. (N.T. 5059-5060)

107. The Board's order required FR&S to not discharge leachate into open lagoons or ponds at any time on the site. On August 8 and 14 leachate was pumped on the top of the landfill into pools. (N.T. 5060 and Ex.C-339)

108. The Board's order allowed FR&S to recirculate leachate into the waste only if it was done as the waste was being dumped and compacted and "then the waste so treated shall be covered on a daily basis according to regulations." Leachate was not being pumped onto the waste as it was being dumped and compacted; rather, it was allowed to flow down the hill and run through the waste. (N.T. 5061) Mr. Maiolie observed the working face saturated with leachate on the morning of August 14, 1984, with exposed refuse in that area, indicating that daily cover had not been applied since his last visit at 7:00 A.M. on August 8, 1984. (N.T. 5061)

109. The Board's order required FR&S to begin operations on a daily basis, full time, and to properly cover any areas of the landfill upon which leachate had already been circulated and which had not been previously applied. On August 6, 1984 Maiolie observed several areas on the top of the landfill where there was a lack of proper cover; exposed refuse was visible and nothing had been done to correct it. On August 14, 1984, Maiolie again observed exposed refuse in the morning before any trash had been dumped. (N.T. 5043 and 5061-5062 and Ex.C-342 and C-343)

111. Discharges of leachate from the FR&S site into the surface waters occurred in August, 1982 and February, 1983 and on March 24 and 29, 1983. (N.T. 131-143, 2305-2313, 2335-2343, and 4733-4734).

112. On October 24, 1983 Maiolie and an FR&S representative observed a leachate discharge of 10-15 gallons per minute from the South Pond overflowing into the stream. The Department and FR&S took split samples of this discharge, and FR&S reported chlorides of 1,565 ppm (a leachate indicator) and several low level VOC's. (Ex.C-43 and C-67)

113. A discharge of leachate from the FR&S site occurred on June 14, 1984. (N.T. 4240-4305)

114. A discharge of leachate from the FR&S site occurred on June 15, 1984. (N.T. 4253-4260 and 4306-4318 and Ex.C-107 through C-115)

115. FR&S' engineer, Mr. Gaydos, admitted that the June 15, 1984 discharge of leachate from the FR&S site came from the North Pond. (N.T. 4358-4359)

116. On July 7, 1984 the North Pond filled with rainwater and the pond itself drained into openings in a standpipe that was connected to the leachate collection system. As a result, several millions of gallons of liquid surcharged the leachate collection system. (N.T. 4748-4749)

117. Gaydos admitted that the North Pond, if it did rise up and overflow, would get into the leachate control system. He said that even though the system was originally installed for the very purpose of draining the pond, FR&S had converted it into a leachate collection system and, therefore, if it were to take pond water, that would cause more harm to the leachate collection system. Gaydos admitted he had nothing to do with the tile drains and the French drains that became a part of that system. (N.T. 4517)

118. On July 7, 1984 the South Pond was overflowing and an overland flow of leachate was going into the South Pond, which, in turn, was overflowing into the stream. It was black and had a strong odor. A number of seeps were also entering the stream in that vicinity. (N.T. 4749 and 4751)

119. The hydrogeologist for FR&S admitted that the North Pond has been pumped into the stream hundreds of times in the past. (N.T. 4654)

120. The hydrogeologist for FR&S was on the site on July 11, 1984, and he observed a small leachate seep running into the stream on that day. (N.T. 4605)

121. He visited the site on July 13, 1984, and he again saw the seep flowing into the stream. (N.T. 4606)

122. He visited the site on July 15, 1984, and he again observed that same seep flowing into the stream. (N.T. 4606)

123. He visited the site again on July 17, 1984, and again observed the same seep flowing into that stream. (N.T. 4606)

124. On August 14, 1984, leachate was seeping through a dike in the South Pond area and entering the stream. (N.T. 5040 and 5041 and Ex.C-349 and C-350)

125. Mr. Maiolie detected landfill odors off the FR&S property at the intersection of Route 82 and Lincoln Road on March 1, 1984, in violation of 25 Pa.Code §123.31(2)(b).

126. John Burd, the Department's air inspector, detected malodors beyond the FR&S property on March 5 and 7, 1984. (N.T. 1811-1813 and 1815-1820)

127. Residents of the area, Linda Buehler, Dale Tobolski, and Glen Hoover, complained of odors from the landfill. (N.T. 1787-1806 and 4345-4347)

128. On August 31, 1984, the Department filed a Complaint in Equity, a Petition for Preliminary and Special Injunctive Relief, and a Petition to Enforce Administrative Orders in Commonwealth Court. The Department alleged, inter alia, that FR&S was not hauling away sufficient amounts of leachate, leachate levels were rising at least one foot per day, there were uncontrolled leachate seeps into the stream, the landfill was hydraulically overloaded, there were numerous uncorrected solid waste violations and malodors were leaving the site. The Department also alleged that the provisions of the August 6, 1984 Board order were not being obeyed.

129. On August 31, 1984, Judge Craig of Commonwealth Court ordered FR&S, inter alia, to haul away enough leachate necessary to lower leachate levels, cover all exposed refuse, and to proceed in conformity with the provisions of the August 6, 1984 Board order.

130. On October 15, 1984, after a hearing, Commonwealth Court ordered that the provisions of its August 31, 1984 order be continued until a final decision by the EHB on the merits of the case; with certain modifications concerning leachate reduction, completion of perimeter drains and conformity of slopes.

131. On February 1, 1985, after a hearing, Commonwealth Court found

that FR&S had failed to obey its order regarding the application of daily and intermediate cover, thereby causing odor problems in the nearby vicinity. FR&S was found in contempt of court and ordered to cease recirculation of leachate and ordered to cease accepting refuse.

132. FR&S did not submit plans to the Department for the installation or alteration of its leachate collection system. (N.T. 359-362, 206-207, and 543-544).

133. FR&S did not show the leachate collection system on the submitted plans. (N.T. 193-196)

134. There was some type of gas venting system installed at the FR&S site. Six gas vents consisting of perforated pipes had been drilled to the bottom of the landfill. No permit for the gas venting system had ever been obtained from the Department. (N.T. 1914-1915)

135. A U-drain system was installed in the southwest borrow area in 1984 by Peifer. Gaydos supervised the installation of it, but plans were never submitted to the Department before the installation. (N.T. 4768)

136. Grades and elevations of the U-drain system were sent to the Department after the system was installed. (N.T. 4773)

137. The 700 foot pipe constructed from the south leachate standpipe to the impoundment in April, 1984 was not indicated on any plans nor was the Department notified in advance of its construction. (N.T. 4167)

138. FR&S never notified the Department in advance of the construction of the impoundment near Red Lane Road in April, 1984. (N.T. 4173-4174)

139. The Red Lane impoundment was 200 x 300 x 3 feet (N.T. 4168) and contained leachate. (N.T. 4082)

140. A discharge from the Red Lane impoundment left the FR&S

property. (N.T. 4092-4093)

141. FR&S never notified the Department of the various discharges from the North Pond into the stream.

142. Donald Peifer was evasive in the cross-examination during the hearings and was warned on four occasions to answer questions or face dismissal of the case. (N.T. 508-509, 514-515, 519, 520-521, and 543-544)

143. Peifer yelled and cursed at solid waste inspectors Layser (N.T. 555) and Maiolie (N.T. 4130-4131).

144. Peifer blocked Department employees from leaving the landfill when FR&S was served with the Department's April 11, 1983 order. (N.T. 550-552)

145. Peifer ordered Maiolie to leave the landfill and used obscene language on June 13, 1984. (N.T. 4092 and 4130-4031)

146. The FR&S permit application is for two distinct areas. The active, or existing area, is approximately 20-25 acres and is located south of the Metropolitan Edison right-of-way and north of the area known as the "notch." The second area is called the expansion, or proposed area, and it is located north of the Metropolitan Edison right-of-way and is approximately 20-25 acres. (N.T. 2164-2165 and Ex.A-3 to A-6)

147. Review of a solid waste management permit application is a two step process, the first part being a desk review of all the material submitted by the applicant and the next being a field review. Applications are submitted in two phases. Phase one involves geology, hydrology and soils, and phase two involves comprehensive design plans. (N.T. 2162)

148. Those portions of FR&S' permit application relating to the geology and hydrogeology of the site were prepared by Carlyle Gray and Associates. (Ex.A-5 and Ex.A-6). At the time of the hearing Walter B.

Satterthwaite and Associates, Inc. provided corroborative data regarding the geology and hydrogeology.

149. Joseph M. Manduke, a hydrogeologist with the Department's Bureau of Waste Management, reviewed the hydrogeologic aspects of the FR&S permit application. (N.T. 2158-2161)

150. The site is located in the Brunswick formation, one of the Newark group, a geologic formation which has a northwesterly dip to it. Essentially it slopes from the Lincoln Road area back underneath the landfill site. (N.T. 706)

151. The strike of the formation is in a northwesterly direction at a dip varying from 17 degrees to 33 degrees. (N.T. 706-797 and Module 5A of Ex.A-5) The dip of the rock is from the abandoned Brooks' landfill in the Furnace Hill site, under the Robert and Brenda Smith site, and toward the FR&S site. (N.T. 706-708 and 1020) This direction of dip is confirmed by the United States Geological Survey and Pennsylvania Geologic Survey publication entitled "Groundwater Resources of the Brunswick Formation, Montgomery and Berks Counties, Pennsylvania," by Stanley Longwill and Chuck Wood. It was also confirmed by field measurements taken by Carlyle Gray and Walter B. Satterthwaite. (N.T. 709-71)

152. The Brunswick formation in this location is characterized as red silty shale with some silty sandstone interbeds. There are joints present and they are tight, except where opened by mass movement. (Module 5A of Ex.A-5 and Ex.A-6 at Pages 2-4)

153. Mass movement could be associated with weathering, such as the frost action in the rock structure when ice freezes and expands and pushes the rocks apart, creating openings which could allow for the infiltration of surface water. (N.T. 2180)

154. The fracture trace map, which is part of Module 5A of the permit application, shows one fracture trace that extends under what is now the existing site in a north-south direction. The Brunswick formation is very much characterized by extensive jointing and fracturing. (N.T. 2170)

155. Because this is an application for a naturally lined site, jointing and fracturing become very important considerations in evaluating the permeability under the landfill. (N.T. 2179)

156. The silt and shales decompose to plug, fill and otherwise heal the fracture system existing in the formation. (N.T. 712-713) This was explained by Dr. Gray as follows:

> ...As the red siltstones and shales of the area weather and break down, clay particles are released. These particles tend to lodge in the fractures and bedding planes of the rock, making them less permeable. This process may be at least effective to depths as great as 200 feet, as the following quotation makes clear. "The sharply defined increase in the yield of wells at a depth of about 200 feet is believed to be the result of a rather abrupt change in the nature of rock weathering at depth. In the area of this investigation it appears that the zone of greatest decomposition -- where the rock voids are believed to be partially plugged with residual clay -- lies above a depth of 200 feet." (Longwill and Wood, 1965, Page 15). (Ex.A-6 at Page 3-4)

157. Walter B. Satterthwaite, FR&S' consulting hydrogeologist, agreed with Dr. Gray's conclusions and found them to be confirmed by his drilling logs (N.T. 713 and 737), the pump tests conducted by him and by Dr. Gray (N.T. 3972), and the fact that the shallow well system does not respond to precipitation. (N.T. 3973-3974)

158. Groundwater moves along bedding planes and fractures, but in this formation the planes and fractures are filled by the decomposed shale, silt, and clay to become tightly plugged, thereby preventing water from flowing through the fractures. (N.T. 709, 712, 1028, 1085, and 2768)

159. The site is underlaid by two separate groundwater flow systems. The existence of the two regimes and a precise definition of the two regimes was pointed out by Carlyle Gray and Associates in the February 1, 1978 submission (Ex.A-5) and in the summary dealing with the natural liner dated November 4, 1978. (Ex.A-6)

160. In October, 1978 one shallow well and one deep well were drilled in the notch through which the intermittent stream passes, approximately 20 feet from each other and identified as MW-23 and MW-24. A shallow and a deep well, MW-25 and MW-26, were located approximately 20 feet from each other on a hilltop, southeast of the existing landfill. (Ex.A-6 at Page 2). Dr. Gray then conducted a 48 hour pumping test of the deep well in the notch. While the pump test caused a fluctuation in the deep well on the hilltop southeast of the site, it did not cause any draw down in the shallow well located 20 feet away from it. In addition, during the pump test Dr. Gray found a fluctuation in the deep well system at the trailer park, but no impact or draw down on the adjacent shallow well. This confirmed the existence of separate shallow and deep flow systems. (Ex.A-6 at Pages 2-3)

161. The upper zone is an aquiclude, which is an impermeable layer confining a water-bearing zone. (N.T. 716 and Ex.A-169)

162. Walter B. Satterthwaite, the consulting hydrogeologist retained by FR&S, reviewed the work of Dr. Gray, checked the water level elevations in the four wells cited by Dr. Gray and concurred with the conclusions reached by Dr. Gray in Exhibit A-6.

163. There is an east and west movement of water within the aquiclude, following the topography and moving toward the notch. Because of the gradient of the notch, which is to the south, the piezometric surfaces in the aquiclude move or trend south. (N.T. 717 and 1088). There is extremely

slow recharge in the aquiclude. When the wells were emptied to dryness, recharge was approximately 1/100th of a gallon per hour into the wells over an 18 to 22 hour period. (N.T. 1092) Despite the construction of the shallow wells, which were placed with slotted casing so as to intersect any permeable zones and allow water to flow into the bore hole, it took some of the wells a week to get any water to come into them. (N.T. 1098-1099)

164. The deep zone, which is a groundwater aquifer, flows evenly north/south east/west across the site toward the Schuylkill River. (N.T. 716-717). The entirety of the water use in the area for residential facilities is from the deep aquifer. It supplies the Smith trailer park immediately adjacent to the old landfill and a number of industrial uses in the area. (N.T. 718)

165. Neither the trailer park well nor the deep aquifer, in general, were impacted by the landfill. (N.T. 2397 and 3169)

166. Walter B. Satterthwaite, hydrogeologist, confirmed the findings of Dr. Carlyle Gray that there are two zones, a shallow aquiclude and a deep groundwater aquifer. (N.T. 725 and Ex.A-132)

167. Pump tests of the groundwater aquifer were performed by Carlyle Gray and Associates as part of the submission in support of the natural liner concept (Ex.A-6) and by Walter B. Satterthwaite and Associates, Inc. (N.T. 731-734)

168. A pump test is designed to determine the effect of controlled pumping on an aquifer system. It is designed around a constant rate of pumping for a sustained period of time, so that in addition to obtaining draw down data on the well being pumped, data is obtained from surrounding wells which are being monitored to obtain very detailed water level measurements throughout the test and after the testing period. Testing is designed to be

during a period when there is no precipitation and no unusual recharge to the system. (N.T. 864).

169. Walter B. Satterthwaite and Associates, Inc. designed a pump test and pumped MW-24, which is located in the notch. (N.T. 865). MW-28 MW-31, MW-25, and MW-29, all deep wells, had their levels carefully monitored during the pumping test. (N.T. 865 and 867-868). The pumping in one of the deep wells caused a response or change in water level in the other deep wells, demonstrating that the deep well system is interconnected all across the landfill. Pumping of MW-24 caused a draw down in MW-27, located approximately 250 feet west in the deep aquifer, a draw down in MW-31, a new deep well located east of MW-24, and a draw down in MW-29, located north of the landfill in an upgradient position. This demonstrated an influence of the pumping in the deep aquifer off the site well beyond the landfill and demonstrated an interconnection in the deep groundwater system. It validates the deep wells as monitoring wells, in that if there was contamination from the landfill it would appear in the interconnected wells. (N.T. 867-871 and Ex.A-144)

170. Despite the draw down demonstrated in the distant deep wells by the pumping of MW-24, no draw down was caused in the adjoining shallow MW-23, which is located approximately 20 feet away. In fact, MW-23, which had been purged the day before, continued to recover during the pump test. (N.T. 872)

171. 25 Pa.Code §75.25(6) provides that natural systems may be utilized to collect leachate from landfills and an acceptable method is the existence of a naturally occurring impermeable zone. When naturally occurring impermeable zones are to be utilized, subsection (iii) provides minimum site requirements:

> A) Zones with a uniform thickness of greater than two feet must have a permeability of less than one times ten to the minus seven cm/sec.

B) Zones with a uniform thickness of greater than four feet and an upward groundwater gradient into the zone may be approved with a maximum permeability of less than one times ten to the minus 6 cm/sec.

172. The FR&S permit application is for a natural liner system with soils having a permeability coefficient of $1x10^{-7}$ cm/sec. (Ex.A-5)

173. The permit application contains a narrative regarding permeability and the report of Allentown Testing Laboratories, Inc., dated October 13, 1978, showing the results of permeability testing and concluding that the requirements of the Department's regulations were met. (Ex.A-6)

174. Bedrock structure becomes very important in a landfill utilizing the natural liner concept, since the bedrock tends to become the liner. (N.T. 2181-2182)

175. Samples of the shale occurring at the site at the time of the original submission were submitted to Allentown Testing Laboratories, Inc. for permeability testing. In an effort to determine the validity of these tests and to confirm the conclusions of Dr. Carlyle Gray, Walter B. Satterthwaite and Associates, Inc. conducted both field tests and labotatory tests with Valley Forge Laboratories. (N.T. 737-738, 756-757, and 762)

176. Five sites were selected for field testing and the location of these sites is set forth on Ex.A-60. Material from two of the sites was sent to Valley Forge Laboratories by Walter B. Satterthwaite and Associates for sieve, compaction and permeability testing. (N.T. 758-760 and Ex.A-135))

177. There was no data submitted concerning <u>in situ</u> (on site) permeability testing. This is generally the results of a test taken on the actual liner itself (in this case the bedrock) or at the very least, from an adjacent, exposed area. The only data that was submitted with the

application were the results of tests on material which was removed from the site. (N.T. 3176-3177)

178. The sieve tests determined whether the material could meet cover requirements regarding coarse fragments. (N.T. 765-766)

179. The compaction test analyzed the material's suitability for final cover and for controlling gases otherwise escaping the site (N.T. 765-766); it also determined the permeability of the shale material in situ. (N.T. 1075)

180. While the laboratory testing confirmed that the material meets the permeability requirements of the regulations, the shale in its naturally occurring state on the site is less permeable than the tested material because it is fully compacted and cemented. (N.T. 1545-1546)

181. The existence of a naturally occurring impermeable zone on the site is established through a number of factors.

182. Drilling operations in the upper sequences (30-100 feet in depth) did not encounter water, and shallow wells required anywhere from a day to a week to have any water accumulate in them. (N.T. 781-782 and Ex.A-136)

183. MW-28 was originally drilled to a 100 foot depth and no water was encountered until 85 to 87 feet, where there was a small water entry zone of one-half gallon per minute. (N.T. 781-784 and Ex.A-136)

184. MW-30 was drilled to 100 feet in the area of the shallowest depth to water at the north end of the site, and water was not encountered until a depth of between 37 and 39 feet, where a quarter of a gallon a minute was encountered, which is the highest yielding of the shallow wells drilled. (N.T. 781-784 and Ex.A-136)

185. MW-32 was drilled to a depth of 40 feet with no water encountered during drilling, MW-35 was drilled to 55 feet without encountering

water and did not produce water for a period of a week after drilling, and MW-36 was drilled to a depth of 54.5 feet without encountering water. This first encountering of water is repeated in the well logs relating to the deep wells. (N.T. 781-784 and Ex.A-136)

186. The abandoned landfill located adjacent to, contiguous with, and immediately north of the FR&S landfill site demonstrates the effectiveness of the FR&S natural liner system. This landfill was completed prior to 1970 and is filled with trash and has seeps from its sides. The seeps are evidence that it is totally saturated, putting a head on the bottom surface. There are two deep wells supplying 30 trailers in the Smith trailer park, and no contaminants have migrated to these water supply wells. (N.T. 735-736 and 1068)

187. The FR&S site has a naturally occurring impermeable zone greater than either two or four feet, with a permeability of less than $1x10^{-7}$ cm/sec. (N.T. 734-735 and 756 and Ex.A-5)

188. John Zwalinski, the soil scientist for the Department, was responsible for evaluating the quality of the cover material proposed by FR&S. (N.T. 3328)

189. In Mr. Zwalinski's experience, most of the textures characteristic of the soils in this region meet the Department's requirements for suitable cover. (N.T. 3330 and 3357-3358)

190. FR&S's permit application designates an area for soil cover material. (N.T. 3336 and Ex.C-71)

191. Zwalinski reviewed the results of the sieve tests, the permeability tests and the Attenberg limits tests conducted on behalf of FR&S by Valley Forge Laboratories (Ex.A-35). He described these tests as standard methods and procedures of the American Society for Testing Materials (ASTM)

and stated that he had no problems with the data submitted by the laboratory. (N.T. 3388-3389, 3393, and 3395-3396)

192. Mr. Zwalinski agreed that the proper material was selected and submitted to the laboratory for analysis and that the cover material met the requirements for coarse fragment material. (N.T. 3397)

193. An onsite inspection was conducted by Zwalinski on August 19, 1982. Mr. Gaydos, the consulting engineer for FR&S, showed him the various areas available for borrow material, specifically including an area west of Red Lane. (N.T. 3331-3332)

194. Zwalinski took a sample of the cover material from the site to his office and subjected it to a soil texture classification test. Based upon that test, the material broke down into a loamy sand, satisfying the textural requirements in the Department's regulations. (N.T. 3361)

195. There are 8.3 millon cubic feet of cover material available for the FR&S site, a sufficient volume of cover material. (N.T. 792 and Ex.A-12)

196. FR&S became an active landfill operator in 1968. From 1968 to 1973 the day to day operations were run by Frank O. Scott. (N.T. 3501-3502). Other landfill operations had been conducted in this area prior to the involvement of FR&S. (N.T. 3501)

197. During this period of time there existed on the lands of A.V.M. Nursery Corporation and within the 50 acres which is the subject of this matter, a pond constructed for nursery purposes. It was designed by the Soil Conservation Service to hold the surface water from the entire drainage area. The breast of the dam contained a pipe which, by means of a series of standpipes, allowed the pond to drain through the pipe into the intermittent drainage ditch. (N.T. 382 and 394-395)

198. In 1972 FR&S extended the pipe that came through the breast of

the dam in a southerly direction, a distance of approximately 600 feet, at which point it terminated with a valve. (N.T. 282-286)

199. The original purpose of this pipe was to convey the stream past the landfill, not to convey leachate. When the pipe was installed, there was no fill or garbage near it. (N.T. 284 and 286)

200. In 1976 FR&S, with the advice of representatives of the Commonwealth (N.T. 384-385), constructed a french drain and a tank system at the terminus of the 600 foot extension. (N.T. 386). The french drain was to collect seeps from the filled material and run it back into the tank system from which it could be pumped. This is located on Exhibit A-59 between grids 9200 and 9500 and 7200 and 7600 (Exhibit A-59) and is designated on Exhibit A-59 as "existing french drain."

201. The tank system consists of two tanks, one tank mounted on the other, with a total capacity of 24,000 gallons. (N.T. 389). Holes were burned in the side of the tank so that pipes in the french drains would drain leachate into the tank system. In 1976 the 24 inch solid pipe which was extended from the north pond terminated in the tank system. (N.T. 388-389 and Ex.A-78)

202. One of the french drains existing in 1976 ran in essentially a southeast direction and served as a monitoring device for the level of leachate. (N.T. 391)

203. Donald L. Peifer of FR&S installed the drains shown as existing french drains running in an easterly direction and a westerly direction tying into the collection tank system. (N.T. 290-291 and Ex.A-15 and A-59). The 24 inch pipe from the pond to the tank and the tank were installed by Hahn Construction Co. (N.T. 287 and 373 and Ex.A-78) and the stone for the french drains was installed by Helen and Russell Schaeffer. (N.T. 307 and 326-328)

204. The drainage system was installed prior to the placing of any fill in this area. (N.T. 284 and Ex.A-25 through A-39 and Ex.A-72 through A-77). The area was prepared by placing eight feet of compacted earthen material so as to drain toward the center pipe collection system. (N.T. 1070 and 1541). (N.T. 300-301 and 377-378 and Ex.A-31, A-32, and A-56)

205. The construction was witnessed by a number of Department inspectors, including Peter Brenner (N.T. 291-292), Emil Washko, J. Wescavage (N.T. 293-294) and T. McGraw (N.T. 302-303). These inspectors appear in various photographs introduced into evidence, confirming their presence during construction. (Ex.A-25 through A-39 and Ex.A-72 through A-77)

206. Dinesh Rajkotia, who was qualified as an expert in the field of chemical engineering, reviewed Phase II of FR&S' permit application. (N.T. 3528)

207. The engineer reviews land specifications, leachate volume calculations, leachate drainage calculations, piping installation designs, methane gas venting systems and various other engineering designs. He also conducts site visits. (N.T. 3520)

208. Mr. Rajkotia visited the FR&S site in 1981, when he was assigned to the Department's former Wernersville Regional Office, and five times after his transfer to the Department's Norristown Regional Office. (N.T. 3521-3523)

209. FR&S' permit application contains maps with the names of adjacent property owners. However, FR&S did not survey the properties, so it is impossible to accurately determine whether the permit application complies with the 25 foot set back requirement in 25 Pa.Code §75.21(s). (N.T. 151 and 3524-3525)

210. FR&S' application failed to designate bench marks on the site,

as required by 25 Pa.Code §75.23(b)(1)(iii). (N.T. 3526)

211. FR&S' permit application contained no plans for gas venting and monitoring systems, as required by 25 Pa.Code §75.24(c)(2)(xxiv). (N.T. 159 and 3527)

212. Gas venting and monitoring systems are necessary to prevent gas migration and attendant fire hazards. (N.T. 3526-3527)

213. The FR&S permit application indicated side slopes of 2 to 1 (50%), in violation of 25 Pa.Code §75.24(c)(2)(iii), which allows a maximum slope of 3 to 1 (33%) with a 10 foot wide bench sloping inward one degree for every 20 feet of vertical elevation. (N.T. 3527-3528)

214. The existing slopes near the Smith property were 2 to 1, as were the existing slopes on the north and west sides of the landfill. (N.T. 119-120, 160-161, 3812, and 4056)

215. FR&S agreed during the course of the hearing to change the existing slopes to conform with the 3 to 1 requirement. (N.T. 119-121)

216. FR&S uses demolition waste (tires, boards, etc.) on its side slopes as cover; demolition waste provides avenues for infiltration of rainwater into the landfill, thereby creating large pockets of leachate. This violates 25 Pa.Code §75.24(c)(2)(xvii), which requires that a landfill be designed and operated in such a manner as to prevent or minimize surface water percolation into the solid waste. (N.T. 3529)

217. 25 Pa.Code §75.24(c)(1)(viii) requires design plans concerning site preparation. It is important to know the subgrade contours and final elevation contours, since they will show the direction of leachate drainage, which is essential for determining the location of the leachate collection system.

218. FR&S' plans did not indicate the excavation grade or final

grade. The FR&S plan was merely a topographic contour map showing the existing (1978) condition on top of the site. (N.T. 153 and 3529-3530 and Ex.A-59 and A-144)

219. The topographic map and the cross-section maps submitted by FR&S did not give any indication of the slopes under the landfill. An excavation map or surface contour map would provide that information. (N.T. 3594-3595)

220. It is impossible to determine the slopes of the entire landfill from the cross-sections submitted by FR&S. (N.T. 3596)

221. FR&S used the EPA water balance method to calculate the amounts of leachate that would be generated on the site. In that method, however, there are several assumptions, the main one being that the landfill has two feet of final cover and vegetation and is properly graded and sloped. About 1000 gallons per acre, or on this site, 20-25,000 gallons per day should be produced. But, this site does not have two feet of final cover and vegetation and it is not properly graded. (N.T. 3536-3537)

222. The leachate collection system on the FR&S plans shows a solid steel pipe going underneath the site in a north to south direction, ending in a 15 inch proposed pipe (the dotted line on the map). Exhibit A-59 shows the various leachate systems installed at different times; yellow is pre-1977, red is pre-1978 and green is post-April, 1982. (N.T. 3537-3538)

223. The use of steel pipe for leachate collection is not best engineering practice, as it would not last for the 20-30 year expected life of a landfill.

224. The leachate collection tank was not shown on the FR&S plans. (N.T. 163-164)

225. The solid pipe that goes from the North Pond to the South Pond

descends from elevations 187 to 181 to 176 to 168 to 154, moving the leachate from the north to the south. (N.T. 3656)

226. Gaydos, the FR&S engineer, said that the leachate was ponding and running down along the solid pipe and then working its way into the drain. (N.T. 3657)

227. Leachate could run parallel to the pipe and come in at right angles to the contours wherever they are under the existing landfill and work its way into the tile drains. (N.T. 3658)

228. Gaydos was not sure whether there was eight feet of compacted soil under the leachate collection for the southern end of the site and the borrow area. If there were eight feet of compacted soil under the pipe, the compacted soil would be at elevation 160.75, since the pipe is at 168.75. The compacted fill would be the shallow groundwater system, according to the groundwater table maps. (N.T. 3661 and 3665-3667)

229. The leachate collection system for the proposed expansion is located in the North Pond. This is a flooding area and would create maintenance problems with which FR&S had not dealt in its application. (N.T. 3535-3536)

230. There are springs in the proposed 25 acre expansion area, but FR&S did not address the problems created by them in the permit application. (N.T. 3789)

231. Water will tend to flow into the proposed expansion area from both a northerly and an easterly direction. (N.T. 3789)

232. Recirculation of leachate only works when a landfill is young and hasn't reached field capacity. This landfill is approximately 20 years old, and field capacity may have already been reached. (N.T. 4892-4893)

233. FR&S did not demonstrate how much leachate will be generated and

how it will be managed.

234. Leachate from the FR&S site can be accepted at the Exeter Township sewage treatment plant without pre-treatment and with no limitations as to volume. (N.T. 411, 417, and 421)

235. The scientific community has established a proper procedure for surface water testing in rivers and streams.

> A water quality survey should be conducted during a dry weather period in the summer months when flows are low and temperatures are high. During these dry weather periods, the small streams and rivers will often approximate steady state conditions and can be sampled spatially at an appropriate time to determine the steady state profiles of various pollutants.
>
> The steady state assumption means that conditions are not changing with time but only as a function of distance along the river. ...for example, the summer low flow period generally represents a steady state situation. However, storm events and the dynamic responses of a river to them, must be considered a transient phenomenon. (Exhibit A-195)

236. If a stream sample is taken after a storm event, there is an influence from surface runoff in the watershed. (N.T. 2959 and 2962-2964)

237. The majority of the Department's stream sampling on or near the FR&S site was conducted after measurable rainfall. (N.T. 3991-3992)

238. Sample bottles are prepared and sealed by the Department's laboratory; the sample bottles are not opened until a sample is taken. (N.T. 2239)

239. The sample bottle itself is used to collect a stream sample. (N.T. 2239)

240. Field measurements of parameters such as specific conductance, pH and temperature are taken at the time of sampling (N.T. 2240). Although failure to take field measurements of these parameters does not necessarily affect the sampling results of other parameters, these parameters may have

some significance in interpreting other results. (N.T. 2240 and 3995)

241. Neither DER nor FR&S took field measurements of these parameters in every sampling. (N.T. 2958, 3995, and 4036)

242. When sampling for metals, it is necessary to field filter the sample in order to obtain an accurate result. Metals become embedded in the sediment in the stream and frequently appear in the water in the form of turbidity. (N.T. 2243-2244 and 2987). If the sample is not filtered, one cannot determine whether metals are suspended in the water or part of the bedload and, therefore, cannot determine whether the metals are from the activity in question. (N.T. 3985 and Ex.A-186 at 19)

243. The Department failed to field filter the surface and groundwater samples, ostensibly because it did not have the equipment. (N.T. 2243-2244 and 3989)

244. In general, the Department does not take field blanks in its surface water and leachate sampling. (N.T. 2245). This is because the sample bottles from the laboratory are sealed and there can be no cross-contamination. (N.T. 2245-2246)

245. Particular containers for samples and various preservation techniques are required for certain parameters in order to assure proper and accurate sampling protocol. (N.T. 887-889 and Ex.A-186 at 18-20)

246. Glass vials with a teflon lined septa are used to obtain samples of volatile organic compounds. Half-gallon prepared glass bottles are used to take samples of semi-volatiles; aluminum foil is placed under the cap and sealed tightly against it. The aluminum foil has been cleaned and then baked in order to remove any residues. (N.T. 2247-2248 and 2453-2455)

247. Samples may have to be analyzed within a specific time frame in order to get an accurate result. (N.T. 889). Failure to properly preserve

or promptly analyze may lead to an unpredictable result, a result too high or too low. (N.T. 1133-1134 and 2503-2506)

248. The method of preservation for ammonia is cooling and analyzing within 24 hours. (N.T. 2241) If the sample were not cooled and analyzed within this period, the ammonia would probably decrease in amount because of bacterial change. (N.T. 2241, 2492-2493, and 2506)

249. Samples of dissolved metals, such as chlorides in leachate, are fixed with acid to prevent precipitation. (N.T. 2242)

250. No preservatives are used for organic analysis. (N.T. 2503)

251. As stated in Ex.A-186, the DER Manual for Groundwater Monitoring:

> ...in order to take a sample which represents the actual water quality in the aquifer being monitored, it is necessary to properly purge the well.

As stated in greater detail in this document, water which has been in a well for some period of time has probably undergone changes in temperature, pH, and in concentration of volatiles, metals, and organics. In order to avoid inaccuracies caused by measuring standing water, rather than water in the aquifer, it is recommended that the well be purged by the removal of five well volumes. (Ex.A-186 at 10-11).

