COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME I

(Pages 1—329)

1987

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1987

Chairman.....MAXINE WOELFLING

Member .....WILLIAM A. ROTH

Member.....ROBERT D. MYERS
from 12/23/87 to present

Secretary.....M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1987 EHB 1

FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1987.

The Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended. Section 21 of Act 275, §1921-A(a) of the Administrative Code, empowered the Board

> "to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," on any order, permit, license or decision of the Department of Environmental Resources."

1987

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

XINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

HOUTZDALE MUNICIPAL AUTHORITY	:	
	:	
v.	:	EHB Docket No. 85-391-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	January 7, 1987

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

The Board holds that a petitioner has satisfied the criteria for grant of a supersedeas under Rule 21.78 where no harm to the public would occur because of a chlorination/dechlorination system to de-activate giardia lamblia cysts, where there was a reasonable doubt concerning the necessity for a multiple barrier treatment system, and where relatively substantial costs would have to be incurred by the petitioner for the design, construction, and operation of the filtration aspect of the multiple barrier system.

OPINION

This matter was initiated by the filing of a notice of appeal by the Houtzdale Municipal Authority ("Houtzdale") on September 23, 1985. Houtzdale is contesting a September 9, 1985 order from the Department of Environmental Resources ("Department") directing Houtzdale to undertake various measures to prevent the recurrence of giadiasis in users of its water supply system. The order was issued pursuant to §10(b) of the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. §721.10(b) ("Safe

Drinking Water Act"), §501 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.501 ("Clean Streams Law"), and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17 ("Administrative Code"). Another order relating to the giardiasis problem was issued by the Department to Houtzdale on March 31, 1986. Houtzdale also appealed that order, and the appeal was docketed at 86-242-W. Docket Nos. 85-391-W and 86-242-W were consolidated at Docket No. 86-391-W by order of the Board dated May 30, 1986.

The present controversy relates to Houtzdale's request that the Board supersede the Department's orders. Houtzdale's initial Petition for Supersedeas was filed on June 2, 1986. The Department moved to quash the petition on June 5, 1986, and the Board, in a telephone conference call with the parties on June 12, 1986, denied the petition, but gave Houtzdale leave to refile. Houtzdale amended and refiled its petition on June 16, 1986. Because of the pendency of a related proceeding in Commonwealth Court and the parties' attempts to reach an amicable resolution, the Board did not rule on the amended petition. Houtzdale filed a second petition for supersedeas on August 27, 1986, which is the focus of this opinion and order. A hearing regarding the petition was held on September 29, 1986.

Although Houtzdale is generally seeking a supersedeas of the two Department orders, it is most concerned with those portions of the orders requiring Houtzdale to study, design, construct, and operate a filtration system in order to prevent future occurrences of giardiasis in users of the Houtzdale water supply system. Houtzdale contends that the super chlorination/dechlorination system it has constructed in accordance with the Department's orders is sufficient to control giardia lamblia; that no cases of giardiasis have occurred since July, 1984; that there are no other

contamination problems that warrant the construction of a filtration system, and that Houtzdale will have to expend funds to study the feasibility of a filtration system, money which it does not possess. The Department, on the other hand, contends that filtration is the only effective treatment means to control giardia. For the reasons set forth below, we are superseding those portions of the orders which require the evaluation, design, construction, and operation of a filtration system. Rule 21.78(a)[1] of the Board's rules of practice and procedure sets forth the standards governing the denial or grant of a supersedeas:

> 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.

A party seeking a supersedeas bears the burden of satisfying all three standards enumerated in Rule 21.78(a). Carroll Township Authority v. DER, 1983 EHB 239, 240. Houtzdale has satisfied these tests.

The irreparable harm Houtzdale contends it will suffer relates exclusively to its costs of compliance with the order, costs which, alone, we believe cannot constitute irreparable harm. Armond Wazelle v. DER, 1984 EHB 865. Clifford Speerstra, Houtzdale's manager, testified that the feasibility study mandated by the earlier Department order cost $11,400, and that construction of the filtration system was estimated to be $85,800. Mr.

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[1] The Board's rules relating to supersedeas were amended, effective August 23, 1986, four days before the instant petition was filed. Rule 21.78 was modified somewhat, but the modifications do not affect the outcome of this matter.

Speerstra also cautioned that the $211,000 expended on the super chlorination/dechlorination system was twice the amount estimated in the feasibility study. Houtzdale did receive grants and loans from the state to defray the cost. The evidence from the Petitioner in this area is weak; little was presented as to the impact of these costs on either Houtzdale or its customers. But, in light of our holding in William Fiore v. DER, 1983 EHB 528, 531, that this factor must be balanced with the factor of likely success on the merits and our finding below relating to this factor, we will deem Houtzdale to have met this standard.

The Board, in evaluating a request for supersedeas, must ascertain the likelihood of the Petitioner's succeeding on the merits. A petitioner's chance of success on the merits must be more than speculative, but he need not be required to establish his claim absolutely. Fisher v. Department of Public Welfare, 497 Pa. 267, 439A.2d 1172(1982). Rather, the petitioner must garner a prima facie case of showing a reasonable probability of success. Mourat v. C. P. Ct. of Lehigh Co., 515 F.Supp. 1074 (E.D. Pa. 198_). We believe that Houtzdale has satisfied this test.

The primary issue before the Board is not the Department's authority to order Houtzdale to address the problems raised by the presence of giardia lamblia in its system. Although the language of those provisions of the Safe Drinking Water Act pertaining to enforcement is not as expansive as other contemporaneous environmental protection statutes, when coupled with related provisions in the Clean Streams Law and the Administrative Code, it is sufficient to provide an enforcement mechanism to deal with the problem before us, namely the public health problem caused by an outbreak of giardiasis. What is before us is the appropriateness of the remedial measures prescribed by the Department.

While the Department's expert advocates a multiple barrier system because it provides a back-up in the event one component or another is inoperative and because it removes, rather than deactivates the cysts, he also stated that the super-chlorination/dechlorination system provided an adequate level of protection if operated as designed. The Department obviously prefers the multiple barrier system for these reasons and believes that filtration is required because giardiasis outbreaks have been primarily associated with unfiltered surface water supplies. But, the Board believes there are significant issues which must be addressed before the multiple barrier system is imposed upon Houtzdale.

Are giardia lamblia cysts so ubiquitous in our environment that expensive technology is necessary to eliminate them? Or, are they unpredictable or cyclical? Are there other problems with the Houtzdale system which necessitate filtration of the supply? Does the chlorination/dechlorination process create a water quality problem because of excess in-stream chlorine? The evidence adduced at the hearing did not support the proposition that giardia is so ubiquitous and chlorination so unreliable and/or so frought with attendant water quality problems that multiple barriers were required. In fact, the Department's personnel supported the proposition that the chlorination system was effective and offered little more to support the multiple barrier concept than a preference because cysts were eliminated rather than deactivated. In light of such testimony, we believe Houtzdale has satisfied the criteria of likelihood of success on the merits.

We believe that if those portions of the orders relating to the filtration system were superseded, that there will be little likelihood of injury to the public. This is so because in the event giardia lamblia cysts

were to recur before the filtration system is operational, the super-chlorination/dechlorination system, which is operational, would provide, by the Department's own admission, an adequate level of protection if operated as designed. The Department is concerned that the chlorination/dechlorination system is not an effective long-term solution because the cysts may only be rendered non-viable, while filtration removes them completely. The Department also is skeptical about the reliability of the chlorination/dechlorination system because it may break down. But filtration also involves mechanical and electrical equipment which is subject to breakdown and human error. The Department wishes to provide the highest level of protection to the public, which is commendable, but the chlorination/dechlorination system in place will provide a suitable level of protection until the filtration issue is resolved. Furthermore, we are also persuaded by the fact that there have been no cases of giardiasis since 1984 and the boil water advisory imposed by the Department was lifted in July, 1986 when the chlorination/dechlorination system came on line.

ORDER

AND NOW, this 7th day of January, 1987, it is ordered that Paragraph 1 of the Department's order of March 31, 1986, is superseded pending an adjudication on the merits. It is further ordered that only those portions of Paragraph 2 which require Houtzdale to operate the interim chlorination/dechlorination facility as a back-up to filtration are superseded.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: January 7, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Winifred Prendergast, Esq.
For Appellant:
Robert Ging, Jr., Esq.
Pittsburgh, PA

mjf

DEBORAH A. LEPLEY :
:
v. : **EHB Docket No. 86-618-R**
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and WINDBER HIGH STANDARD COAL CO., Permittee Issued: January 7, 1987

OPINION AND ORDER

Synopsis

The above captioned appeal is dismissed for Appellant's failure to perfect his appeal in accordance with 25 Pa.Code §21.52.

OPINION

Appellant, Deborah A. Lepley ("Lepley") initiated this matter by filing a Notice of Appeal on November 4, 1986. Lepley sought to review the refusal by the Department of Environmental Resources (DER) to take action against the Permittee, Windber High Standard Coal Company, regarding an alleged loss of well water. Lepley's notice of appeal consisted of a type-written letter to the Board. However, Lepley's appeal was not perfected; the following information was missing: the date Lepley received the DER action; and indication that Lepley notified the permittee, the Bureau of Litigation, and the responsible DER official.