252. Except at such time as the Department was participating with the consultant for FR&S in the taking of split samples, proper well purging was never conducted by the Department. (N.T. 2890 and 3094)

253. For taking groundwater samples, an intermediate sampling device called a bailer, a very thin pipe with a one-way valve in the bottom, is generally used to take the water from the well. The water is then poured into the sample bottles. Field blanks, which are composed of laboratory prepared water, are used to check the purity of the bailer. (N.T. 2248)

254. The bailer that was used in the groundwater sampling program in this matter was FR&S' bailer, not the Department's. The Department also used the field blank that was taken by FR&S. (N.T. 2249-2250)

255. The chain of custody is assured through Department procedures. Each sample sheet has its own number and that is recorded on the chain of custody portion of the sample sheet. A legal seal is put on the sample when it is taken, and the sample is then transported to the laboratory. The laboratory technician, by signing the form, indicates whether or not the seal was intact when the sample arrived. This insures the integrity of the transportation process. (N.T. 2231)

256. If the legal seal was not intact, the sample sheet will say "Seal Not Intact." (N.T. 2233)

257. The use of improper sample containers is also noted on the laboratory sheet. (N.T. 2503)

258. A quality control/quality assurance program consists of standard operating techniques designed to assure the validity of analytical results. It involves all steps in the process from taking the sample through analyzing it in the laboratory. (N.T. 884-885 and 1683)

259. Satterthwaite and Associates utilized an EPA approved quality assurance/quality control program in taking groundwater samples at the FR&S site. (N.T. 885)

260. The Department has requirements for proper collection and handling of samples. (Ex.A-186)

261. Samples for ammonia taken by the Department were regularly held beyond the permissible holding time without preservation. (N.T. 1352 and 1362-1363)

262. The Department's samples for BOD were held beyond the

permissible 48 hours on several occasions. (N.T. 1370 and 1446-1449)

263. Information was omitted by the Department on the chain of custody document. (N.T. 1377)

264. In August and September, 1983, FR&S installed, at the request of the Department, an additional upgradient shallow well, MW-30, and an additional upgradient deep well, MW-29. It also installed a series of deep and shallow downgradient wells along the southern perimeter of the landfill. The newly installed downgradient shallow wells were MW-28, 32, 35, 36 and 37. The newly installed downgradient deep wells were MW-27 and 31. The pre-existing downgradient shallow wells were MW-23 and 26. The previously existing downgradient deep wells were MW-24 and 25. (Ex.A-60)

265. MW-23 is a shallow, downgradient well located in the notch and is a discharge point for the aquiclude. (N.T. 924-925 and 2415)

266. MW-24 is a deep, downgradient well on the west side of the notch. (N.T. 2373)

267. MW-27 is a deep, downgradient well in the area of the southwest borrow pit. (N.T. 2373)

268. MW-28 is a shallow, downgradient well located west of the notch, adjacent to the diversion ditch and in the southwest portion of the site in the area of the borrow pit. (N.T. 928)

269. MW-29 is a deep, upgradient well located at the confluence of the two tributaries. (N.T. 2371-2372)

270. MW-30 is a shallow, upgradient well approximately 1000 feet above the north end of the FR&S landfill. (N.T. 931)

271. MW-31 is a deep, downgradient well located to the east of the notch, between the notch and the Smith property. (N.T. 2374-2375)

272. MW-32 is a shallow, downgradient well located between the notch

and the Smith property. (N.T. 930 and 2424)

273. MW-35 is a shallow, downgradient well also adjacent to the Smith property. (N.T. 940)

274. MW-36 is a shallow, downgradient well located adjacent to the Smith property. (N.T. 940)

275. MW-37 is a shallow, downgradient well located south of Lincoln Road and south of the landfill. (N.T. 2433)

276. The construction of MW-35 and 36 is such as to allow for migration of liquids through the aquiclude into the well. (N.T. 988-989 and 1257)

277. There were split sampling rounds on August 31, 1983, involving MW-27, the North Pond, the south leachate pond and the Smith residence (N.T. 3251); on September 6, 1983, involving the North Pond and the Smith residence (N.T. 3261); on September 13, 1983, involving MW-29 (N.T. 3262); on September 14, 1983, involving the Smith residence (N.T. 3262); on September 15, 1983, involving MW-30, 24, 23, 28 and 32 (N.T. 3263); on September 16, 1983, involving MW-25 (N.T. 3263); on October 20, 1983, involving MW-32, 35, 36, and 37 (N.T. 3263-3264); on October 24, 2983, involving the north leachate seep and the south leachate pond, as it was discharging into the stream (N.T. 3264); and on October 25, 1983, involving MW-23, 26, 28 and 30 (N.T. 3265).

278. The Smith well was the only water supply well located directly downgradient from the FR&S site. (N.T. 2275)

279. Despite the fact that the shallow wells were constructed with slotted casing so as to intersect any permeable zones and allow water to flow into the bore hole, they have extremely slow recharge after purging. (N.T. 1098-1099). Starting in the southwest corner, and proceeding in the southeasterly direction, the rate of recharge after purging on October 24,

1983, for the shallow wells, was as follows: MW-28 at .31 gallons per hour, MW-23 at 1.9 gallons per hour, MW-32 at .02 gallons per hour, MW-35 at .07 gallons per hour, MW-36 at .07 gallons per hour and MW-26 at .64 gallons per hour. MW-30, the upgradient shallow well, had a recharge rate on that date of .01 gallons per hour. (Ex.A-171)

280. With the exception of MW-23 and 26, these wells had been drilled in September of 1983. But, the recharge was so slow that proper purging to remove boring debris, oil from the drilling bit, contamination from the drilling rig, the steel casing and the PVC slotted casing was difficult, if not impossible. Even after two purgings and samplings, the wells still exhibited extremely high pHs and high conductivities (indicating high sediment) which are not typical of the formation. (N.T. 922-924)

281. Non-purged samples of MW-35 and 36 were taken by FR&S on December 8, 1983 to determine if surface contamination from the Smith site had invaded the wells. (N.T. 1201-1202, 1481-1482, 1608-1609, and 1614-1615)

282. Ideally, a field blank should be taken each time the bailer is used to take a groundwater sample at a different well. FR&S did not run a blank between each time. The samples were transferred from the bailer into the sample bottle and then sent to the laboratory using the Department's chain of custody procedures. No fixatives or preservatives were added to the organics. (N.T. 2250-2251)

283. With a field blank, the sampler takes laboratory pure water and runs it through the process of taking the sample, using the bailer or other device, pouring the water in the bailer, pouring it out of the bailer into the sample bottle, closing up the sample bottle and sending it with the other samples back to the laboratory. The analyst is not informed that it is a sample of laboratory pure water and runs it as if it came from the field. If

it contains a contaminant after analysis, then there is an error in the sampling or transportation procedure. (N.T. 1685)

284. Soil samples were taken from the Smith site and analyzed. (N.T. 1661-1664)

285. Parameters which are commonly accepted indicators, or fingerprints, of leachate are specific conductance, pH, BOD (biochemical oxygen demand), COD (chemical oxygen demand), TOC (total organic carbon), phenolics, ammonia, turbidity, chlorides, sulfates, phosphorus, metals (iron, manganese, aluminum, lead and nickel), and organics. (N.T. 904-907 and Ex.A-149)

286. FR&S' samples were analyzed by Roy F. Weston and Gilbert Laboratories, both of which are EPA certified. (N.T. 893)

287. Michael Webb, a Department chemist who was admitted as an expert in chemistry, analyzed the FR&S samples. (N.T. 2451)

288. When a sample is received, a laboratory control number is attached and used to identify it throughout the process of analysis. If it is a volatile organic compound (VOC), the analysis is generally done the day it is received. If it can't be done that day, the sample will be refrigerated. Semi-volatiles are kept in a separate refrigerator. The difference between VOCs and semi-volatiles really lies in the boiling point range. Compounds that have boiling points lower than ethyl benzene would be classified as volatiles (100-130°C), and those that have boiling points above ethyl benzene would be considered semi-volatiles. (N.T. 2453)

289. The Department's laboratory runs approximately 40 VOC analyses and 4 semi-volatile analyses each week. (N.T. 2497)

290. EPA Method 624 is used to analyze for the presence of some 35 VOCs. The sample has a gas blown through it in order to remove the volatile

materials and catch them on a trap. The trap holds the VOCs, allowing the water and air to pass through. The trap is then heated and air is blown through the trap, desorbing the VOCs onto a gas chromatographic column. The column is then programmed, or heated slowly, and the VOCs are separated into components. The gas chromatograph dilutes these components into a mass spectrometer, which is supposed to identify and measure the amount of each individual component. (N.T. 1696-1697)

291. EPA Method 625 is used to extract semi-volatile organics from a water matrix for analysis. Extraction is necessary because it is very difficult to measure components from water directly, and, in order for the gas chromatograph/mass spectrometer to identify and measure semi-volatiles, the components must be concentrated. The method consists of adjusting the pH of the water, adding methylene chloride, extracting the water, removing the methylene chloride that now contains the organic materials and evaporating the methylene chloride to a very small volume (the concentration factor is roughly 1,000). The methylene chloride is then injected into the gas chromatograph and the components are separated. From there, they pass into the mass spectrometer where they are identified and quantitatively measured. (N.T. 1698-1699)

292. EPA Methods 624 and 625 were used by Roy F. Weston and Gilbert Laboratories to analyze the FR&S samples. (N.T. 1696, 1698, and 2452)

293. The Department used EPA Methods 624 and 625. It also used a variation of the EPA Method 624. This variation has not been documented or subjected to peer review. (N.T. 2672-2674 and 3948)

294. The aim of all laboratory procedures is to achieve accuracy, precision, and validity.

295. Accuracy relates to the ability to measure exactly what is

contained in a sample. (N.T. 1687 and 3946)

296. Precision is the ability to reproduce the analytical result. It is a measurement of how well one can repeatedly quantitate a substance in the matrix.

297. Duplicates of samples are used to measure the accuracy and precision of analyses. A duplicate is taken at the same time as the sample, by the same person, shipped the same way, received at the laboratory at the same time, and analyzed at the same time as the sample. If there is accuracy and precision, the results should all be the same, i.e., all positive, or all negative, and if positive, the numbers should be in a certain range. (N.T. 1686-1687)

298. As a part of its Quality Assurance/Quality Control (QA/QC) program, the Department's laboratory requires that two samples be taken of each VOC. The reason is that for every ten (10) samples that go through the laboratory, a duplicate must be run to check the laboratory's quality control. With the FR&S samples, there was at least one occasion when a duplicate was run. The duplicate was not run as a blind. (N.T. 2456-2457)

299. Spikes are used to test the accuracy of a method. A known amount of a substance is placed in a sample in the field and run through the analytical process. For example, if a sample contains 50 mg/l of a substance and is taken to the field where it is spiked with 50 mg/l of the same substance, a result of 50 mg/l in the laboratory indicates the substance was lost and the method does not work. (N.T. 1690)

300. Spikes may also be used to verify the identification of a compound. (N.T. 1690)

301. It would be advantageous for a laboratory to run spikes, duplicates and individual field blanks, but they are not always practical,

and they are not necessary to establish the accuracy, precision and validity of a method. (N.T. 2667-2669)

302. The Department's laboratory has established the accuracy and precision of its methods by running spikes on other samples than the FR&S samples. No spikes were run on FR&S samples. (N.T. 2576)

303. The Department does spike samples with internal standard aterials, but not on a routine daily basis. (N.T. 2576)

304. One point determinations are a standard method of doing analyses. To do duplicates, triplicates and spike samples on every sample would make the cost prohibitive and, in fact, Weston Labs did not do this on every FR&S sample. (N.T. 2571)

305. According to Webb, most laboratories run spikes and duplicates to establish the accuracy and validity of the method for the matrix in which it is being used. (N.T. 2669)

306. The Department laboratory takes the first sample of the day and runs it at the end of the day to determine whether there has been any variation of an analytical method over the working day. (N.T. 2560)

307. The Department laboratory also runs a method blank on a daily basis; a method blank is a sample of organic-free water that is run through the entire analytical method to determine whether or not there are any contaminants common to the method and the associated glassware used in handling the sample and performing the analysis. (N.T. 2513 and 2577). Generally, another method blank will be run to insure quality control. (N.T. 2455-2466)

308. It is not unusual to find contaminants in a blank, either as a result of field procedure or laboratory procedure. (N.T. 1686). The contaminant could come from various sources: wind blowing something into the

sample, the cooler, transportation, the laboratory refrigerator, the laboratory environment, or other materials in the refrigerator. (N.T. 3363-3364)

309. Laboratory blanks are more important during the day, since the amount of solvent in the air increases during the day. (N.T. 3940)

310. The Department runs a laboratory blank at least once a day, but laboratory blanks are also run after any samples which contain large quantities of a compound (i.e., in the range of 30-40 ppb). (N.T. 2667-2669)

311. Methylene chloride, also known as dichloromethane, and phthalates are potential laboratory contaminants. (N.T. 2457-2458)

312. The laboratory is reluctant to report any methylene chloride found unless it is above the threshold level usually found in the laboratory, which is around 1 ppb. (N.T. 1701 and 2458). This is because methylene chloride is used by the laboratory to extract organics using EPA Method 625.

313. Phthalates are ubiquitous in the environment. (N.T. 2526)

314. The matrix of the sample is everything else in the sample except the compound being analyzed. (N.T. 3879). The matrix can interfere with the analysis. (N.T. 3926). One way to determine matrix effect is to run a spike sample. (N.T. 3926)

315. EPA Methods 624 and 625 are protocols that were designed for the analysis of compounds from water and wastewater. The method was developed initially using organic-free water, but has been validated by using real world samples. (N.T. 1709-1710, 2610 and 2669)

316. While the matrix effect can make quantification more difficult, it does not necessarily invalidate the analytical methodology. (N.T. 2528)

317. There is a possibility of a matrix effect in raw leachate. (N.T. 2522-2523)

318. The FR&S samples are groundwater samples and groundwater is a less complex matrix; therefore, it is easier to quantitate to lower levels with greater degrees of precision. (N.T. 2532)

319. The matrix effect in chromatography generally occurs where there are extreme levels of organic compounds present in the extract. After the extraction is performed, a lot of the matrix will be left in the water, particularly in the form of inorganic ions. (N.T. 2640)

320. A sample matrix may be complicated when the sample arrives at the laboratory, but EPA Method 625 simplifies the matrix by removing the organic portion. (N.T. 2643)

321. Eight organics were found in the sample from MW-28. The sample did not have a very complex matrix; a complex matrix would be something like gasoline, with 600 to 700 compounds. (N.T. 2641)

322. A sample with 19 organic compounds has a less complex matrix than the laboratory standard which has some 70 compounds in it, all of which are priority pollutants. (N.T. 2654-2655)

323. The machine used by the Department for analysis is a Gas Chromatographic/Mass Spectrometer (GC/MS). A seven-point calibration curve is established to provide accuracy. Internal check standards are then made on a daily basis from stock solutions that are replaced monthly. A sample is run through the system, and if the standard shows appropriate response factors for the compounds indicated, then analysis may commence. This is a daily procedure. (N.T. 2455-2456, 2514, and 3867)

324. The Weston laboratory only ran a five-point calibration curve. (N.T. 3867)

325. The Department's laboratory does not run a calibration curve once a day. It runs a check standard on a daily basis to verify that the

response factors are the same for the point being checked as those that were obtained on the calibration curve. (N.T. 2514)

326. The Department's laboratory checks the response factor to see whether or not the curve has changed. (N.T. 2514-2515)

327. Even in the 1979 version of EPA Method 624, EPA stated that once the linearity of the system has been shown, checking the response factor is adequate to determine whether or not the system is still working. (N.T. 2516)

328. Method variability relates to the level of confidence one has in a result obtained by the use of an analytical methodology. It occurs in EPA Methods 625 and 625. (N.T. 1706)

329. If one were to take an actual result of 100 parts per billion and measure that same sample over and over again, using the same method with the same people, 95 out of the 100 measurements would lay in a range. The range of variability at 100 ppb is roughly from 50 ppb to 175 ppb. (N.T. 1706-1707)

330. There are two different processes; one is quantification, the other is qualification. (N.T. 2651)

331. In 1979, EPA, considering the level of available technology, believed that the minimum level of detection, or MDL, for a laboratory was 10 ppb. Since that time, however, EPA has developed a 1982 method, recognizing that there are variances among laboratories and that certain laboratories may be capable of detecting limits below 10 ppb for certain methods. The method detection limit in this case would have to have a 99% confidence level. In essence, this means that the laboratory can calculate the minimum level at which a positive value is 99 percent sure of being positive. (N.T. 2467)

332. The Department's laboratory is capable of reporting quantities below 10 ppb on a consistent basis. This is substantiated by the laboratory's work in the EPA programs and check standards that the laboratory runs on a regular basis for in-house quality control work. (N.T. 2472)

333. The Department's laboratory has been able to establish, at least to the EPA's satisfaction, its ability to perform Method 624 (used for VOCs) at less than 10 ppb. (N.T. 2521-2522)

334. The method detection limits of the Department's laboratory are 1 ppb, with a 99% confidence that the value is indeed a positive value. The 1982 version of Method 624 sets standards even lower than that. (N.T. 2528, 2559, 2650)

335. The Department's laboratory has taken all of the priority pollutants and run standards on each one of them, from 1 ppb to 120 ppb, and found the curve to be linear. This has been done for all 27 of the VOC quantifiable compounds. Using Method 624, the method detection limit, 99% confidence level value, was calculated for each of those compounds. (N.T. 2566)

336. If the Department reports a value, it is above the minimum detection level for that compound. (N.T. 2468)

337. Qualitative analysis is used to assure whether a compound is present. Among the factors involved in qualitative analysis are data retention time and presence of significant masses. (N.T. 2649 and 2653)

338. The Department's laboratory will not quantitate anything less than 1 ppb. (N.T. 2649)

339. The presence of a compound is not reported unless the Department's laboratory has supplemental evidence of the compound in the sample and there is an extremely high degree of certainty in the

identification. (N.T. 2654 and 2462)

340. There are about 3 1/2 million organics, of which probably 150,000 are in common usage. A laboratory would have to develop calibration curves for each one of them in order to make a positive identification. (N.T. 2660)

341. The Department has standards for volatile and semi-volatile priority pollutants. (N.T. 2665)

342. The Department's laboratory uses the terms "estimated," "possible trace," and "possible" in reporting results. If a result is listed as "estimated," it means that the result has a degree of variability and the value should not be taken literally. "Possible trace" means that it was probably there, but a positive identification cannot be made. "Possible" means that it is a tentative evaluation and that the field person should probably do more work in order to make a firm identification. (N.T. 2463)

343. FR&S consultants used guidelines for data acquisition and data quality evaluation developed by the American Chemical Society subcommittee on environmental analytical chemistry in evaluating water quality data. (N.T. 899-902 and Ex.A-178)

344. These American Chemical Society criteria are as follows:

NONE DETECTED - To be used where no measurable concentration was found and also when concentration less than 10 ppb are reported on a consistent basis.

NOT RELIABLY FOUND - When concentrations are greater than 10 ppb and are not greater than 66% of the sample population for three samples and not greater than 75% of the sample population for four samples.

FALSE POSITIVE - Positive identification of a sample at

concentrations greater than 10 ppb which is not reproducible between two laboratories for given split sample and/or cannot be repeatedly reproduced over time.

LIMIT OF DETECTION (LOD) - The limit of detection is the lowest concentration of an analyte that the analytical process can reliably detect.

(Ex.A-178)

345. The analysis of the samples taken on October 24, 1983, and split between DER and FR&S show a reasonable degree of correlation. (N.T. 2477-2478)

346. Despite criticizing the Department's laboratory results as tentative, FR&S' consultant, Dr. Smith, admitted that his own laboratory's results were tentative. (N.T. 3934-3935)

347. The consultant for FR&S took soil samples of the Robert and Brenda Smith property in accordance with a method developed by Dr. Smith of the Weston Laboratory. The method has been certified by the United States Army Hazardous Materials Agency and is EPA approved. The method, however, does not get all the contaminants that are in the soil. (N.T. 1724-1726 and Ex.A-184)

348. Surface water upgradient of FR&S, from the intermittent stream from the top of the watershed to the intersection of the Metropolitan Edison power lines, is characterized as having high COD, high chlorides, high ammonia, and high total kjeldahl nitrogen. This is to be expected of a stream receiving direct discharges from septic systems and being impacted by a motorcycle club which uses the ditches as part of its events. (N.T. 958-960 and Ex.A-157)

349. The surface waters above the landfill are degraded from the

standpoint of organics and sediment. (N.T. 957-961 and Ex.A-157)

350. Results from sampling the surface waters from the Metropolitan Edison power lines along the FR&S landfill to Lincoln Road indicate that the waters essentially meet conventional water quality standards for treatability, except for iron and manganese. (N.T. 962-963 and Ex.A-158)

351. The elevated iron and manganese are caused by the Jett seep which emanates from the abandoned landfill on the north side of Lincoln Road. (N.T. 962-963)

352. The filtered samples of the Jett seep indicate they are very high in iron and manganese, which is a very minor constituent of the FR&S leachate. (N.T. 1601-1602 and 1604-1605 and Ex.A-172 and A-173)

353. An ammonia reading of 15 mg/l was found in the surface water at the location of the Jett septic tank. (N.T. 963-967). Considering that the range of ammonia readings above the landfill is essentially the same as the range of ammonia readings where the diversion ditch leaves the site, and the average ammonia reading in the leachate is 396 mg/l, it is reasonable to conclude that there is no impact or leakage from the landfill to the intermittent stream. (N.T. 965-966 and 1294)

354. A summary of the sample results from the intermittent stream off-site below Lincoln Road to the Schuylkill River is set forth in Exhibit A-159. (N.T. 969-973). This area of the stream is impacted by the abandoned landfill seeps and the runoff from the Furnace Hill property which enter it south of Lincoln Road. It also is impacted by the various present and former industrial uses which border on it. (N.T. 969-973)

355. The FR&S landfill has had temporary impacts on the intermittent stream. (N.T. 992-993)

356. FR&S' leachate is variable as a result of accepting different

wastes at different times. (N.T. 2480 and 3189-3190 and Ex.C-67)

357. If one compares the chemical analyses of the leachate with those of a contaminated downgradient monitoring point, one would expect to see some, but not all, of the same compounds. (N.T. 2479-2480)

358. FR&S' leachate contains parameters commonly associated with landfills, such as organic solvents and hydrocarbons. It also contains several unusual compounds, such as phenobartitol and n-butyl benzene sulfanamide (n-butyl). (N.T. 2401 and 2412 and Ex.C-54, Chart A)

359. The FR&S landfill is not impacting the deep aquifer, a conclusion which is shared by DER and Satterthwaite. (N.T. 919, 1499, 2396, 2751, and 3169)

360. There was no contamination in MW-30, the shallow, upgradient monitoring well. (N.T. 1758-1760 and 2413-2414 and Ex.A-151 and C-54, Chart B)

361. The Department found seven organics in the sample from MW-23, three of which, including n-buytl, were found in the FR&S leachate. (N.T. 2415 and Ex.C-54, Chart D)

362. N-butyl is used by Rilsan, a plastics manufacturer, which is about one-half mile from FR&S. Rilsan stores the n-butyl in tanks. (N.T. 2418)

363. There are no discharges into the atmosphere from the Rilsan plant. One of Rilsan's corporate officers believes that the n-butyl could have found its way into Rilsan's sewage discharge into the Exeter Township system. (N.T. 3956-3958)

364. Analysis of the Exeter Township sewage sludge shows the presence of n-butyl. (N.T. 2419)

365. Caprolactum was also used at Rilsan. It was found by the

Department in the sample from MW-23, but not in the leachate from FR&S. (N.T. 2421)

366. FR&S' analysis indicated "not found" for organics, although three were detected--a phthalate as a result of sample contamination, an ethyl compound at 2 ppb, and a compound not quantified. (N.T. 925 and Ex.A-151)

367. MW-26, a side gradient well, was clean. (N.T. 2413 and Ex.A-151 and C-54, Chart B)

368. FR&S' analysis of MW-28, a shallow, downgradient well, indicated no contamination. The Department detected 17 organics, of which eight were found in FR&S' leachate. However, most of these compounds were found in gasoline or fuel oil used to power the equipment at the FR&S site. (N.T. 929 and 2414-2415 and Ex.A-151 and C-54, Chart B)

369. MW-32 presented significant problems with recovery after purging, which was at the rate of .38 gallons over a 23 hour period. As a result, there was not sufficient recovery to run all tests. However, with respect to the tests that were run and as split samples, there were no contaminants found in the well by the FR&S consultant. (N.T. 929-931 and Ex.A-151)

370. The Department's analysis of MW-32 detected 11 compounds matching compounds found in the FR&S leachate, but not at extremely high levels. (N.T. 2425-2426 and Ex.C-54, Chart E)

371. MW-35, a shallow, downgradient well, after purging, recovered at the rate of 1.5 gallons in 22 hours. This well also did not show the parameters that one would normally associate with contamination from a landfill. Ammonia was at 1.65 mg/l, nitrite was at .54 mg/l, nitrate was at 5.01 mg/l, high residues which are to be expected from a newly drilled well,

chloride was low and the filtered metal sample indicates metals representative of background. (N.T. 942 and Ex.A-171) Similarly, the other typical parameters identified in the leachate, such as toluene, benzene (6.2 ppb in the DER sample), chlorobenzene, and ethylbenzene were not found. (N.T. 942 and Ex.A-171)

372. MW-35, however, shows contaminants, but in higher concentrations than appear in MW-36. They are 1,1 dichloroethane at 160 ppb and an estimated 210 ppb by DER, 1,2 dichloroethane at 61 ppb and 68 ppb, methylene chloride at 89 ppb (by FR&S and probably a lab contaminant), 1,1,2,2 tetrachloroethane at 18 ppb (FR&S), tetrachloroethyl at 22 ppb (FR&S only), 1,2 trans dichloroethene at 29 ppb (FR&S only), 1,1,1 trichloroethane at 17 ppb (FR&S only) and trichlorothylene at 32 ppb (FR&S only). In this well the Department reported 1,2 dichloroethane at 68 ppb, trichloroethene at 33 ppb, tetrachloroethene at 22 ppb, various refrigerants at less than 10 ppb and 2 unquantified items by means of its high temperature scan. (Ex.A-171)

373. MW-36, a shallow, downgradient well, produced one and one-half gallons of water in 22 hours after purging. Indicators generally associated with a landfill were not present. Phenolics were not found, ammonia was at 1.76 mg/1, nitrite and nitrate were very low, and chlorides, metals and sulfates were within the range to be expected in this formation. Neither the Department nor the consultant for FR&S found toluene, benzene, chlorobenzene or ethylbenzene. (N.T. 940-941 and Ex.A-151)

374. However, trichloroethane was found at 20 ppb and 24 ppb. The consultant for FR&S found 1,1 dichloroethane at 43 ppb and the Department found it at 58 ppb. The consultant for FR&S found 1,1,1 trichloroethane at 20 ppb, but the Department did not find this substance. The consultant for FR&S found Bis(2)-ethyl hexyl phthalate at 13 ppb, but this substance was not

found by the Department. (Ex.A-151)

375. MW-35 and 36 show contamination, but not the sort indicative that it was emanating from the FR&S landfill.

376. Because the contamination was isolated to MW-35 and 36 and the samples from those wells failed to match the footprint of the FR&S leachate, two consultants from FR&S met with Dr. Smith to review the various leachate analyses and compare them to the findings for these wells.

377. Even applying the DER criteria and concluding that contaminants are validly detected down to .5 ppb, the consultant for FR&S was unable to match the fingerprint of the contaminants found in MW-35 and 36 with the FR&S leachate. The results from the sampling of MW-35 and 36 also were inconsistent with the findings of no contamination in all other shallow, downgradient monitoring wells. (N.T. 945-946, 1201-1202 and 1261-1264 and Ex.A-152)

378. Recalling his observations of the property of Brenda and Robert Smith, such as the discharge of effluent directly to the surface of the land, a vent pipe with a black sticky substance about it, the automotive repair uses, spray painting, refrigerators in various stages of disassembly and the like, the consultant for FR&S consulted with Dr. James Smith of the Weston Lab and decided to make a further inspection of the Smith property and to take a "grab-sample" or non-purged samples of MW-35 and 36. (N.T. 1201-1202, 1481-1482, and 1608-1609)

379. The non-purged sample was taken on December 8, 1983 to check the theory that, because of well construction allowing for a slow in-flow of material from the surface through the well casing, the contamination was from the soil surface. In that case, a non-purged sample would represent water standing in the well over a period of time and would show higher

concentrations of contaminants, which it did. (N.T. 1509)

380. Based on his analysis of the non-purged samples of MW-35 and 36, Dr. Smith concluded that the materials in the samples did not correspond to those in the leachate. The materials in MW-35 and 36 were common degreasing chemicals such as methochloroform, or 1,1 trichloroethane. The most predominant chemical in the well was 1,1 dichloroethane, which is the precursor in the manufacture of methchloroform. (N.T. 1734 and 1735)

381. Four sites were selected on the Smith property for soil samples. They did not represent all possible spill areas on the property. (N.T. 1515-1616, 1642, 1673, and 4059-4063 and Ex.A-160)

382. The locations were chosen because those areas showed evidence of surface staining or discolorations. (N.T. 1482-1483)

383. Sample 642 lists 15 contaminants (N.T. 982 and 984). Soil sample 644 disclosed ten contaminants (N.T. 982 and 984) and soil sample 635 discloses three contaminants.

384. The compounds detected in the soil samples match those existing in MW-35 and 36 and do not match the leachate samples from the FR&S site. (N.T. 946, 951, 987, and 1499 and Ex.A-175 and A-176)

385. MW-35 and 36 are constructed so that migration from the surface of the soil into the well boring occurs easily because of the shallow casing and the depth of the disturbed frost zone. (N.T. 1257, 1582-1583, 1592, 1641, and 4057-4063)

386. The Department's analysis of MW-37 indicated 29 organics, 25 of which were found in the FR&S leachate. (N.T. 2433 and Ex.C-54, Chart H)

387. Ethyl benzene, a parameter commonly found in leachate was not detected in any upgradient monitoring well, nor in MW-23, 25, 32, 35, and 36. Therefore, the upgradient and downgradient wells were isolated from this

parameter. (N.T. 946-947 and Ex.A-152)

388. Toluene, another parameter commonly found in leachate, was undetected in the upgradient and downgradient well and is, therefore, isolated within the landfill. (N.T. 947 and Ex.A-152)

389. Tetrachloroethylene was not detected in the upgradient or downgradient wells, with the exception of MW-35, which had a result of 22 ppb. The parameter was not detected in the landfill leachate. (N.T. 948 and Ex.A-154)

390. Trichloroethylene was not found in the landfill leachate, nor in the upgradient and downgradient wells, with the exception of MW-35 and 36. (N.T. 949 and Ex.A-156)

391. Dichloroethane was not found in the leachate, nor in the monitoring wells, with the exception of MW-35 and 36. (N.T. 949 and Ex.A-156)

392. MW-35 and 36 were being impacted by parameters not present in the landfill. (N.T. 950-951)

393. The aquiclude is not being impacted by the FR&S landfill. (N.T. 951 and 980-987 and Ex.A-160)

DISCUSSION

To the casual reader this appeal would seem to be a simple case of the Board deciding whether the Department abused its discretion in denying a solid waste management permit to FR&S and ordering the closure of FR&S' existing site. However, it has been clouded by the existence of related Commonwealth Court proceedings, a pending motion for recusal of the Board Chairman, and FR&S' argument that, despite the Department's April 11, 1983 order and permit denial, it does possess a valid solid waste management permit.

As is noted in the introduction and the post-hearing briefs of the parties, the parties have sought, and been afforded, relief by the Commonwealth Court prior to, during, and subsequent to the Board's involvement with this matter. Furthermore, both parties have advanced strenuous arguments relating to the effect of the Commonwealth Court's orders on this proceeding. The Board is bound by the Commonwealth Court's precedent. But, the instant situation is not one involving the application of precedent. Rather, the Commonwealth Court was enforcing a Department order, not adjudicating its underlying validity, as we are charged to do under §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21. The Commonwealth Court's orders become relevant, though, in our determination of the ability and intent of FR&S to comply with the law, as is discussed below.

MOTION FOR RECUSAL OF CHAIRMAN WOELFLING

To further complicate an already lengthy and complex record, the Board received a motion on May 26, 1987 from FR&S requesting the recusal of Chairman Woelfling from participating in the adjudication of this matter. There were two primary grounds alleged--the Chairman's previous employment in the Department of Environmental Resources' Office of Chief Counsel and the Chairman's alleged reluctance to circulate a draft opinion prepared by former Member Anthony J. Mazullo, Jr. immediately prior to his resignation from the Board on January 31, 1986. We are denying that motion in this adjudication in order to avoid further prolonging the resolution of this appeal.[2]

The Board finds the motion for recusal to be somewhat peculiar from a procedural standpoint. Counsel filing the recusal motion, William F. Fox,

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[2] FR&S has filed a petition for review at No. 3044 C.D. 1986 seeking to compel the Board to issue an adjudication in this matter.

Jr. of Fox, Differ, Callahan, Ulrich & O'Hara, has never entered his appearance in this matter, as is required by Rules 21.22 and 21.23 of the Board's rules of practice and procedure. A member of Mr. Fox's firm, Paul W. Callahan, represented FR&S until January 13, 1986, when his appearance was withdrawn. Simultaneously on that date, Edward C. German of German, Gallagher and Murtagh entered his appearance and is still the attorney of record in this matter. While the lack of an entry of appearance may appear to be procedural hair splitting, without it, the Board cannot determine whether an attorney is authorized by a client to pursue a matter before the Board. Moreover, the Board has no authority to delve into private transactions and attempt to divine which attorney or firm represents a party in what matters and for what purposes.[3] Consequently, it would be perfectly appropriate for the Board to ignore the motion, as it was not filed by Mr. German, the attorney of record.

Even if we were to treat the motion as properly filed, we believe the motion is unfounded for several reasons. With respect to the contention that the Chairman should recuse herself because of her previous employment with

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[3] There is also an August 25, 1986 letter in the docket from A. Richard Gerber of Gerber and Gerber inquiring about the status of the Board's adjudication on behalf of Franex, Inc., which allegedly, at that time, owned FR&S. Like Mr. Fox, Mr. Gerber never entered his notice of appearance. How is the Board to determine whether Fox, Gerber, German, or some combination represents FR&S?

Even more confusing are the indications that FR&S may have changed hands at least twice during the course of these proceedings. Mr. Callahan's withdrawal of appearance specifically states there has been a sale of the FR&S stock and Mr. Gerber's letter notes his representation of Franex, Inc. The docket also contains a letter dated June 7, 1985 regarding the intent of J. P. Mascaro and Sons, Inc. to purchase FR&S, Inc. and pleadings filed at No. 3044 C.D. 1986 indicate Pasquale Mascaro as president of FR&S. If FR&S is now under new ownership, we read 25 Pa.Code §75.22(f) as requiring the new owner(s) to file a permit application with the Department, as solid waste management permits (assuming one exists) cannot be transferred. Blevins v. New Garden Tp., 91 Pa.Cmwlth 207, 496 A.2d 1309 (1985)

the Department's Office of Chief Counsel, the motion is unsupported and untimely. The parties were given every indication that the Chairman intended to participate in this matter from her responses to various inquiries concerning the status of the adjudication in this matter. If the Chairman's participation in this matter is now objectionable by virtue of her previous association with the Department, it was just as objectionable when she joined the Board in September, 1985 and when Member Mazullo resigned in January, 1986. As such, this matter is analogous to the situation in DER v. Lawrence Coal Company, 1986 EHB 1021. Moreover, even if the recusal request were not untimely, the mere fact that the Chairman was previously employed by the Department is not sufficient to support a recusal request. Participation in or supervision over the Department's action is the type of evidence necessary.

Rather, the recusal request, as is apparent from Count II of the motion, is a thinly-veiled attempt to compel the Board, for whatever reason, to issue the draft adjudication prepared by former Member Mazullo. The Board faced a similar situation in DER v. Lawrence Coal Company, 1986 EHB 519 where the defendant, in a petition for reconsideration, sought the recusal of the Chairman because of her previous employment with the Department and former Member Gerjuoy because he concurred in the reassignment of the matter to former Member Mazullo from a hearing examiner who indicated to the parties that he was favorably inclined toward the defendant. The Board emphatically stated in deciding Lawrence's petition for reconsideration that it is not bound by the recommendations of its hearing examiners. 1986 EHB at 1027. Nor is the Board bound by the recommendations of its Members sitting as hearing examiners in individual appeals. The Commonwealth Court has held repeatedly that the decision of an administrative law judge or hearing examiner may

always be superseded by an agency, absent a statutory requirement that the agency is bound by the decision of the hearing examiner. Northwestern Institute of Psychiatry v. Com., ___ Pa.Cmwlth ___, 513 A.2D 495 (1986) and Fitz v. Intermediate Unit #29, 43 Pa.Cmwlth 370, 403 A.2d 138 (1979). We have considered former Member Mazullo's draft proposed adjudication in reaching our decision, as previously noted.

THE EXISTENCE OF A SOLID WASTE MANAGEMENT PERMIT AND THE BURDEN OF PROOF

FR&S' claim that it has a solid waste management permit affects the assignment of the burden of proof. If the Board accepts FR&S' argument that it has a permit, the Department's April 11, 1983 action was a permit revocation and closure order, and the Department, pursuant to 25 Pa.Code §21.101(b)(2) and (3) bears the burden of proof. If, on the other hand, the Department's April 11, 1983 action was a permit denial and closure order, FR&S, pursuant to 25 Pa.Code §21.101(c)(1), would bear the burden of proof in demonstrating that it was entitled to a permit and the Department, pursuant to 25 Pa.Code §21.101(b)(3), would bear the burden of justifying its closure order. To avoid further clouding the issues, we will address the existence or non-existence of the permit.

Because FR&S is contending that the solid waste permit was issued by the Department, it is asserting the affirmative of the issue and, therefore, bears the burden of establishing the existence of the permit under 25 Pa.Code §21.101(a). We hold that FR&S has not satisfied its burden.

The evidence does establish that a solid waste permit was prepared, numbered, and signed by a duly authorized Department official, but not dated. (Ex.A-90). Indeed, an undated transmittal letter to FR&S and a draft news release were also prepared by the Department. (Ex.A-90 and A-92). The permit was stamped "VOID" on each page, allegedly by John Wilmer, the Department's

counsel. (N.T. 478). While we are unaware of any authority in the Solid Waste Management Act or the Commonwealth Attorneys Act, the Act of October 15, 1980, P.L. 950, 71 P.S. §732.101 et seq., which empowers a member of the Office of General Counsel to administer the permit provisions of the Solid Waste Management Act, we believe Mr. Wilmer's alleged act did nothing to alter the status quo. A permit was not issued to FR&S prior to Wilmer's act, nor was one issued subsequent to his act. We reach this conclusion based on our interpretation of what constitutes issuance of a permit.

The terms "issued" and "issuance" are not defined in the Solid Waste Management Act or 25 Pa.Code §75.1, or §1991 of the Statutory Construction Act, 1 Pa. C.S.A. §1991. Consequently, §1903(a) of the Statutory Construction Act, 1 Pa. C.S.A. §1903 requires the Board to construe the terms either "according to their common and approved usage" or to their "peculiar and appropriate meaning or definition." "Issue" is defined in Webster's Collegiate Dictionary (9th ed.) as "The act of publishing or officially giving out or making available...." Similarly, Black's Law Dictionary (4th ed.) defines the term as "To send out officially...." and in the accompanying annotation states that "the term is ordinarily construed as imparting delivery to the proper person...." We have found several Pennsylvania cases construing the meaning of "issued" as used in §1006 of the Pennsylvania Municipalities Planning Code, the Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §11006, most notably Zimmer v. Susquehanna County Planning Commission, 14 Pa. Cmwlth. 435, 322 A.2d 420 (1974). The Commonwealth Court, applying the common and approved usage of the word, construed it to mean "send forth or mailed...." 322 A.2d at 421. Whether we regard issuance of a permit to involve sending the permit out from the Department's offices or physical delivery of the document to a prospective permittee, the result is the same, no permit ever left the offices of the

Department. The fact that a press release and transmittal letter were prepared is immaterial; the undated permit never left the Department's offices.

Having determined that a solid waste permit was never issued to FR&S, the burden of proving that the Department's April 11, 1983 denial of FR&S' permit application constituted an abuse of discretion falls upon FR&S. We will not substitute our discretion for that of the Department unless FR&S shows by substantial evidence that the Department's denial was arbitrary, capricious, or unreasonable, nor will we mandate the issuance of a permit unless FR&S clearly demonstrates it is entitled to the permit. Sanner Brothers Coal Company v. DER, EHB Docket No. 81-107-M (issued April 21, 1987).

PERMIT DENIAL

In determining whether FR&S has satisfied its burden of demonstrating that the Department abused its discretion in denying FR&S' permit application, we must examine the requirements of §§502 and 503 of the Solid Waste Management Act and the rules and regulations adopted thereunder at 25 Pa.Code §§75.21-75.25. While we believe that FR&S has sustained its burden of demonstrating that the Department's action, in certain respects, was arbitrary and capricious, we believe that, based solely on §§503(c) and (d) of the Solid Waste Management Act, the Department's denial of the permit was proper.

Sections 503(c) and (d) of the Solid Waste Management Act provide, in relevant part, that:

> (c) In carrying out the provisions of this act, the department may deny...any permit...if it finds that the applicant...has failed or continues to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as

"The Clean Streams Law," the act of January 8, 1960, (1959 P.L. 2119, No. 787), known as the "Air Pollution Control Act," and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant...has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations. ...

(d) Any person...which has engaged in unlawful conduct as defined in this act, or whose partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent has engaged in such unlawful conduct, shall be denied any permit...required by this act unless the permit ...application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected. Independent contractors and agents who are to operate under any permit shall be subject to the provisions of this act. Such independent contractors, agents and the permittee shall be jointly and severally liable, without regard to fault, for violations of this act which occur during the contractor's or agent's involvement in the course of operations.

"Unlawful conduct" is defined at great length in §610 of the Solid Waste Management Act, the most pertinent subsections being the following:

It shall be unlawful for any person or municipality to:

(1) Dump or deposit, or permit the dumping or depositing, of any solid waste onto the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping of such solid wastes has been obtained from the department; provided, the Environmental Quality Board may by regulation exempt certain activities associated with normal farming operations as defined by this act from such permit requirements.

(2) Construct, alter, operate or utilize a solid waste storage, treatment, processing or disposal facility without a permit from the department as required by this act or in violation of the rules or

> regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.
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> * * * * *
>
> (4) Store, collect, transport, process, treat, or dispose of, or assist in the storage, collection, transportation, processing, treatment, or disposal of, solid waste contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.
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> * * * * *
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> (7) Refuse, hinder, obstruct, delay, or threaten any agent or employee of the department in the course of performance of any duty under this act, including, but not limited to, entry and inspection under any circumstances.
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> * * * * *
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> (9) Cause or assist in the violation of any provision of this act, any rule or regulation of the department, any order of the department or any term or condition of any permit.

We have interpreted these two subsections of §503 in Refiner's Transport and Terminal Corporation v. DER, 1986 EHB 400, wherein we held that

> Subsection (c) grants DER discretionary authority. DER is not required automatically to deny a license or permit to anyone who ever has violated the Commonwealth's environmental laws. Wisniewski v. DER et al., EHB Docket No. 82-045-G (Adjudication dated February 7, 1986). Rather, in determining whether the license or permit should be issued, DER must take into account a variety of factors and determine whether denial is "reasonable and appropriate under the circumstances." Commonwealth, DER v. Mill Service, Inc., 21 Pa.Cmwlth 642, 347 A.2d 503 (1975).
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> 1986 EHB at 456

We went on to state that §503(d) mandates the Department to deny a permit where an applicant fails to demonstrate in its application that it has corrected unlawful conduct and that the Department could, even if unlawful conduct were corrected, still deny a permit under §503(c).

Like Armand Wazelle v. DER and the Borough of Punxsutawney, 1985 EHB 207, the record in this case provides ample support for the Department's

conclusion that there were violations existing on the site at the time of permit denial and that, viewing FR&S' history of compliance with the Solid Waste Management Act and rules and regulations adopted thereunder over time, it lacked both the ability and the intention to comply with the law. As in Wazelle, the violations are too numerous to discuss them at length. Since they are detailed in the Findings of Fact, we will only touch upon them in a cursory fashion.

Approximately three weeks before the Department denied the permit, an inspection was conducted at the FR&S site and numerous violations of the regulations were found by the Department's inspector (Findings of Fact 62 and 64-71). As there was no evidence put forth by FR&S to establish that the violations were corrected at the time of the Department's final action on the permit application and the violations constituted unlawful conduct by reason of §610(2), (4), and (9) of the Solid Waste Management Act, the Department was mandated by §503(d) to deny the permit. Refiner's Transport and Terminal, supra. Since §503(d) imposes a mandatory duty on the Department, we cannot substitute our discretion and must either uphold or vacate the Department's action. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth 156, 341 A.2d 556 (1975). On the basis of our findings, we must uphold the Department's denial under §503(d) of the Solid Waste Management Act.

Even if we were to hold that the Department acted improperly in denying the permit because of uncorrected unlawful conduct, we must still sustain the Department's determination under §503(c) that FR&S lacked both the ability and intention to comply with the Solid Waste Management Act. Prior to the April 11, 1983 permit denial and closure order, there was ample demonstration of this by FR&S. The site was operated by FR&S without a permit from 1971 to 1976 (Finding of Fact 35) and FR&S violated a 1978

Commonwealth Court order relating to leachate management (Finding of Fact 63). Discharges of leachate from the site into surface waters had occurred on prior occasions (Finding of Fact 111).

FR&S' actions subsequent to the April 11, 1983 order and permit denial are even more telling. Because we exercise de novo review over the Department's actions, we will consider evidence garnered after the fact, if it is relevant to our determination. Refiner's Transport and Terminal, id. at 457. Numerous violations of the regulations were found in Department inspections on the following dates:

May 11, 1983 (Findings of Fact 72 and 73)
June 29, 1983 (Findings of Fact 74 and 76)
July 21, 1983 (Finding of Fact 78)
September 8, 1983 (Findings of Fact 79-82)
October 18, 1983 (Finding of Fact 83)
December 7, 1983 (Findings of Fact 84 and 85)
March 1, 1984 (Findings of Fact 86-88 and 125)
March 5 and 7, 1984 (Finding of Fact 126)
April 9, 1984 (Findings of Fact 89-92)
May 1, 1984 (Finding of Fact 93 and 94)
August 8, 1984 (Finding of Fact 96)
August 14, 1984 (Finding of Fact 97)

And, leachate was discharged from the site into the surface waters on these dates:

October 24, 1983 (Finding of Fact 112)
June 14, 1984 (Finding of Fact 113)
June 15, 1984 (Finding of Fact 115)
July 7, 1984 (Finding of Fact 118)
July 11, 1984 (Finding of Fact 120)
July 13, 1984 (Finding of Fact 121)
July 15, 1984 (Finding of Fact 122)
July 17, 1984 (Finding of Fact 123)
August 14, 1984 (Finding of Fact 124)

FR&S failed to notify the Department of the leachate discharges from the North Pond into the surface waters (Finding of Fact 141) and neglected to notify the Department of various alterations to the leachate management and collection system (Findings of Fact 132-138). And, the Department's

inspectors were subjected to rude and abusive treatment by Donald Peifer, FR&S' agent (Findings of Fact 143-145).

While these violations of Department regulations are legion, we also have violations of our own orders and those of Commonwealth Court. Our own August 6, 1984 order, especially as it related to leachate management, was repeatedly violated by FR&S (Findings of Fact 102, 103, and 106). And FR&S was found in contempt of the Commonwealth Court on February 1, 1985 (Finding of Fact 131).

In the face of this overwhelming evidence of flagrant, continuing misconduct and untrustworthiness, we have no choice but to sustain the Department's exercise of its discretion under §503(c) of the Solid Waste Management Act. Vik-Kel Corporation v. DER et al., 1983 EHB 111.

TECHNICAL ISSUES RELATING TO THE PERMIT

We turn now to consideration of the various technical issues relating to denial of FR&S' permit application. FR&S has satisfied its burden of demonstrating that the Department's denial of its permit application was, in some respects, an abuse of discretion. However, a permit cannot issue where an applicant has only partially demonstrated compliance with the underlying statute and the applicable rules and regulations. And, even if an applicant were to demonstrate complete compliance with the relevant technical requirements, the Department still has the discretion, in appropriate circumstances, to deny the permit application under §503(c) of the Solid Waste Management Act. Although we have held here that the Department properly denied FR&S' permit application under §§503(c) and (d) of the Solid Waste Management Act, we will address FR&S' compliance with the various requirements of 25 Pa.Code §§75.21 and 75.23-75.25.

Section 75.21(s) states that "A twenty-five foot (25') zone shall be

established upon which no solid waste shall be deposited adjacent to perimeter property lines unless otherwise approved by the Department." Because FR&S did not survey the properties of adjacent landowners, it was impossible for the Department to ascertain whether FR&S met the set-back requirement in 25 Pa.Code §75.21(s) (Finding of Fact 209). In a similar vein, 25 Pa.Code §75.23(b)(1)(ii) provides, in pertinent part, that:

> (1) ...The design plans shall include but not be limited to the following data and information:
> * * * * *
> (ii) Grid and/or Coordinate system for the entire site. The horizontal control system shall consist of a grid not to exceed two hundred foot square sections. The grid shall be controlled and tied to a permanent physical marker or object located on site. The vertical control shall be tied to an elevation established for the permanent marker.

FR&S' application failed to designate benchmarks on the site (Finding of Fact 210) and, therefore, did not comply with the requirement of 25 Pa.Code §75.24(b)(1)(ii).

Slope requirements for sanitary landfills are detailed at 25 Pa.Code §75.24(c)(2)(iii):

> (c) Phase II. Application Design Requirements
> * * * * *
> (2) Design criteria
> * * * * *
> (iii) Where final grades are approved exceeding 15%, but in no case exceeding 33%, a horizontal terrace ten feet (10') minimum in width shall be constructed on the slope for every twenty feet (20') maximum rise in vertical elevation of the slope. The gradient of the terrace shall be 1%.

As noted in Findings of Fact 213 and 214, FR&S' existing slopes were 2:1 (50%) and its permit application proposed 2:1 slopes.

Permit applicants are required by 25 Pa.Code §75.24(c)(1)(viii) to include design plans relating to site preparation. These plans are also necessary to design other elements of the landfill system, such as the

leachate collection system (Finding of Fact 217). Topographic maps and surface contours are insufficient (Findings of Fact 217-220).

FR&S' application was also deficient in addressing the requirements of 25 Pa.Code §75.24(c)(2)(xviii), which provides that: "The site shall be designed and operated in a manner which will prevent or minimize surface water percolation into the solid waste material deposits." FR&S' use of demolition wastes on its side slopes as cover creates avenues for infiltration of surface water into the fill (Finding of Fact 216). The application was also deficient in satisfying the requirements of 25 Pa.Code §75.24(c)(2)(xxiv), in that no plans for a gas venting system were included (Finding of Fact 211).

The nature and mechanics of a site's leachate collection system are an integral part of any solid waste application. FR&S proposes a naturally occurring impermeable zone as a liner, so 25 Pa.Code §75.24(c)(2)(xix), which provides

> Sites not meeting the criteria listed herein for natural renovation for the prevention of groundwater pollution may be utilized if leachate collection and treatment facilities are approved by the Department.

and 25 Pa.Code §75.25(o)(7), which states

> Documentation insuring the proper treatment and disposal of all leachate collected will be provided to the Department by the applicant. Said documentation may include a contractual agreement with the operators of a treatment facility off-site and a contractual arrangement for the transporting of leachate to said site.

are the applicable requirements for the leachate collection and treatment

system.[4] FR&S has certainly demonstrated that the leachate generated by the site may be disposed of at the Exeter Township sewage treatment plant (Finding of Fact 234), but the adequacy of the collection system is another matter. Because of the operational state of the facility, FR&S' estimates regarding leachate generation are suspect (Finding of Fact 221). And, the collection system is, at best, a crazy-quilt patchwork of various pipe, installed at various times and with little regard to contours, elevations, and the shallow groundwater system (Findings of Fact 222-231). The Department's rejection of the application for these reasons was more than justified.

We do hold that FR&S satisfied its burden of demonstrating that the Department abused its discretion in denying the permit on the grounds that sufficient, suitable cover did not exist at the site and that the site was hydrogeologically unsuitable for use as an unlined landfill. We will address the simplest of these two issues--the cover material--first.

The Department's regulations contain various requirements relating to cover material. A permit applicant is required by 25 Pa.Code §75.24(b)(4)(i) and (ii) to submit

> (4) A soils, geologic and groundwater report of the characteristics of the site shall be included as required by the Department. This report shall be based on a soils, geology and hydrology investigation and on a published standard soil survey or equivalent data and shall encompass the criteria below:
>
> (i) A sufficient number of excavations and

---

[4] The Department argues that 25 Pa.Code §§75.25(k)-(o)(5) are also applicable. While the solid waste regulations are, in our opinion, somewhat less than a model of legislative drafting and we may be overlooking some relevant language, it appears that the majority of these provisions relate to facilities proposing to utilize man-made liners. In any event, their applicability does not change our conclusion regarding the acceptability of FR&S' leachate management system.

borings or wells shall be provided to determine the valid and conclusive soil, geology and groundwater conditions. Exploratory borings or wells shall be provided. These borings or wells shall be drilled ten feet into the groundwater or bedrock; or in the absence of groundwater or bedrock, a distance equal to the planned depth of refuse to be deposited. A minimum of three borings or wells shall be drilled ten feet into the groundwater to delineate groundwater flow system(s). Groundwater monitoring systems required: A minimum of one groundwater quality monitoring point shall be established in each dominant direction of groundwater movement and one monitoring point upgradient of the site. Location of points shall not be located in excess of 500 feet of the permitted area. Monitoring points shall be accessible to the applicant. Chemical analysis and hydrologic data shall be submitted quarterly to the Department in a format provided to the applicant by the Department. Each monitoring point shall be purged prior to obtaining the annual sample analysis.

(ii) Detailed soil descriptions shall be submitted from excavations for materials proposed for use as renovating soil or cover material.

And, 25 Pa.Code §75.24(c) provides in pertinent part that

* * * * *

(ix) Final cover shall be soils that fall within the United States Department of Agriculture (USDA) Textural classes of sandy loam, loam, sandy clay loam, silty clay loam, and silt loam. All other final cover materials must be approved by the Department. The soil must compact well, not crack excessively when dry and support a vegetative cover. The coarse fragment content (particles not passing the No. 10 mesh sieve, 2mm.) shall not exceed 60% by volume.

* * * * *

(xi) Soils to be used as daily and intermediate cover material shall be soils that fall within the USDA textural classes of sandy loam, loam, sandy clay loam, silty clay loam, loamy sand, and silt loam. All other cover materials must be approved by the Department. The coarse fragment content (fragments not passing the No. 10 mesh sieve, 2mm) shall not exceed 75% by volume and the combustible and/or coal content shall not exceed 12% by volume.

(xii) Boulders and stones as classified by the USDA shall be separated out or excluded from soils to be used for any type of cover material or

renovating soils.

* * * * *

Given the testimony of the Department's witness, John Zwalinski, we must conclude that the cover material proposed by FR&S was both sufficient and suitable. The volume of available cover material was 8.3 million cubic feet, an amount sufficient for FR&S' operation (Finding of Fact 195). The soils in the geographic region, in Mr. Zwalinski's experience, meet the Department's proposed cover material, after being subjected to various ASTM sanctioned tests, met the Department's requirements (Findings of Fact 191, 192 and 194).

The most difficult technical issue in this appeal was the hydrogeological suitability of the FR&S site for use as an unlined landfill. The Board, in evaluating this issue, examined the physical, hydrogeologic evidence, as well as real world evidence, from the operation of the site. We have reached the conclusion that the Department abused its discretion in concluding that the site was hydrogeologically unsuitable. In doing so, we found the testimony of FR&S' experts, Walter Satterthwaite and Dr. Smith, to be more credible than the testimony of the Department's primary expert, Mr. Manduke.

The regulation central to this issue is 25 Pa.Code §75.25(o)(6)(iii) which states

> (6) Natural systems may be utilized to collect leachate from landfills. The methods to utilize the natural systems may be the manipulation of the groundwater flow system(s) or naturally occurring impermeable zones.
>
> * * * * *
>
> (iii) Where naturally occurring impermeable zones are to be utilized, the minimum site requirements must be met are:
>
> (A) Zones with a uniform thickness of greater than two feet (2') must have a permeability of less than 1×10^{-7} cm/sec.
>
> (B) Zone with a uniform thickness of greater than four feet (4') and an upward ground-

water gradient into the zone may be approved with a maximum permeability of less than 1 x 10^{-6} cm/sec.

FR&S contends that its site meets the requirements of 25 Pa.Code §75.25(o)(6)(iii)(A).

The Department's geologist testified that permeability testing was not conducted, or was inconclusive regarding permeability. He also testified that the site was fractured and contained joints which would allow migration of contaminants to the groundwater and, therefore, the site was geologically unsuitable for landfilling. On the other hand, the expert retained by FR&S testified that the site was located in the Brunswick formation and that, even conceding the existence of fractures and joints, the site was suitable. Both his reports and testimony, and the report of Dr. Carlyle Gray, a geologist previously retained by FR&S, concluded that the shales present at the site, after weathering, filled the joints and fractures and sealed them.

While the Department points to evidence of leachate seeping through bedding planes and the admitted existence of joints and fractures as the bases of its position that the site is hydrogeologically unsuitable, we give little credence to its position. The more acceptable conclusion is that the topography of the site, the recharge rate of the shallow wells evidencing the existence of the aquiclude, the strike of the bedrock to the northwest (Finding of Fact 151), the dip of the rock from Lincoln Road to the center of the site (Finding of Fact 151), and the structure and texture of the silty shales as shown by the permeability test results (Findings of Fact 175-180), all indicate that the site is hydrogeologically suitable.

The site has a configuration much like a bowl. The surface is underlain with red silty shale interspersed with sandstone beds (Finding of Fact 152), and the silt and the sandstone decompose to fill the joints and

fractures (Finding of Fact 156). Although weathering action as a result of frost and thaw allows for some migration of water into the soil at depths of three to five feet (Finding of Fact 153), below this the joints and fractures are plugged (Finding of Fact 158). Furthermore, an aquiclude exists in the upper, or shallow, groundwater flow zone (Findings of Fact 161 and 166) and extends as much as 40 feet below the surface. Permeability testing indicates that the natural liner does meet the $1x10^{-7}$ cm/sec requirement (Findings of Fact 173-180).[5]

The final consideration as to hydrogeologic suitability is the deep well information. If there is no naturally occurring impermeable zone underlying the site, water, or leachate, would migrate through the underlying soils and rock formations and eventually reach the deep aquifer, which is used for water supply (Finding of Fact 164). Significantly, the leachate has not reached the deep aquifer, and the Department admits this fact (Finding of Fact 165). Also, and just as significant, is the undisputed fact that no connection was shown between the shallow wells and the deep wells (Findings of Fact 160 and 170). Pumping tests were conducted which conclusively showed that there was a hydrogeologic connection among the deep wells in the aquifer--drawdown from one deep well was reflected in other deep wells, from as much as a mile away (Finding of Fact 169). Conversely, when a drawdown was observed in the deep well system, there was no such effect on the shallow wells. In fact, one shallow well was gaining while a drawdown was occurring in the deep well system (Finding of Fact 170).

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[5] Superficially, the FR&S situation may appear to be analogous to William Fiore, t/d/b/a Municipal and Industrial Disposal, Inc. v. DER, 1986 EHB 744. However, Fiore dealt with a hazardous waste disposal site and a liner that had been put down and exposed to the elements with no waste material ever being placed on it.

Considering the totality of the evidence presented on this issue, it is established, by more than a preponderance of the evidence, that the site is underlain by a naturally occurring impermeable zone of material of a permeability of at least $1x10^{-7}$ cm/sec.

The alleged existence of ground and surface water contamination at or adjacent to the site, an issue directly related to the hydrogeologic suitability of the site, was another major reason for the denial of FR&S' permit application. As was noted above, the Department, after being confronted with overwhelming evidence, conceded that the aquifer was not being contaminated by leachate from the landfill. However, the Department still strenuously asserted that groundwater contamination from the landfill was having an impact on the aquiclude and the intermittent stream.

The intermittent stream, at one time, flowed from the northern edge of the site through the center of the site to the notch and thence south to the Schuylkill Rive. By order of the Commonwealth Court the stream was diverted to the western edge of the site by the construction of a diversion ditch constructed by FR&S. Drainage from the upland area above the site is carried by three streams which converge above the site and then enter the diversion ditch for eventual discharge into the Schuylkill River (Finding of Fact 12). The Department does not contest the fact that the waters in the intermittent stream are degraded and contaminated before they reach the site. The stream is dry from at least three months up to six months of the year, and the stream is not a source of water supply. The Department asserts that the stream is contaminated by landfilling activities at the center portion of the FR&S site and in the area of the notch.

We believe the Department's conclusions regarding contamination of the intermittent stream to be highly suspect as a result of questionable

sampling protocol. The water quality standards system is built upon the concept of Q_{7-10}[6] as the design stream flow. 25 Pa.Code §93.5. The question of source aside, measurements of in-stream quality are not necessarily indicative of contamination, much less pollution, if not taken during a Q_{7-10} flow condition. There is no evidence that the Department's sampling was conducted at Q_{7-10} flow conditions. And, measurements after a rainfall event, as were the majority of the Department's samplings here (Finding of Fact 237), are even more skewed. Given the nature of the surrounding land use and the sampling deficiencies, the data collected by the Department is of very limited utility. One can hardly conclude that a stream is contaminated or polluted by FR&S as defined in 25 Pa.Code §93.1 et seq., when one does not sample at Q_{7-10} and fails to evaluate other sources of contaminants or pollutants.

For another reason, we cannot take the great leap of faith which the Department asks us to take here and conclude that subsurface leachate contamination from the FR&S site was impacting the water quality of the intermittent stream. On the basis of the evidence before us, we must conclude that the leachate reached the intermittent stream as a result of discharges from the leachate pond and FR&S' practice of mixing leachate with weathered shale to be used as cover material. These activities, as we have discussed previously, are operational deficiencies which are violative of the Department's regulations, not necessarily deficiencies which must lead to the denial of a permit.

Regarding the existence and extent of shallow groundwater (in this case, the aquiclude) contamination at the site, we hold that FR&S has

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[6] The lowest seven day average flow in a ten year period.

satisfied the burden of demonstrating that the Department's conclusion was an abuse of discretion. We reach this conclusion based on our evaluation of the results from sampling the extensive system of monitoring wells at the FR&S site and again find FR&S' expert witnesses to have given more credible testimony.

The main area of contention between the parties as to contamination of the aquiclude is the direction of flow in the aquiclude, and the source of contaminants found in the downgradient monitoring wells. The Department asserts that leachate flows in the aquiclude along joints, fractures, and bedding planes in a southerly direction and has caused contamination in MW-23, 32, 35, 36 and probably 37,[7] the shallow downgradient wells. Before analyzing the results from each monitoring well, which, of necessity, involves conclusions drawn from laboratory analyses, we will address certain issues regarding the analyses.

There are differences in the analytical methodologies utilized by each of the parties, differences which FR&S has pointed out at great lengths in an effort to discredit the results of the Department. While we have devoted substantial effort to pointing out these differences in our findings, we will not opine on the validity of the Department's methodology here, for we believe the critical issue to be one of interpretation of the significance of the results. And, in this area, we conclude that the Department's evidence was lacking because of failure to explain the significance of results less than 10 ppb and unexplained inconsistencies relating to the existence of contamination, despite identification of contaminants. With

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[7] The parties agree that MW-26 and MW-28 are not contaminated.

these deficiencies in mind, we will discuss each shallow monitoring well separately.

MW-23 is located in the notch and is one of the original wells drilled at the site. The well is located in a discharge area of the aquiclude (Finding of Fact 265) and could also be receiving discharges from MW-37. The Department identified seven contaminants in this well and associated three of them with the FR&S landfill. FR&S asserts that, after proper purging, the well shows no contamination and meets drinking water standards. Based on Findings of Fact 361-366, the evidence is, at best, inconclusive to establish contamination of MW-23.

MW-32 is located east of the notch, west of the Smith property, and south of the landfill (Finding of Fact 237). Because of insufficient recharge (.38 gallons per 23-hour period), not all tests were run. FR&S found no contaminants, while the Department identified 11 contaminants, all of which matched constituents found in the FR&S leachate, but at extremely low levels. Because of the insufficient rate of recharge and the very low levels of contaminants, we find these results to be suspect.

MW-35 and MW-36 are located on, or immediately adjacent to the Smith property (Findings of Fact 273 and 274). They are constructed so that surface liquids may migrate into them (Finding of Fact 276). The Department identified contaminants in these wells matching the fingerprint of the leachate, and concluded that the wells are downgradient of the landfill and are being impacted due to flow of leachate to the wells from the landfill. FR&S also found contaminants in the wells and was puzzled that the constituents were of a kind and quality that were not characteristic of orginary leachate constituents. After a field visit and inspection of the site, including the activities conducted there by the Smiths, FR&S'

consultants took soil samples to gain further information. Results of the soil sampling revealed that the soil was contaminated with the constituents found in the wells. The Department inspected the area, and by use of a metering device also detected these contaminants in the soil. The constituents found by the Department and FR&S are those associated with the automobile repair activities on the Smith site.

Despite the soil sampling, the activities on the Smith property, and the construction of MW-35 and MW-36, the Department continues to assert that the wells are impacted by the landfill, on the basis that the rock gradient is such that the flow of leachate is to the Smith property. The Department ignores the acknowledged dip of the rock in the area, the results of FR&S' soil sampling, and the Department's own metering inspection of the site. What the Department desires is for the Board to accept its identification of matching constituents and its negated rock dip theory, in the face of uncontroverted physical proof that factors other than landfill leakage contaminated the wells. Logic and common sense dictate that the physical proof cannot be disregarded as to the source of the contaminants at MW-35 and MW-36.

The remaining well is MW-37. The Department presented no evidence to prove its assertion that the rock dip does not exist in the area. Published literature establishes the existence of the dip in the area, and the existence of the seep at the Jett property, which matches the fingerprint of the well, cannot be overlooked in deciding the direction of ground flow to MW-37. We, therefore, hold that MW-37 is not impacted by the FR&S landfill.

Having reached these conclusions regarding each shallow, downgradient monitoring well, we must conclude that FR&S is not impacting the aquiclude. And, in light of our conclusion that FR&S is not impacting the intermittent

stream with subsurface discharges and the parties' agreement that the deep aquifer was not being impacted by FR&S, we cannot support the Department's conclusion regarding the hydrogeologic unsuitability of this site.

As a last comment on the permit denial aspect of this appeal, we note that if we were not presented with such substantial and overwhelming evidence of FR&S' lack of ability and intention to comply with the law, we may have been inclined to remand the denial to the Department. But, we have no choice in light of FR&S' conduct in operating the landfill. We cannot dissect Mr. Peifer away from FR&S, designate him responsible for all of this egregious conduct, and hold that, if Peifer is excised, FR&S should receive a permit. Neither the language of the Solid Waste Management Act, §§503(c) and (d) particularly, nor common sense allows us to do so. Mr. Peifer is not the permit applicant, FR&S is. If we attribute all the unlawful conduct to Peifer, which we cannot, based on the evidence, and grant a permit to FR&S, we would, in essence, reward FR&S for the unlawful conduct of its agent.

CLOSURE ORDER

The Department's closure order remains. Because we have ruled that the Department's denial of the permit was proper, largely as a result of FR&S' lack of ability and intention to comply with the law, as evidenced by numerous violations of the Department's regulations and orders of this Board and the Commonwealth Court, we need no other bases to sustain the Department's order. Section 602 of the Solid Waste Management Act empowers the Department to order the closure of any solid waste facility if it is being operated in violation of the statute. Since FR&S' permit denial is sustained, it cannot conduct any operations. And, the numerous violations detailed in our findings provide grounds for the closure order.

CONCLUSIONS OF LAW

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

2. A request for recusal will not be entertained from counsel who is not the attorney of record.

3. A request for recusal of a Board Member will be denied where it is untimely. DER v. Lawrence Coal Company, 1986 EHB 1021.

4. The Board is not mandated to adopt the recommendations of hearing examiners or Board Members sitting as hearing examiners. Northwestern Institute of Psychiatry v. Com., ___ Pa.Cmwlth ___, 513 A.2d 495 (1986).