On November 5, and again on November 26, 1986, the Board sent Lepley its standard "Acknowledgement of Appeal and Request for Additional

Information." Attached to each request was the Board's standard Notice of Appeal form as well as a copy of the Board's rules of practice and procedure. Each request afforded Lepley 10 days from receipt to supply the requested information. The second request was sent by certified mail, return receipt requested. The return receipt indicates that Lepley received it on November 29, 1986. As of this date nothing has been received from Lepley in response to the Board's second request of November 26, 1986.

Under the provisions of 25 Pa.Code §21.52(c), "[T]he appellant shall, upon request from the Board, file the required information or suffer dismissal." Under the above outlined circumstances, the Board is justified in dismissing the instant appeal for failure to perfect. Central Western Pennsylvania Mining Corp. v. DER, 1985 EHB 817.

O R D E R

AND NOW, this 7th day of January 1987, pursuant to 25 Pa.Code §21.52, the above captioned appeal is dismissed for failure to perfect.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 7, 1987

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

For Appellant:
Deborah A. Lepley (pro-se)
Stoystown, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

BOLIVAR BOROUGH :

v. : EHB Docket No. 86-335-R

: January 14, 1987

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

SYNOPSIS

Sanctions were imposed against Appellant for failure to file a pre-hearing memorandum as ordered by the Board. Pursuant to the authority granted by 25 Pa.Code §21.124, Appellant is precluded from presenting its case in chief.

OPINION

On July 8, 1986, the Board issued Pre-Hearing Order No. 1, requiring that Appellant file a pre-hearing memorandum on or before September 22, 1986. The purpose of the memorandum is to outline the factual and legal bases of the appeal. When no memorandum had been filed by October 2, 1986, the Board sent a notice to counsel for Appellant via Certified Mail warning that failure to file the memorandum within 10 ten days might result in the imposition of sanctions. When the memorandum still had not been filed by October 29, 1986, the Board sent a notice to counsel for Appellant via certified mail warning that failure to file the same by November 10, 1986 would result in the imposition of sanctions. To date no such memorandum has been filed with the Board. This is an appeal of a DER compliance

order. Consequently, DER at least as an initial matter bears the burden of proof. 25 Pa.Code §21.101(b) (3). Therefore, dismissal of the appeal is not an appropriate sanction. See Armond Wazelle v. DER, EHB Docket No. 83-063-G. (Opinion and Order dated September 13, 1983). However, the Board will not tolerate continued disregard of its orders.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered that at the hearing on the merits of this appeal, if and when held, Appellant will be precluded from presenting its case in chief. Appellant will be limited to the presentation of evidence such as would normally be offered in rebuttal, rather than in its case in chief, cross-examination of DER's witnesses, and the filing of a post-hearing brief. DER's pre-hearing memorandum is due within fifteen (15) days of receipt of this Opinion.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, Member

DATED: January 14, 1987

cc: Bureau of Litigation
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Western Region
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J. Allen Roth, Esq. (Certified Mail)
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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

SCOTT PAPER COMPANY	:	
	:	
v.	:	**EHB Docket No. 75-171-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued January 15, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS AS MOOT

Synopsis

The Board denies the Motion to Dismiss an appeal from a Department of Environmental Resources ("DER") certification of a National Pollution Discharge Elimination System (NPDES) permit as moot even though the permit expired by operation of law when the renewal permit was issued by the DER. Appellant Scott Paper Company ("Scott") is still subject to collateral legal consequences. DER has the power, pursuant to Section 605(c) of the Clean Streams Law, 35 P.S. §691.605(c), to impose civil penalties for a five year period from the date of any violation of a permit provision related to the certification, pursuant to Section . As a logical consequence, of the foregoing, the Board, by separate order, grants Scott's motion to consolidate the instant appeal with an appeal from the renewal permit.

OPINION

This matter was initiated by the filing of an appeal by Scott Paper Company on July 29th, 1975, from a June 30, 1975 DER "Certification"

respecting National Pollution Discharge Elimination System (NPDES) Permit No. PA0013081 ("Permit") which permit authorized the discharges of treated waste water from its Tinicum Township, Delaware County plant, to the Delaware River. The permit to which the Department certification applied was issued by the United States Environmental Protection Agency (EPA) on July 9th, 1974 and was effective August 9th, 1974.[1] The permit's stated expiration date was August 9, 1979. DER's certification authority was granted by Section 401 of the Federal Water Pollution Control Act of 1972, 33 USC 1251, et seq. Though the permit was originally issued and enforced by EPA, by Memorandum of Agreement between DER and EPA dated June 30, 1978, DER was delegated administration and enforcement authority pursuant to federal regulations at 40 CFR Part 124. Hence, the permit became a state permit, fully enforceable by DER.

On November 28th, 1986, the Department filed a Motion to Dismiss this matter as moot since the permit to which the certification applied has expired. Appellant filed objections on December 8th, 1986, and had previously (on November 17th, 1986) filed a motion with this Board to consolidate the instant appeal with one filed in connection with the renewal permit issued at Docket No. 85-036-R.

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

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[1] The certification appealed from in the instant case, even though issued by DER nearly a year after EPA issued the permit, is actually the second certification issued by DER. On June 26, 1974, DER issued its first certification, which was appealed by Scott at EHB Docket No. 74-269-C. The instant certification superseded the June 26, 1974 certification and accordingly, Scott withdrew its appeal at Docket No. 74-269-C and filed the instant appeal.

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. As the Board recently ruled in New Jersey Zinc Company v. Commonwealth, DER, EHB Docket No. 80-022-W, Opinion and Order dated December 10, 1986, when an NPDES permit has expired by operation of law due to issuance of the renewal permit by DER, the Board can no longer grant any meaningful relief and the appeal should be dismissed as moot. However, there are exceptions to the mootness doctrine.

In the instant appeal, Scott argues that it is subject to residual legal consequences from enforcement actions which may still be possible under the now expired permit. The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq, generally grants DER the authority of administration and enforcement with regard to permits. Section 691.605 generally provides for the imposition of civil penalties for violations of, inter alia, violations of permit conditions. Section 691.605(c) provides that "[a]ny other provision of law to the contrary notwithstanding, there shall be a statute of limitations of five years upon actions brought by the Commonwealth pursuant to this section."

At the present time, there are no allegation that there are outstanding civil penalty actions by DER against Scott. However, depending upon the expiration date of the permit, the initiation of such actions may still be possible. DER argues that, on its face, the permit was set to expire on July 9, 1979. If this is the case, DER could no longer bring any civil penalty actions against Scott, the statute of limitations having expired on July 9, 1984. On the other hand, if the permit expired when the renewal permit was issued on December 20, 1984, as Scott argues, then Scott is subject to civil penalty action for violations of permit conditions related to the DER certification until December 20, 1989. For example, for a violation which

occurred on

December 1, 1984, DER would have until December 1, 1989 to bring a civil penalty action.

The permit was set to expire on August 9, 1979 but the Board's decision herein hinges on when permit expiration actually occurred. DER argues that the August 9, 1979 was the expiration date and in support produced a copy of the cover sheet of the permit which, indeed, shows such an expiration date. However, Scott argues that, in accordance with 25 Pa. Code §92.9, its permit did not expire until December 20, 1984, when DER issued the renewal permit. 25 Pa. Code §92.9 provides as follows:

> (a) ALL NPDES permits shall have a fixed term not to exceed five years.
> (b) The terms and conditions of an expired permit are automatically continued pending the issuance of a new permit when the following conditions are met:
> (1) the permittee has submitted a timely application for a new permit in accordance with §92.13 of this title (relating to reissuance of permits); and
> (2) the Director is unable, through no fault of the permittee, to issue or deny a new permit before the expiration date of the previous permit.
> (c) Permits continued under subsection (b) of this section shall remain effective and enforceable against the discharger until such time as the Director takes final action on the pending permit application.

Scott asserts that on February 9, 1979 it filed a timely reapplication for a renewal of its permit. 25 PA. Code §§92.13(a) provides as follows:

> (a) Any permittee who wishes to continue to discharge after the expiration date of his NPDES permit must submit a new NPDES application for reissuance of the permit <u>at least 180 days prior to the expiration of the permit</u> unless permission has been granted for a later date by the Director. The application fees specified in §92.22 (relating to application fees) shall apply.
>
> (Emphasis added)

Scott appears to have met the requirement of §92.13(a). Further, Scott asserts that it properly requested and received extensions in which to file its application due to a change of application forms. Scott argues that due to its timely application, its permit did not expire until DER's permit reissuance on December 20th, 1984. On its face, appellant's argument looks persuasive; DER has not alleged that Scott at any time was operating without a valid NPDES permit or that Scott did not comply with the provisions of 25 Pa. Code §92.9 or §92.13. On this point, the Board can only conclude that Scott's permit was effective until December 20, 1984, when DER issued the renewal permit.

Because Scott is still subject to civil penalty actions under the now expired permit, it falls under an exception to the mootness doctrine. An appeal, otherwise moot, may be heard if a party to the controversy will continue to suffer some detriment. Commonwealth v. Smith, 336 Pa. Super 636, 486 A.2d 445 (1984); Janet D. v. Carros, 240 Pa. Super 291, 362 A.2d 1060 (1976) Even though the permit is no longer in effect, issues concerning violations while the permit was in effect may yet arise by virtue of 52 P.S. §691.605(c). Hence, we cannot find that the issues raised are moot. Trilog Associates, Inc. v. Farmilaro, 455 Pa. 243, 256-7, 314 A.2d 637 (1974)[2]; Community Sports v. Denver Ringsley Rockets, Inc., 429 Pa. 565, 575-6 (note 7), 240 A.2D 823, 837 (n.7), (1968). Accordingly, we now deny DER's Motion to Dismiss this appeal as moot. In addition, we grant, by separate order, Scott's motion to consolidate this appeal with that at Docket No. 85-036-R.

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[2] DER maintains that Trilog was superseded by Sidco Paper Company v. Aaron, 465 Pa 586, 351 A.2d 250 (1976). A portion of Trilog was indeed found to be not authoritative for an issue unrelated to mootness; however, the reasoning with regard to mootness was left untouched. The exception to the mootness doctrine in Community Sports, supra, remains on point.

ORDER

AND NOW, this 15th day of January, 1987 DER's Motion to Dismiss this appeal as moot is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 15, 1987

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

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SECRETARY TO THE BOARD

GREATER GREENSBURG SEWAGE AUTHORITY, et al:
:
v. : **EHB Docket No. 86-321-R**
:
COMMONWEALTH OF PENNSYLVANIA : Issued January 22, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Appellants' Motion for Sanctions is denied since Appellee has filed supplemental answers to written interrogatories and produced additional documents, which appear to be acceptable to Appellant. Appellants' Motion for Enlargement of Time is granted.

OPINION

Appellants Greater Greensburg Sewage Authority, et. al. ("Greensburg") initiated this matter when they filed Notices of Appeal of a Department of Environmental Resources ("DER") order directing Greensburg to undertake various actions concerning sewage treatment. The several appeals were consolidated at the above captioned Docket No.

Greensburg asserts that on August 26, 1986 it propounded certain written interrogatories to DER. DER filed its written answers and objections to the interrogatories on September 30, 1986. Greensburg, on October 9, 1986 filed a Motion for Sanctions with the Board, generally alleging that DER's answers were insufficient, incomplete, not responsive and evasive and also

alleged specific instances. Concurrently, Greensburg filed a Motion for Enlargement of Time in which to file its pre-hearing memorandum because of DER's alleged unresponsive answer to written interrogatories. On October 29, 1986, DER filed it response to Greensburg's motion and supplemental answers to Greensburg's First Set of Interrogatories. There have been no subsequent filings by any of the parties.

Pennsylvania Rule of Civil Procedure No. 4019 provides for the imposition of sanctions where a party fails to sufficiently answer written interrogatories. P.R.C.P. 4019(a)(1)(i). However, imposition of sanction is largely within the discretion of the trial court. Marshall v. Southeastern Pennsylvania Transportation Authority, 76 Pa. Cmwlth. 205, 463 A.2d 1215 (1983). The Board notes that DER has filed supplemental answers and has produced additional documents. As there have been no further filings by Greensburg, DER's supplemental answers and additional documents appear to have been acceptable to Greensburg. Accordingly, Greensburg's Motion for Sanctions is denied. To account for delays in the Board's ruling on Greensburg motion, Greensburg is given 60 days from the date of the following order to complete discovery and to submit its pre-hearing memorandum.

ORDER

AND NOW, this 22nd day of January, 1987, Appellant's Motion for Sanctions is denied. Appellants shall have 60 days from the date of this order in which to complete discovery and submit their pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 22, 1987

cc: **Bureau of Litigation**
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Donald J. Snyder, Jr. Esq.
For Appellant Borough of Southwest Greensburg:
Mark S. Mansour, Esq.
For Appellant City of Greensburg:
Scott O. Mears, Esq.
For Appellant Borough of South Greensburg:
Dominic Ciarimboli, Esq.

rm

KEYSTONE SANITATION CO.,INC.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 84-349-M

Issued: January 26, 1987

OPINION AND ORDER

Synopsis

A municipality will be allowed to intervene when its interests are inadequately represented by the present litigants. A petitioner, however, will be denied an opportunity to intervene when intervention would result only in a multiplicity of arguments and broadening of the scope of the appeal.

OPINION

Keystone Sanitation Company (Appellant) owns and operates a solid waste landfill on approximately 40 acres of land in Union Township, Adams County. On September 7, 1984, the Department of Environmental Resources (Department) denied two of Appelllant's requests to dispose of asbestos-laden and sludge industrial wastes pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S.§6018.503(c). In denying Appellant's Module I requests, the Department asserted that Appellant had polluted the groundwater at the site of the landfill with volatile organic compounds (VOC's) in violation of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S.§§691.301,691.307. The Department also ordered that

no Module I requests would be considered by DER until the on-site groundwater pollution was corrected. The Appellant filed a timely appeal from these Department denials on October 9, 1984.

The parties to this appeal attempted unsucessfully for over a year to reach a settlement agreement. Due to the resignation of Board member Anthony J. Mazullo, the member to whom this case was initially assigned for primary handling, this appeal was formally transferred to Chairman Maxine Woelfling for primary handling on May 13, 1986.

On September 29, 1986, Union Township filed a petition to intervene in the above-captioned appeal. A second petition to intervene was subsequently filed by Citizens Urging Rescue of the Environment (CURE) on December 17, 1986. These petitions to intervene, the focus of this order, were opposed by Appellant.

In support of its Petition for Intervention, Union Township notes that the landfill in question is located entirely within its borders. The activities at the landfill, Union Township asserts, could immediately affect the health, safety, and welfare of the Township's property and citizens. Union Township also asserts that its dual interests, namely protection of the township's property and citizenship, are inadequately represented by the DER. The Township also contends that it would be in the interest of judicial economy to allow the Township to intervene in the instant appeal rather than force Union Township to sue in another tribunal.

CURE, on the other hand, supports its Petition for Intervention by asserting that the members of its organization live, work, and own property in the vicinity of the landfill. Moreover, CURE contends that it has an expert witness uniquely familiar with the landfill who could provide valuable information to the trier of fact at trial if CURE is allowed to intervene.

CURE also asserts that the members of its group are inadequately represented.

Keystone Sanitation's reponse to each petition is nearly identical. Keystone first notes that both petitioners have misrepresented the scope of this appeal. Keystone Sanitation asserts that the only issue before the Board is whether there is groundwater contamination on-site, not off-site as both petitioners allege. Keystone contends that inclusion of evidence regarding off-site contamination will greatly broaden the scope of the litigation and confuse the issues. Keystone also states that the interests of both the citizens and the township are adequately represented by the DER, thus eliminating the need for intervention by either petitioner. Keystone also contends that petitioners need not intervene in order to present evidence through expert witnesses at trial. Rather, Keystone suggests that petitioners can simply request DER to call and examine such witnesses. Finally, Keystone asserts that both of these Petitions to Intervene are untimely.

Intervention before the Board is governed by 25 Pa. Code §21.62. The Board has frequently reasserted the fact that intervention is discretionary with the Board. Franklin Township v. DER, 1985 EHB 853; U.S. Steel v. DER, 1975 EHB 451. The Board has also established a policy of granting intervention where a party has a direct, substantial, and immediate interest in the outcome of the litigation. Franklin Township v. DER, 1985 EHB 853. Intervention will not be granted, however, if it is not in the public interest, or if intervention would overly broaden the scope of the original appeal. Id. In any event, the petitioner bears the burden of persuasion in intervention matters. Sunny Farms Ltd v. DER, 1982 EHB 442.

Union Township is the host township for the Keystone Sanitation Landfill. Although Appellant correctly states that the DER Module I denial was based upon on-site contamination at the Keystone Facility, the Board

believes that, given the potential mobility of groundwater, it is possible that this alleged contamination could eventually extend beyond the borders of the landfill, thus threatening the township and its citizens. It is likely that Union Township may be able to provide significant information regarding off-site contamination presently unavailable to the DER or Appellant. Moreover, the Board agrees with Union Township's assertion that the interests of the citizens and general public would be better represented by allowing the Township to intervene. Although the Board concedes that the public interest is already represented by the DER, the Board believes that Union Township can add significantly to a just outcome of this conflict by simultaneously advancing the interests of the township and its citizens without broadening the scope of the orginal appeal. Furthermore, since this appeal has been repeatedly continued by extensions, and a hearing has yet to be held, the Board does not believe Township's petition is untimely, nor will Township's intervention prejudice any of the parties to this appeal. The Board grants Union Township's Petition for Intervention. The scope of Union Township's intervention, however, will be limited to the presentation of evidence regarding off-site groundwater contamination. Delta Excavating & Trucking Co. and Delta Quarries & Disposal, Inc. v. DER, EHB Docket 86-266-W (September 17, 1986) (where Board allowed intervening Township to present evidence limited to groundwater contamination). The Board is confident that all other issues in this appeal are adequately represented by the current litigants. Id.