5. FR&S, since it is asserting the existence of a solid waste permit, is asserting the affirmative of the issue and bears the burden of proof on that issue. 25 Pa.Code §21.101(a).

6. The Department never issued a solid waste permit to FR&S, since no permit ever left the Department's office. Zimmer v. Susquehanna County Planning Commission, 14 Pa.Cmwlth 435, 322 A.2d (1974).

7. FR&S bears the burden of proving that the Department abused its discretion in denying FR&S' permit application. 25 Pa.Code §21.101(c)(1) and Sanner Brothers v. DER, EHB Docket No. 81-107-M (issued April 21, 1987).

8. The Department must deny a permit under §503(d) of the Solid Waste Management Act where the applicant cannot demonstrate, at the time of final action on the permit application, that unlawful conduct has been cured.

9. The Department has discretion under §503(c) of the Solid Waste Management Act to deny a permit where violations are existing or where the applicant has demonstrated a lack of ability or intention to comply with the statute.

10. Even where unlawful conduct has been corrected to the satisfaction of the Department, it may still deny a permit where an applicant's actions have demonstrated a lack of ability or intention to comply with the Solid Waste Management Act.

11. The Department properly denied FR&S' permit application under §503(d) of the Solid Waste Management Act because of uncured unlawful conduct.

12. FR&S' actions prior to and subsequent to the permit denial demonstrated its lack of ability and intention to comply with the Solid Waste Management Act, and the Department's denial of FR&S' permit application on this basis was not an abuse of discretion.

13. Even where a permit applicant has demonstrated compliance with all relevant technical requirements, the Department may still deny a solid waste permit under §503(c) of the Solid Waste Management Act.

14. FR&S' permit application did not satisfy 25 Pa.Code §75.21(s), since it was impossible to accurately determine whether solid waste would be placed closer than 25 feet to the perimeter of a property line.

15. FR&S' permit application did not designate benchmarks on the site and, therefore, failed to comply with 25 Pa.Code §75.23(b)(1)(ii).

16. FR&S' permit application did not satisfy the slope requirements of 25 Pa.Code §75.24(c)(2)(iii).

17. FR&S failed to submit adequate site preparation plans as required by 25 Pa.Code §75.24(c)(1)(viii).

18. FR&S' site was not designed to be operated in a manner which would prevent surface water percolation as required by 25 Pa.Code §75.24(c)(2)(xviii).

19. FR&S' permit application did not contain plans for a gas venting system as required by 25 Pa.Code §75.24(c)(2)(xxiv).

20. FR&S' leachate management system, which was required by 25 Pa.Code §§75.24(c)(2)(xix) and 75.25(o)(7), was deficient.

21. There was sufficient, suitable cover material at the FR&S site to meet the requirements of 25 Pa.Code §75.24(c)(ix)(xi), and (xii).

22. FR&S established by a preponderance of the evidence that the site was underlaid by a naturally occurring impermeable zone with a permeability of $1x10^{-7}$ cm/sec.

23. In-stream sampling results must be interpreted in the context of the design flow of Q_{7-10}. 25 Pa.Code §93.5.

24. FR&S was not polluting or contaminating the shallow or deep groundwater flow regime in violation of the Solid Waste Management Act or the Clean Streams Law.

25. The Department's closure order to FR&S was proper in light of FR&S' numerous violations and lack of a solid waste management permit. §602 of the Solid Waste Management Act, 35 P.S. §6018.602.

O R D E R

AND NOW, this 16th day of June, 1987, it is ordered that the Department's April 11, 1983 order denying FR&S' permit application and requiring closure of FR&S' landfill is sustained and the appeal of FR&S is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 16, 1987

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bl

CONNEAUT CONDOMINIUM GROUP	:	
	:	
v.	:	EHB Docket No. 86-553-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 16, 1987

OPINION AND ORDER
SUR MOTION TO VACATE ORDER and
SUR RENEWED MOTION TO COMPEL DISCOVERY

Synopsis

The Board evaluates motion to vacate a prior interlocutory order imposing sanction as a request for reconsideration which the Board denies. Appellant's assertion that sanctions should have been reconsidered in light of a pending request for an extension of time is not an exceptional circumstance warranting reconsideration, when no such request was ever filed with the Board.

OPINION

On September 29, 1986, Conneaut Condominium Group, Inc. (Conneaut) initiated this matter by filing a Notice of Appeal with the Board. The appeal was taken from a compliance order issued by the Department of Environmental Resources (DER) on September 22, 1986. The order alleged that Conneaut, while constructing its condominium complex had caused damage to wetlands in violation of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1, et seq, and the

Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et seq. The order further directed Conneaut to institute corrective action.

On March 11, 1987 the Board issued an interlocutory order in this matter, sanctioning Conneaut by precluding it from presenting its case-in-chief for its failure to file its pre-hearing memorandum after repeated orders by the Board to do so. See Conneaut Condominium Group, Inc. v. DER, EHB Docket No. 86-553-R, (Opinion and order Issued March 11, 1987.) On March 17, 1987 Conneaut filed a Motion to Vacate Order of March 11, 1987 (motion to vacate) and a Renewed Motion to Compel Discovery (renewed motion to compel). On March 23, 1987, DER filed its response to the motion to vacate.

The Board will regard the instant motion to vacate as a request for reconsideration. Requests, or petitions, for reconsideration are governed by 25 Pa. Code §21.122. The Board has held, that interlocutory orders are not proper subjects for reconsideration, Springettsbury Township Sewer Authority v. DER, 1985 EHB 612, unless there are exceptional circumstances. Magnum Minerals v. DER, 1983 EHB 589. No exceptional circumstances exist here.

The basis of Conneaut's Motion to Vacate is set forth in Paragraphs 9 and 10 of the motion:

> "9. On January 17, 1987, Appellant made its Motion to Compel Discovery raising therein substantially the same matters raised herein, which has yet to be acted upon by the Board.
>
> 10. Upon receipt of the Board's several notices concerning compliance with Pre-Hearing Order No. 1, and in view of the thirty (30) day period for the Board to grant the enlargement requested by DER in October, 1986, counsel for Appellant reasonably believed that the enlargement of time requested in the aforesaid motion [to compel discovery] would be favorably considered by the Board prior to any sanctions for failure to submit a

Pre-Hearing Memorandum, which Appellant is unable to do because of the conduct of DER which has precluded the completion by Appellant of its discovery within the enlarged period of time."

Motion to Vacate, Paragraphs 9 and 10
(emphasis added)

The Board's docket [1] contains neither the motion to compel discovery nor any request for enlargement of time to submit a pre-hearing memorandum. And, in any event, even if the motions were docketed, Conneaut was not relieved of its obligation to file a pre-hearing memorandum by any order of the Board. Because no exceptional circumstances exist here, reconsideration must be denied.

Because a motion to compel discovery was never filed with the Board, we must simply treat Conneaut's motion as a motion to compel discovery rather than a renewed motion and deny the motion.

Finally, the Board notes that Conneaut did comply with the Order of March 11, 1987 to the extent it filed with its other motions, a statement of its intent to proceed with this appeal.

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[1] DER, the only other party to the appeal, avers that it "...was never served with such a Motion [to compel discovery] if indeed one exists..." DER Response to Motion to Vacate, Paragraph 5.

ORDER

AND NOW, this 16th day of June, 1987, it is ordered that Conneaut Condominium Group, Inc.'s Motion to Vacate Order of March 11, 1987 is denied and the Board's March 11, 1987 order imposing sanctions on Conneaut is affirmed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 16, 1987

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FETTEROLF MINING, INC.	:	
	:	
v.	:	EHB Docket No. 87-035-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 16, 1987

OPINION AND ORDER
SUR MOTION TO DISMISS OR,
ALTERNATIVELY, MOTION TO LIMIT/ISSUES

Synopsis

Department of Environmental Resources (DER's) motion to dismiss or, alternatively, motion to limit issues, is denied because there is doubt as to DER's claim that the instant completion report, whose denial is the subject of this appeal, covers the same site, tract, or area encompassed in a previous completion report, whose denial was unappealed.

OPINION

On January 26, 1987 Appellant Fetterolf Mining, Inc. (Fetterolf) initiated this matter when it filed a Notice of Appeal from DER's return, via letter dated January 12, 1987, of Fetterolf's Completion Report No. 386070 (Completion Report I). Completion Report I pertained to Fetterolf's surface mine site located in Stoneycreek Township, Somerset County and operated under Mine Drainage Permit No. 4173SM8 (MDP). On February 25, 1987 DER filed a motion to dismiss this appeal or, alternatively, a motion to limit issues (DER's motion). On March 16, 1987 Fetterolf filed its objection and answer to DER's motion (objection and answer). On April 9, 1987, the Board received

DER's response to Fetterolf's answer to motion to dismiss. On April 16, 1987, Fetterolf responded with a motion to strike DER's response to Fetterolf's motion to dismiss which essentially alleged that DER had no authority to file its April 9, 1987 response. On May 7, 1987, the Board received DER's response to Fetterolf's motion to strike which argued that it had a right to file the response.

In its motion to dismiss, DER alleges that Completion Report I requested Stage 1 bond release for 95.42 acres of Fetterolf's surface mine. DER also asserts that on March 11, 1986 it denied Fetterolf's request for Stage I bond release which Fetterolf set out in Completion Report No. 23-84-165(c) (Completion Report II), which denial Fetterolf never appealed. DER maintains that Completion Report I and Completion Report II both request Stage I bond release for the same mine site and the same acreage, with the only difference being that Completion Report I refers to 95.42 acres instead of the 96.5 acres referred to in Completion Report II. Because of these alleged facts, DER concludes that its action of returning Completion Report I on January 12, 1987 does not affect the personal rights, privileges or obligations of Fetterolf and is therefore not a final action for the purposes of Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 . Consequently, as DER alleges that this return of Completion Report I is not a final action, it maintains that this appeal should be dismissed for lack of jurisdiction.

In the alternative, DER moves that the Board limit the issues in the appeal solely to whether Fetterolf has permanently abated alleged groundwater contamination and acid mine drainage production. As a basis for this request, DER contends that Fetterolf never appealed DER's denial of Completion Report II because of the presence of acid mine drainage conditions. Since, according

to DER, both completion reports cover the same mine site and the same acreage, Fetterolf is barred under principles of finality and/or collateral estoppel from contesting the factual and legal validity of the denial of Completion Report II.

The essence of Fetterolf's objection and answer to DER's motion is that Completion Report I covers a different area than Completion Report II and, therefore, the instant appeal is timely and viable even though Fetterrolf never appealed the denial of Completion Report II. See Fetterolf's objection and answer, supra, at Paragraphs 3, 4, 5, 11 and 14.

First, the Board must address the jurisdictional question raised by DER. A DER order is appealable when it is both final and alters the rights or obligations of the parties. See Annville Township Sewer Authority v. DER, 1980 EHB 425. The last paragraph in the denial of Fetterolf's Completion Report II directs that appeals be filed within thirty days with the Board. Thus, it appears that the Completion Report was a final order. As to whether, as DER contends, Completion Report I is merely a duplication of Completion Report II and therefore does not constitute an action that alters the status quo, the Board will not rule. DER's pleading on this point is muddled and the Board is unable on the basis of this pleading to find that the areas covered by the two Completion Reports are identical.

There is some indication that Completion Reports I and II may cover different areas. The acreage involved in Completion Report I is claimed by Fetterolf to be 98.4, compared with DER's assertion that the area is 95.42 acres. DER's motion and Fetterolf's objection and answer, Paragraph 13. The Board must point out that it also finds Fetterolf's objection and answer lacking in clarity. In Paragraph 3 of its objection and answer, Fetterolf asserts that Completion Report II was for "a different site" than

Completion Report I. In Paragraphs 5 and 14 Fetterolf avers that Completion Report I is for "a different tract" than Completion Report II. Finally, in Paragraph 11, Fetterolf claims that the two completion reports each cover a "different area". At this point the Board is uncertain as to whether Fetterolf is using the terms "site", "tract" or "area" interchangeably or if these terms are intended to have different meanings.

The Board's ruling on DER's motion hinges on whether Completion Report I covers a site, tract or area which is encompassed by Completion Report II. If it does, Fetterolf's appeal is barred by principles of finality and res judicata due to the fact that Fetterolf failed to appeal Completion Report I. Fetterolf's notice of appeal and its allegations, supra, while vague and completely lacking in factual support, cast some doubt on DER's claim that the Completion Report I covers the same site, tract or area as is encompassed in Completion Report II. When ruling on a motion to dismiss, the record must be reviewed in a light most favorable to the non-moving party, and all doubts must be resolved against the moving party. James E. Martin v. DER, Docket No. 86-567-R (issued March 9, 1987), citing Herskovitz v. Vespicco, 238 Pa. Super, 529, 362 A.2d 394 (1976). Consequently, because Fetterolf has cast a doubt as to the identity of the areas covered by the two Completion Reports, the Board must deny DER's motion.

ORDER

AND NOW, this 16th day of June, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss or, alternatively, motion to limit issues is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 16, 1987

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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

DITHRIDGE HOUSE ASSOCIATION	:	
	:	
v.	:	EHB Docket No. 86-550-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 17, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is granted in an appeal where there is no dispute as to material facts and where the moving party is entitled to judgment as a matter of law. Decking around all sides of a condominium pool is a safety feature and is properly regulated under the permitting system of the Public Bathing Law. Appellant does not dispute that its pool lacks the required deck around its pool. Because Appellant's pool was deficient with respect to the deck, DER acted properly in denying Appellant's permit application. Accordingly, the Department is entitled to judgment as a matter of law.

OPINION

On September 23, 1986 Dithridge House Association (Dithridge) initiated this matter by filing a Notice of Appeal from the denial of its public bathing place permit application by the Department of Environmental Resources (DER). DER took its action pursuant to the Public Bathing Law, the Act of June 23, 1931, P.L. 899, as amended, 35 P.S. §672, et seq. ("Public

Bathing Law").

In approximately 1971, Dithridge constructed a swimming pool at Dithridge house for its members and their guests. Subsequent to construction, Ross Contracting Company filed an application for a public bathing place permit for the Dithridge House condominium pool with DER. On September 14, 1973, DER denied the permit application on the grounds that the Dithridge pool failed to meet the following requirements:

> "1. A clear, unobstructed paved walkway or deck at least four feet wide from the edge of the pool around the entire perimeter of the pool has not been provided. The overhang walkway on two sides of the pool constitutes a safety hazard.
>
> 2. The plans, modules and specifications submitted are incomplete and inadequate in their present form. Should you request additional information concerning these items, please contact this office."

The permit denial was not appealed and Dithridge continued to operate its pool. On June 3, 1974, DER issued an order directing Dithridge to close the pool due to Dithridge's lack of a bathing place permit. Dithridge also did not appeal DER's closure order.

After the passage of the 1979 amendments to the Public Bathing

Law[1], Dithridge submitted a new permit application to DER. On August 25, 1986, DER denied this second permit application, noting that Dithridge had not taken any steps to correct the design deficiency which formed the basis of DER's earlier permit denial and closure order. DER has filed a motion for summary judgment or to limit issues (DER's motion), which is the subject of this opinion and order.

JUDGMENT AS A MATTER OF LAW

In order for the Board to grant DER's motion, there must be no dispute of material fact and DER must be entitled to judgment as a matter of law, Rule 1035 Pa. R.C.P. In this case, the dispositive issue is one of entitlement to judgment as a matter of law and it must be resolved before determining the existence of any genuine issue of material fact.

DER advances a variety of arguments in support of its motion. It contends, relying on Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22

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[1] Prior to 1979, Section 2(1) of the statute defined "bathing place" in very broad terms:

> "(1) A public bathing place shall mean any place open to the public for amateur and professional swimming or recreative bathing, whether or not a fee is charged for admission or for the use of said place, or any part thereof."
>
> 35 P.S. §673(1)

The definition of "bathing place" was amended in 1979 as follows:

> "A public bathing place shall mean any place open to the public for amateur and professional swimming or recreative bathing; whether or not a fee is charged for admission or use of said place or any part thereof. Except with respect to the regulation of water supply and content, hygiene and plumbing and electrical facilities, and safety equipment, a public bathing place shall not include a swimming pool, lake or pond, owned, operated and maintained for the exclusive use and enjoyment of residents of a condominium or members of such a property owners association or the personal guests of such residents or members.
>
> 35 P.S. §673(1)
> (emphasis added)

Pa. Cmwlth. 280, 348 A.2d 765 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977), that Dithridge is barred under principles of finality and/or res judicata from challenging DER's 1986 permit denial because it failed to appeal the earlier permit denial action and closure order which were predicated on the same grounds. DER also argues that the findings set forth in its June 3, 1974 unappealed order that operation of the pool constituted a public nuisance cannot now be challenged by Dithridge. Additionally, relying on Commonwealth v. Glasgow Quarry, 23 Pa. Cmwlth. 270, 351 A.2d 689 (1976), DER contends that it cannot issue a permit or allow a facility to operate if it constitutes a public nuisance.

Dithridge takes exception with DER's finality and res judicata arguments. Citing Schubock v. Silver, 461 Pa. 366, 336 A.2d 328 (1975), it asserts that the purpose of collateral estoppel is to preclude relitigation of issues, and the issue of whether the 4-foot deck requirement applies to Dithridge House under the amended Public Bathing Law has never been considered. Similarly, Dithridge argues that res judicata is not applicable to the instant action because the principle of res judicata applies only to matters that could have been litigated at the time of the 1973 permit denial and closure order. Dithridge also disagrees with DER's interpretation of the permitting requirements of the Public Bathing Law and argues that the pool decking does not fall into any of the categories enumerated in Section 2(1) of the Public Bathing Law, 35 P.S. §673(1) as subject to the permitting requirements of the statute.

DER argues, however, pursuant to 25 Pa. Code §193.41[2] and the legislative history of the 1979 amendments to the Public Bathing Law, that it has the authority to regulate the safety equipment of condominium swimming pools (in this context, the deck requirement.)

The Board is persuaded by DER's arguments. The Board has recently held that Public Bathing Law permits are required for the aspects of condominium pools which fall into the categories enumerated in Section 2(1) of the Public Bathing Law, supra. Nemacolin, Inc. v. DER, EHB Docket No. 86-546-R (opinion & order issued April 28, 1987.) One of the enumerated categories requiring a permit is safety equipment, and the deck design here is a safety feature which falls within the safety equipment category under which condominium pools may be regulated pursuant to Section 2(1) of the Public Bathing Law, 53 P.S.§673(1). Accordingly, Dithridge's condominium pool is subject to the requirements of the Public Bathing Law, including the requirement of obtaining a permit.

Additionally, because Dithridge did not appeal DER's June 3, 1974 permit denial, it is now estopped from challenging the findings set forth in that order. To allow Dithridge to proceed otherwise would be to condone a collateral attack on a final order of DER. This is impermissible under principles of administrative finality and the Board has previously held accordingly. See James E. Martin v. DER, EHB Docket No. 86-567-R (Opinion & Order issued March 9, 1987). The Board prohibits any attack by Dithridge on the findings underlying the order issued by DER on June 3, 1974.

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[2]"Construction, equipment, operation and maintenance at all public bathing place shall be such as to reduce to a practical minimum the danger of injury to persons from drowning, falls, collisions, fires, nuisances or hazards of any kind."

25 Pa. Code §193.41

Since Dithridge's pool is deficient with respect to the deck requirement,and DER's finding that the deck requirement was a safety hazard was never appealed, DER's action in denying Dithridge's permit application was proper and DER is entitled to judgment as a matter of law.

ISSUE OF MATERIAL FACT

This Board has the authority to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law". Summerhill Borough v. DER, 34 Pa. Cmwlth 574, 383 A.2d 1320, 1322 (1978).

There are two material facts in this case. First, whether Dithridge's condominium swimming pool still lacks the required deck on all sides. DER asserts, and Dithridge does not dispute, that the pool has not been altered since it was first constructed. The second material fact is whether pool decking can be regulated under one of the enumerated categories of Section 2(1) of the Public Bathing Law, 53 P.S. §673(1). The Board holds here that it can, as it falls squarely into the safety category under which condominium pools can be regulated pursuant to the statute. Accordingly, there are no genuine issues of material facts and since DER is entitled to judgment as a matter of law, DER's motion for summary judgment is granted.

ORDER

AND NOW, this 17th day of June, 1987, it is ordered that the Department of Environmental Resources' Motion for Summary Judgment is granted and the appeal of Dithridge House Association is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 17, 1987

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MAXINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOA

STAR TITANIUM CORPORATION	:	
	:	
v.	:	EHB Docket No. 85-342-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued June 25, 1987

OPINION AND ORDER

Synopsis

Appeal is dismissed for failure to prosecute.

OPINION

This matter was initiated on August 26, 1985 by the filing of a Notice of Appeal by Star Titanium Corporation (Star Titanium) from a Department of Environmental Resources' (DER) cease order in which DER alleged that Star Titanium failed to comply with Section 4 of the Clean Air Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. ("Air Act").

On August 27, 1985 the Board issued Pre-hearing Order No. 1 which required Star Titanium to file its pre-hearing memorandum on or before November 12, 1985. On November 14, 1985, Star Titanium filed its pre-hearing memorandum with the Board.

On December 12, 1985 the Board sent, via certified mail, a default

letter to DER threatening sanctions if it did not file its pre-hearing memorandum by December 27, 1985. The notice was sent certified mail, return receipt requested and was received by DER on December 16, 1987. Then, on December 19, 1985, DER requested an extension of 60 days in which to file its pre-hearing memorandum which was granted by Board order on December 24, 1985.

On February 12, 1986, because Star Titanium had ceased doing business and had filed for relief under the U.S. Bankruptcy Code, 11 U.S.C., §101-1330, DER requested that there be an indefinite continuance of the matter. The Board issued an order on February 14, 1986 that the matter be continued indefinitely but directed the parties to file status reports on or before February 28, 1987.

On March 11, 1987, the Board issued notices to both parties threatening sanctions if no status reports were filed with the Board by March 25, 1987. The notices were sent certified mail, return receipt requested and were received by DER on March 13, 1987 and by counsel for Star Titanium on March 14, 1987. On March 13, 1987, the Board received a status report from DER indicating that it was under the impression that Star Titanium had filed for relief under the Bankruptcy Code, supra, and that in light of the fact that it had received no contact from Star Titanium's attorney for over a year, it did not appear that Star Titanium intended to prosecute this appeal. On March 19, 1987, the Board received Star Titanium's status report which stated that Star Titanium had been in bankruptcy for over a year, had ceased doing business and that it was unlikely that it would commence doing business again.

On the basis of the foregoing status reports, on March 30, 1987, the Board issued a rule to show cause, returnable by April 20, 1987, as to why this appeal should not be dismissed for failure to prosecute. This rule was sent certified mail, return receipt requested and was received by Star

Titanium's counsel on April 17, 1987.

The Board has yet to receive a response from Star Titanium. In light of the fact that close to three months have passed since the rule was issued, the Board must order this case dismissed for Star Titanium's failure to prosecute its appeal.

ORDER

AND NOW, this 25th day of June, 1987, it is ordered that the appeal of Star Titanium Corporation docketed at 85-342-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 25, 1987

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M. DIANE SMITH
SECRETARY TO THE BOARD

CHESTER COUNTY SOLID WASTE AUTHORITY :
:
v. : EHB Docket No. 86-437-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: June 30, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A notice of violation of a permit modification, absent some action affecting the permittee's rights or duties, is not an appealable action.

OPINION

Chester County Solid Waste Authority (CCSWA) is a municipal authority which owns and operates the Lanchester Landfill (Landfill) located in Lancaster and Chester Counties. On November 28, 1984, the Department of Environmental Resources (DER) issued a modification to CCSWA's Solid Waste Disposal and/or Processing Permit No. 100944 (permit) which allowed the disposal of asbestos-containing waste (ACW) at the Landfill. ACW has been received and disposed of at the Landfill since December, 1984.

On July 31, 1986, DER issued a notice of violation to CCSWA indicating it was in violation of Conditions No. 5 and 7 of its permit; the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 et seq. (SWMA) and the regulations promulgated thereunder; and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as

amended, 71 P.S. §510-17.

CCSWA appealed this notice of violation to the Board on September 4, 1986. On December 5, 1986, DER filed a motion to dismiss, arguing that a notice of violation is not a final action of the Department, and, as such, is not appealable. Sunbeam Coal Corporation v. DER, 8 Pa.Cmwlth 622, 304 A.2d 169 (1973). DER's motion was amended on December 30, 1986. CSWA's answer to the motion to dismiss and amendment has not been considered by the Board in deciding this motion as a sanction for its failure to timely file the answer or seek an extension from the Board.

Previously, the Board held that a notice of violation of bonding requirements for hazardous waste storage, treatment, and disposal was not an adjudication, and, therefore, was not appealable.

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). Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the party.

The notice of violation here, as in an earlier appeal by CCSWA, Chester County Solid Waste Authority v. DER, 1986 EHB 1169 , was entitled "Notice of Violation" and did not affirmatively direct remedial action or payment of a penalty. The letter merely recommended certain procedures to CCSWA in order to achieve compliance with its permit and the SWMA. The course of action suggested in the letter was not mandatory and not the equivalent of an order. The possibility of future prosecution was addressed hypothetically

and prospectively contingent upon the failure of CCSWA to remedy the identified violation.

The Board concludes that the DER letter of July 31, 1986, like the notice involved in the earlier CCSWA appeal, is not an action or adjudication. This letter was a "classic" notice of violation and is not an appealable action.

O R D E R

AND NOW, this 30th day of June, 1987, it is ordered that DER's Motion to Dismiss is granted and the appeal of Chester County Solid Waste Authority is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: June 30, 1987

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COUNTY OF BUCKS	:	
	:	
v.	:	EHB Docket Nos. 84-321-M
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 1, 1987

ADJUDICATION

Synopsis

Appellant's failure to apply for reimbursement of sewage facility enforcement program expenses prevents Appellant from appealing DER's refusal to reimburse the Appellant for these expenses at a later date. DER is not estopped from asserting the unappealability of this action.

OPINION

Introduction

The County of Bucks (County) filed the above-captioned appeal from the Department of Environmental Resources' (DER) failure 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 et seq. (Sewage Facilities Act) for certain sewage facility program expenses incurred by the County in the

year 1983. The parties agreed to the inclusion of various documents in the record of this appeal and requested the Board to adjudicate it 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 this appeal, the Board did not hold a hearing and will adjudicate this matter from the record before it. Board Chairman Maxine Woelfling has recused herself from participation in this matter. Neither party objected to this appeal being adjudicated solely by Board Member Roth.

FINDINGS OF FACT

1. Appellant is the County of Bucks, which is a "local agency" as that term is defined in the Sewage Facilities Act.

2. Appellee is the Department of Environmental Resources, the agency of the Commonwealth authorized to administer the Sewage Facilities Act and the rules and regulations promulgated under this Act.

3. Pursuant to its responsibilities as a local agency under the Sewage Facilities Act, the County employs sewage enforcement officers (SEO's), as that term is defined in the Sewage Facilities Act.

4. Prior to 1981, DER reimbursed the County for fifty percent of the expenses associated with employee life insurance benefits and retirement benefits that the County provided to its SEO's.

5. On November 4, 1981, DER's Bureau of Water Quality Management sent a letter to all local agencies, including the County, informing the local agencies that fringe benefits not required by law, including life insurance and health care benefits, were not eligible for reimbursement under the Sewage Facilities Act.

6. On January 13, 1982, Georgine Adams, an administrative officer in DER's Bureau of Water Quality Management, sent a letter to all local agencies, clarifying the November 4, 1981 letter by stating that health care benefits for full-time employees were eligible for reimbursement.

7. The Department did not reimburse the County for life insurance and retirement benefit expenses applied for in 1981. The County did not appeal this 1981 reimbursement denial.

8. On November 4, 1982, DER mailed to the local agencies, including the County, applications for reimbursement of expenses incurred in enforcing the Sewage Facilities Act during 1982. In the cover letter sent with these applications, DER listed items that were not eligible for reimbursement, and this list included pension plans and life insurance expenses.

9. In 1982, the County paid $1200 for life insurance, and $29,000 for retirement benefits for its SEO's.

10. In its application for reimbursement of expenses for enforcing the Sewage Facilities Act in 1982, the County applied for, among other things, reimbursement for $15,100, which was fifty percent of the life insurance and retirement benefits it paid for its SEO's in 1982.

11. On May 3, 1983, Louis W. Bercheni, Director of DER's Bureau of Water Quality Management, sent a letter to Gordian V. Erlacher, the Public Health Administrator of the County Department of Health. This letter purported to be a reply to the County's questioning DER's reduction of employees' retirement benefits and certain insurance expenses from the County's applications for reimbursement for enforcing the Sewage Facilities Act during calendar years 1980 and 1981. The May 3, 1983 letter enclosed a copy of a letter dated July 12, 1982, from DER's Georgine Adams to Gordian Erlacher, explaining that retirement benefits were not eligible for

reimbursement under the Sewage Facilities Act. The May 3, 1983 letter also enclosed a copy of the Environmental Hearing Board's rules pertaining to appeals and five copies of the appropriate Notice of Appeal form.

12. Although the May 3, 1983 letter referred to the County's applications for reimbursement under the Sewage Facilities Act for the years 1980 and 1981, the County filed an appeal from this letter with the Board on June 6, 1983, seeking review of the Department's denial of reimbursement for fifty percent of life insurance and retirement benefits paid for SEO's in 1982. This appeal was docketed at 83-110-M. This appeal was dismissed for untimeliness by an order of the Board dated November 20, 1986.

13. By letter dated May 7, 1986, counsel for the Department informed the Board that the May 3, 1983 letter, which was the subject of the County's appeal at 83-110-M, was in error in its reference to the years 1980 and 1981, and that the May 3, 1983 letter should have referred to the years 1981 and 1982. The Department's May 7, 1986 letter is an "official correction" of the Department's May 3, 1983 letter.

14. The July 12, 1982 letter, to which the May 3, 1983 letter refers, is a letter from DER's Georgine Adams to Gordian Erlacher, which purports to be an explanation to the County as to why the Department did not reimburse the County for retirement benefits for SEO's for the year 1981. The explanation was as follows:

> Section 6(b) of the Pennsylvania Sewage Facilities Act (Act 537) provides for reimbursement of "expenses incurred by the local agency in enforcement of the provisions of the Act." Section 6(b) does not mandate that retirement benefits be reimbursed as part of these expenses. Section 71.63 of the Department's Rules and Regulations does not specifically authorize reimbursement of retirement benefits.

15. In 1983, the County paid $1,472.37 for life insurance, and

$43,388.58 for retirement benefits for its sewage enforcement officers.

16. When the County applied to DER for reimbursement for fifty percent of the costs it incurred in enforcing the Sewage Facilities Act in 1983, it did not include the amounts incurred for life insurance and retirement benefits in its cost report because the Department instructed the County not to include these expenses in its 1983 request. The County complied so as not to delay reimbursement for those costs that the Department considered eligible. The County appealed to the Board on September 10, 1984, from the Department's reimbursement letter for the year 1983, which was dated August 8, 1984, because this reimbursement did not include the life insurance and retirement benefits (84-321-M).

17. Had the County filed a claim for reimbursement under the Sewage Facilities Act for fifty percent of life insurance and retirement benefits it paid for its sewage enforcement officers in 1983, this claim would have been for $22,430.46.

DISCUSSION

The only issue before the Board in these appeals is whether the County is entitled to a $22,430.46 reimbursement from the Commonwealth, under the Sewage Facilities Act, for fifty percent of the cost of providing life insurance and retirement benefits for County SEO's in 1983. The Sewage Facilities Act provides for grants to local agencies for fifty percent of expenses incurred in enforcing the Act:

> (b) Local agencies complying with the provisions of this act in a manner deemed satisfactory by the secretary shall be reimbursed annually by the department from funds specifically appropriated for such purpose equal to one-half of the cost of the expenses incurred by the local agency in enforcement of the provisions of this act. Such grants shall not

> be withheld from any local agency which is complying with the terms of this act. For the purposes of this section, costs shall be exclusive of those reimbursed or paid by grants from the Federal Government.
>
> 35 P.S. §750.6(b)

"Local agency" is defined by the Sewage Facilities Act as "a municipality, or any combination thereof acting cooperatively or jointly under the laws of the Commonwealth, county, county department of health or joint county department of health." 35 P.S. §750.2. The County is a local agency as defined in the Sewage Facilities Act. One of the powers granted to local agencies under the Sewage Facilities Act is the power to employ SEO's:

> (b) Each local agency in addition to the powers and duties conferred upon it by existing law shall have the power and the duty:
>
> (1) To employ sewage enforcement officers to administer the provisions of section 7 of this act in accordance with the rules and regulations of the department. No person shall be employed as a sewage enforcement officer unless said person has been certified "qualified" by the department pursuant to standards set by the Environmental Quality Board. No person shall be employed as a sewage enforcement officer to administer the pro- visions of section 7 of this act with respect to a community sewage system for which he was or is the contractor. In such a case, the local agency shall employ a certified "qualified" enforcement officer from an adjoining local agency to administer the provisions of section 7 of this act with respect to the particular community sewage system.
>
> 35 P.S. §750.8(b)(1)

"Sewage enforcement officer" is defined in the Sewage Facilities Act as "the official of the local agency who issues and reviews permit applications and conducts such investigations and inspections as are necessary to implement the act and the rules and regulations thereunder."

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 SEO's in accordance with their authority to enforce certain provisions of the Act. Under the language of the Sewage Facilities Act, therefore, expenses incurred by local agencies in the employment of sewage enforcement officers are eligible for reimbursement.

The Sewage Facilities Act empowers the Environmental Quality Board (hereinafter "EQB") to "adopt such rules and regulations of the department, applicable throughout the Commonwealth, as shall be necessary for the implementation of the provisions of this act," and these rules and regulations are to establish standards for, among other things, "requirements for the disbursement of State and Federal funds to municipalities and local agencies for planning, personnel and construction of sewage disposal systems." 35 P.S. §750.9. The rules of the EQB pertaining to reimbursement to municipalities under the Sewage Facilities Act are at 25 Pa.Code §§71.61, 71.62, and 71.63. Since the filing of this appeal the regulations found in Chapter 71 have been revised. Before proceeding further, therefore, it is necessary to determine which set of regulations control the present controversy.