The Board denies CURE's Petition for Intervention. CURE is an ad hoc coalition of citizens who live, work, or own property in the vicinity of the landfill. The Board finds, especially in light of its granting Union Township's intervention petition, that the interest CURE seeks to have represented

--namely, the public and private interest of unpolluted groundwater--is well represented by both the DER and Union Township. Granting intervention to CURE would only result in a multiplicity of arguments and a confusion of issues. Intervention in this matter by Cure would not benefit the trier of fact. See Sunny Farms LTD, supra. The Board, therefore, in its discretion, denies CURE's Petition to Intervene.

O R D E R

AND NOW, this 26th day of January, 1987, it is hereby ORDERED that the Petition to Intervene by Union Township is granted, subject to the limitations enunciated herein, while the Petition to Intervene by CURE is denied. Union Township shall file its pre-hearing memorandum on or before March 2, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: January 26, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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For CURE:
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KINE WOELFLING, CHAIRMAN

LIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

HOWARD D. WILL, t/a WILL'S CONSTRUCTION COMPANY	:	
v.	:	EHB Docket No. 86-247-R
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 30, 1987

OPINION AND ORDER

SYNOPSIS

Appeal arising out of a bond forfeiture action is dismissed for failure of Appellant to prosecute or even state its intent to do so, and for failure of Appellant to comply with Board Orders directing Appellant to file pre-hearing memorandum.

OPINION

This Appeal was filed with the Board on May 5th, 1986, and arises out of a bond forfeiture action taken by the Department. Pre-Hearing Order No. 1 required Appellant to file its pre-hearing memorandum by July 21, 1986. On September 24th, Appellant not having filed its pre-hearing memorandum, the Board sent a default notice to Appellant via certified mail threatening sanctions pursuant to 25 PA. Code §21.124 if Appellant failed to file his pre-hearing memorandum by October 8, 1986. The return receipt indicates counsel received the notice.

On November 17, 1986, the Board still not having received Appellant's pre-hearing memorandum, issued an order imposing sanctions on Appellant. The

Board precluded Appellant from putting on its case in Chief, if and when this matter came to a hearing on the merits, but permitted Appellant to put on rebuttal evidence to cross examine the Department's witnesses and to file a post-hearing brief.

The Board also ordered Appellant to file a statement within twenty(20) days, explaining whether, under the circumstances, it still intended to prosecute the matter. The Board threatened that if no such statements were filed, the Appeal would be dismissed for inactivity. The return receipt indicates that, again, counsel received the notice.

More than sixty days have elapsed since the Board's November 17, 1986 order, and the Board has not received the required statement of intent from the Appellant. Although the Board normally does not impose the sanction of dismissal in a case where the Department bears the burden of proof, the Board has no other choice but to dismiss an Appeal where its orders are repeatedly ignored by an Appellant. Western Allegheny Limestone Corporation v. Commonwealth of Pa. DER, EHB Docket No. 85-495-G, (November 25, 1986) Penn Minerals Company v. DER, Docket No. 85-221-G (O&O, July 31, 1986).

ORDER

And now, this 30th day of January, 1987, it is ordered that the Appeal of Howard D. Will, t/a Will's Construction Company is dismissed for failure to prosecute and to comply with this Board's orders.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

Maxine Woelfling, Chairman

William A. Roth

William A. Roth, Member

DATED: January 30, 1987

cc: For the Commonwealth, DER:
Timothy Bergere, Esq.
Western Region

For Appellant:
John D. Dirienzo, Jr. Esq.
Fike, Cascio & Boose
Somerset, PA

DER Bureau of Litigation
Harrisburg, PA

MIDDLECREEK COAL COMPANY	:	
v.	:	EHB Docket No. 86-250-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 30, 1987

OPINION AND ORDER

Synopsis

Failure to appeal a compliance order precludes Appellant from appealing a subsequently issued failure-to-abate order of nearly identical content.

OPINION

Middlecreek Coal Company (Appellant) operates a coal refuse bank in Wiconisco Township, Dauphin County for the purpose of stockpiling coal refuse material. Middlecreek's surface mining operator's license, obtained pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended 52 P.S.§1396.1 et seq., expired on May 31, 1984. On October 11, 1985, the Department of Environmental Resources (DER) issued a compliance order to Middlecreek alleging Middlecreek had 1) failed to adequately mark the permit boundaries of the Middlecreek site, and 2) failed to reclaim land affected due to the mining license expiration. DER ordered Middlecreek to erect site boundary markers and reclaim appropriate land. Middlecreek failed to appeal this October 11, 1985 compliance order.

DER performed inspections at the Middlecreek site on January 6, February 13, and March 25, 1986, all of which revealed that conditions at the site remained unchanged. On April 7, 1986 officials at DER and representatives of Appellant met at the Middlecreek site. Among other things, the group decided to vacate previous orders directing erosion and sedimentation control. The DER, however, issued a failure-to-abate order on April 7, 1986 essentially reiterating the demands of the October 11, 1985 compliance order. Middlecreek appealed this failure-to-abate order on May 7, 1986.

On October 2, 1986, the DER filed a Motion to Dismiss, which is the focus of the instant order, asserting that since Middlecreek failed to appeal the original October 11, 1985 compliance order, Appellant is precluded from appealing the issuance of the nearly identical failure-to-abate order of April 7, 1986. Furthermore, DER asserts that the failure-to-abate order alleges the same violations unappealed in the compliance order--namely, Appellant's failure to mark the permit boundary area and its incomplete reclamation work. Appellant did not respond to DER's Motion to Dismiss.

The Board's rules of practice state that failure to respond to a motion may result in " treating all relevant facts stated in such pleading as admitted." 25 Pa. Code 21.64 The Board will employ this rule in deciding the Motion to Dismiss presently before it.

DER asserts, and Appellant admits, that the April 7, 1986 failure-to-abate order at issue alleges the same violations as the earlier unappealed compliance order of October 11, 1985. The Board has held on numerous occasions that one who fails to appeal an order directed to it cannot collaterally attack that order in subsequent proceeding. Commonwealth v. Wheeling-Pittsburg Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977)(company

was not allowed to appeal compliance order regarding a variance since company did not contest the original issuance of the variance); Houtzdale Municipal Authority v. DER, EHB Docket No. 85-391-W (Issued December 15, 1986)(failure to appeal an earlier order prevents municipal authority from contesting identical findings of fact incorporated into a subsequent order). The above cited caselaw controls the facts of this case. The Board, therefore, concludes that Appellant's is precluded from contesing this order by virtue of its failure to appeal an earlier identical order. DER's motion is granted and this case is dismissed.

O R D E R

AND NOW, on this 30th day of January, 1987, the Department of Environmental Resources' Motion to Dismiss is granted and the above captioned case is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 30, 1987

cc: **Bureau of Litigation**
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ROB COAL COMPANY, INC. :

v. : EHB Docket No. 86-554-R

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: January 30, 1987

OPINION AND ORDER

SYNOPSIS

Notwithstanding the pro-se status of the Appellant, the above captioned appeal is dismissed for Appellant's failure to perfect its appeal, despite three requests from the Board, in accordance with 25 Pa. Code §21.52.

OPINION

Appellant, Rob Coal Co., initiated this matter by filing a notice of appeal on September 29, 1986. Appellant, which is acting pro-se, appears to be appealing a Department of Environmental Resources (DER) compliance order.

On September 30, 1986, the Board sent Appellant an Acknowledgement of Appeal and Request for Additional Information. Attached to this request was the Board's Standard Notice of Appeal form as well as a copy of the Board's rules of practice and procedure. Appellant was given 10 days from the date of receipt to supply the Board with the information missing from its Notice of

Appeal in order to bring it intocompliance with Section 21.51 of the rules of practice and procedure.

On October 20th, with no response from Appellant, a second Acknowledgement of Appeal and Request for Additional Information was sent to Appellant. This time, the form was sent Certified, return receipt requested. The return receipt indicates that Appellant received the second notice on October 22, 1986.

When no response to the second request was received and in light of Appellant's pro-se status, the Board, on December 24, 1986 gave Appellant a third chance to perfect its appeal. On that date, the Board sent Appellant a Rule to Show Cause why its appeal should not be dismissed, for failure to perfect in accordance with 25 Pa. Code §21.52(c). Again, the Rule was sent Certified, return receipt requested. The receipt was returned to the Board signed by the Appellant and indicated receipt on December 24, 1986. The Appellant was given ten (10) days to perfect its appeal. To date, no response has been received from the Appellant. On all three occasions where the Board requested additional appeal information from Appellant, the Board made it clear that failure to supply this information would lead to dismissal for failure to perfect pursuant to Pa. Code §21.52(c). After three requests and no response, the Board has no choice but to dismiss this action for Appellant's failure to perfect its appeal in accordance with 25 Pa. Code §21.52(c).

O R D E R

And now this 30th day of January, 1987, the above referenced appeal is dismissed for Appellant's failure to perfect its appeal in accordance with 25 Pa. Code §21.52.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: January 30, 1987

CC: For the Commonwealth, DER:
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For Appellant:
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JAY TOWNSHIP, et. al., Petitioners :
:
v. : EHB Docket No. 82-300-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and E.M.BROWN COAL COMPANY,INC.,Permittee : Issued: February 2, 1987

OPINION AND ORDER

Syllabus

Petitioners are entitled to recover reasonable attorneys fees, determined by the market rate, and costs pursuant to Section 4 of the Surface Mining Conservation and Reclamation Act, 52 P.S. 1396.4.

OPINION

The Petitioners are Jay Township Supervisors, the Fox Homes Improvement Association, Fox Township, the Weedville Water Association, Inc. and Byrnesdale Homes, Inc. The Petitioners are represented in this matter by the law offices of Robert P. Ging, Jr., Professional Office Building, 430 Boulevard of the Allies, Pittsburgh, Pa. 15219, and specifically by attorneys Robert P. Ging, Jr., and Lee R. Golden. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the administrative agency of the Commonwealth empowered to administer and enforce the provisions of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (PaSMCRA), and the regulations

promulgated thereunder. The Surface Mining Conservation and Reclamation Act (PaSMCRA) is the vehicle by which Pennsylvania exercises primacy over the regulation of surface coal mining under the federal Surface Mining Control and Reclamation Act, 30 U.S.C 1201 (1977) et seq.

Permittee is E. M. Brown Coal Company, Inc., a corporation engaged in the business of coal mining. On December 1, 1982, the DER issued a mine drainage permit (#24820102) to Permittee for surface coal mining in an area known as the Byrnes Run Watershed, a Cold Water Fishery as classified by 25 Pa.Code §93.9, located in Fox Township, Elk County. Petitioners filed an appeal from the issuance of this permit on December 20, 1982. Subsequent to the filing of this appeal, the parties to this controversy engaged in extensive discovery proceedings. Four days of hearings on the merits of this case were held on August 8, 9, 25, & 30, 1983.

At the close of these hearings, Board Member Anthony J. Mazullo, to whom this case was assigned for primary handling,[1] granted Permittee a continuance to gather further evidence to buttress the validity of its permit. An interlocutory order in the nature of a supersedeas was also entered directing "the permittee ... not [to] exercise any of the rights which would otherwise pertain to, or be pertinent to, that permit without further order of this Board". Hearing Transcript, August 30,1983, p. 820.

During the continuance, the Permittee conducted an overburden analysis, as requested by Petitioners, and discovered toxic or acid forming material on the mining site. As a result of this overburden analysis, Permittee requested that its permit be canceled. DER granted this request and canceled the permit on April 18, 1984.

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[1] Because of Member Mazullo's resignation from the Board on January 31, 1986, this matter was reassigned to Chairman Woelfling for primary handling.

On July 12, 1984, Petitioners filed a Petition for Attorneys Fees. After requesting appropriate responses to this Petition from the parties to this appeal, the Board held a hearing on the issue of fees on October 2, 1985. At the hearing, Permittee and Department stipulated that Petitioners were the prevailing party in this matter. Permittee and Department also did not contest the Petitioners' calculation of hours expended in litigating this appeal, or costs associated with this litigation, contingent upon review of the documentation.

Robert P. Ging, counsel for Petitioners, was qualified by stipulation at the hearing as being an expert with regard to setting attorneys fees. Mr. Ging graduated from Duquesne University Law School in 1977, was employed in the litigation department of a law firm for a year and a half, and thereafter worked for the DER for over three years. Mr. Ging started his own law practice upon his departure from the DER in January, 1982.

As of September 30, 1985, Mr. Ging's law practice expended 177.75 hours working on the present appeal, and had spent $4,116.58 on costs associated with the litigation. Mr. Ging's practice has expended 38 hours on this appeal from October 1, 1985 to the present, producing a total of 215.75 hours spent on prosecuting this appeal and total costs of $4,116.58. These figures were calculated independently by the Board from billing sheets and cost itemizations provided by Mr. Ging.

Mr. Ging billed Petitioner at $65-$75/hour for his services over the duration of this controversy, while since 1984, his firm has typically charged, as a minimum, $100 per hour for legal representation.

Mr. Anthony P. Picadio, attorney for Permittee, is employed at the law practice of Karlowitz, Sherman & Picadio, 31st Floor, 600 Grant Street, Pittsburgh, PA 15219. Mr. Picadio billed Permittee at the rate of

$110-$120/hour for services in this matter. Evidence was produced at the hearing on attorneys fees indicating that the Commonwealth of Pennsylvania has employed special outside counsel with expertise in environmental matters at a compensation rate of $200/hour. Mr. Ging stopped billing Petitioners in June, 1983 for his travel time between Pittsburgh and Byrnes Run. Mr. Ging, thereafter, stopped billing his client for other matters in anticipation of a fee award, and eventually did not charge Petitioners for any services rendered after August, 1984.

Attorneys Fees Under PaSMCRA

Section 4(b) of PaSMCRA states, in part, "[t]he Environmental Hearing Board, upon request of any party, may in its discretion order the payment of costs and attorney fees it determines to have been reasonably incurred by such party in proceedings pursuant to this section." Petitioners have petitioned the Board, consistent with this language, for fees and costs incurred in challenging DER's issuance of a mining permit. Simply stated, the broad issues addressed in the present controversy are: 1) whether the Petitioners are entitled to attorney's fees and litigation costs under PaSMCRA, 2) if so, how much should be awarded, and finally 3) who should be responsible for paying these fees and costs.

Petitioner is requesting that DER and Permittee be held jointly and severally liable for attorneys fees calculated at $200/hour, arguing this figure is justified because the purpose of the statute was advanced by the lawsuit, the risk of not prevailing in this litigation was great, and the DER and Permittee have themselves compensated outside counsel at rates between $120-$200/hour.

Permittee, on the other hand, advances that attorneys fees are not justified in this case because the validity of the permit was not fully

litigated on the merits. Moreover, DER and Permittee both assert that since there was no violation of an act, regulation, or permit, as allegedly required by the Board's decision in Sheesley v. DER and Equitable Coal Company, 1982 EHB 85, the Appellants are not entitled to fees and costs. Finally, DER avers that even if attorneys fees are awarded, the hourly fee figure used to calculate the award should not exceed $75/hour, as limited by the Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 et seq., commonly referred to as the Costs Act, or the actual expenses incurred by Appellant during the litigation.

Petitioners bear the burden of proving their entitlement to attorneys fees and litigation costs. Jones v. Muir, 515 A.2d 855, __ Pa. (Pa. 1986); In Re Fine Paper Antitrust Litigation, 751 F.2d 562 (3rd Cir.1984). The allowance of counsel fees generally rests in the judgment of the court of first instance. In re Rambo's Estate, 193 A. 1, 327 Pa. 258 (1937); In re Trimble's Estate, 140 A.2d 609, 392 Pa. 277 (1958); Danks v. Government Employees Ins. Co., 453 A.2d 655, 307 Pa. Super. 421 (1982).

Before addressing the broad issues of the case, as delineated above, it is important to specify the statutory authority applicable to this controversy. The language of Section 4 of PaSMCRA, although vague in its particulars, specifically allows the EHB to award attorneys fees and costs in actions brought under the act. Petitioners limited their request for relief to Section 4 of PaSMCRA at the hearing. DER, however, asserts that the Costs Act applies to this controversy, rather than PaSMCRA's attorneys fees provision. Petitioners provide the correct interpretation here because the Costs Act has no direct application to the facts of this case.

First, the Costs Act directs the payment of attorneys fees only where an agency of the Commonwealth initiated the proceedings in question. 71 P.S.

§ 2031(c)(2). See Hardy v. DER, 515 A.2d 356 (Pa. Cmwlth. 1986) (DER's deferral of petitioner's request to revise township's sewage facilities plan was not governmentally initiated action). See also Martin v. DER, 1986 EHB Docket No. 85-064-G (Issued February 7, 1986)(DER's denial of appellant's request for modification of its permit was not an action initiated by the Commonwealth). The instant case arose through a third party appeal. The Costs Act, like its federal counterpart, the Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412, was enacted to protect citizens and domestic corporations from unjustified governmental intrusion. Since the Petitioners themselves initiated the instant appeal, the Costs Act clearly does not govern the determination of attorneys fees in this case. Although the Costs Act should, if possible, be construed in pari materia with the PaSMCRA, both laws do not apply to the present factual setting, and, thus, any attorneys fees award in this case must be directed by an application of the PaSMCRA rather than the Costs Act. Martin v. DER, EHB Docket No. 85-064-G (Issued February 7,1986).

Should Petitioners be awarded Attorneys fees and costs under PaSMCRA?

The Board has addressed the propriety of awarding attorneys fees under PaSMCRA on two previous occasions. Sheesley v. DER and Equitable Coal Company, 1982 EHB 85; Martin v. DER, EHB Docket No. 85-064-G (Issued February 7, 1986). The seminal case, Sheesley, involved an unsuccessful third party appeal from a release of a mining bond by DER. Although all parties to this action have cited Sheesley in support of differing, overly broad propositions, the narrow holding of Sheesley is that the EHB has the discretion to award litigation expenses if the petitioner either succeeds on the merits of the case, or if exceptional circumstances exist. Examples of such exceptional circumstances are where DER procedures, policies, rules, or regulations are

modified due to petitioner's participation in the litigation, or where the petitioner has made a substantial contribution to the litigation. Id. at 100. The Board arrived at this holding by reviewing relevant federal surface mining and environmental law addressing attorneys fees awards.