Prior to January 1987, Section 71.63(a) listed several particular items that were eligible for reimbursement under the Sewage Facilities Act:

> (a) The Department will reimburse local agencies for 1/2 the cost of expenses incurred in the enforcement of the act as provided in section 6 of the act, including the following items:
>
> (1) Expenses for each permit application processed, issued or denied, including wages and salaries.
>
> (2) Costs for legal services actually incurred in prosecuting or restraining violations and defending against appeals.
>
> (3) Costs for legal services in the preparation of local ordinances and regulations consistent, and needed for the enforcement of the provision of the act and this chapter and Chapter 73 of this title

(relating to standards for sewage disposal facilities).

(4) Fees for special consultants retained by the local agency for technical consultation on specific permits.

(5) Mileage expenses incurred by the local agency in processing, issuing or denying applications for permits.

(6) Mileage and expenses for sewage enforcement officers employed by local agencies to and from training courses mandated by the Department in accordance with §71.71(b)(2) of this title (relating to conditions of certification).

Section 71.63(d) listed particular items that are specifically ineligible for reimbursement under the Sewage Facilities Act:

> (d) The Department will not reimburse local agencies for legal fees resulting from an appeal or suit against the Commonwealth; purchase of a vehicle; purchase, rental or leasing of earth moving or excavating equipment; clothing purchase or clothing allowance; development of duplication of maps; or for payment of local agency employes other than the sewage enforcement officer for surveillance.

Under the pre-1987 regulations, therefore, 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. On January 10, 1987, however, the EQB published a new set of final regulations specifically including life insurance and pension benefits as reimbursable expenses under the Sewage Facilities Program. 25 Pa.Code §72.44. This new set of regulations, however, did not become effective until publication in the Pennsylvania Bulletin. The regulations which govern this controversy, therefore, are the pre-1987 regulations which were in effect at the time of DER's reimbursement in 1984. See, Old Home Manor v. DER, 1986 EHB 1248.

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 in 1983 because they are reasonable costs, and they are not specifically excluded by §71.63(d). The County also argues that prior to 1980, DER did reimburse it for life insurance and retirement benefits. Any change in reimbursement policy, the County asserts, is arbitrary and capricious.

DER, on the other hand, admits it reimbursed the County for fifty percent of the life insurance and retirement benefits through 1980. The Department began denying reimbursement for such expenses in 1981 because of a change in policy. The Department argues that the denial of the County's 1981 claims, which were not appealed, 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 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 this case. The Board holds that the action the County appealed from is an unappealable action and, therefore, the Board lacks jurisdiction to decide this issue on the merits.

In a letter to the Board dated October 1, 1984, the County states that DER directed it not to apply for reimbursements for fringe benefits for 1983 because they would not be awarded. The County also asserts that it followed DER's directions, and did not apply for such expenses incurred in 1983 in an attempt to expedite the reimbursement process. The County received a 1983 reimbursement letter on August 13, 1984. The fringe benefit expenses, which were not applied for, were predictably not included in the reimbursement check. The County filed a timely Notice of Appeal with the Board on September 10, 1984 from DER's failure to reimburse the County for fringe benefit

expenses incurred in 1983.

The Environmental Hearing Board only has the authority to adjudicate orders, permits, licenses, and decisions of DER. 71 P.S. 510-21(a). The the County did not apply for reimbursement of its 1983 fringe benefit expenses. Accordingly, these expenses were not before DER when it calculated eligible expenses of the County. DER, therefore, never had an opportunity to render an appealable "decision" as to the County's fringe benefits expenses. The County's failure to apply for such expenses in 1983 prevents it from contesting the non-reimbursement at a later date. Finally, it is not relevant that DER never argued in this case that County's action is unappealable. The appealability of an action is a jurisdictional matter which the Board may raise sua sponte at any time in the proceeding. Cf. Eugene Petricca v. DER, 1986 EHB 309 (failure to timely file is jurisdictional); Thomas Fitzsimmons v. DER, 1986 EHB 1190 (failure to file appeal bond is jurisdictional).

The Board considered a similar situation in Allegheny County Sanitary Authority v. DER, 1984 EHB 759. In this case, hereinafter Alcosan, the authority appealed DER's refusal to consider revised applications for grants for expenses associated with sewage treatment works pursuant to Act 339, the Act of August 20, 1953, P.L. 1217 as amended, 35 P.S. §701 et seq. DER argued that, although the original application for grants was timely filed, the supplements revising the grant application were submitted late, and therefore, DER would not grant the request. The Board rejected DER's contention and held that the revised applications were timely filed.

The Alcosan case also tangentially involved another issue. The authority was seeking, through an amended application, reimbursement for items entirely left out of its original grant application. The authority originally applied for these expenses in its grant application. DER, however,

subsequently directed the it to delete these expenses from its application because they would not be reimbursed by DER. The authority failed to delete these expenses, and DER did not include them in the base for calculation of the authority's grant. Eventually, however, the authority deleted all of these contested expenses from its application and the DER subsequently issued a grant for the reduced amount. The Board held that the authority could appeal DER's refusal to reimbursement expenses deleted from the application.

Alcosan is distinguishable from the present controversy. First, Alcosan involved the application of a different regulation, 25 Pa.Code §103.21. The instant case regards the application of 25 Pa.Code §71.63. Although both of these regulations essentially address local reimbursement for sewage program expenses, these regulations differ both in content and specificity. Alcosan, therefore, is not absolutely on point with the instant case. More importantly, however, the authority in Alcosan included the contested expenses in its original grant application as filed with DER. The authority only removed the items because DER refused to issue a grant until the items were deleted from the application. In the present case, however, the County never even applied for fringe benefit expenses in 1983. Although DER did discourage the County from applying for these expense, DER never threatened to penalize the County if it proceeded to apply for these expenses. In fact, the County received its reimbursement check the two immediately preceding years despite DER's indications that the fringe benefit expenses would not be reimbursed. The present case is distinguishable from Alcosan on several fronts and, therefore, the Board refuses to rely on it as authority for the present controversy. The only remaining issue for the Board's consideration is whether DER should be estopped from asserting the County's request for relief is unappealable because DER discouraged the County from

applying for the expenses.

The estoppel defense is most appropriately invoked when one party makes a misrepresentation which misleads the other party into acting against its interest. Bear Creek Watershed Authority, et al., v. DER, 1984 EHB 837. DER, however, did not make a misrepresentation in the case at hand. Regardless of the propriety of this DER decision not to reimburse local agencies for fringe benefits, DER indicated it was not planning on reimbursing local agencies for fringe benefits in 1981-1983, and consistent with this representation, it did not. Furthermore, nowhere in the record is it evident that DER planned on penalizing the County if it did apply for fringe benefit reimbursement for calendar year 1983. Contra, Alcosan, supra, (where it was evident that DER would not issue a grant under 25 Pa.Code 103.21 until the county deleted certain expenses from its grant application). DER had reimbursed the County for all but the fringe benefit expenses in years 1981 and 1982. The County, by admission, independently chose not to apply for the controverted expenses in 1983 in what it characterized as an attempt to expedite reimbursement for other eligible expenses. See Cover Letter to the County Supplement to Notice of Appeal 84-321-M, October 1, 1984. Finally, the propriety of DER decision aside, DER made representations to the County as early as November 4, 1981 that it would no longer reimburse local agencies for fringe benefit expenses. Despite these representations, the County applied for fringe benefit reimbursements for both calendar years 1981 and 1982. By applying for these expenses in 1981 and 1982, the County preserved its right to contest their non-reimbursement in these years. the County's decision not to apply for reimbursements in calendar year 1983 seems to be based more upon self-serving expediency than reliance upon DER's representations.

In conclusion, the Board does not have jurisdiction over the present

controversy because the County's failure to apply for fringe benefit expense reimbursements in 1983 renders its reimbursement requests unappealable at a later date. Moreover, the Board finds that the County was in no way misled by DER's representation discouraging the County from applying for its reimbursement request in 1983. DER, therefore, is not estopped in this matter. The Board lacks jurisdiction to consider this appeal, and accordingly, the County's appeal at 84-321-M is dismissed for failure to contest an appealable action.

O R D E R

AND NOW, this 1st day of July 1987, it is ordered that the appeal at Docket No. 84-321-M is dismissed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 1, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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County of Bucks
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BROAD TOP TOWNSHIP	:	
v.	:	**EHB Docket No. 86-607-W**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 2, 1987
and	:	
DASH COAL COMPANY, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The Board will not grant a motion to dismiss the appeal of a Stage I bond release on grounds that it has no power to grant the relief requested where the pleadings and supporting documentation are insufficient to establish the Board's lack of jurisdiction. The Board must view such a motion in the light most favorable to the non-moving party.

OPINION

On October 3, 1986, the Department of Environmental Resources (DER) approved, over the objections of Appellant Broad Top Township (Township), Dash Coal Company's (Dash) request for release of Stage I bonding in completion report No. 386079. Broad Top Township appealed from this approval on October 29, 1986. DER filed a motion to dismiss the appeal on February 17, 1987 on the grounds that this Board does not have powers to grant equitable relief and that the issue raised by the Township is not yet ripe for review.

The Township, a second class township in Bedford County, owns Road 596. Dash was permitted to mine coal in the Township under SMP 05753 004. In accordance with the rules and regulations of DER, Dash had posted bonds with

DER in the amounts of $52,000, $67,000 and $51,000. Dash completed its mining operations and alleges it also completed the backfilling, regrading, and drainage control work required to secure Stage I bond release under 25 Pa.Code §86.172(a)(1). The Township objected to the release of these bonds, alleging that Road 596 had not been properly replaced pursuant to a contract between Dash and the Township. The Township avers that Dash moved Road 596, resulting in a much greater curve. A portion of the area requested to be released is a banked area that forms the upper half of a slope above Road 596. The Township contends that the cost of the slope changes necessary to prevent dirt, debris and rocks from falling onto the road bed and to prevent erosion from washing into drainage ditches by the road should be the responsibility of Dash. The Township claims the contract it entered into with Dash concerning the reclamation of the road is clearly part of the company's reclamation plan.

DER maintains this contract is a separate and private agreement. When DER approved the bond release, it held that the road had been properly reclaimed and that the area contested was not pertinent to the area being released. DER further contends the Board has no jurisdiction in this dispute because the Township is seeking equitable relief and that the issue is not ripe because of the location of the road, which it maintains is not on an area of land covered by the bonding increment.

The Board must view this motion in the light most favorable to the non-moving party. Staiana v. Johns Manville Corp., 304 Pa.Super. 280, 450 A.2d 681 (1982), William R. Bennett Coal Co. and American States Ins. Co. v. DER, EHB Docket No. 86-091-W (issued April 3, 1987). DER has failed to establish that the original permit did not incorporate or reference the contract between Dash and the Township, or that the slope in question was not part of the reclamation plan. DER has also failed to establish that the

sloped area above Road 596 is not a part of the bonding increment.

The relief requested by the Township is the withholding of Dash's bond release for its failure to reclaim the graded slope above Road 596. If the graded area is part of the permit area, the Board certainly has jurisdiction to determine whether DER properly granted Stage I bond release. Since DER has failed to establish through the pleadings before us that the area in question is not within the bonding increment, we have no choice but to deny DER's motion.

O R D E R

AND NOW, this 2nd day of July, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss the appeal of Broad Top Township is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 2, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Central Region
For Appellant:
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For Permittee:
Richard A. Husband, Esq.
McCUE & WATSON
Connellsville, PA
bl

SAMUEL B. KING :
:
v. : EHB Docket No. 87-111-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 2, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Motion to dismiss an appeal on grounds that objections raised in the notice of appeal request relief which the Board has no power to grant is denied. The Board is reluctant to dismiss appeals, particularly those of pro se appellants, solely on the basis of the objections in the notice of appeal.

OPINION

This matter was initiated with the filing of a Notice of Appeal by Samuel B. King of Providence Township, Lancaster County, on March 23, 1987. King was seeking review of a March 12, 1987 order from the Department of Environmental Resources (Department) directing him to cease disposal and open burning of tires and other wastes not related to King's farming operation and to properly dispose of the remaining tires and residue. The Department's order was issued pursuant to a variety of environmental control statutes, including the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. and the rules and regulations adopted thereunder.

On April 23, 1987, the Department filed a motion to dismiss, contending that the Board, because of the nature of King's objections, as stated in his Notice of Appeal, should dismiss this matter because the Board has no power to grant the relief requested by King. The objections in Paragraph 3 of King's Notice of Appeal state:

> Removal of tires is an unfair and inequitable burden and expense to the Appellant. Appellant has offered and continues to offer to guarantee that no further burning of tires shall occur. Further, the remaining tires can be buried below ground surface; and such a disposal is equitable to the Appellant.

The Board sent King its customary motion letter, advising him that if he wished to respond to the Department's motion, he must do so by May 18, 1987. King, who is not represented by counsel, has filed no response with the Board.

We have held in the past that we are reluctant to dismiss an appeal because of an appellant's failure to state specific objections to the Department action being contested. George and Shirley Wisniewski v. DER, 1982 EHB 376. This is so because the issues relating to many appeals are highly complex and technical, and appellants may not have sufficient time to explore all of the issues prior to filing the appeal. And, we have been particularly reluctant to sanction pro se appellants whose objections to a Department action have been less than artfully stated in a notice of appeal. Guy and Mary Setliff v. DER, 1984 EHB 571.

King's argument that the remedial action mandated by the Department's order is an "unfair and inequitable burden" is certainly within the scope of the Board's review of Department actions, as it raises the issue of reasonableness. And, we see no good reason to depart from our prior

opinions regarding the specificity of an appellant's objections. The Department's proper remedy is to either now file a motion for a more specific pleading or await the receipt of King's pre-hearing memorandum and, if necessary, file such a motion.

O R D E R

AND NOW, this 2nd day of July, 1987, it is ordered that the Department's motion to dismiss the appeal of Samuel B. King is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 2, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kimberly K. Smith, Esq.
Central Region
For Appellant:
Samuel B. King
Willow Street, PA 17584

bl

JAMES L. SPOONER, THE BENTLEY CLUB	:	
v.	:	EHB Docket No. 87-088-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 7, 1987

OPINION AND ORDER
SUR
REQUEST FOR RECONSIDERATION

Synopsis

The Board refuses to reconsider its approval of a consent order and adjudication where the appellant has failed to proffer any reasons within the ambit of 25 Pa.Code §21.122(a). Appellant's request for reconsideration is nothing more than an attempt to withdraw from the agreement it negotiated with the Department of Environmental Resources.

OPINION

This matter was initiated by James L. Spooner, owner of the Bentley Club, on March 11, 1987 with the filing of a notice of appeal seeking review of the Department of Environmental Resources' (the Department) March 6, 1987 order suspending the Bentley Club's public bathing place permit. Subsequently, Spooner and the Department negotiated a consent order and adjudication (consent adjuducation) which was executed by the parties on April 21, 1987. The consent adjudication was forwarded to the Board for its approval under 25 Pa.Code §21.120 on June 18, 1987. The Board approved it by order dated June 24, 1987 and transmitted it to the Pennsylvania Bulletin for publication.

On July 2, 1987, Spooner filed a Request for Reconsideration of the consent adjudication. As grounds for reconsideration, Spooner contended that the consent adjudication was an illegal act by the Department, as it was in contravention of Attorney General's Opinion No. 15 of 1976 (Opinion No. 76-15) and that the Department had demanded "specific performance of the illegal Agreement" without having obtained approval from the Board. The Department responded to the petition on July 6, 1987, and it also filed a motion to disqualify Spooner's counsel. For the reasons set forth below, we deny Spooner's request for reconsideration.

The Board, pursuant to 25 Pa.Code §21.122(a) may reconsider its decisions 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.

We are unaware of any other instances where a party has sought to void a consent adjudication it has entered into by seeking reconsideration of the Board order approving the consent adjudication.[1] Despite the novelty of the situation, we must deny the petition.

Initially, we note that, in executing the consent adjudication,

---

[1] The relief sought by Spooner is more akin to striking off a judgment because of alleged irregularities or illegalities on the face of the record. The Board previously ruled in Del-AWARE Unlimited, Inc., et al. v. DER et al., 1986 EHB 1179, that it has no power to vacate and reopen an adjudication, and that reasoning is equally applicable in this matter. We note that even if we possessed such power, Spooner has failed to allege any grounds sufficient to strike the consent adjudication.

Spooner waived his right to appeal it. Paragraph N of the consent adjudication specifically states that

> Mr. Spooner knowingly, intelligently and with the advice of counsel hereby agrees and consents to the terms and conditions of this Consent Order and Adjudication and waives his right to appeal from its issuance.

The request for reconsideration is an attempt to circumvent the waiver of appeal rights in the consent adjudication. However, even if such a waiver did not occur, we must still deny the petition, as it fails to meet either of the criteria in 25 Pa.Code §21.122(a).

The first, and primary, reason advanced by Spooner is that the Department's execution of the consent adjudication was an illegal act because it was in contravention of Opinion No. 76-15. The Board's approval of the consent adjudication did not rest on this particular issue, and, therefore, 25 Pa.Code §21.122(a)(1) is inapplicable. And, if Spooner is advancing Opinion No. 76-15 as grounds for reconsideration under 25 Pa.Code §21.122(a)(2), he has failed to provide the Board with any enlightenment as to how this opinion even remotely relates to the consent adjudication. Our own review of the opinion leads us to the conclusion that it is totally irrelevant, as it addresses the manner in which Department field inspectors must institute summary criminal proceedings under Rule 51, Pa.R.C.P. If Spooner believes there are irregularities in the manner in which the Department institutes summary criminal prosecutions, the Board is not the forum in which to raise them.

Similarly, the Department's attempts to implement the consent adjudication without having obtained approval from the Board are not reason to reconsider the Board's approval of the consent adjudication. Neither the Department nor Spooner requires the Board's permission to implement the

consent adjudication.[2] If Spooner is dissatisfied with the fruits of his negotiation with the Department, he must pursue the appropriate remedies. He may seek to have the consent adjudication modified by negotiations with the Department. Or, if he disputes the actions taken by the Department pursuant to the consent adjudication, he may exercise his appeal rights to this Board in accordance with Paragraph I of the consent adjudication. Spooner, however, cannot vitiate the underlying consent adjudication by attacking its validity in a petition for reconsideration of its approval by the Board.

Since the Board has rejected Spooner's petition for reconsideration, it is unnecessary to decide the Department's motion for disqualification of Spooner's counsel.

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[2] It is conceivable that Spooner is alleging that the Department attempted to implement the consent adjudication prior to the Board's approval of the document. It is not our responsibility, however, to divine what a litigant meant in his pleadings.

O R D E R

AND NOW, this 7th day of July, 1987, it is ordered that James L. Spooner's Request for Reconsideration is denied and the Board's June 24, 1987 approval of the Consent Order and Adjudication between Spooner and the Department of Environmental Resources is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 7, 1987

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LIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BENSON & REYNOLDS GAS COMPANY	:	
	:	
v.	:	EHB Docket No. 85-190-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 8, 1987
and COMMISSIONERS OF POTTER COUNTY,	:	
Intervenor	:	

OPINION AND ORDER

Synopsis

The Board defers a ruling on the Department of Environmental Resources (DER) Motion for Sanctions for Appellant's failure to diligently prosecute its appeal by repeatedly failing to produce noticed witnesses for deposition and grants DER's motion to compel discovery. DER must first serve subpoenas on the two expert, non-party witnesses central to the controversy here.

OPINION

Benson & Reynolds Gas Co. (Benson) appealed from DER's April 4, 1985, denial of a Water Quality Management Part II Permit for a proposed brine injection and gas recovery project in Hebron Township, Potter County on May 7, 1985. On August 23, 1985, the County of Potter petitioned the Board for leave to intervene in this matter. This petition was granted on November 4, 1985. The Board, after pre-hearing memoranda were filed, scheduled a hearing in this matter for August 4-8, 1986. Since there were outstanding discovery matters,

the Board, on July 3, 1986, issued an order requiring that discovery be completed on August 1, 1986.

On July 9, 1986, DER served a notice of deposition on Benson, requiring the appearance of James Reynolds and Robert Benson, both officers of the company, Tom Hungerford, a petroleum engineer, and Art VanTyne, a geologist, on July 17 and 18, 1986. The notice also requested that each deponent bring any documents he wrote or relied upon and any documents in any way relevant to the proceeding, including all water quality data gathered at or near the site. DER had contacted Benson to solicit acceptable dates for these depositions. The notice sent was in compliance with Pa.R.C.P. 4007.1 and 25 Pa. Code §21.111.

On July 16, 1986, the day before the scheduled depositions, Benson notified DER that it could not produce its representatives at the time and place specified in the notice of deposition. The parties agreed on the phone to seek a continuance of the hearing and to reschedule the depositions. DER confirmed this phone conversation in writing in a letter dated July 18, 1986, and included in that letter a request that depositions be scheduled for the week of August 4, 1986. Benson never responded to this request.

On December 31, 1986, the Board issued a notice of hearing for the week of March 13, 1987, seven months after the original hearing date. Between January 2, 1987 and January 26, 1987, DER made several calls in an attempt to reschedule the depositions. On January 26, 1987, DER received a message that Benson would produce two of its representatives on January 30, 1987. On January 29, 1987, Benson notified DER that it could not produce all of the witnesses the following day, but agreed to produce all of them on February 5 and 6, 1987. DER immediately filed a motion to compel discovery, requesting the Board to compel Benson to produce its representatives and to impose

sanctions against Benson.

On February 2 and 3, 1987, DER made repeated attempts to contact Benson and confirm the depositions for February 5 and 6. Late on February 4, 1987, Benson again notified DER that it could not produce its representatives for deposition. On February 5, 1987, DER filed its motion for sanctions and request for dismissal for Benson's failure to diligently prosecute its case.

The Board will rule on DER's motion to compel discovery and issue an order compelling discovery at this time. Unfortunately, DER chose to rely on Benson's verbal affirmations that it would produce its witnesses on each of the three dates it scheduled in conjunction with opposing counsel at DER. Benson has admitted that DER had consulted it before scheduling the first deposition of July 17-18, 1986. The following two depositions for January 30, 1987, and February 5-6, 1987, were scheduled by Benson and, yet, Benson still cancelled. But, because of what the Board perceives as a procedural problem, it will defer ruling on DER's motion to dismiss and to impose sanctions pending the outcome of this order.

The Rules of Civil Procedure differ with regard to parties and non-parties and if a party does not appear after notice, notice alone is sufficient to support subsequent sanction procedures under Rule 4019 for failure to appear. Pa.R.C.P. 4007.1 (Explanatory Note). Yet, a sanction against Benson at this time is not warranted since Benson was requested at all times by DER to appear with the expert, non-party witnesses. There is nothing requiring that witnesses be deposed at the same time or even within one day of each other. Furthermore, DER did not comply with the requirements necessary to depose Benson's witnesses. While no subpoena was necessary for the parties to the suit pursuant to Pa.R.C.P. 4007.1(a), subpoenas were necessary for the two non-party, expert witnesses, Mr. Hungerford and Mr. VanTyne. According to

Pa.R.C.P. 4007.1(d), DER should have sent a subpoena duces tecum to insure the appearance of these two witnesses and the production of the documents requested in DER's original notice of deposition.

These pleadings have consumed an inordinate amount of time and energy over a two year period. The Board cannot justify the continued use of already overtaxed Board resources to resolve disputes such as this which should have been avoided through the exercise of professional courtesy. Were it not for the procedural problems mentioned here, sanctions would surely be warranted against Benson for its repeated failure to produce its witnesses. It is worth noting that Benson did not object to the notice served upon its non-party witnesses and it had, three times, represented its ability to present these witnesses. Yet, Benson failed to produce these witnesses in each instance and each time with less than twenty-four hours notice to DER.

Benson bears the burden of proof in an appeal such as this, 25 Pa. Code §21.101(c)(1), and unless an immediate and sincere effort is made to comply with this order compelling discovery, stringent sanctions will result. Thus far, the Board has little evidence that Benson intends to diligently prosecute its appeal. But for the procedural problems, sanctions would be imposed on Benson at this time. The parties are hereby put on notice that the Board will expend no more resources to resolve this discovery dispute.

ORDER

AND NOW, this 8th day of July, 1987, it is ordered that DER's motion to compel is granted and that Benson shall produce Messrs. Benson, Reynolds, Hungerford and VanTyne for deposition by DER at a mutually convenient time within the next thirty days.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 8, 1987

cc: **Bureau of Litigation**
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mjf

C & K COAL COMPANY :
:
v. : EHB Docket No. 86-364-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 8, 1987

OPINION AND ORDER
SUR
MOTION FOR SANCTIONS

Synopsis

Motion for sanctions is denied where the interrogatory objected to is vague and overbroad. The motion is also denied where the interrogatory is objected to as requiring the identification of regulations, since discovery's purpose is to disclose pertinent facts. Finally, the motion is granted where information regarding other mining operations within a defined radius of appellant's proposed mining site is potentially relevant to the denial of appellant's mining permit.

OPINION

This matter was initiated by C & K Coal Company (C&K) on July 24, 1986 with the filing of a notice of appeal challenging the Department of Environmental Resources' (the Department) denial of C&K's application to conduct surface mining at a site in Pine and Mercer Townships, Mercer and Butler Counties. The controversy presently before the Board stems from C&K's motion for sanctions against the Department because of the Department's alleged failure to sufficiently answer C&K's Interrogatories and Request to

Produce Documents. More particularly, C&K argues that the Department failed to sufficiently respond to Interrogatories 12, 13, and 15. We will address each interrogatory individually.

Interrogatory 12 states "Identify and produce copies of all documents or correspondence relating or pertaining to 'wetlands' to or from other Pennsylvania agencies." The Department has objected to this interrogatory as vague and unclear and has also asserted that preparation of an answer "would cause the Department unreasonable annoyance, oppression, burden, and expense and would require it to make an unreasonable investigation." We believe that the interrogatory is vague because C&K has failed to identify "Pennsylvania agencies." Although the Board broadly construes relevancy in the context of discovery, we still believe C&K's request is overbroad and would require the Department to produce documents which are not even remotely relevant to the denial of C&K's permit application. Therefore, we will deny C&K's motion as it relates to Interrogatory 12.

Interrogatory 13 requests the Department to

> Identify and produce copies of all documents or inspection reports pertaining or relating to the impact or result of other mining operations within a 3 mile radius of the proposed operation including inspection reports.

The Department has objected to this interrogatory as seeking information which is irrelevant to the matter before the Board and has, as with Interrogatory 12, asserted that production of the documents would cause unreasonable annoyance and burden. The information sought by this interrogatory may, in some way, be relevant, especially from the standpoint of impact on the habitat of the Massassauga rattlesnake, which the Department, in its pre-hearing memorandum, advanced as one of the bases for denial of

C&K's permit application. Furthermore, we do not believe that C&K's request is unreasonable or burdensome, as it is limited to a three mile radius of its proposed site. Consequently, we will grant C&K's motion as it relates to Interrogatory 13.

C&K has requested the Department in Interrogatory 15 to "Identify and produce copies of all regulations, policies, or guidelines relating to wetlands." The Department objected to the interrogatory on the grounds that since regulations are not evidence, they are, therefore, outside the scope of permissible discovery. In addition, the Department argues that responding to the interrogatory would require the disclosure of attorney work product and would be unreasonably annoying because it would require the Department's counsel to perform legal research for C&K's counsel. The Department did produce its wetlands policies and guidelines. The purpose of discovery is to acquaint the parties with the pertinent facts of a case in order for them to be adequately prepared at trial. Lower Merion Township v. Hobson, 79 D&C 385. Regulations are not facts and, consequently, are outside the scope of discovery. We will deny C&K's motion as it relates to Interrogatory 15.

ORDER

AND NOW, this 8th day of July, 1987, it is ordered that:

1) C&K's Motion for Sanctions is granted with respect to Interrogatory 13. The Department is ordered to produce the documents and inspection reports for mining operations within a three mile radius of C&K's proposed site at a mutually convenient time. The Department may produce the requested documents at its Knox District Office; and

2) C&K's Motion for Sanctions with respect to Interrogatories 12 and 15 is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 8, 1987

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ASSOCIATION OF PROPERTY OWNERS OF THE HIDEOUT, INC.	:	
v.	:	EHB Docket No. 86-358-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	Issued: July 9,, 1987
EDWARD B. AND JOSEPH W. STRASSER, Permittees	:	

OPINION AND ORDER

Synopsis

A request for an order compelling inspection and measuring, surveying, photographing, testing and sampling is denied where the request is not formulated with reasonable particularity, thereby making it invasive and unduly burdensome.

OPINION

The Department of Environmental Resources (DER) issued an encroachment permit on June 21, 1986 to Edward B. and Joseph W. Strasser to perform wetland excavation for the purpose of peat removal. The Association of Property Owners of the Hideout (Association) appealed the issuance of the permit on July 21, 1986, principally because the Strassers and DER allegedly had not conducted a thorough examination of the downstream environmental impact of the proposed mining.

On April 13, 1987, the Association filed a request for entry to property in control of the Strassers for inspecting and measuring, surveying, photographing, testing or sampling under Pa.R.C.P. 4009 and 25 Pa.Code

§21.111(d). In this request, the Association asked to inspect and measure, survey and photograph the 6.1 acre proposed peat mining site. In addition, it requested to take selected core samples within the proposed site, stating this sampling would take a full week to complete.

The Strassers filed objections to the request on April 22, 1987, claiming that a full week of testing would be invasive and burdensome, causing undue annoyance and expense. They also argued that the information sought is not relevant to the present appeal and is not reasonably calculated to lead to the discovery of admissible evidence.

The Association, on May 5, 1987, filed a motion to compel the discovery it had requested pursuant to Pa.R.C.P. 4019(a), explaining that one week of sampling would be necessary to ensure the completion of the sampling in case of inclement weather. Furthermore, the Association assured the Strassers it would bear all the expenses and it would not exceed the number of soil probes taken by DER. The samples, it contends, are necessary to compare with future samples to check for any increased sedimentation. Finally, the Association conceded that if the DER samples are satisfactory, the entry for discovery motion would not be necessary.

The Strassers filed a memorandum in opposition to the motion to compel discovery on May 11, 1987, objecting to the Association's plan as vague, burdensome and expensive.

Under Board rule 21.111(d) written requests for entry for inspection and other purposes are governed by Rule 4009 of the Pennsylvania Rules of Civil Procedure. The rule of civil procedures is clear on the criteria for evaluating a request for entry for the purpose of discovery. Rule 4009(a)(2) states that a party may serve on any other party a request to permit entry upon designated land in the possession or control of the party being served

for the purpose of inspecting and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon within the scope of Rules 4003.1 through 4003.5 inclusive. Relevance to the subject matter involved is a requirement for permissible discovery. Pa.R.C.P. 4003.1. The explanatory note to Rule 4009 provides that the request should designate with reasonable particularity the items to be inspected, copied, tested, or sampled and the time, place and manner of the activities. If the party upon whom the request is served does not respond or objects, the requesting party may move for an order under Rule 4019(a) to compel the inspection, copying, testing or sampling.

In Pa. Game Commission v. DER and Ganzer Sand & Gravel, Inc., 1983 EHB 355, the questions of relevance and expenses were the basis for a denial of a motion for an order to permit inspection and entry where the request was broad and the desired tests had already been done by one party and were available to the other party. Ultimately, the Board held that extensive inspection and testing without some minimal assurance that the objectives of the proposed digging did not already exist on the site would not be permitted.

This matter is analogous to Ganzer. Here, the Association's proposal is vague with regard to the number, size and depth of holes to be dug on the site. It provides no plan or assurances as to the manner in which the work is to be done. The question of necessity for these sample arises, particularly in view of the DER samples already in existence and the Association's concession that if DER has or will take core samples meeting their criteria, then the requested entry to take core samples would not be necessary and the DER data would suffice. And, yet, the Association has made no effort to obtain or analyze the DER data. Under these circumstances, we must deny the motion, but if these DER samples are found, after examination by the

Association, to be controversial or unsatisfactory, then the Association may renew its motion.

O R D E R

AND NOW, this 9th day of July, 1987, it is ordered that the Association of Property Owners of the Hideout's Motion to Compel Inspecting and Measuring, Surveying, Photographing, Testing or Sampling is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 9, 1987

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 87-069-CP-W
S. S. FISHER STEEL CORP.	:	Issued: July 9, 1987

OPINION AND ORDER

Synopsis

Allegations in new matter regarding settlement negotiations between the Department of Environmental Resources and defendant are stricken as impertinent under Pa.R.C.P. 1017(b)(2), as they are irrelevant to the Board's determination of civil penalties and are privileged under 1 Pa.Code §35.115.

OPINION

This matter was initiated by the Department of Environmental Resources (the Department) on February 25, 1987 with the filing of a complaint for civil penalties against S. S. Fisher Steel Corp. (Fisher). The complaint, which was brought pursuant to §9.1 of the Air Pollution Control Act, the Act of January 8, 1960, P.L.(1959) 2119, as amended, 35 P.S. §4009.1 (the Air Pollution Control Act), sought penalties for Fisher's removing a boiler containing friable asbestos material from Lancaster General Hospital. Fisher duly filed its Answer and New Matter in response to the complaint.

On April 22, 1987, the Department filed a motion to strike Paragraphs 26, 27, and 28 of Fisher's New Matter as irrelevant, immaterial and inappropriate. The Department alleged that those paragraphs were irrelevant,

immaterial, and inappropriate because they contained material relating to settlement negotiations between Fisher and the Department. Fisher contended in its answer to the Department's motion that Paragraphs 26, 27, and 28 were relevant and material to the amount of penalty sought by the Department. For the reasons set forth below, the Department's motion is granted.

Rule 1017(b)(2) of the Pa.R.C.P. allows the filing of a motion to strike off a pleading because of impertinent matter. Matter is impertinent if it is irrelevant to resolution of the material issues in a proceeding. DER v. Peggs Run Coal Co., 55 Pa.Cmwlth.312, 423 A.2d 765 (1980).

In determining a civil penalty under §9.1 of the Air Pollution Control Act, the Board is to consider "...the wilfulness of the violation, damage or injury to the outdoor atmosphere of the Commonwealth or its uses, and other relevant factors..." We are aware of no precedent for our considering what the Department was willing to accept in settlement of a matter as a factor in our assessment of a civil penalty. Moreover, evidence relating to the settlement negotiations between the Department and Fisher would be inadmissible by reason of 1 Pa.Code §35.115, which provides in relevant part that

> ...Unaccepted proposals of settlement...shall be privileged and shall not be admissible in evidence against any counsel or person claiming such privilege.