Permittee, citing Sheesley as support, asserts that Petitioners cannot recover attorneys fees from Permittee unless there is some violation of an act, regulation, or permit. Id. at 99. Although DER and Permittee's restrictive reading of Sheesley may be a correct interpretation of the holding, the Board now unequivocally broadens the holding in Sheesley.

The Board is accutely aware of the fact that the federal attorneys fees regulations are not absolutely binding on the EHB. But, in its review of Pennsylvania's primacy program, of which Section 4 of PaSMCRA was a part, the Department of Interior directed final approval of PaSMCRA "... provided that the award of costs and expenses... is no less effective than 30 CFR 840.15 and in accordance with Section 525(e) of (federal) SMCRA." 47 FR 33080 (July 30, 1982). 30 CFR §840.15 cross-references the reader to 43 CFR Part 4 for the substantive regulations governing attorneys fees; 43 CFR §4.1294(a)-(b) in turn states that any person can recover fees from a permittee or agency if he prevails in the litigation or if he substantially contributes to a fair determination of the issues. Consequently, in order to be "no less effective than" the federal SMCRA and its regulations, we believe that a broad interpretation is required and PaSMCRA should be interpreted as allowing recovery of fees against either the government or the permittee if the petitioner "substantially contributes" to the outcome of the litigation. The Board believes that reliance upon the federal attorneys fees regulations as guidance is both appropriate and consistent with previous case law. See Sheesley, 1982 EHB 85; Martin, EHB Docket No. 85-064-G (Issued February 7,

1986).

Now, the Board must decide whether the Petitioners have "substantially contributed" to the outcome of the present litigation. A recent Supreme Court case in this area requires at least "some degree of success on the merits" of the case by petitioner before fees are recoverable. Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983). Total success is not necessary, however; a modicum of success may justify a fee award. Id. Furthermore, the "success" achieved by petitioner must be of a substantive nature--namely, success on one of the central issues in the litigation, rather than a purely procedural victory. Sierra Club v. EPA, 769 F.2d 796 (D.C. Cir. 1985)(petitioner's efforts resulted in a redefinition of Clean Air Act regulations). On the other hand, the Supreme Court has held that where a petitioner fails to succeed on any of the substantive issues in its case, an award of litigation fees is not "appropriate". Ruckelshaus v. EPA, 463 U.S. 680 (1983)(court held against petitioner on every issue in litigation). Fees have been granted, however, in cases where the petitioner has achieved the relief requested without a formal adjudication by the tribunal. Maher, Commissioner of Income Maintenance of Connecticut v. Gagne, 448 U.S. 122 (1980)(petitioner that obtained requested relief through settlement is still entitled to attorney fees).

It is evident from the record in the case before the Board that the Petitioners achieved some degree of success on the merits. Petitioners, in a third party posture, challenged the DER's issuance of a mining permit to Permittee. During the hearing on the merits, the Petitioners' efforts led to a supersedeas of the permit while Permittee gathered evidence in support of its permit. During the continuance, Permittee determined its permit was probably wrongfully issued because of the potential for pollution

from the mine site existed, and, thereafter, requested cancellation of the permit. The arguments advanced by Petitioners addressed the merits of the permit. Moreover, Petitioners' efforts resulted in preventing a wrongful permit from being exploited, thus protecting the waters of the Commonwealth. For these reasons, the Board holds that the Petitioners in this case did enjoy a substantial measure of success on the central issue of the case, and, therefore, a fee award in Petitioners' favor is appropriate.

The final issue to be addressed in determining whether attorneys fees should be awarded is whether a final order exists from which fees can be granted. The federal regulations at 43 CFR Part 4 unequivocally state that one cannot petition for litigation costs until a "final order" has been issued in the controversy. At the hearing of October 2, 1985, Hearing Examiner Mazullo granted a continuance to allow Permittee to gather further evidence in support of its permit. Simultaneous with this continuance, the Board ordered the permit superseded until further direction of the Board. Subsequent to the hearing, Permittee requested a permit cancellation from DER, and this request was honored. Although the record does not reveal any formal remand for DER revocation of the permit and sustaining of the third party appeal, the Board believes that the October 2 supersedeas, combined with the subsequent permit cancellation, is the operational equivalent of a final order by the Board for the purposes of attorneys fees.

Calculation of amount

As stated above, Petitioners, at the hearing of October 2, 1985, specifically limited their right to recover attorneys fees to Section 4 of PaSMCRA. DER asserts, however, that the Costs Act is applicable and at least should be read in pari materia with PaSMCRA, thus limiting recovery of attorney fees to $75/hour. For the reasons enunciated above, the Costs Act

does not govern the present proceeding and, therefore, a mandatory $75/hour award limitation does not apply.

Section 4(b) of PaSMCRA allows the Board, in its discretion, to order payment of attorneys fees and costs it believes to have been reasonably incurred by a party to a proceeding under this section of PaSMCRA. PaSMCRA leaves open the issue of the appropriate rate at which an attorney should be compensated. Petitioners request fees calculated at market price standards, while DER and Permittee advocate recovery only for actual costs of litigation. The Board holds, for the reasons enunciated below, that the market rate approach will be employed when calculating attorneys fees awards under Section 4(b) of PaSMCRA.

In determining the standard for calculating fee awards, the Board has taken cognizance of the standards set by the Department of the Interior Board of Land Appeals (IBLA) when applying federal SMCRA in Virginia Citizens For Better Reclamation, 88 IBLA 126 (1985). As noted supra, the Board is not absolutely bound by federal caselaw or regulations in this area, yet the Board consistently has looked to this authority for guidance. Moreover, the courts have repeatedly rejected the actual costs approach and employed the market rate formula. Copeland v. Marshall,641 F.2d 880 (D.C. Cir. 1980). Having adopted the market rate approach, the Board must now determine the appropriate market rate for legal services in this present case.

As a starting point, the Board of Land Appeals in Virginia Citizens established a "lodestar" figure, i.e. the number of hours expended multiplied by the "reasonable market value" of the services rendered. Petitioner has the burden of proof as to both of these factual determinations. See Blum v. Stenson, 104 S.Ct.1541,1548 (1984). When the petitioner has carried the burden of proving that both the number of hours and claimed rate are

reasonable, the resulting lodestar figure is presumed to be the reasonable fee award. Id. Permittee and DER did not contest the number of hours expended by Petitioners' attorney in bringing the present appeal. The Board's independent calculations, based upon uncontested documentation provided by Petitioners' counsel, reveal a total of 215.75 hours expended by Petitioners' attorneys in bringing this appeal. To determine the "lodestar" for the case at issue, this number must be multiplied by the reasonable market value for services rendered.

The reasonable hourly rate is the rate prevailing in the community for similar work. See Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). A reasonable hourly rate is the product of many factors. Several of the relevant considerations are: the level of skill of the attorney, the level of skill necessary to bring the case, and the undesirability of the case. Mr. Ging has demonstrated skill and experience in the field of environmental law. Moreover, this case could be characterized as somewhat undesirable because DER issued permits are rarely overturned due to the efforts of third parties. Venango Township and Lake Pleasant Action Committee v. DER and Foster Grading Company, 1983 EHB 79 (air quality permit issuance upheld); Coolspring Township v. DER and Higbee/Struthers, 1983 EHB 151 (appeals of third parties dismissed). In addition, Petitioners' limited resources placed in jeopardy the receipt of any substantial fee by counsel.

In determining market value of services, it is also appropriate to examine rates charged by comparable attorneys in the same locality litigating similar matters. Virginia Citizens, 88 IBLA 126 (1985). Petitioners' counsel is an attorney in Pittsburgh, Pennsylvania, with a bulk of his practice in environmental law. Petitioners' counsel testified as an expert at the hearing that a reasonable hourly rate for comparable services would be in the range of

$115-$150/hour. Petitioners elicited testimony at trial that Permittee's counsel billed his client at $120/hour for his defense of the permit presently at issue. Petitioner's counsel also testified that the Commonwealth has paid counsel with expertise in environmental matters as much as $200 per hour for services rendered. Finally, Petitioners' counsel also testified that his law practice had initially billed at a varied rate between $60-$90/ hour, depending upon the clients ability to pay, and the possibility of recovery from sources other than the client. In the fall of 1982, the Petitioners' counsel started a uniform billing rate for all environmental clients at a rate of $75/hour, and $100/hour for other matters. Petitioners counsel also testified that his firm soon discovered that, compared to similar firms, it was undercharging clients, and raised its billing rate shortly thereafter. Petitioners counsel has been billing at a minimum rate of $100/hour since 1984. Petitioners were, however, billed at the lesser rate of $75/hour during the duration of this controversy. Petitioners request fees calculated at a rate of $200/hour.