Consequently, Paragraphs 26, 27, and 28 are impertinent and will be stricken.

O R D E R

AND NOW, this 9th day of July, 1987, it is ordered that the Department of Environmental Resources' Motion to Strike is granted and Paragraphs 26, 27, and 28 of S. S. Fisher Steel Corp.'s Answer and New Matter are stricken.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 9, 1987

cc: **Bureau of Litigation**
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BETHENERGY MINES, INC. :
:
v. : EHB Docket No. 86-624-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 10, 1987

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

Petition for supersedeas is denied. A mine inspector has the authority to issue an order requiring that, pursuant to Section 228(a) of the Bituminous Coal Mine Act, pre-shift examinations be made in areas where energized electrical equipment is present. Petitioner is unlikely to prevail in its view that the intent of Section 228(a) of the Act was to confine "pre-shift" examinations to areas where miners are about to enter for the beginning of a work shift. Because Petitioner failed to meet the first of the three supersedeas tests in 25 Pa.Code §21.78, the Board need not analyze the likelihood of injury to the public and irreparable harm to the Petitioner.

The Board has jurisdiction over this appeal even though there exists an alternative administrative remedy in the act. The Board holds that the administrative remedies provided in Sections 120 and 123 of the Act constitute alternatives which may have been taken by Petitioner, but that a direct appeal to the Board was an appropriate alternative for Petitioner because of the powers granted the Board pursuant to §§1921-A(a) and (b) the Administrative

Code over disputes arising out of actions taken by DER.

OPINION

INTRODUCTION

BethEnergy Mines, Inc. ("BethEnergy") initiated this matter on November 10, 1986 when it filed a Notice of Appeal with this Board from an action of the Department of Environmental Resources ("DER"). The action appealed from was a letter from DER which, in toto, reads as follows:

> In answer to your request of an interpretation of Section 228 of the Bituminous Coal Mining Laws of Pennsylvania - "Duties of the Mine Examiner." The subject in question - "Would the law require a pre-shift examination of an area that has been dangered off, but energized power cable are present within the danger area?"
>
> My answer to your question is that all places that have energized power, even though the entries are fenced off, require a preshift examination.
>
> I am directing you to comply with same.

This DER letter pertained to BethEnergy's underground mine known as the Mine 84 Complex ("84 Complex") located in Washington County, Pennsylvania, and consisted of DER's interpretation of Section 228(a) of the Bituminous Coal Mine Act, the Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §701.101, et seq. (" the Act") and a directive to comply with DER's construction of the Act. Specifically, BethEnergy challenges DER's interpretation of 52 P.S. §701.228 requiring that pre-shift examinations be conducted in areas of the 84 Complex in which operations have been suspended but which have not been abandoned and in which energized electrical equipment is present. Concurrent with its notice of appeal, BethEnergy filed a Petition for Supersedeas, which petition is the subject of this opinion and order. A hearing on the petition was held on December 8, 1986.

FACTORS AFFECTING THE GRANT OR DENIAL OF A SUPERSEDEAS

It is well established Board practice that one seeking a supersedeas must demonstrate that it has satisfied or complied with the standards for the grant of supersedeas by the Board. Armond Wazelle v. DER, 1984 EHB 865; William Fiore v. DER, 1983 EHB 528.

The Board's rules of practice and procedure which establish the factors evaluated by the Board in granting or denying a supersedeas are found at 25 Pa. Code §21.78, which reads:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered are:
>
> (1) Irreparable harm to the petitioner
> (2) The likelihood of the petitioner prevailing on the merits.
> (3) The likelihood of injury to the public or other parties, such as the permittee, in third party appeals.
>
> (b) A supersedeas will not be issued in cases where pollution or injury to the public health safety or welfare exists or is threatened during the period when the supersedeas would be in effect.
>
> (c) In granting a supersedeas, the Board may impose conditions that are warranted by the circumstances, including the filing of a bond or other security.

A petitioner for a supersedeas must prove all three of the factors listed in §21.78(a). See Carroll Township Authority v. Commonwealth, DER, 1983 EHB 239.

FACTUAL BACKGROUND

The 84 Complex has been under development for many years. Its underground areas are composed of active, inactive and worked out sections. Only those sections which are active and inactive are relevant to this appeal. Active sections generally are those sections where coal extraction is taking place. In the terminology of 84 Complex personnel, inactive sections are those in which coal extraction has taken place in the past, are now inactive

but have not been abandoned and where coal extraction can be expected to occur again at some time in the future.

In general, a section at the 84 Complex is composed of a face area at which coal is severed from the seam, headings and cross cuts and local haulageways over which coal is transported from the face area to a conveyor system which removes the coal out of the mine. The "inby" area is that area near the face. The "outby" area is that area away from the face but in the same general vicinity.

Electrical energy is supplied to sections by means of conducting cables. Sections are also provided with "load centers" whose purpose is to transform current to useful voltage levels and to distribute the electrical energy to the various pieces of equipment such as conveyors, mining machines and coal shuttles. These load centers are located in the "outby" area. At the 84 Complex, when a section is designated as inactive, the practice is to remove that equipment which uses the electrical energy but to leave the load centers in place. Electrical energy is maintained to the load centers solely to prevent damage to its mechanisms from, among other things, condensation of moisture.

When a section is designated inactive, it is "dangered off", i.e., fences or other means are used to prevent unauthorized persons from entering such inactive sections. The practice at the 84 Complex is to examine these areas once per shift, though not necessarily during the three hours preceding a coal producing shift. It is the fact that energized electrical equipment is maintained in the inactive sections that is the basis for DER's order that BethEnergy conduct pre-shift examinations in those areas.

DISCUSSION

1. Jurisdiction

BethEnergy raised the issue of the Board's jurisdiction over the matter in its Memorandum in Support of Petition for Supersedeas. BethEnergy argued that pursuant to Section 121[1] of the Act, if Mr. Bolen, the official who issued the subject order to BethEnergy, believed any portion of the mine was dangerous enough to constitute a safety threat to the workers, he had a duty to notify the Secretary of DER, or, the Commissioner of Deep Mine Safety, the Secretary's delegate. The Secretary would then have convened a commission to investigate and issue an appropriate order. Consequently,

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1 Section 121 provides in pertinent part:

§ 701-121. Mine inspectors' findings

To enable the mine inspector to perform [his] duties ...he shall have the right ...to enter any mine in his district or any mine in any other district when directed to do so...- to make examinations or obtain information; and upon the discovery of any violation of this act, or upon being informed of any violation of the act, he shall institute proceedings against the person...under the provisions of this act. In case any mine or portion of a mine is, in the judgment of the mine inspector, in so dangerous a condition, from any cause, as to jeopardize life and health, he shall at once notify the secretary, who shall immediately appoint a commission ... The commission shall make a full investigation, and if if they shall agree that there is immediate danger they shall direct the superintendent of the mine, in writing, to remove forthwith said dangerous condition. If the superintendent fails to do so, the mine inspector in the district shall immediately apply, in the name of the Commonwealth, to the court of common pleas of the county in which said mine is located, or to a judge of said court in chambers, for an injunction to enjoin the operation of all work in and about said mine.... [S]hould any mine inspector find during his inspection of a mine, or portion of a mine, such dangerous conditions existing therein that, in his opinion, any delay in removing the workmen from such dangerous places might cause loss of life or serious personal injury to the employes, the said mine inspector shall have the right to temporarily withdraw all persons from such dangerous places until the foregoing provisions of this section can be carried into effect.

(emphasis added)

52 P.S. 701-121

BethEnergy's jurisdictional argument was that Section 121 of the Act was ignored by DER and no commission convened. Instead Inspector Bolen issued what DER termed an enforceable order.

On March 20, 1987, the Board requested that both parties submit memoranda of law on the issue of whether the Board had jurisdiction to hear this appeal since DER had not asked that a commission be convened, as outlined in Section 121 of the Act. Both parties argued that the Board had jurisdiction to hear this appeal, though for different reasons.

DER contended that there were two appropriate avenues by which BethEnergy might have appealed Mr. Bolen's order, pursuant to Section 123 of the Act.[2] The first, was to request the appointment of a Commission by DER "to make further examination into the matter in dispute". If this route had been chosen, the commission would issue its ruling, BethEnergy would have had a right to review of the decision. DER argued that the second avenue for appeal of the Inspector's order was for BethEnergy to take a direct appeal to the

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[2] Section 123 states as follows:

> The mine inspector shall exercise sound discretion in the performance of his duties under the provisions of this act, and if the operator, superintendent, mine foreman or other person employed in or about any mine, shall be dissatisfied with any decision the mine inspector has given in the discharge of his duties, which decision shall be in writing, it shall be the duty of the dissatisfied person to appeal from said decision to the secretary, who shall at once appoint a commission to accompany promptly the mine examination into the matter in dispute. If the said commission shall agree with the decision of the mine inspector in the district, their decision shall be final and conclusive, unless an appeal is taken in accordance with the provisions of the act of June 4, 1945 (P.L. 1388, No.442), known as the "Administrative Agency Law."
>
> 52 P. S. 701-123

Board. Thus, DER sees no jurisdictional problem with BethEnergy's failure to seek the appointment of a commission before appealing to the Board.

There are several bases for BethEnergy's argument that the Board has jurisdiction over this matter. BethEnergy relies first on §1921-A of the Administrative Code, the Act of April 9, 1929, P.L.177, as amended. 71 P.S. §510.21, particularly subsections (a) and (c) which state that the Board has jurisdiction over an appeal of any "action" of DER.

BethEnergy further contends that it should not be compelled to exhaust its administrative remedies under Section 123 of the Act if the remedy is obviously futile. BethEnergy's basis for this argument is that the Commissions have traditionally been made up of three DER mine inspectors and in this case, the inspectors would most likely have interpreted §228(a) of the Act as set forth in Inspector Bolen's order. Consequently, BethEnergy concluded, the remedy of Section 123 of the Act would not adequately and fairly deal with BethEnergy's appeal.

BethEnergy, like DER, construed Section 121 of the Act to allow the Board to have jurisdiction over this matter. Finally, BethEnergy alleged, relying on BethEnergy Mines Corporation v. DER 1983 EHB 296, and, DER v. Butler County Mushroom Farm, 499 Pa. 509, 454 A. 2d 1 (1982) that since DER has argued that it has the power to issue orders such as the one issued by Inspector Bolen, then the Board would have authority to hear the appeal under Section §1921-A of the Administrative Code.

In reviewing these arguments, the Board agrees that it has jurisdiction. The Board find DER's "alternate avenues" approach most persuasive, but for slightly different reasons than DER sets forth. The Board does agree that the Sections under the Act calling for the convening of commissions for dispute resolution remain valid alternatives. However, even

the section which uses mandatory language, Section 121 of the Act, supra, does not specifically rule out other jurisdictional avenues or state that this administrative remedy must be exhausted before an appeal is brought before another forum. Further, as alluded to by BethEnergy, §1921-A(a) and (b) of the Administrative Code, the Act of December 3, 1970, P.L.834, No. 275, as amended, 71 P.S. §510-21 et seq., grants the Environmental Hearing Board the power to adjudicate disputes arising out of decisions made by DER. This section of the Administrative Code confers jurisdiction on the Board to hear this appeal as an alternative to the remedies specified under the Act.

2. The Likelihood of Petitioner's Prevailing on the Merits

At issue in the instant dispute is whether §228(a) of the Act requires that inactive sections be "pre-shifted" [4] if those sections contain energized electrical equipment.

Section 228(a), which is entitled " Duties of Mine Examiners," provides, in relevant part, as follows:

> (a) In a gassy mine, within three hours immediately preceding the beginning of a coal-producing shift, and before any workmen in such shift...enter the underground areas of such mine, certified persons designated to act as such a mine examiner shall be directed to examine a definite underground area of such mine and...shall inspect every active working place and places immediately adjacent thereto in such area... The mine examiner shall examine seals and doors to determine whether they are functioning properly; inspect and test the roof, face, and rib conditions in the working places; inspect active roadways, travelways approaches to abandoned workings, and accessible falls in active sections for explosive gas and other hazards; and inspect to determine whether the air in each split is traveling in its proper course and in normal volume...

[4] The term "pre-shifted" is commonly used to refer to pre-shift examinations under §228(a) of the Act.

> A second examination by the same or other mine examiner shall be made during working hours of every working place where men are employed...
>
> (emphasis added)

DER advances several arguments in connection with its position that §228(a) of the Act requires "pre-shifting" for areas of the mine in which energized electrical equipment is present, but are otherwise inactive. DER's first argument relies on Section §1921 of the Statutory Construction Act, 1 Pa.C.S.A. §1921(a).[5] DER contends that in the instant context, the rule that the statute "shall be construed, if possible to give effect to all its provisions", means that any area that contains a condition which could endanger the safety of the workers must be pre-shifted under §228(a) of the Act. In this connection, DER asserts that construing the pre-shift requirement as pertaining only to areas where miners are about to enter would be to read the intent of §228(a) too narrowly and to contravene §1921(a) the Statutory Construction Act.

DER also argues that BethEnergy's definition of "active sections" as only areas where mining is occurring is an underinclusive one. DER continues that this definition ignores the fact that the equipment at issue in this appeal is being powered by electricity, and that BethEnergy unreasonably limits the concept of active areas to those where coal is being mined. DER contends that the severing of coal relates to the definition of a working place and that §228(a) does not limit examinations to working places.

DER construes active workings" pursuant to Section 103 of the Act as "all places in a mine that are ventilated and inspected regularly." 52 P.S.

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[5] Section 1921 of the Statutory Construction Act states:

> (a) The object of all interpretation and construction of statues is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.

§701-103 . DER argues that the subject load centers are required to be located on intake air by Section 332, 52 P.S. §701-332, and that the units be examined daily to "see that [they are] in a safe operating condition" §226(d), 52 P.S. §701-226(d). Consequently, DER argues that the load centers are part of the "active workings" as defined by the Act and, therefore require pre-shift examinations under §228(a) of the Act, within three hours before anyone enters the underground areas (i.e. pre-shifted).

BethEnergy, on the other hand, argues primarily that §228(a) contains no language requiring pre-shift examinations of an area merely because energized components of the mine's electrical system are present in the area. Instead, BethEnergy believes that the pre-shift requirement contained in §228(a) of the Act is directed only at mines in coal producing areas where conditions are more likely to change. BethEnergy's position is that the intent of §228(a) is to require preshift examinations only in areas in which miners are about to enter for a work shift and which are located in the active sections where coal is being produced. BethEnergy acknowledges that the pre-shift requirement is applicable to "working places" as well.

BethEnergy's next argument is that Inspector Bolen lacked the authority to issue the order contested here, under 52 P.S.§§701-120, 701-121, or §701-123 of the Act, supra. BethEnergy contends that since these are the only sections of the Act that deal with enforcement authority of Bituminous Mine Inspectors, there is, in fact, no authority under the Act for Inspector Bolen's order.

ANALYSIS

The Board's decision here depends upon whether it construes the §228(a) pre-shift requirement as being tied to a work shift. If it rules that

only active working areas where miners are about to enter for a work shift are subject to the requirement, then BethEnergy would prevail. If, however, the Board views the pre-shift requirement as mandated in an area where danger to miners exists, regardless of whether the area is tied to a work shift, BethEnergy's arguments would not be persuasive.

It is obvious from even a cursory examination of §228(a) of the Act that it is inartfully drawn and antiquated in its language. Additionally, there is no precedent directly on point that might make construction any simpler.

The very structure of §228(a) of the Act lends support to the Board's view that the pre-shift requirement is not tied only to a place where miners will enter to work. The first paragraph of §228(a) deals with all the particular areas which are subject to the examination requirement. Not all of these areas relate to active working places (for example the seals and doors, roofs and faces) and this listing does not suggest that the intent was to require pre-shift examinations in only those areas into which miners were about to enter. This is certainly an indication that the pre-shift requirement was intended to be tied to more than just an active working place. Second, the second paragraph of §228(a) reads, "A second examination by the same or other mine examiner shall be made during working hours of every working place where men are employed..." It is apparent that this sentence constitutes a statutory requirement to examine every working place, tying this second examination to a work shift. The Board believes that the contrasting lack of specificity in the first paragraph in tying the pre-shift examination solely to an active working place, suggests that there must have been a different intent for the examinations required under the first paragraph of §228(a). It appears to the Board, from the extensive list of places subject to examination as well as the

use of language reflecting safety considerations, such as " hazards, explosives," that the safety of all miners on site was the underlying reason for the §228 pre-shift requirement. Additionally, there is no language in the first paragraph of §228(a) that suggests that pre-shift examinations were intended to be restricted to areas of a mine in which miners were about to enter.

Turning back to §1921(a) of the Statutory Construction Act, supra, the Board has employed the rule that the statute "shall be construed, if possible to give effect to all its provisions" in interpreting the intent of the "pre-shift" requirement. In doing this, the Board is guided by three significant factors. First is the definition of "active workings" (see DER's arguments, supra) under which energized load centers fall. Second is the fact that the work place was not mentioned as the only area to be pre-shifted under §228(a). The third factor is the extensive, but not necessarily exhaustive, areas enumerated in the statute which are subject to the "pre-shift" requirement.

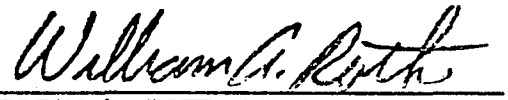
There can be no doubt that the safety of miners and not the work-related nature of the activity was the operative factor in framing the pre-shift requirement in §228(a) of the Act. Indeed, Walter Vicinelly, the Director of DER's Bureau of Deep Mine Safety testified that the only way to be sure that a mine is safe before miners enter is through a pre-shift examination under §228(a). (Supersedeas hearing transcript, p. 164) A malfunction of an energized load center in an area where miners are not working, coupled with an accumulation of explosive methane gas, can affect miners in an active working place far removed. As Mr. Vicinelly testified, the force of a deep mine explosion can be carried as far as three miles through a mine's underground workings. (Tr. 163)

Based on the foregoing, the Board holds that BethEnergy is not likely to succeed on the merits as the Board is not persuaded that the §228 "pre-shift" requirement pertains only to areas where miners are about to enter. Because it has failed in satisfying this test it is not necessary to consider the other two prongs; a supersedeas may not issue. Tenth Street Building Corporation v. DER, 1985 EHB 829; C & L Enterprises, Inc. and Carol Rogers v. DER,, EHB Docket No. 86-626-R (Opinion & order issued February 12, 1987).

ORDER

AND NOW, this 10th day of July, 1987, it is ordered that BethEnergy, Inc.'s petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: July 10, 1987

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For Appellant:
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Pittsburgh, PA 15219

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MAXINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOA

KING COAL COMPANY :
:
v. : EHB Docket No. 83-064-M
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 13, 1987

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where the docket was inactive for an extended period and appellant failed to comply with Board orders or respond to a motion to dismiss for lack of prosecution.

OPINION

This matter was initiated on March 31, 1983 by the filing of a Notice of Appeal by King Coal Company ("King"). King was seeking review of a March 2, 1983 order from the Department of Environmental Resources ("Department") directing it, pursuant to §4.2(f) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(f), to replace the water supplies at the residences of Michael Blough and Beatrice Mosteller in Jenner Township, Somerset County. The parties engaged in discovery and filed their pre-hearing memoranda, and the Board scheduled a pre-hearing conference on February 16, 1984.

The docket was inactive until July 17, 1986, when the Board requested a status report from King. Counsel for King, after being granted an extension because of the incarceration of King's partners, requested

on August 27, 1986, that the matter be continued until early 1987, when the partners could appear at a hearing on the merits. In an order dated September 3, 1986, the Board continued the matter to March 2, 1987, and warned King that if no activity occurred at the docket by May 4, 1987, its appeal would be dismissed for inactivity. King's counsel withdrew his appearance on January 21, 1987.

The Department filed a motion to dismiss the appeal for lack of prosecution on April 23, 1987. On April 28, 1987, the Board sent its customary motion letter to the partners, Robert Woods and Anthony Pivirotto, advising them that they must file any objections to the motion on or before May 20, 1987. When the motion letter to Pivirotto was returned because the forwarding order from his address had expired, the Board obtained Pivirotto's current address and sent another motion letter advising him that any objections to the Department's motion must be filed by June 2, 1987. No responses to the Department's motion have been received from either Woods or Pivirotto, so, pursuant to 25 Pa. Code §21.64(d), we must deem all relevant facts to be admitted.

Because the docket has been inactive for a lengthy period and King has failed to respond to the Department's motion, the Board has no choice but to dismiss this matter for lack of prosecution under 25 Pa. Code §21.124.

ORDER

AND NOW, this 13th day of July , 1987, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of King Coal Company is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 13, 1987

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Central Region
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Anthony Pivirotto
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XINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BOWMAN PETROLEUM CO., INC.	:	
	:	
v.	:	**EHB Docket No. 85-040-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 13, 1987

OPINION AND ORDER

Synopsis

The Board dismisses an appeal where it has no authority to grant the relief requested by the appellant -- the payment of monies appellant expended in complying with an order of the Department of Environmental Resources.

OPINION

This matter was initiated on February 4, 1985, with the filing of a notice of appeal by Bowman Petroleum Co., Inc. (Bowman). Bowman sought review of a January 4, 1985 order from the Department of Environmental Resources (Department) requiring it to conduct pressure tests on an underground gasoline storage tank. The Department issued the order pursuant to §§5, 316, 402, and 610 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.5, 691.316, 691.402, and 691.610 (the Clean Streams Law).

The parties duly filed their pre-hearing memoranda and, on January 6, 1986, a pre-hearing conference was scheduled by former Member Anthony J. Mazullo, Jr. for May 16, 1986. Because of Mr. Mazullo's resignation, the pre-hearing conference was canceled by Board order dated March 18, 1986.

Thereafter, a hearing on the merits was scheduled for September 15, 1986, but it was canceled at the request of the parties.

On March 2, 1987, the Department filed a motion to dismiss the appeal, contending that since Bowman had complied with the Department's order, the matter was moot and that since the only relief sought from the Board by Bowman was payment of the cost of the pressure test, the Board lacked jurisdiction to adjudicate the matter. The Board advised Bowman that it must file its response to the Department's motion by March 24, 1987. As of the date of this opinion and order, Bowman has not filed an answer to the Department's motion.

Because Bowman failed to answer the Department's motion, the Board, pursuant to 25 Pa. Code §21.64(d), will treat all relevant facts stated in the Department's motion as admitted. Bowman, then, is deemed to have admitted that the only relief it seeks is reimbursement, from the Department, of the $1,222 it expended to conduct the pressure test. Because the Board has no statutory authority to grant such relief, it must grant the Department's motion and dismiss this appeal.

As the Department correctly points out in its motion, neither §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, nor the Clean Streams Law authorizes the Board to award monetary relief of the nature requested by Bowman.[1] To the extent such relief is available under the laws of the Commonwealth, it must be sought in a forum other than the Board.[2] Joseph McFadden v. DER, 1974 EHB 25 and Bob Groves

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[1] The Clean Streams Law does authorize the Board to award monetary relief in the form of attorneys fees under certain circumstances; however, Bowman is not seeking attorneys fees.

[2] We will not hazard our opinion as to under what forum and what statute Bowman may appropriately seek relief of this sort.

et al. v. DER, 1976 EHB 266.

In light of our determination that we have no authority to grant the relief requested by Bowman, it is unnecessary to address the Department's argument that the matter is moot because Bowman complied with the Department's order.

ORDER

AND NOW, this 13th day of July, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Bowman Petroleum Co., Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 13, 1987

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MAXINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

PETER E. STANFORD	:	
	:	
v.	:	EHB Docket No. 85-082-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 13, 1987

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution.

OPINION

This matter was initiated by Peter E. Stanford on March 20, 1985 with the filing of a notice of appeal seeking review of the Department of Environmental Resources' issuance of Surface Mining Permit No. 17764008 to Benjamin Coal Company. Subsequent to the filing of pre-hearing memoranda by the parties, Benjamin Coal Company filed motions for sanctions and summary judgment, to which Stanford filed an answer. The Board, in an order dated April 2, 1987, denied both motions and required Stanford to submit, on or before April 20, 1987, a statement regarding his intent to proceed with this matter. When Stanford failed to file the required statement, the Board, on April 28, 1987, issued a rule to Stanford to show cause why his appeal should not be dismissed for lack of prosecution. The rule was returnable on or before May 26, 1987. Stanford has, as of the date of this opinion and order, failed to respond to this rule, and his lack of response to the Board's order of April 2, 1987 and its rule of April 28, 1987 must be interpreted as

indicative of his lack of intent to prosecute his appeal. Therefore, the sanction of dismissal pursuant to 25 Pa. Code §21.124 is appropriate under the circumstances.

ORDER

AND NOW, this 13th day of July, 1987, it is ordered that the appeal of Peter E. Stanford docketed at No. 85-082-W is dismissed for lack of prosecution.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 13, 1987

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For Permittee:
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mjf

HARRY L. UMHOLTZ & DOROTHY S. UMHOLTZ :
:
v. : EHB Docket No. 86-627-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 13, 1987
:
and :
:
WILLIAMSTOWN BOROUGH WATER AUTHORITY, Permittee

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Motion for summary judgment is granted where appellants' only contention is that a water supply permit should not have been issued prior to resolution of a title question regarding the land on which the proposed facility would be constructed. Because the Department of Environmental Resources had neither the authority nor the responsibility to examine land ownership during the course of its permit application review, it was entitled to judgment as a matter of law.

OPINION

This matter was initiated on November 3, 1986 with the filing of a notice of appeal by Harry L. and Dorothy S. Umholtz (the Umholtzes) of Williamstown, Dauphin County. The Umholtzes were challenging the Department of Environmental Resources' (the Department) issuance of a permit pursuant to the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 et seq. (the "Safe Drinking Water Act") to the Williamstown

Borough Water Authority (the Authority) for the construction of a chlorinator facility.

Subsequent to the filing of the Umholtzes' pre-hearing memorandum, the Department filed a motion for summary judgment, which was unopposed by the Authority. The Department alleged that the only contention raised by the Umholtzes in their pre-hearing memorandum was that the permit should not have been issued prior to the Dauphin County Court of Common Pleas' resolution of title to the land on which the facility would be built. Because the Safe Drinking Water Act did not authorize the Department to consider questions of property ownership in its review of permit applications, the Department argued it was entitled to judgment as a matter of law. In their response to the Department's motion, the Umholtzes admitted that their only contention was that the Department should not have issued the permit prior to the resolution of the title issue.[1]

The Board may render a summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and Order issued March 19, 1987). There are no issues of material fact in the matter before us, so our only task is to determine whether the Department is entitled to judgment as a matter of law.

Section 7(j) of the Safe Drinking Water Act provides in pertinent part that

> The Department shall have the power to grant a permit if it determines that the proposed water

---

[1] The Dauphin County Court of Common Pleas resolved the land title question in the Authority's favor in an opinion and order dated May 8, 1987. However, for the reasons explained infra, its opinion has no bearing on the propriety of the Department's permit issuance.

> system is not prejudicial to the public health and complies with the provisions of this Act, the regulations adopted hereunder, and all other applicable laws administered by the department.

There is no other provision in the Safe Drinking Water Act which empowers the Department to determine, in the course of its review of a permit application, whether an applicant has title to the land on which it plans to construct a facility. Similarly, the regulations at 25 Pa.Code §§109.503, 508 and 604 pertaining to review and issuance of permits do not authorize any such inquiry. Indeed, the regulation most germane to the issue raised by the Umholtzes, 25 Pa.Code §109.604, merely states in relevant part that

> New facilities shall be located on sites which are not subject to floods, fires, earthquakes, or other disaster which could cause a breakdown of the public water system or facilities.

And, we are unaware of any provision in other applicable laws administered by the Department authorizing such an inquiry, much less authorizing the withholding or denial of a permit where questions of property ownership exist. Cf. Donald T. and Kathleen Cooper v. DER, 1982 EHB 250. Obviously, the Department can exercise only those powers entrusted to it by the General Assembly. Pennsylvania Human Relations Commission v. Transit Casualty Insurance Co., 478 Pa.430, 387 A.2d 58 (1978).

The Department's issuance of the Authority's permit is a determination that the permit application is in compliance with the Safe Drinking Water Act and the rules and regulations adopted thereunder. It does not obviate the necessity for approval under other applicable statutes administered by the Department, other agencies or municipalities, and it does not grant or abrogate any property rights. Washington Tp. v. Com., Dept. of Transp., 54 Pa.Cmwlth 431, 421 A.2d 859 (1980). Since the Department has acted on the Authority's permit application within the bounds

of its statutory authority, the Department is entitled to judgment as a matter of law and summary judgment in its favor will be granted by the Board.

O R D E R

AND NOW, this 13th day of July, 1987, it is ordered that the Department os Environmental Resources' Motion for Summary Judgment is granted and the appeal of Harry L. and Dorothy S. Umholtz is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 13, 1987

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MAXINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

LANCASTER COUNTY NETWORK	:	
	:	
v.	:	EHB Docket No. 86-644-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 13, 1987
and LANCASTER COUNTY, Permittee	:	

OPINION AND ORDER

Synopsis

Notification of preliminary approval of a draft county solid waste management plan is not an appealable action pursuant to 25 Pa. Code §21.2(a).

OPINION

Lancaster County Network (Network) initiated this matter by filing a Notice of Appeal with the Board on November 28, 1986. The Notice of Appeal challenged the Department of Environmental Resources' (DER) October 29, 1986 preliminary approval of the Lancaster County Solid Waste Management Plan (Plan). DER moved to dismiss the appeal on January 21, 1987, arguing that its action was not a final action and, therefore, the Board had no jurisdiction to hear Network's appeal. Lancaster County moved to dismiss the appeal on February 4, 1987, contending that the DER letter was not a final action and that Network lacked standing to pursue the appeal.

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 §1921 - A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa. Code §21.2(a)(1).

Adjudications are defined as those actions which affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of the parties. We hold that DER's preliminary approval of the Plan is not an adjudication.

The October 29, 1986 letter from DER refers at all times to the approval as being "preliminary." It states that DER's consideration of final approval under 25 Pa. Code §75.11(e) is to be based on the receipt of:

1. Unqualified resolutions adopted by the local municipalities signifying their adoption of the plan.

2. The necessary legal instruments as specified in the plan to assure the delivery of all municipal solid waste to the facilities designated in the plan.

3. Designation of the site for the resource recovery facility.

4. Details of the procedures to be used for financing the development, construction, and operation of the planned system.

5. Responses to the Request for Qualifications from vendors for the development of the resource recovery facility.

Finally, the letter stipulates that before any final approval can be made, a written request must be made for that final approval.

An analogous case, though not directly on point, is Upper Moreland Township v. DER, 104 EHB 1978. There, several townships sought to appeal DER's publication of a study which concluded that regional spray irrigation was the most cost effective method of sewage treatment for the region in which the townships were located. The Board concluded that the findings of the study were not an appealable action over which the Board could exercise jurisdiction. Although the municipalities were concerned about the possible future adoption and implementation of the recommended irrigation system, the municipalities were not yet aggrieved. No particular action ordering the

municipalities to construct a specific sewage facility or denying a request to construct any system had been taken.

Similarly, here, the concern about the final approval of the county waste management plan is purely conjectural. The plan will not have any effect upon property rights and interests until it is adopted or, after adoption, implemented through future permits for specific facilities. There is no direct or immediate impact resulting from the Department's review of the plan at this time. For these reasons, it is not an adjudication and, therefore, not appealable to the Board.

In light of our ruling regarding appealability, it is unnecessary for us to dispose of Lancaster County's contentions that the Network lacks standing.

ORDER

AND NOW, this 13th day of July, 1987, it is ordered that DER's motion to dismiss is granted and the appeal of Lancaster County Network is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 13, 1987

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TRANSAMERICA INSURANCE COMPANY	:	
	:	
v.	:	EHB Docket No. 87-008-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 13, 1987

OPINION AND ORDER

Synopsis

Principal's failure to safeguard the interests of the surety in the principal's appeal of a bond forfeiture is not sufficient grounds for the allowance of an appeal nunc pro tunc.

OPINION

Transamerica Insurance Company (Transamerica) filed a petition for leave to file an appeal nunc pro tunc on January 5, 1987, seeking review of DER's forfeiture of Transamerica's bonds posted 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., for Joseph Weaver's mining operation in Penn Township, Westmoreland County.

While Transamerica admits that it was notified of the bond forfeiture on December 28, 1983, the day the forfeiture was issued, it advances several arguments in support of its petition. First, it asserts that the December 28, 1983 forfeiture letter was the first notification it received of the impending forfeiture. Second, Transamerica argues that its agent was without knowledge of its available appeal rights, and that due to

covenants in the Agreement of Indemnity between Transamerica and its principal, Joseph Weaver, it expected Weaver to take all the steps necessary to defend Transamerica's interests. Joseph Weaver did file an appeal of the Department's forfeiture, but the Board dismissed that appeal on July 9, 1984 because Weaver failed to perfect it.

DER filed a motion to dismiss Transamerica's petition on February 4, 1987, responding to each of the justifications put forth by Transamerica. DER argues that it is not required to give any notice of possible surety default. It need only notify the parties of actual default, which it did. Ohio Farmers Ins. Co. v. DER, 73 Pa.Cmwlth. 18, 457 A 2d 1004 (1983). DER also avers that it was Transamerica's duty to inquire into its available appeal rights and to diligently prosecute its own appeal, rather than to rely on its principal to defend these interests. Negligence, such as this, does not, DER argues, justify the granting of an appeal nunc pro tunc. Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources, 26 Pa.Cmwlth. 478, 364 A 2d 761 (1976).

Under the Board's rules, a petition for leave for an appeal nunc pro tunc must be filed in writing and good cause must be shown. 25 Pa.Code §21.53(a). Board precedent allows such an appeal only where some conduct on the part of the Board misled appellant or where a breakdown in the Board's operation resulted in an untimely filing. Fitzsimmons v. DER, 1986 EHB 1190. No such misleading information or breakdown of Board operations has been alleged by the appellant.

Rather, the crux of Transamerica's argument is its mistaken reliance upon the principal to protect its interests. The Board dealt with a similar situation in Shirley Anderson v. DER and Eastern Industries, Inc., 1986 EHB 632, where the Board denied a petition for reconsideration of a Board

dismissal by the assignees of the original appellant. The assignees were unaware that the appeal had been dismissed because of Anderson's failure to comply with the Board's orders. The Board held that Anderson's failure to notify the purchasers of the posture of the appeal was a private matter and not grounds for reconsideration of the dismissal. Similarly here, Weaver's failure to safeguard Transamerica's interests is not grounds for the allowance of an appeal nunc pro tunc. Nor does Transamerica fall within the standard enunciated in Roderick v. Com., State Civ. Service Comm., 76 Pa. Cmwlth. 329, 463 A 2d 1261 (1983) where the non-negligent acts of a third party not part of the litigation have caused the tardy filing. Transamerica itself, for whatever reason, is responsible for its current predicament. The Board has no choice but to deny the petition.

ORDER

AND NOW, this 13th day of July , 1987, it is ordered that DER's motion to dismiss is granted, and the petition of Transamerica for leave to file an appeal nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 13, 1987

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MAXINE WOELFLING, CHAIRMAN

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M. DIANE SMITH
SECRETARY TO THE BOA

DEL-AWARE UNLIMITED, INC.	:	
	:	
v.	:	EHB Docket No. 87-037-R
	:	(Consolidated Appeals)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	Issued: July 17, 1987
NESHAMINY WATER RESOURCES AUTHORITY	:	
and PHILADELPHIA ELECTRIC COMPANY,	:	
Permittees	:	
and	:	
NORTH PENN and NORTH WALES WATER	:	
AUTHORITIES, Intervenors	:	

OPINION AND ORDER
SUR
MOTIONS FOR PROTECTIVE ORDER

Synopsis

A motion for protective order is granted where the party seeking discovery proposes to inquire into issues which have been previously excluded from an appeal. A motion for protective order is denied when the issue which is the subject of the proposed discovery clearly falls within an appeal. Normally, the Board broadly construes relevancy during discovery, though such relevancy is not an indication of admissibility at hearing. However, an exception to this broad construing of relevancy is made when reintroduction of an excluded issue through discovery is sought or will result.

O P I N I O N

Introduction

The above captioned matter involves two appeals filed by Del-AWARE

Unlimited, Inc. (Del-AWARE) from the extension of expiration date and amendment of two dams and encroachment permits by the Department of Environmental Resources (DER). On December 30, 1986, DER extended the expiration date of and amended Permit ENC 09-81 which authorizes, inter alia, the construction of an outfall on the North Branch of the Neshaminy Creek (North Branch). The permittee for ENC 09-81 is the Neshaminy Water Resources Authority (NWRA). On December 30, 1986, DER extended the expiration date of and amended Permit ENC 09-77 which authorizes, inter alia, the construction of an outfall on the East Branch of the Perkiomen Creek (East Branch). The permittee for ENC 09-77 is the Philadelphia Electric Company (PECO). The North Penn and North Wales Water Authorities (NP/NW) have been granted leave to intervene in these appeals.

The two permits are part of the so-called Point Pleasant Project. For a full description of the project, the reader is directed to the Board lengthy adjudication found at Del-AWARE Unlimited v. DER, 1984 EHB 178 (hereinafter Del-AWARE I).

The matter before the Board in this opinion is a discovery dispute among the parties. On May 27, 1987, the Board issued an opinion and order in the above captioned matter (hereinafter Del-AWARE III) which dismissed ten appeals of various permit extensions related to the Point Pleasant Project but which also kept open the appeals of the two permits, supra., and consolidated the appeals at the above docket number. As part of the Del-AWARE III order, the Board granted leave to conduct discovery, relevant to the issues remaining in the appeal, for 60 days from the date of the order, or until July 26, 1987.

On July 7, 1987 Del-AWARE filed with the Board a copy of its notice of depositions and request for production of documents from PECO, NP/NW and NWRA. Motions for protective order were filed by PECO on July 10, 1987 and by

NP/NW on July 14, 1987. Del-AWARE filed its answer on July 16, 1987. The Board now proceeds to rule.

Del-AWARE III Discovery Order

The Board's order in Del-AWARE III with regard to discovery reads, in relevant part, as follows:

> 13. The parties may engage in discovery without leave of the Board for a period of 60 days from the date of this order, but any such discovery must be relevant to one of the issues listed in paragraphs 7 and 8 . . .
>
> (emphasis added)

Paragraphs 7 and 8 of the Board's order specifically defined the issues in the two remaining appeals of permits ENC 09-81 and ENC 09-77. In whole, Paragraphs 7 and 8 read as follows:

> 7. The appeal of Permit No. ENC 09-81 at Docket No. 87-037-R remains before the Board with respect to whether DER properly comported with the Board's order in Del-AWARE I with regard to the issues of:
>
> a) velocity/stream erosion control in the North Branch Neshaminy Creek; and
> b) condition regarding NPDES permit.
>
> 8. The appeal of Permit No. ENC 09-77 at Docket No. 87-039-R remains before the Board with respect to whether DER properly comported with the Board's order in Del-AWARE I with regard to the issues of:
>
> a) velocity/stream erosion control in the East Branch Perkiomen Creek;
> b) condition regarding the NPDES permit; and
> c) condition regarding the Bucks Road gauge cutoff flow.

Del-AWARE I Findings and Order

The resolution of this discovery dispute will hinge on precisely what the Board held in Del-AWARE I. Accordingly, the Board once again reviews that adjudication.

With respect to the velocity and stream erosion issue, the Board found that, with respect to both the North Branch and the East Branch, the

critical velocity is 2.0 feet per second (fps). Del-AWARE I, supra., at 291. The Board concluded that, as a matter of law, "[i]n order to comply with the second and third of the three Payne [v. Kassab, 312 A.2d 86, 11 Pa. Cmwlth. 14 (1973)] standards, DER should have required NWRA and PECO to cease discharges if and when the flow velocities of the respective creeks below their outfalls exceed 2.0 fps, or, in the alternative, DER should have quantified the damage to the receiving streams caused by velocities above 2.0 fps and determined that the benefits to be derived from the project clearly outweigh this environmental harm." Id., at 331. If the resulting velocities could be kept below 2.0 fps, no analysis would be required.

In its discussion of this issue, the Board noted that ". . . we believe that under the third prong of the Payne v. Kassab test it is incumbent upon DER to balance the need for the project against the impact of erosion on the receiving streams, after all possible mitigation of the erosive impacts." Id., at 293. In its concluding remarks, the Board again stated that remand was required with respect to ". . . the requirement that the need for the project be balance against the impact of erosion on the receiving streams, if velocities in the East Branch or the North Branch cannot be reduced to 2.0 fps . . ." Id., at 329.

With respect to construing the meaning of the term "project", we note that the Board devoted some 22 pages to the a description of the Point Pleasant Project. Id., at 234-256. We can only conclude that the Board, in Del-AWARE I, meant the Point Pleasant Project as described in detail and was not merely referring to a specific component, e.g., the outfall on the East Branch.

The Board's order with respect to the NPDES permits and the Bucks Road gauge is simple and straight forward. The Board merely ordered that

appropriate conditions be inserted in the permits. The Board did not require that NPDES permits be issued. However, the need of the NPDES permit condition was related to the introduction of water from the Delaware River and was not related to water quality conditions attendant to additional flows in the East Branch or the North Branch. With respect to East Branch flooding, the Board found that if a flow cutoff condition was incorporated into permit No. ENC 09-77, no flooding would be expected.

Del-AWARE's Depositions and Documents Request

We now can turn to the motions for protective order. PECO's and NP/NW's motions each covered various aspects of Del-AWARE's discovery. To rationally analyze and rule, the Board will separately consider each of Del-AWARE's discovery items. The discussion below is correlated with the number of Del-AWARE's request for deposition or document production and their subject matter. Only those deposition or document requests from which protection is sought are discussed.

A. Requested Depositions

4. Evaluation of Environmental Impacts of Diversion

NP/NW objects to this deposition as being outside the scope of the Del-AWARE III order. As stated by Del-AWARE, the Board concurs. The "environmental impacts of diversion" implies environmental impacts which extend far beyond those which may be erosion related. However, the environmental impacts to the East Branch or the North Branch when water velocities reach or exceed 2.0 fps are entirely within the Board's holding in Del-AWARE I. Since the Board found that velocities below 2.0 fps were not critical, the Board will grant in part and deny in part NP/NW's motion. Del-AWARE will be permitted to depose DER officials only with respect to

erosion related environmental impacts the streams which result when water velocities reach or exceed 2.0 fps.

5. Relative Impacts of Other Available Alternatives

PECO objects to this deposition as being outside the scope of the discovery order and overly broad. The Board concurs. The holding in Del-AWARE I related solely to the need for additional analysis when velocities reach or exceeded 2.0 fps. The matter of additional alternatives to the project were considered separately in Del-AWARE I. As the Board held in Del-AWARE III, the matter of alternatives was already thoroughly explored and will be excluded from discovery in this proceeding. Accordingly, the Board grants PECO's motion for protective order with respect to alternatives.

6. Water Quality Impacts of Diversions

NP/NW objects to this deposition as being outside the scope of the discovery order. The Board agrees. The matters which were remanded to DER did not include water quality. As noted above, the only connection with water quality issues was the remand to condition the outfall permit such that discharges could not occur without a properly issued NPDES permit. As the Board noted above, this involved the mere insertion of an appropriate condition in the outfall permits. The Board holds that water quality impacts fall far beyond the scope of these appeals and, accordingly, NP/NW's motion for protective order in this regard is granted.

7. Need for the Project

Both PECO and NP/NW object to this deposition as being outside the scope of the discovery order. The Board disagrees. As the Board noted above, the issue of the need for the project was a necessary component of the balancing process that DER was ordered to perform in Del-AWARE I. It was this need which DER was expected to balance against the harm of erosion impacts

if, in fact, the stream velocities could not be reduced below 2.0 fps. It is entirely appropriate for Del-AWARE to be able to explore this issue. Accordingly, with respect to this issue, PECO's and NP/NW's motion for protective orders are denied.

8. Integration of Factors/Permit Decision Recommendation

Both PECO and NP/NW object to this deposition as being overly broad and outside the scope of the discovery order. The Board disagrees. Obviously, DER's actions and analyses with respect to the remand issues entail the input of several persons with diverse areas of knowledge. It is appropriate for Del-AWARE to be able to depose the individual responsible for coordinating and synthesizing the effort and making the recommendations. However, as noted above, we have limited certain of the issues. Accordingly, the motions for protective order are denied in part but granted in part in this context. Del-AWARE may depose the DER official responsible for the integration of factors and the making of recommendations with respect to those factors which are not excluded by the instant protective order.

9. Water Quality Impacts of the Diversion

This deposition was not specifically objected to by either PECO or NP/NW. However, the issue of water quality impacts of the diversion appears to be well beyond the scope of the discovery order, The Board, sua sponte, limits Del-AWARE to discovery of water quality impacts related to stream erosion, and then only when flow velocities reach or exceed 2.0 fps. Allowance of discovery related to this issue will effectively permit the reintroduction of this issue to the appeal. The Board specifically excludes discovery related to water quality impacts which may arise from the introduction of water to the East and North Branches from the Delaware River.

10. Liaison With Governor's Office

NP/NW objects to this deposition as being outside the scope of the discovery order. The Board concurs. This Board only has the power to review actions of the Department of Environmental Resources. In the instant matter, the issue before the Board is whether DER, in amending and extending these permits, abused its discretion. Issues which are political in nature or which involve the conduct of individual Commonwealth employees do not fall within the Board's scope of review. Consequently, issues relating to DER-Governor's Office communications or relations are beyond this Board's jurisdiction and, in this connection, NP/NW's motion for protective order is granted.

16. Approval of PECO and NP/NW Alternatives

Both PECO and NP/NW object to this deposition as being overly broad and beyond the scope of the discovery order. The Board agrees. As indicated above, the issue of alternatives to the project as it is currently constituted is beyond the scope of the discovery order. The matter, at this stage, primarily involves the question of the impacts of stream velocities equal to or greater than 2.0 fps balanced against the need/benefits of the project. As discussed in Del-AWARE III, alternatives to the project are no longer an issue. Accordingly, the motions for protective order are granted with respect to this issue.

B. Requests for Documents Production

2. Documents Relating to Communications With DER/Governor's Office

Both PECO and NP/NW object to this request for documents as being overly broad and beyond the scope of the discovery order. The Board agrees in part and disagrees in part. Regardless of what may have been communicated to the Governor's Office, this Board, as noted above, only has jurisdiction to

review the final actions of DER. Accordingly any documents relating to communications with the Governor's Office are protected. With regard to DER, however, Del-AWARE is entitled to review certain documents as they relate to issues which remain in the appeal pursuant to Del-AWARE III and as clarified in the foregoing opinion. Communications from a permittee or a permit applicant certainly are factors which DER considers in making its permitting decisions. Accordingly, the motions for protective order are denied with regard to documents related to PECO's communications with DER on the specific remand issues.

3. Documents Relating to Need for The Project

Both PECO and NP/NW object to this request as being overly broad and beyond the scope of the discovery order. The Board agrees in part and disagrees in part. For the reasons discussed above, the issue of alternatives to the project indeed is beyond the scope of the discovery order and, in this regard, the motions are granted. However, documents relating to the need for the project, for the reasons discussed above, fall squarely within the discovery order and, in this regard, the motions are denied.

Saturday/Sunday Depositions

Both PECO and NP/NW object to the holding of depositions on Saturday and Sundays. The Board agrees. The Board sees no compelling reason to interfere with and disrupt deponents' religious observances, to deprive them of the time to be with family or friends or preclude leisure pursuits. In recognition of Del-AWARE's averred scheduling difficulties, however, the Board grants an additional 30 days to complete discovery. Accordingly, the motions are granted with respect to the holding of depositions on Saturday and Sundays.

Before concluding this opinion, the Board notes that it normally construes the concept of relevancy broadly during discovery. Tenth Street Building Corporation v. DER, Docket No. 85-068-R (Opinion and Order issued March 27, 1987), citing Commonwealth, DER v. Envirogas, 1982 EHB 328 and Chernicky Coal v. DER, 1985 EHB 360. Relevancy, however, is not to be construed as interchangeable with admissibility. Tenth Street, supra. Nonetheless, the Board will not construe relevancy so broadly that issues which have been excluded through the Board's opinion and order in Del-AWARE III are bootstrapped back into the proceeding through discovery.

O R D E R

AND NOW, this 17th day of July, 1987, consistent with the foregoing opinion, it is ordered that:

1. NP/NW's motion for protective order with respect to Del-AWARE's deposition No. 4 is denied in part in that Del-AWARE may inquire into the environmental impacts in the East Branch and the North Branch due to water velocities equal to or greater than 2.0 fps. The motion is granted with respect to any inquiry regarding the environmental impacts of any other segment or component of the Point Pleasant Project.

2. PECO' motion for protective order with regard to Del-AWARE's deposition No. 5 is granted.

3. NP/NW's motion for protective order with regard to Del-AWARE's deposition No. 6. is granted.

4. PECO's and NP/NW's motion for protective order with regard to Del-AWARE's deposition No. 7 is denied.

5. PECO's and NP/NW's motion for protective order with regard to Del-AWARE's deposition No. 8 is denied.

6. Sua sponte, Del-AWARE is precluded from conducting deposition No. 9.

7. NP/NW's motion for protective order with regard to Del-AWARE's deposition No. 10 is granted.

8. PECO's and NP/NW's motion for protective order with regard to Del-AWARE's deposition No. 16 is granted.

9. PECO's and NP/NW's motion for protective order with regard to request for documents No. 2 is granted with respect to the Governor's Office. With respect to DER, the motion is denied only in that Del-AWARE may discover documents relating to PECO or NP/NW communications to DER on those issues

remaining in this appeal as defined in Del-AWARE III and further clarified herein.

10. PECO's and NP/NW's motion for protective order with regard to request for documents No. 3 is denied in part and granted in part. The motions are denied in that Del-AWARE may discover documents relating to the need for the project. The motions are granted in that Del-AWARE may not discover documents which relate to alternatives to the project.

11. PECO's and NP/NW's motions for protective order with regard to Saturday and Sunday deposition is granted.

12. Del-AWARE is granted an additional 30 days to complete its depositions and obtain the requested documents.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, Member

DATED: July 17, 1987

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WILLIAM H. MARTIN, INC.	:	
	:	
v.	:	EHB Docket No. 87-129-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 20, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A communication from the Department of Environmental Resources which notes violations and directs a permittee to undertake specific corrective actions is an appealable action, notwithstanding its being labeled a notice of violation.

OPINION

This matter was initiated by William H. Martin, Inc. (Martin) with the April 8, 1987 filing of a notice of appeal seeking review of a March 6, 1987 Department of Environmental Resources' (Department) letter regarding Martin's Arden Landfill in Chartiers Township, Washington County. The letter was titled "Notice of Violation" and alleged violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and the rules and regulations adopted thereunder at 25 Pa.Code §75.1 et seq.

On April 24, 1987, the Department filed a motion to dismiss this appeal on the grounds that a notice of violation was not an appealable

action. Martin responded to the Department's motion on May 13, 1987, contending that the substance, and not the Department's titling, of the March 6, 1987 letter, is determinative of the letter's appealability. For the reasons set forth below, we are denying the Department's motion.

The Board has repeatedly held that a notice of violation, absent some action affecting the violator's rights or duties, was not appealable. Perry Brothers Coal Company v. DER, 1982 EHB 501. We have also stated that the title affixed to correspondence from the Department did not necessarily establish whether the correspondence was in the nature of an adjudication. Chester County Solid Waste Authority v. DER, 1986 EHB 1169.

The letter presently at issue contains a recitation of three violations relating to the West Valley portion of the landfill and 16 relating to the East Valley portion. The violations are cited in numbered paragraphs, which typically read:

> 1. SWMA §6018.610(2) and 25 Pa.Code §75.26(a) - Only one leachate collection pond was constructed instead of two.
>
> Install the leachate collection ponds as shown on Sheets 1 and 5 of the Approved Plan and permit condition No. 1(a), Sections 5.1 and 18.3.

Unlike the letter in Perry Brothers, which contained a list of alleged violations and requested the violator to submit a remedial plan to address the violations, this letter not only advises Martin of its alleged violations, but directs specific corrective actions. The March 6, 1987 letter to Martin is, in reality, an order, an action of the Department the

review of which is clearly within the Board's jurisdiction.[1]

O R D E R

AND NOW, this 20th day of July, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss the appeal of William H. Martin, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 20, 1987

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[1] The Board has recently been compelled to divine the meaning of a number of letters relating to solid waste management problems. E.g., Chester County Solid Waste Authority, supra; Edward Vogel v. DER, 1986 EHB 914, and Chester County Solid Waste Authority v. DER, EHB Docket No. 86-437-W (Opinion and Order issued June 30, 1987). Affixing titles and disclaimers of appealability to these letters cannot substitute for careful drafting, which will, in turn, eliminate the necessity of the Board devoting its strained resources to resolution of questions of appealability.

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M. DIANE SMITH
SECRETARY TO THE BOARD

C & K COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 87-014-R**
	:	**(Consolidated Appeals)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 21, 1987

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is denied where the petitioner is unlikely to prevail on the merits. A hydrogeologic connection between petitioner's mine site and an off-site discharge establishes petitioner's responsibility for the off-site discharge. Evidence presented at supersedeas hearing shows the likelihood of a hydrogeologic connection between a mine site and an off-site discharge. Because a likelihood of prevailing on the merits has not been shown, it is not necessary to consider other factors relating to the granting of a supersedeas.

OPINION

On January 8, 1987 Appellant C & K Coal Company, Inc. ("C & K") initiated this matter when it filed a notice of appeal with this Board. C & K appealed from a compliance order issued by the Department of Environmental Resources ("DER") on December 16, 1986. DER alleged that two discharges from C & K's Rankin site in Allegheny Township, Butler County

violated DER regulations with regard to effluent limitations. The order directed C & K to provide treatment, although no compliance date was specified.[1] DER issued its order pursuant to the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.S. 1198, as amended, 52 P.S. §1396.1 et seq., and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.S. 177, as amended, 71 P.S. §510.17.

Concurrent with its notice of appeal, C & K filed a petition for supersedeas on which a hearing was held February 10-12, 1987. The Board now rules on C & K's petition.

Factors Affecting Grant or Denial of a Supersedeas

The Board's rules of practice and procedure for granting or denying a supersedeas are found at 25 Pa.Code §21.78, which reads:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered are:
>
> (1) Irreparable harm to the petitioner.
>
> (2) The likelihood of the petitioner prevailing on the merits.
>
> (3) The likelihood of injury to the public or other parties, such as the permittee, in third party appeals.
>
> (b) A supersedeas will not be issued in cases where pollution or injury to the public health safety or welfare exists or is threatened during the period when the supersedeas would be in effect.
>
> (c) In granting a supersedeas, the Board may impose conditions that are warranted by the circumstances, including the filing of a bond or other security.

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[1]DER issued a subsequent compliance order specifying a compliance date of February 2, 1987, which C & K appealed. That appeal, at EHB Docket No. 87-045-R, was consolidated with the instant appeal.

A petitioner for a supersedeas bears the burden of persuading the Board that it is likely to prevail on all three of the factors listed in §21.78(a). Armond Wazelle v. DER, 1984 EHB 865; Carroll Township Authority v. DER, 1983 EHB 239.

C & K operated the Rankin site from sometime after 1981 until September, 1985. Three coal seams were mined -- Lower Clarion (lowest seam), Upper Clarion (middle seam), and Lower Kittanning (highest seam). C & K's Rankin operation was, in essence, a continuation of surface mining which had been conducted by an unknown operator in the 1950's or possibly earlier.

The site is situated on a knob pointing toward the west. To the site's northwest, west and southwest, there existed, prior to C & K's operations, a highwall, the top of which was at an approximate elevation of 1380 feet. During the original mining, excavation into the Lower and Upper Clarion seams[2] proceeded in southeast, east and northeast directions from where these two coal seams intersected the surface of the northwest, west and southwest sides, respectively, of the knob. As mining progressed, spoil was cast to the northwest, west and southwest. The unknown operator never reclaimed the site but simply left the highwall in place. C & K's operation picked up where the earlier mining stopped. Again, C & K mined in the southeast, east and northeast directions.

As part of C & K's permit application, it submitted a drawing, a copy of which was marked at the supersedeas hearing as Appellant's Exhibit 1. Exhibit 1 shows, inter alia, the permit boundary of C & K's operation and several locations for pre-mining sources of strip mine drainage. Two of these locations are the subject of this appeal, namely, RC-22 and RC-25.

---

[2]Because of its elevation and location of outcrop, the Lower Kittanning seam was not mined during the original mining.

Discharge location RC-22 lies southwest of the site but in pre-existing spoil area. RC-25 lies west-southwest of the site and is also in the pre-existing spoil area. Both RC-22 and RC-25 lie outside of C & K's permit area.

The resolution of this dispute will hinge on two issues. The first issue is whether a mine operator can be held responsible for a discharge located near, but not on, its permitted mine area.

The Board recently dealt with such a situation in its adjudication in Hepburnia Coal Company v. DER, 1986 EHB 563. DER had ordered the appellant to treat several discharges, one of which was located off the permitted area. In order for DER's treatment order to be within DER's discretion, the Board held, there must be a hydrogeologic connection between the mine and the off-site discharge. See Hepburnia, supra, Conclusion of Law No. 6.

Therefore, resolution of the instant appeal will hinge on a second issue, namely, whether there is a hydrogeologic connection between C & K's mine site and RC-22 and RC-25. If no such connection is shown, C & K will prevail, as did the appellant in Hepburnia. On the other hand, if a hydrogeologic connection is demonstrated, then C & K can be held responsible for treatment.

On the basis of evidence presented by both C & K and DER, the Board concludes that it is very likely that a hydrogeologic connection exists between C & K's mine site and off-site discharge locations RC-22 and RC-25. In large measure, the Board bases this conclusion on the respective recharge zones portrayed on appellant's exhibit No. 1, at the Board's request, by C & K's and DER's expert witnesses.

C & K portrayed recharge areas which implausibly reached--but did not cross--C & K's permit boundary, a line which exists only on paper. Furthermore, C & K indicated directions for groundwater flow which, in part,

implausibly indicated up-gradient flow directions.[3] Indeed, C & K contends that all groundwater within its irregular mine permit boundary flows toward the northeast because the strike and dip of the strata under the mined Lower Clarion seam and the lithology of the unmined strata beyond the final highwall operate to draw C & K's groundwater away from RC-22 and RC-25.

DER, on the other hand, presented credible evidence that, in the vicinity of discharge locations RC-22 and RC-25, topography controls the direction of groundwater flow. Furthermore, DER convincingly explained that while the lithology may result in some flow towards the final highwall (and away from RC-22 and RC-25), a pool of water can result due to the low porosity of the unmined strata beyond C & K's final highwall. Combined with the relative higher porosity of spoil material, both on and off C & K's site, flows of water from C & K's site to RC-22 and RC-25 are not only probable, but likely.

Another indication of a likely hydrogeologic connection comes from C & K's own testimony. It was explained that in many old mining operations, it was common to cut through the so-called low-wall so that any water in the pit area near the highwall could be drained by gravity. C & K's expert witness testified that the areas where the instant discharges occur appeared to him to be locations for gravity drains. Because the pit areas and highwall of the original mine lie within C & K's mine site, the likelihood of a hydrogeologic connection is enhanced.

On the basis of the evidence heard at the supersedeas, the Board

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[3]The Board is mindful that C & K's expert testified that he considered the topographic representations on appellant's exhibit No. 1 to be inaccurate. However, no corrections were attempted. Furthermore, the exhibit is a copy of a drawing included in C & K's mine permit application. Because no other evidence was presented to the contrary, the Board must accept this map as accurate.

finds a strong likelihood of a hydrogeologic connection between C & K's mine site and discharge locations RC-22 and RC-25. The Board sees little likelihood that C & K will prevail on the merits, since C & K can be held responsible for an off-site discharge where a hydrogeologic connection between its mine site and off-site discharges can be shown. Hepburnia, supra.

Because C & K is unlikely to prevail on the merits, it is not necessary to consider irreparable harm to C & K or injury to third parties. Tenth Street Building Corporation v. DER, 1985 EHB 829.

Before concluding, the Board notes that its conclusion regarding the supersedeas petition does not include consideration of a defense raised by C & K with regard to an alleged DER policy covering pre-existing discharges. C & K alleges that, at the time it sought a permit for the Rankin site, there was a DER policy which operated to relieve C & K of responsibility for pre-existing, non-complying discharges if, during and after mining, C & K did nothing to worsen either the quantity or quality of the discharges. C & K argues that it neither created, caused nor worsened the discharges. Because it relied on the alleged policy when it made its decisions to accept a permit, C & K argues that DER is now estopped from imposing any liability upon C & K for discharges RC-22 and RC-25.

At the supersedeas hearing, evidence on this alleged policy was excluded by order of the Board. In so ruling, the Board relied on McIntire Coal Company, Inc. et. al. v. DER, 1986 EHB 969, in which the Board wrote that "[t]he policy [regarding pre-existing discharges] . . . could not overrule the enforcement clauses of enacted statues, such as §315(a) of the Clean Streams Law, 35 P.S. §691.315(a) . . ." Currently, there is pending a

DER motion to limit issues which seeks to permanently exclude this issue from this appeal. The matter of whether the alleged DER policy can be raised as a defense will be dealt with in the Board's forthcoming ruling on DER's motion. Obviously, if the Board rules that the matter of an alleged DER policy on pre-mining discharges is relevant, the conclusion with regard to the supersedeas petition may be subject to reevaluation by the Board.

O R D E R

AND NOW, this 21st day of July, 1987, it is ordered that C & K Coal Company, Inc.'s petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 21, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
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Katherine S. Dunlop, Esq.
Western Region
For Appellant:
Leo M. Stepanian, Esq.
STEPANIAN & MUSCATELLO
Butler, PA

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HOUTZDALE MUNICIPAL AUTHORITY	:	
	:	
v.	:	EHB Docket No. 85-391-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 29, 1987

OPINION AND ORDER

Synopsis

The Board denies a motion to compel responses to interrogatories and sustains objections to the interrogatories as irrelevant, overbroad, seeking information not yet available and continuing to request answers when a full and complete answer has been provided. The Board grants the motion to compel where responses were vague and the information is readily available to the responding party so it can easily provide a more complete response.

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 ("DER") directing Houtzdale to take remedial measures to prevent the occurrence of giardiasis in customers served by Houtzdale.

The present controversy stems from a motion to compel filed by DER requesting the Board to order Houtzdale to fully and properly respond to interrogatories (specifically, Nos. 1, 2, 8-11, 28-31, 33 and 35) proffered by DER, to which Houtzdale responded on January 16, 1987. Houtzdale filed a

response to DER's motion, and DER, in turn, filed a reply to Houtzdale's response. We will address the interrogatories individually.

Interrogatory No. 1 requests Houtzdale to identify all persons known to Houtzdale to have knowledge of those matters set forth in its Notice of Appeal, and, for each person so identified, to state the substance of facts and/or opinions which constitute that knowledge. DER defines its term "identify" to include information on the person's present or last known business affiliation, business address and phone number; present or last known position or title and a description of the person's duties or responsibilities; and the person's relationship to the subject matter. Houtzdale objected to the question as overly broad and beyond the scope of Pa.R.C.P. 4003.1. It has also asserted that preparation of this answer would cause unreasonable annoyance, burden and expense. In its motion, DER explained that it lacked the specific information requested on only four of the eight people named to have such knowledge by Houtzdale and that the more detailed information is necessary to determine the need for further discovery by deposition in order to avoid the unnecessary waste of time and expense. The Board finds this interrogatory to Houtzdale not to be overly broad. It is limited to persons known to Houtzdale to have knowledge and merely requests Houtzdale to state what information it already has on the knowledge of each person identified. It is not beyond the scope of discovery as set forth in Pa.R.C.P. 4003.1 which authorizes discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party. Further, the rule specifically mentions the identity and location of persons having knowledge of any discoverable matter as being within the scope of permissible discovery, providing this readily available information on only

four of the eight persons named in its answer is not an unreasonable annoyance or burden under Pa.R.C.P. 4011 and may avoid the need for depositions. We will, therefore, grant the motion to compel with respect to Interrogatory No. 1.

Interrogatory No. 3 requests Houtzdale to identify any and all experts consulted regarding the issues raised in the Notice of Appeal. Houtzdale objected to the request stating that it was beyond the scope of discovery set forth in Pa.R.C.P. 4003.5(a)(3). DER alleges Houtzdale was consulting with Dr. Charles Hibler prior to anticipating litigation and, thus, this information would be discoverable under Rule 4003.5(a)(3) which only precludes discovery of facts known and opinions held by an expert and acquired or developed in anticipation of litigation or for trial where the expert will not be testifying. Houtzdale responds by saying Dr. Hibler's opinions prior to the anticipation of litigation relate to matters beyond those being litigated in this appeal and that if and when Dr. Hibler is to be called as an expert witness, then at that time, his opinions will be discoverable. Provided that Houtzdale alerts DER if and when it does decide to use Dr. Hibler as an expert witness, the current response is proper and the motion to compel is denied with respect to Interrogatory No. 3.

Interrogatories 8-10 request the identification of all persons to be called on as experts at trial, the substance of the experts' testimony and any documents written by or ruled upon by the expert in preparation for testimony. Houtzdale's response stated that it had not yet determined who would be called as expert witnesses. Provided that when this determination is made DER is alerted, this response is entirely proper and the motion to compel is denied for Interrogatories No. 8, 9, and 10.

Interrogatory No. 11 asks Houtzdale to identify all documents that

it expects to introduce into evidence at trial. Houtzdale replied that it was not yet sure what documents it would introduce and would wait to see what is needed to rebut DER's evidence. As long as DER receives adequate notice of the list of documents so it is able to review them and prepare for cross examination, this response is proper at this time. The motion to compel is denied for Interrogatory No. 11.

Interrogatories 28-31, 33 and 35 request information supporting or refuting specific opinions and statements averred in Houtzdale's pre-hearing memorandum.

In Interrogatory No. 28, DER seeks all facts, opinions and other evidence known to Houtzdale to support or refute its statement that "DER 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 insisted on treatment." Houtzdale responded by directing DER to the deposition of Samuel Heitzenrater. DER objected to this response as incomplete. Houtzdale, in its response, gave DER the specific page numbers within the deposition to find the information. Because Houtzdale has fully and completely responded to this interrogatory, we deny the motion to compel with respect to Interrogatory No. 28.

Both Interrogatories No. 29 and 30 request any evidence supporting or refuting Houtzdale's statement that chlorination-dechlorination is the "best available technique" and the "best practicable technology" available for the treatment of giardia. To both questions, Houtzdale responded that the information came from DER. DER again objected to these answers as incomplete because they cited no specific documents or source. Houtzdale replied that it had assumed that since this was the method ordered used by DER, it was the best available and best practicable technology. Because the

source of the statement is now understood, we will deny the motion to compel with regard to Interrogatories No. 29 and 30.

Interrogatory No. 31 again requests all information known to Houtzdale to refute or support its statement that there are currently no standards for giardia and that current levels of contamination cannot be shown to pose a health threat. Houtzdale responded by directing DER to the deposition of Samuel Heitzenrater and the testimony of Frederick Marrocco. DER objected to this response as incomplete because it fails to state more specifically where to find this information. Houtzdale responded that DER is equally capable of reviewing the testimony of Messrs. Heitzenrater and Marrocco and the DER regulations. This not a satisfactory reply and Houtzdale must cite with specificity where in these depositions it found the information to support this opinion. The motion to compel is granted for Interrogatory No. 31.

Interrogatory No. 33 requests any information known to Houtzdale to support its statement that the proposed system is best for preventing giardia cysts from entering the distribution system. Houtzdale initially responded that DER had expressed these sentiments in the past but Houtzdale did not say where or to whom these opinions were expressed. In its response, Houtzdale further explains that it interprets DER's choice of this system to mean this is the best system. Because it is now clear that this statement is derived from opinion, not fact, its source is clear and no further answer is required. Consequently, the motion to compel with respect to Interrogatory No. 33 is denied.