In light of the evidence presented, the Board holds that $100/hour is a reasonable rate at which to compensate Petitioners for attorneys fees. Petitioners seek $200/hour because they assert that the DER has paid that rate to outside counsel for assistance in the past. The market rate, however, is determined by considering all evidence produced by the petitioner, not only one occurrence. The Board believes that Petitioners' counsel's minimum billing rate of $100/hour accurately reflects the prevailing market rate in Pittsburgh. Given the evidence produced by Petitioners indicating billing rates between $65-120/hour for the Pittsburgh area, the Board finds that $100/hour is a "reasonable market rate" for this case. The finder of fact in an attorneys fees determination need not set the market rate with

mathematical certainty, as long as the rate set is "reasonable".[2] Blum v. Stenson, 104 S.Ct. 1541,1547 (1984).

Returning to the calculation of the "lodestar" figure, multiplication of 215.75 total hours expended by $100/hour results in $21,575, or the base figure. The Petitioners request the base figure of $21,575 be increased by a multiplier to reflect inequities present in this litigation, such as delay in payment and risk of success. The burden of proving an upward adjustment is also upon the petitioner, and, absent extraordinary circumstances, a multiplier will rarely be warranted. Virginia Citizens For Better Reclamation, 88 IBLA 126 (1985). Petitioners did not meet the burden of proving the imposition of a multiplier and, therefore, the total fee award is $21,575.00. This figure is added to the Petitioners' uncontested litigation costs, which the Board finds to be $4,116.58, bringing the total award to $25,691.58.

Who is responsible for payment of attorneys fees and costs?

Petitioners request in their Post-Hearing Brief that DER and Permittee be held jointly and severally liable for litigation fees and costs. None of the parties to this action cite any legal authority directing liability for the payment of litigation costs. Moreover, the Board's extensive research on this issue revealed a paucity of authority.

The Board is aware the DER places the burden of defending all issued permits upon the Permittee. The Board, however, is also cognizant of the fact that, absent the DER's arbitrary and capricious decisionmaking, a permit would

---

[2] The Board notes that Petitioners have produced the absolute minimum amount of evidence necessary in satisfying their burden of proving the market rate for comparable services in the locality. In the future, the Board advises petitioners seeking fees under PaSMCRA to look to the regulations of 43 CFR Part 4, and applicable caselaw, for guidance regarding the type of evidence to produce in support of a petition for fees.

have never issued in this case. The DER contends that the permit was issued in reliance upon Permittee's inaccurate drill logs. The Board is not convinced by DER's argument, and furthermore, believes that it is the DER's duty to scrutinize information submitted to it during the permit application process. The Permittee complied with every information request of the DER. The DER failed to require an overburden analysis from Permittee. Petitioners challenge from the issuance of the permit resulted in the Board directing Permittee to perform an overburden analysis. Thereafter, when it became evident from the results of the overburden analysis that acid drainage existed on the mining site, Permittee initiated a request for cancellation of its permit. If DER had initially required an overburden analysis, the permit issuance, and subsequent litigation, would have probably never occurred. Permittee's actions, on the other hand, contributed little or nothing to prolonging the present litigation.

Traditionally, the courts have been reluctant to award fees against nongovernmental adversaries. See,e.g., Delaware Valley Citizens'Council for Clean Air v. Pennsylvania, 762 F.2d 272 (3rd Cir. 1985).(where court imposed fees against government, but refused to award fees against private intervenor). The instant case is not a situation demanding deviation from this trend. Moreover, this is the first case in which the Board will grant litigation costs under PaSMCRA. The Board, therefore, is reluctant to award fees against the Permittee, absent some controlling authority or circumstances dictating such a result. Permittee's degree of fault, if any, is minor

compared to the arbitrary and capricious behavior of the DER. Therefore, the entire award of fees and costs is to be paid by the Commonwealth of Pennsylvania.[3]

---

[3] The post-hearing brief of DER was not considered in deciding this matter as a sanction for DER's failure to timely file that brief. The Board is aware that the impact of this award on the public purse may, arguably, be affected by the fact that DER's post-hearing brief was not considered; however, we remain steadfastly behind our decision to exclude DER's post-hearing brief due to the Commonwealth's unexcused tardiness and repeated non-compliance with Board orders granting it extensions. DER stands in the same shoes as any other party before the Board. This decision is mollified by the fact that the Board had DER's pre-hearing pleadings and the hearing transcript before it for consideration when deciding this issue. Thus, the Commonwealth's position was not entirely absent from this determination.

O R D E R

AND NOW, this 2nd day of February, 1987, pursuant to the authority granted to the Environmental Hearing Board under Section 4 of PaSMCRA, it is ordered that Petitioners are awarded $25,691.58 for their costs and attorneys fees associated with this litigation and that the entire amount of this award is to be paid by the Commonwealth of Pennsylvania, Department of Environmental Resources.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 2, 1987

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For Permittee:
Anthony P. Picadio, Esq.
Pittsburgh, PA

bl

ROSIO COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-430-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 3, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeal of a Department of Environmental Resources civil penalty assessment is dismissed because Appellant failed to post the required appeal bond or to prepay the penalty as required by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.22, and the Clean Streams Law, 35 P.S. §691.605(b).

OPINION

On September 2, 1986 Rosio Coal Company ("Rosio") filed an appeal with this Board from an assessment of a civil penalty by the Department of Environmental Resources ("DER" or "Department"). DER assessed a civil penalty against Rosio in the amount of $4,700 for alleged violations at Rosio's surface mining operations. The assessment was received by Rosio on August 2, 1986. DER assessed the civil penalty pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1, et seq. ("Surface Mining Act"), 52 P.S. §1396.22; and Section 605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L.

1987, as amended, 35 P.S. §691.1, et seq., 35 P.S. §691.605(b).

In the notice of assessment at Page 6, DER informed Rosio that it must pay the assessed penalty within thirty days of receipt of the assessment, or if it wished to appeal the assessment, it must forward the proposed amount of the assessment to the Secretary of DER for placement in an escrow account, or it must post an appeal bond with the Secretary in the amount of the proposed assessment. The notice of assessment warned Rosio that procedures for appealing a civil penalty assessment set forth in Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22 and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b) must be followed or the right to appeal the civil penalty assessment will be waived.

On October 2, 1986, DER filed a Motion to Dismiss this appeal on the ground that Rosio had not posted an appeal bond or prepaid the penalty, as required by Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22 and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b). In response to DER's motion, Rosio argues that it was not advised of the bond requirement by "the Department". No other grounds were asserted.

Section 18.4 of the Surface Mining Act provides in pertinent part as follows:

> When the department proposes to assess a civil penalty, the secretary shall inform the person or municipality within a period of time to be prescribed by rule and regulation of the proposed amount of said penalty. The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty, such bond shall be executed by a surety licensed to do business in the Commonwealth and be satisfactory to the department . . . .Failure to forward the money or the appeal bond to the secretary within thirty (30)

days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

52 P.S. §1396.22

Section 605(b)(1) of the Clean Streams Law provides as follows:

> (b) Civil penalties for violations of this act which are in any way connected with or relate to mining and violations of any rule, regulation, order of the department or condition of any permit issued pursuant to this act which are in any way connected with or related to mining, shall be assessed in the following manner and subject to the following requirements:
>
> (1) The department may make and initial assessment of a civil penalty upon a person or municipality for such violation, whether or not the violation was wilful, by informing the person or municipality in writing within a period of time to be prescribed by rules and regulations of the amount of the penalty initially assessed. The person or municipality charged with the violation shall then have thirty days to pay the proposed penalty in full, or if the person or municipality wishes to contest either the amount or the fact of the violation, to forward the proposed amount to the department for placement in an escrow account with the State Treasurer or any Pennsylvania bank or post an appeal bond in the amount of the proposed penalty, such bond shall be executed by a surety licensed to do business in the Commonwealth and be satisfactory to the department, and thereafter to file an appeal to the Environmental Hearing Board within the same thirty day period. The initial assessment shall become final if the amount of the appeal bond is not forwarded to the department or if no appeal is filed with the Environmental Hearing Board within thirty days of the written notice to the person or municipality of the initial assessment6 and thereafter the person or municipality charged with the violation and suffering the assessment shall be considered to have waived all legal rights to contest the fact of the violation or the amount of the penalty.

35 P.S. §691.605(b)(1)

Rosio argues that it was not informed by the Department of the need to prepay the civil penalty assessment or post an appeal bond. There is lack of clarity in Rosio's response to the Department as it relates to the alleged lack of advice concerning the appeal bond/escrow. Rosio may be referring to either DER or the Board. If it is referring to DER, its claim is meritless because DER provided clear and obvious notice of this requirement at Page 6 of the DER assessment, as indicated supra. And if Rosio is referring to the Board, its claim is equally meritless. Neither the Board nor the

Department has a duty to advise Rosio of the prerequisites for properly filing an appeal. Rosio is charged with knowledge of the applicable statues and regulations.

The Board has no jurisdiction over cases where an appellant has failed to perfect its appeal by prepaying the proposed penalty or forwarding an appeal bond within the thirty day appeal period required by law. Boyle Land and Fuel Company v. Commonwealth of Pennsylvania, EHB, 82 Pa. Cmwlth 452, 475 A.2d 928 (1984), aff'd., 507 Pa. 135, 488 A.2d 1109 (1985); Everett Stahl v. DER, 1984 EHB 825.