Interrogatory No. 35 requests any evidence known to Houtzdale to support or refute its statement that "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." Houtzdale responded that this is common knowledge based on a review of existing literature, depositions of Samuel Heitzenrater, testimony of Frederick Marrocco, and that the conclusion that giardia are no longer present is based on a simple mathematical formula. DER objected to this answer as incomplete. In its response, Houtzdale again directed DER to the testimony of Messrs. Heitzenrater and Marrocco. It also cited a specific DER report which explains the life cycle of a giardia cyst as an explanation of its mathematical formula. Again, Houtzdale's answer is unsatisfactory and to facilitate discovery it must now cite specifically the information in the testimony from which it draws this conclusion. On this question the motion to compel is granted with respect to Interrogatory No. 35.

O R D E R

AND NOW, this 29th day of July, 1987, it is ordered that the Department of Environmental Resources' Motion to Compel Discovery from the Houtzdale Municipal Authority is granted with respect to Interrogatories No. 1, 31 and 35 and is denied with respect to Interrogatories No. 3, 8, 9, 10, 11, 28, 29, 30 and 33. Houtzdale Municipal Authority shall provide the Department of Environmental Resources with full and complete answers to Interrogatories No. 1, 31 and 35 consistent with this order on or before August 28, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 29, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Pittsburgh, PA

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WEST PINE CONSTRUCTION CO. and	:	
ALLEN REBER AND SANTINO ANGELO,	:	
Interrvenors	:	
v.	:	EHB Docket No. 86-236-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 31, 1987

OPINION AND ORDER
SUR
MOTION TO COMPEL

Synopsis

Motion to compel is granted where a party failed to provide full and complete answers to interrogatories and failed to verify its answers in accordance with Pa.R.C.P. 4006(a)(1).

OPINION

This matter was initiated on April 29, 1986 with the filing of a notice of appeal by West Pine Construction Company (West Pine) seeking review of the Department of Environmental Resources' (Department) April 3, 1986 forfeiture of five surety and collateral bonds in the amount of $146,000 posted for Mine Drainage Permit 5479105 in Reilly Township, Schuylkill County. The Board, by order dated May 30, 1986, granted a petition to intervene filed by Allen Reber and Santino Angelo (Intervenors), two individuals who had pledged residential real estate as collateral pursuant to an indemnity agreement in favor of Fortune Assurance Co., surety for two of the bonds posted by West Pine.

The Department served its First Set of Interrogatories on West Pine

and Intervenors on May 19, 1986. When no answers were forthcoming, the Department filed a motion to compel with the Board on September 30, 1986. In an order dated October 8, 1986, the Board granted the Department's motion and directed that answers to the Department's interrogatories be filed on or before October 28, 1986. Intervenors' answers were filed on November 6, 1986, while West Pine's answers were not filed until December 1, 1986. The Department filed a motion for sanctions or, in the alternative, a motion to compel on January 8, 1987, requesting, inter alia, that West Pine's appeal be dismissed for lack of prosecution as is evidenced by West Pine's inadequate, evasive, and unresponsive answers. West Pine responded to the Department's motion on February 4, 1987.

In its motion the Department specifically contends that West Pine's answers to Interrogatories 1, 13-16,30, 36, 45 and 49 are inappropriate and unresponsive for a variety of reasons. In addition, Paragraph 32 of the Department's motion avers that:

> Responses 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 37, 38, 39, 40, 42, 44, 46, 47, 48 also demonstrate West Pine's total lack of diligence in responding to the Commonwealth's Interrogatories...

The Department then continues by citing three examples as support for its allegation that West Pine has been less than diligent in responding to the Department's requests. If the Department wishes the Board to grant it relief regarding these interrogatories, we must have more of a basis than "lack of diligence." We will not devote our strained resources to attempts to ascertain what in West Pine's answers to this latter group of interrogatories constitutes grounds for imposition of sanctions. We will, however, address Interrogatories 1, 13-16, 30, 36, 45 and 49.

Interrogatory 1 stated:

> Please identify any and all persons who have any knowledge concerning the matters set forth in the notice of appeal and the petition to intervene filed in the instant action, and for each person, state the substance of the facts and opinions known to that person.

West Pine answered by merely listing the names of 14 individuals or entities. Since West Pine failed to state the substance of the facts and opinions known by each, its answer was incomplete and inadequate and we will order West Pine to fully and completely answer this interrogatory.

Interrogatories 13-16 requested West Pine to provide information concerning dimensions and physical features of the site, remaining reclamation work, and equipment. West Pine responded "Unknown" to sub-parts of Interrogatory 13 and Interrogatories 14, 15, and 16. Interrogatory 30 requested West Pine to identify mine discharges and pit water accumulations at the site, while Interrogatory 45 requested West Pine to identify coal reserves on the site and the manner of calculating them. Similarly, West Pine responded, "Presently unknown or "Unknown" to these questions. All of the information requested by these interrogatories is properly discoverable and could be readily produced by West Pine. West Pine's answers to these interrogatories are completely inadequate.

Interrogatory 36 states:

> Describe any communications between Fortune Assurance Co. and West Pine, Gaelic, or Intervenors. Please provide a copy of all documented communications.

And, West Pine's response was "Any such communications are privileged." A mere statement that a communication is privileged is not sufficient; the party invoking the privilege must put forth a basis for invocation of the privilege. Consequently, West Pine's response is not complete.

And, the Department has claimed that West Pine's responses to its interrogatories are inadequate because they were not properly verified in

accordance with Pa.R.C.P. 4006(a)(1). West Pine's answers were not verified. West Pine's involvement in bankruptcy proceedings is no excuse for failing to supply proper verification.

ORDER

AND NOW, this 31st day of July, 1987, is is ordered that the Department of Environmental Resources' Motion for Sanctions or, in the Alternative, for an Order to Compel is granted. On or before August 31, 1987, West Pine Construction Co. shall provide full and complete answers to Interrogatories 1, 13-16, 30, 36, and 45 and verify them in accordance with Pa.R.C.P. 4006(a)(1).

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 31, 1987

cc: **Bureau of Litigation**
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COUNTY OF WESTMORELAND	:	
	:	
v.	:	**EHB Docket No. 86-515-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued July 31, 1987
and	:	
MILL SERVICE, INC., Permittee	:	

OPINION AND ORDER SUR MOTION TO COMPEL

Synopsis

Motion to dismiss objections and compel more specific answers to interrogatories is granted in part and denied in part. Permittee's interrogatories pertaining to matters raised in appellant's notice of appeal must be answered where the interrogatories are narrowly drawn and relevant to the preparation of appellant's defense. Relevancy is construed broadly in discovery, and therefore, permittee's interrogatories referring to the basis of appellant's contentions in its notice of appeal are proper subjects of discovery. However, where permittee's interrogatory is broad, and asks for vast amounts of information, appellant only need respond with information immediately at hand and will not be forced to further investigate the matter for a more complete response. The motion to compel is denied where permittee seeks information regarding whether and to what extent the appellant provides support services to a county citizen's group, which is challenging the same

permit issuance in a separate matter. Such information is not relevant to any issue raised in this appeal.

OPINION

This action was commenced by the filing of a notice of appeal on September 5, 1986 by the County of Westmoreland (the County) from the Department of Environmental Resources' (DER's) issuance of a series of permits to Mill Service, Inc. (Mill Service) authorizing the construction and operation of a residual waste disposal facility known as "Impoundment No. 6" in Yukon, Pennsylvania.

The instant matter arises out of a discovery dispute between Mill Service and the County. On October 20, 1987, Mill Service served interrogatories and a request for production of documents upon the County, to which the County responded on January 23, 1987. On March 12, 1987, Mill Service, pursuant to Pa.R.C.P. 4006(a)(2), 4019(a)(1)(i) and 4019(c)(5), filed its motion to dismiss objections and to compel more specific answers to certain interrogatories (motion). The County, in its response filed with the Board on April 1, 1987, maintained its refusal to fully and completely answer these interrogatories, pending the results of the investigation of the County's technical experts into the adequacy of the proposed construction and operation of Impoundment No. 6. The County contends with regard to the matters raised in these interrogatories that its responses will depend in large measure upon these experts' recommendations. However, seven months have passed since the County responded to Mill Service's interrogatories, and the County has failed to file supplemental responses. Moreover, as discussed below, the information sought by Mill Service is not dependent upon the results of any technical investigation. Consequently, the Board holds that

this contention raised by the County as to why it cannot respond to Mill Service's interrogatories is meritless.

SPECIFIC INTERROGATORIES IN DISPUTE

Interrogatory No. 8 reads as follows:

> Describe separately and with particularity all facts and identify all documents and communications upon which Appellant relies or will rely to support its contention in Paragraph 10 of its Notice of Appeal that the construction and operation of proposed Impoundment No. 6 would create new and additional discharges of hazardous materials.

Mill Service argues that the County should have access to this information if it formed the basis of an allegation in its appeal.[1] Further, Mill Service argues that this information is essential and relevant to its preparation of a defense. The County counters that due to the aforementioned lack of technical information on its part, it is unsure of what communications, facts, documents, etc. it will rely upon.

The Board agrees with Mill Service that the response to this interrogatory is relevant to the presentation of its case given the issues raised by the County in its notice of appeal, including that the construction and operation of Impoundment No. 6 would create new and additional discharges of hazardous materials from Impoundment No. 5. Mill Service is entitled to know the basis of the County's allegations with regard to new and additional discharges even if the County has not obtained the results of its technical

---

[1]Paragraph 10 of the County's Notice of Appeal reads:

> Moreover, should Mill Service, Inc. be permitted to construct and operate Impoundment No. 6 as proposed, such construction and operation would create new and additional discharges of hazardous materials from Impoundment No. 5.

investigation.

Further, the Board notes that this request is not unduly burdensome particularly given the fact that sufficient time has elapsed for the County's technical staff to have completed its investigation. The County is ordered to answer this interrogatory completely.

Interrogatory No. 9 reads as follows:

> Describe separately and with particularity all facts and identify all documents and communications upon which appellant relies or will rely to support its contention in Paragraph 11 of its Notice of Appeal that the amount of the bond set by the DER is grossly inadequate for final closure of proposed Impoundment No. 6.

The Board holds that this interrogatory is narrowly drawn and relates directly to contentions raised by the County in its appeal. Mill Service is entitled to the information relied upon by the County in the drafting of Paragraph 11 of its notice of appeal.[2] The County is ordered to answer this interrogatory completely.

Interrogatory No. 10 reads as follows:

> Describe separately and with particularity all facts and identify all documents and communications upon which Appellant relies or will rely to support its contention in Paragraph 12 of its Notice of Appeal that the amount of insurance set by the DER is grossly inadequate to protect

---

[2] Paragraph 2 of the County's Notice of Appeal reads:

> The DER has further found in the above-mentioned Consent Order that Mill Service, Inc. violated Water Quality Permit No. 657203 and NPDES Permit No. PA0027715, and has created a nuisance. These violations of law, environmental rules and regulations and permit conditions reflect Mill Service, Inc.'s lack of ability or intention to comply with statutory requirements, rules and regulations, permit requirements, and common law. Pursuant to 35 P.S. §6018.503(c) of the Solid Waste Management Act, Mill Service, Inc. should have been denied the permit.

> the public and the interests of the Commonwealth itself in violation of the Solid Waste Management Act and the rules and regulations of the DER.

Again this is a narrowly drawn interrogatory, the substance of which is derived directly from the County's notice of appeal.[3] This request is neither oppressive nor burdensome and is fundamental to Mill Service's defense. It is ordered that the County answer this interrogatory.

Interrogatory No. 11 reads:

> Describe separately and with particularity all facts and identify all documents and communications upon which Appellant relies or will rely to support its contention in Paragraph 13 of its Notice of Appeal that Mill Service's construction and operation of Impoundment No. 6 would create a nuisance and aggravate pre-existing harms.

Mill Service repeats its argument here that this request is neither oppressive nor burdensome. Further, Mill Service notes that in its response to this interrogatory, the County stated that "[g]iven Mill Service's inability to properly construct and maintain Impoundment No. 5, Westmoreland County has no reason to believe that Mill Service will construct and operate Impoundment No. 6 in a superior manner so as to avoid the creation of a nuisance and the aggravation of pre-existing harms." Mill Service argues that this is an insufficient response to the nuisance allegation outlined in Paragraph 13 of the County's Notice of Appeal.[4] The Board again finds Mill Service's

---

[3]Paragraph 12 of the County's Notice of Appeal reads as follows:

> The amount of insurance set by the DER is grossly inadequate to protect the public and the interests of the Commonwealth itself, in violation of the Solid Waste Management Act, 35 P.S. §6018.502(e) and the rules and regulations of the Department.

[4]Paragraph 13 of the County's Notice of Appeal reads:

> Mill Service, Inc.'s construction and operation at Impoundment No. 6 would create a nuisance and aggravate preexisting harms.

arguments persuasive. This is a narrowly drawn interrogatory which is not "unduly oppressive or burdensome" and is directly related to the County's nuisance allegation in its notice of appeal, supra. The Board orders that County to answer this interrogatory fully and completely so that Mill Service may prepare an effective defense.

Interrogatory No. 13 reads as follows:

> To the extent not answered in other Interrogatories addressed to Appellant, describe separately and with particularity all facts and identify all documents and communications upon which Appellant relies or will rely to support the allegations, statement, arguments and contentions raised in CRY's [the Concerned Residents of the Yough, a community group also actively contesting the granting of these permits] Notice of Appeal filed in No. 86-513-R and incorporated by reference in Paragraph 15 of Appellant's Notice of Appeal.

Mill Service again, in this carefully worded interrogatory, is requesting that the County merely support the arguments it made in its notice of appeal.[5] The County's only objection to responding completely is that the County and CRY will each handle their respective cases, and there is no need for the County to respond to matters already being pursued by CRY at this time. The Board holds that regardless of the fact that CRY is pursuing the same issues, they were alleged by the County as a basis of its case, and therefore the County must disclose the requested information so that Mill Service can properly prepare its case.

---

[5]Paragraph 15 of the County's Notice of Appeal reads:

> Appellant Westmoreland County hereby adopts and incorporates by reference the objections raised in the Notice of Appeal By Concerned Residents of the Yough, Inc.

Interrogatory No. 15 reads as follows:

> State whether Appellant or any of its agents made any evaluations, reviews, inspections or examinations of the design or specifications for the proposed Impoundment No. 6, and with respect to each such evaluation, review, inspection or examination made by Appellant or its agents:
>
> (a) describe separately and with particularity the nature and extent of the evaluation, review, inspection or examination;
> (b) identify each and every person who conducted or participated in the evaluation, review, inspection or examination;
> (c) state the conclusions or opinions reached as a result of such evaluation, review, inspection or examination;
> (d) identify all persons to whom such evaluation, review, inspection or examination were communicated and state the date of such communication;
> (e) identify the action taken by or on behalf of Appellant in response to such communication; and
> (f) identify any documents and communications which relate to or reflect such evaluation, review, inspection or examination and the subject matter of this Interrogatory No. 15.

Again, this interrogatory is narrowly drawn and a response is essential to Mill Service's building a defense to the County's attack on DER's issuance of the Impoundment No. 6 permit. Yet, the Board also must agree with the County that to completely and specifically answer each interrogatory would be burdensome. Therefore, the Board holds that the County must respond to this interrogatory as completely as possible utilizing all information currently at its disposal without launching a separate investigation into this matter. See Tenth Street Building Corporation v. DER, EHB Docket No. 85-068-R (Opinion and order issued March 27, 1987). The County will therefore respond in good faith to this interrogatory with its "immediately at-hand knowledge with no implication that [the County] is to search...in its files or elsewhere." Magnum Minerals v. DER, 1983 EHB 310 at 314.

Interrogatories 17 and 18 read as follows:

> 17. Has Appellant offered or rendered any assistance or service to CRY (outside of such assistance or service as is rendered to residents of Westmoreland County in the ordinary course of the County's business) including, but not limited to, contributions of money, equipment or the time of County personnel?
>
> 18. If the answer to the preceding interrogatory is in the affirmative, please
> (a) identify all persons authorizing and/or engaged in such assistance and/or service, and
> (b) describe with particularity the services or assistance so offered or rendered.

Mill Service contends that the basis for this interrogatory is that it believes that the two lawsuits are duplicative and might lead to inconsistency of result. The County objects to these interrogatories, stating that they are irrelevant and have no relationship to its notice of appeal.

The Board believes that this material is not relevant to Mill Service's defense in this appeal. Even though the Board has acknowledged in previous decisions that the concept of relevancy is broadly construed during discovery, Del-AWARE, Unlimited, Inc. v. Commonwealth, DER, NWRA and NP/NW, Intervenors, EHB Docket No. 82-037-R (Opinion and order issued July 17, 1987); Chernicky Coal v. Commonwealth, DER, 1985 EHB 360 at 363, it believes that the County's provision of services to any party is not relevant to any of the issues raised in the County's appeal. Therefore, the Board holds that the County need not respond to these interrogatories.

Interrogatories 23 and 27 read as follows:

> 23. Has Appellant proposed, authorized or conducted any scientific tests, completed, currently underway or proposed, that test for leakage or ground water contamination from Mill Service's Yukon site?
>
> 27. Has Appellant proposed, authorized or conducted

any scientific tests (completed, currently underway or proposed) that test for air pollution at or in the vicinity of Mill Service's Yukon site?

The County originally answered that at the time these interrogatories were propounded, they had not conducted any scientific testing. At this time, Mill Service requests a supplemental response since these original answers did not indicate an unwillingness to respond but merely that as of the time of their propounding, no scientific testing had been done. The Board holds, consistent with the County's own claim that it had enlisted a technical expert over seven months ago, that the County must supplement its responses as fully as possible.

Interrogatories 33, 34, 35 and 36 read as follows:

33. Please identify the name, address and area of expertise of each and every person who will testify as an expert on Appellant's behalf before the EHB in the appeal filed by Appellant with the EHB.

34. What will be the subject matter of the testimony to be given by each expert mentioned in response to the preceding Interrogatory?

35. What will be the opinion of each expert and upon what facts will each opinion be based?

36. Please identify the name and address of every other person who will testify on Appellant's behalf before the EHB in the appeal filed by Appellant with the EHB and the subject matter of each person's testimony.

The County argues that these interrogatories are premature, speculative, and require the investigation of voluminous documents. The Board's view of discovery is that it is a process designed to foster the free exchange of information and the Board is reluctant to impede this process. Consequently, relying on the good faith of the County, the Board holds that the County must provide the requested information if it is in fact information

which the County currently has the ability to provide.

ORDER

AND NOW, this 31st day of July, 1987, it is ordered that Mill Service's motion to compel is granted in part and denied in part. The County of Westmoreland is ordered to provide supplemental responses with respect to Mill Service's interrogatories Nos. 8, 9, 10, 11, 13, 15, 23, 24, 33, 34, 35, and 36 on or before August 30, 1987. Mills Service's motion to compel is denied with respect to interrogatories Nos. 17 and 18.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: July 31, 1987

cc: **Bureau of Litigation**
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Kirkpatrick & Lockhart

JEK CONSTRUCTION COMPANY :
:
v. : EHB Docket No. 86-629-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 31, 1987

OPINION AND ORDER SUR
MOTIONS TO DISMISS, TO APPEAL
NUNC PRO TUNC AND FOR SUMMARY JUDGMENT

Synopsis

Motion to dismiss an appeal as untimely is denied and request for an allowance of an appeal nunc pro tunc is granted where the Board did not adhere to its customary practice regarding skeleton appeals. Appellant's motion for summary judgment because the Department of Environmental Resources denied its permit application, rather than allowing it to supplement it under 25 Pa.Code §75.22(c), is denied because the denial was also based on technical considerations relating to site suitability.

OPINION

This matter was initiated by JEK Construction Company (JEK) on November 14, 1986, with the filing of a notice of appeal seeking review of the Department of Environmental Resources' (the Department) October 1, 1986 denial of a Phase I permit application for a landfill in Fallowfield Township, Washington County.

On March 19, 1987, the Department filed a motion to dismiss JEK's

appeal as untimely, since JEK had stated in its notice of appeal that it had received notice of the Department's denial "on or about October 6, 1986." JEK responded to the motion on March 23, 1987, contending that it was in the process of preparing its appeal when it learned that a special form was necessary and that it requested the form from the Board in a letter dated October 28, 1986, which was received by the Board on October 30, 1986. JEK argued that the Board should have docketed the October 28, 1986 letter as a skeleton appeal. It also raised an issue that the Department, in reviewing its application, had failed to comply with 25 Pa.Code §75.22(c). A contemporaneous Motion to Allow Appeal Nunc Pro Tunc, containing the same arguments, was filed by JEK.

JEK then filed a Motion for Summary Judgment on May 6, 1987, alleging that there were no disputed facts and that it was entitled to judgment as a matter of law because of the Department's not availing JEK of the opportunity to correct the deficiencies in its permit application pursuant to the provisions of 25 Pa.Code §75.22(c). The Department responded to this motion on May 21, 1987, admitting all the factual averments in JEK's motion, but also contending that the Department's denial of JEK's permit application was not solely for reasons of incompleteness.

We will rule first on the Department's motion to dismiss and JEK's motion for an allowance of an appeal nunc pro tunc.

Jurisdiction of the Board does 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. 25 Pa.Code §21.52(a). See Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth.478, 364 A.2d 761 (1976). 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. 25 Pa.Code §21.53. Good cause is defined by the common law standards for nunc pro tunc cases. 25 Pa.Code §21.53. Consistent with these cases, the Board permits filing of an appeal nunc pro tunc where fraud or a breakdown in the Board's procedures contributed to the tardy filing of the appeal. Appalachian Industries, Inc. v. DER, EHB Docket No. 86-521-W (Opinion and order issued May 11, 1987).

We must determine whether any action by the Board prevented JEK from timely filing its appeal. JEK has not alleged that the Board informed it that its appeal must be filed on forms provided by the Board. The Board's rules do not contain such a requirement; 25 Pa.Code §21.51(a)-(f) only require the appeal to be in writing and contain certain information. And, JEK is charged with constructive notice of such requirement. 45 Pa.C.S.A. §904. So, JEK's belief regarding the appeal forms cannot serve as the basis of an appeal nunc pro tunc.

But, we believe JEK's argument that the Board should have docketed JEK's October 28, 1986 letter as a skeleton appeal has merit and hold that our failure to do so was a breakdown in the Board's procedures sufficient to warrant the allowance of an appeal nunc pro tunc. The October 28, 1986 letter, in its entirety, reads as follows:

October 28, 1986

Re: Permit Application - Phase I Review
Clairmont Solid Waste Disposal Site
Fallowfield Township
Washington County
I.D. #101388

Environmental Hearing Board
Third Floor
221 North Second Street
Harrisburg, PA 17101

Gentlemen:

Pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. Section 510-21; and the Administrative Agency Law, 2 Pa.C.S., Chapter 5A, please be advised that JEK Construction Company plans to appeal the decision of the Commonwealth of Pennsylvania Department of Environmental Resources concerning the permit application denial of the above referenced site.

Will you please furnish us with the appeal form and regulations governing practice and procedure before the Board.

Very truly yours,

JEK CONSTRUCTION COMPANY

/s/ GERALD T. VITALE, JR.

The Board treated the October 28, 1986 letter as a request for information. However, the Board's customary practice is, in fact, to docket any correspondence remotely resembling a notice of appeal as a skeleton appeal. This letter would have been normally docketed as a skeleton appeal, and our failure to docket it was a breakdown in the Board's procedures which prevented a timely filing. Consequently, we will grant JEK's request for an allowance of an appeal nunc pro tunc.

We now address JEK's Motion for Summary Judgment. We are empowered to enter summary judgment in favor of a party where the pleadings, depositions, answers to interrogatories, and admissions on file establish that there are no disputes as to material fact and the party is entitled to judgment as a matter of law. Summermill Borough v. DER, 34 Pa.Cmwlth.574, 383 A.2d 1320 (1978). We believe that summary judgment is barred here because there are disputes of material fact and JEK is not entitled to judgment as a matter of law. The

language of the pertinent regulation, 25 Pa.Code §75.22(c) provides that

> (C) Incomplete applications.
> When the Department has found an application incomplete, the applicant shall be notified of the deficiencies in writing and the application shall be returned. The applicant must supply the requested information within 90 days or such longer period as the Department may specify or agree to. Failure to supply such information shall constitute sufficient cause for denial of the application.

Recently, the Commonwealth Court, in D'Amico v. Board of Sup'rs, Alsace Tp., ___ Pa.Cmwlth. ___, 526 A.2d 479 (1987), interpreted a similar requirement in the sewage facilities program at 25 Pa.Code §71.44, as mandating providing an applicant an opportunity to supplement its permit application when the reviewing agency found it to be incomplete. However, that is not the case here. The permit denial is not solely predicated on the lack of sufficient information, as the following passage from the first paragraph indicates:

> Based on this review, your permit application is being denied due to the lack of information, the incompleteness of the application, and site specific conditions of the site which would preclude development of a sanitary landfill.

The remaining text of the denial letter notes numerous concerns and deficiencies relating to overall site suitability, many of which would not be addressed by the submission of additional or amendatory information. Even if this were not clear from the face of the letter, we must view the text in the light most favorable to the non-moving party, the Department. Broad Top Township v. DER and Dash Coal Company, EHB Docket No. 86-607-W (Opinion and order issued July 2, 1987). Therefore, because of the Department's denial of the permit application was also for technical reasons regarding site suitability, JEK is not entitled to an opportunity to supplement its application under 25

Pa.Code §75.22(c) and is, therefore, not entitled to judgment as a matter of law.

O R D E R

AND NOW, this 31st day of July, 1987, it is ordered that the Department of Environmental Resources' Motion to Dismiss is denied, JEK Construction Company's Motion to Allow Appeal Nunc Pro Tunc is granted, and JEK Construction Company's Motion for Summary Judgment is denied. The Department shall file its pre-hearing memorandum on or before August 30, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: July 31, 1987

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DELTA PENN CORPORATION :
:
v. :
: EHB Docket No. 85-326-R
COMMONWEALTH OF PENNSYLVANIA, : (Consolidated Appeals)
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued August 3, 1987

OPINION AND ORDER

Synopsis

An appeal is dismissed for failure to prosecute.

OPINION

This matter involves three appeals by Delta Penn Corporation (Delta Penn) from four compliance orders issued by the Department of Environmental Resources (DER) under the provisions 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. The compliance orders pertain to Delta Penn's Hostetter coal refuse reprocessing operation located in Unity Township, Westmoreland County.

On August 5, 1985 Delta Penn appealed compliance orders issued by DER, one on July 25, 1985 and another on July 26, 1985. DER alleged that, on July 24 and July 26, 1985, Delta Penn was pumping water with a pH of less than 6.0 from sedimentation pond "C" to a stream. Each order directed Delta Penn to cease pumping. This appeal was docketed at No. 85-326-R. On August 12, 1985, Delta Penn appealed a July 11, 1985 compliance order which cited it for, on July 10, 1985, pumping water with a pH of less than 6.0 from sedimentation

ponds "B" & "C" and for inadequate erosion and sedimentation controls. Delta Penn was ordered to provide adequate treatment and to upgrade its erosion and sedimentation controls. This appeal was docketed at No. 85-339-R. Finally, on August 15, 1985 Delta Penn appealed a July 17, 1985 compliance order which cited it with failure to comply with the July 11, 1985 compliance order. This appeal was docketed at No. 85-345-R. By order of the Board dated September 17, 1985, the three appeals were consolidated.

Both parties engaged in discovery and both have filed pre-hearing memoranda. On February 21, 1986, the Board sent a notice to the parties advising that the dates June 15-19, 1987 were reserved for a hearing on the merits. On January 22, 1987, counsel for Delta Penn moved to withdraw his appearance, which motion the Board granted by order dated January 26, 1987.

On March 27, 1987, the Board issued a notice stating that the hearing in this matter would be held June 15-19, 1987. After the Board was advised by counsel for DER that he was unable to establish contact with anyone connected with Delta Penn, the Board, by letter dated May 18, 1987, ordered Delta Penn to file, on or before June 1, 1987, a statement of its intent to go forward with its appeals.

The letter was sent via certified mail, return receipt requested. On June 5, 1987, the U. S. Postal Service returned to the Board the letter of May 18, 1987 with the indication that, after two notices, it was unclaimed by Delta Penn. The Board issued a notice that the scheduled hearing was cancelled and a rule to show cause why Delta Penn's appeal should not be dismissed for failure to prosecute.

The rule to show cause was sent via certified mail, return receipt requested, on June 5, 1987. On June 21, 1987, the U. S. Postal Service returned the rule to show cause, again indicating that it was unclaimed by

Delta Penn.

In a final attempt to contact Delta Penn, on July 1, 1987 a call was placed to the phone number provided by Delta Penn. The person who answered indicated that Delta Penn no longer had office operations at that location but that all records were transferred to a person in Oklahoma.

In this appeal, DER bears the initial burden of proof, and the Board is generally reluctant to dismiss an appeal for lack of prosecution where DER has the burden. However, the Board is under no obligation to expend time and resources to search for missing appellants, and dismissal for failure to prosecute is appropriate. Granbay Coal Company, Inc. v. DER, 1986 EHB 1092.

ORDER

AND NOW, this 3rd day of August, 1987, it is ordered that the appeal of Delta Penn Corporation is dismissed for failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 3, 1987

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WEST PINE CONSTRUCTION CO. and	:	
ALLEN REBER AND SANTINO ANGELO	:	
Intervenors	:	
v.	:	EHB Docket No. 86-236-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 7, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Partial summary judgment is granted in an appeal of a bond forfeiture. Because the operator failed to appeal the cease order and the two failure to abate orders underlying the forfeiture, it is precluded from now challenging the findings and determinations of those orders. In light of the violations conclusively established by the unappealed orders, the Department of Environmental Resources had a duty under §4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(h) to forfeit the operator's bond. Consequently, the Department is entitled to summary judgment on the issue of the propriety of forfeiture. However, since there were material issues of fact regarding the amount of the forfeiture, summary judgment is denied on this issue.

OPINION

This matter was initiated on April 29, 1986 with the filing of a notice of appeal by West Pine Construction Company (West Pine) seeking review of the Department of Environmental Resources' (Department) April 3, 1986

forfeiture of five surety and collateral bonds in the amount of $146,000 posted for Mine Drainage Permit 5479105 in Reilly Township, Schuylkill County. The Board, by order dated May 30, 1986, granted a petition to intervene filed by Allen Reber and Santino Angelo (Intervenors), two individuals who had pledged residential real estate as collateral pursuant to an indemnity agreement in favor of Fortune Assurance Co., surety for two of the bonds posted by West Pine.

The Department, on October 8, 1986, filed a motion to dismiss contending that because West Pine failed to appeal a November 8, 1985 cease order and December 12, 1985 and March 4, 1986 failure to abate orders, it was precluded from challenging the findings and determinations set forth in those orders. The Department further argued that, based on the violations established by those unappealed orders, its forfeiture of the bonds was proper under §4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4 (the Surface Mining Act) and §315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315. Although captioned a motion to dismiss, the Department's pleading requested the Board to dismiss the appeal in accordance with Rules 1034 and 1035, Pa. R.C.P. Therefore, we will treat the Department's motion as a motion for summary judgment.

Intervenors responded to the Department's motion on October 16, 1986, contending that since the Department orders were not adjudications and, therefore, not appealable to the Board, their validity could now be challenged. Because the Rules of Civil Procedure did not apply to the Board, Intervenors argued that the Board had no power to grant summary judgment. In the alternative, Intervenors averred that there were questions of material fact which prevented the entry of summary judgment in the Department's favor.

West Pine filed an answer to the Department's motion on November 7, 1986, admitting that it failed to appeal the three orders, but arguing that it should not now be precluded from contesting those orders because of procedural technicalities advanced by the Department in its motion.

Contrary to Intervenors' assertions, this Board has the authority to grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law." Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320, 1322 (1978). For the reasons set forth below, we will enter partial summary judgment in the Department's favor.

Section 4 of the Surface Mining Act provides in relevant part that:

> (h) If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such portion of the bond forfeited, and shall certify the same to the Department of Justice, which shall proceed to enforce and collect the amount of liability forfeited thereon, and where the operator has deposited cash or securities as collateral in lieu of a corporate surety, the department shall declare said collateral forfeited...

A similar provision is contained in §315(b) of the Clean Streams Law 35 P.S. §691.315(b). Commonwealth Court has ruled in Morcoal Co. v. Com., Dept. of Environ. Res., 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983), that the language of §4 of the Surface Mining Conservation and Reclamation Act mandates the Department to forfeit bonds where an operator fails or refuses to comply with the law. See also King Coal Company v. DER, 1985 EHB 604. West Pine has admitted that it failed to appeal the three compliance orders underlying the Department's forfeiture. Therefore, it is precluded from contesting the violations set forth in those orders in this proceeding. Armand Wazelle v.

DER, 1984 EHB 748. Intervenors are also precluded from challenging the existence of those violations. East Lampeter Tp. Sewer Authority v. Butz, 71 Pa. Cmwlth. 105, 455 A.2d 220 (1983). Applying the Commonwealth Court's reasoning in Morcoal, and, given the existence of the violations at the site and West Pine's failure to cure them as evidenced by the two failure to abate orders, the Department's forfeiture of the bonds was proper. Consequently, we will enter summary judgment in the Department's favor on the issue of propriety of the forfeiture.

However, our task of reviewing a bond forfeiture action is two-fold. In addition to determining whether it was proper for DER to forfeit the bonds in light of the operator's violations, we must also determine the correctness of the amount of liability under the bond, which, of necessity, requires an examination of the bond instrument. Southwest Pennsylvania Natural Resources, Inc. v. DER, 1982 EHB 48. Since the Department has failed to plead this issue in its motion, much less provide the Board with copies of the bond instruments, we cannot reach any conclusions regarding the propriety of the amount of the forfeiture. Therefore, there are outstanding issues of material fact which preclude us from granting summary judgment in the Department's favor on this aspect of the appeal. For an analysis of an analogous situation relating to civil penalty assessments, see Thomas Fitzsimmons v. DER, 1986 EHB 265.

ORDER

AND NOW, this 7th day of August, 1987, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted in part and denied in part. Summary judgment is entered in the Department's favor on the issue of the propriety of the Department's bond forfeiture, and this appeal is dismissed in part as it relates to that issue. The Department may file an additional motion for summary judgment regarding the amount of liability under the forfeited bonds.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 7, 1987

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