Since Rosio has failed to file an appeal bond or post the proposed amount of the assessment with the Secretary of Environmental Resources, Rosio has not perfected its appeal as required by law. Boyle Land and Fuel Company, supra.; Everett Stahl, supra.; Anthracite Processing Co., Inc. v. DER, Opinion and Order issued December 2, 1986, EHB Docket No. 86-074-W. ORCT Corporation v. DER, 1984 EHB 941; Martin v. DER, 1984 EHB 821. Therefore, DER's Motion to Dismiss is granted.

ORDER

AND NOW, this 3rd day of Feb. , 1987, the appeal of Rosio Coal Company at EHB Docket No. 86-430-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 3, 1987

cc: **Bureau of Litigation**
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LOR CAN, INC. :
:
v. : EHB Docket No. 86-620-R
:
COMMONWEALTH OF PENNSYLVANIA : February 4, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER
SUR
MOTION TO QUASH

Synopsis

Because Appellant did not timely file its appeal, the Board has no jurisdiction to hear it and the appeal is quashed.

OPINION

On November 5, 1986 Appellant Lor Can, Inc. ("Lor Can") initiated this matter by filing a Notice of Appeal with the Board from a compliance order issued by Appellee Department of Environmental Resources ("DER"). Concurrent with its Notice of Appeal, Lor Can filed a Petition for Supersedeas.

On November 17, 1986 DER filed a Motion to Quash the instant appeal, which motion is the subject of this opinion and order. DER alleges that Lor Can did not file its appeal within the 30 day filing period as required by the Board's rules of practice and procedure. 25 Pa. Code §21.52(a). On November 20, 1986 a conference call was held with the parties regarding this matter and Lor Can was given 20 days, or until December 10, 1986, to file its answer to DER's motion. On December 5, 1986 Lor Can requested an extension

of 10 days, or until December 20, 1986, which the Board granted. Then, on December 22, 1986 Lor Can requested yet another extension to answer DER's motion, this time to January 5, 1987. Again, the Board granted the request. As of this date, and despite two extensions, Lor Can has failed to submit its answer to DER's motion to quash. Accordingly, the Board herein proceeds to rule on DER's motion without Lor Can's answer.

In its Notice of Appeal, Lor Can admits to having received the appealed from compliance order on October 2, 1986. For an appeal to be timely, it must be filed within 30 days of receipt by the appellant of the DER action. The Board has no jurisdiction over 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, Lor Can would have had to file its appeal no later than November 1, 1986 in order for it to have been timely. However, since November 1, 1986 was a Saturday, the last day for filing the appeal was the next regular business day, or Monday, November 3, 1986. As indicated above, the appeal was not filed with the Board until November 5, 1986. Clearly, the appeal was not timely filed and consequently, the Board has no jurisdiction. Accordingly, DER's motion to quash is granted.

ORDER

AND NOW, this 4th day of February, 1987, it is ordered that the appeal of Lor Can, Inc. is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 4, 1987

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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES Plaintiff	:	
v.	:	
WILBUR GUILE	:	EHB DOCKET NO. 84-332-R
ANGELO SWANHART	:	EHB DOCKET NO. 84-333-R
FRANCIS DWYER	:	EHB DOCKET NO. 84-334-R
JAMES MILLIGAN	:	EHB DOCKET NO. 84-335-R
Defendants		February 9, 1987

OPINION AND ORDER

Synopsis

Defendants' Petitions for Reconsideration of the Board's Order denying their Motions for Summary Judgment is granted. The Board member who issued the order denying summary judgment has since retired from the Board. Because the order lacks a detailed explanation and because that member is not available to clarify the order, the Board will reconsider its order.

OPINION

This opinion and order deals with the above-named Defendants' Petitions for Reconsideration of the Board's interlocutory order of December 15, 1986, denying their Motions for Summary Judgment in the above-captioned matters.

Background and procedural history of these matters is as follows. On September 11, 1984 Plaintiff Department of Environmental Resources (DER) initiated this matter when it filed separate complaints against the above

named Defendants. DER's complaints stem from an explosion on July 3, 1983, which claimed one life, at the Helen Mining Company mine, a gassy, deep, bituminous mine in Homer City, Pennsylvania. DER sought that various certifications of the Defendants be revoked pursuant to Section 206 of the Bituminous Coal Mine Act, the Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §701.101 et seq. ("Act"). The above captioned docket numbers have not been consolidated.

On December 23, 1985, Defendants filed Motions for Summary Judgment pursuant to Pennsylvania Rule of Civil Procedure 1035. The motions were supported by memoranda of law. On February 18, 1986 DER filed is answers. On March 14, 1986, Defendants filed responses to DER's answers. Oral argument was heard on April 3, 1986. On August 25, 1986, DER filed a reply to Defendants' responses to DER's answers. On September 17, 1986, Defendants filed what were purported to be statements of undisputed facts pertaining to the motions for summary judgment. Finally, on September 25, 1986, DER filed a responses to Defendants' statements of undisputed facts.

The Board ruled on Defendants' Motions for Summary Judgment by order dated December 15, 1986. In relevant part, that order stated as follows:

> The Board has reviewed the record in these appeals. The Statements of "Undisputed Facts" filed by the defendants have been disputed by DER. The Board's review of the transcript of the hearing on the defendants' motions for summary judgment has not been able to resolve all disputed questions of material fact.
>
> WHEREFORE, this 15th day of December, 1986:
>
> 1. The defendants' motions for summary judgment in the above-captioned appeals are denied

On January 2, 1987 Defendants filed petitions for reconsideration with this Board. Because the Board's order of December 15, 1986 denied Defendants' motions for summary judgement, it was interlocutory in nature. The Board has repeatedly held in the past that interlocutory orders are not

the proper subject for reconsideration. Springettsbury Township Sewer Authority v. DER, 1985 EHB 612, citing, Envirosafe Services of Pa., Inc. v. DER, 1984 EHB 609 and Magnum Minerals v. DER, 1983 EHB 589. However, the Board has ruled that reconsideration may be granted in exceptional circumstances. Old Home Manor and W. C. Leasure v. DER, 1983 EHB 463; Magnum Minerals, supra,;

The instant petitions cite numerous reasons why Defendants believe reconsideration is warranted. Most reasons appear to be rearguments of factual or legal issues. However, the Defendants cite two circumstances which the Board considers sufficient to allow reconsideration at this point. Paragraphs 11 and 17 of the petitions read as follows:

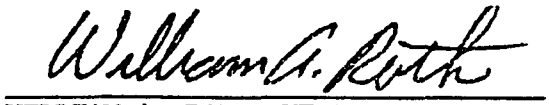
> 11. On December 15, 1985 [sic] the Board denied the Motion for Summary Judgment on the basis that there are facts in dispute which precluded entry of summary judgment. The Board did not discuss what factual issues were still in dispute nor did it provide any analysis of the extensive submissions by DER and defendant or any analysis of the numerous legal issues raised by the Motion for Summary Judgment.
>
> 17. The brevity of the Board's discussion of the issues suggest that extensive analysis of the arguments of the parties was not conducted.

The Board's review of its order of December 15, 1986 finds Defendants' Paragraph 11 supra to be accurate. Because the Board member who issued the order has retired, the extent of his analysis, as referred to in Defendants' Paragraph 17 supra is not known to the Board member to whom the matter has been reassigned and hence the Board cannot simply issue a statement of clarification. Only because the Board's reasoning was not presented in the December 15, 1986 order will the Board reconsider that order.

ORDER

AND NOW, this 9th day of February, 1987, Defendants' Petition for Reconsideration is granted.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: February 9, 1987

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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

VICTOR P. SMITH	:	
	:	
v.	:	**EHB Docket No. 86-198-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 12, 1987

OPINION AND ORDER

Synopsis

Appeal of permit denial is dismissed pursuant to 25 Pa. Code §21.124 due to Appellant's failure to comply with Board orders.

OPINION

On April 9, 1986 Appellant Victor P. Smith ("Smith") initiated this matter by filing a Notice of Appeal with the Board from the Department of Environmental Resources' ("DER") denial of Smith's application for a permit pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 et. seq. ("Act").

On April 10, 1986, the Board sent out a pre-hearing order requiring that, by June 25, 1986, Smith file a pre-hearing memorandum. On October 28, 1986, with no pre-hearing memorandum having been filed by Smith, the Board sent via certified mail, return receipt requested, a default letter threatening to impose sanctions pursuant to its Rule 21.124 if Smith failed to file his pre-hearing memorandum by November 12, 1986. The return receipt indicated that the letter was received by Smith's counsel on October 29,

1986. On January 8, 1987, his pre-hearing memorandum still not filed, the Board sent a second default notice to Smith. Said notice, sent via certified mail, return receipt requested, directed Smith to file his pre-hearing memorandum by January 20, 1987 or face sanctions, including dismissal. This notice of January 8, 1987 stated "this is your second and final notice." The return receipt indicates that Smith's counsel received the letter on January 12, 1987.

At this time, the Board has yet to receive Smith's pre-hearing memorandum and must impose sanctions pursuant to 25 Pa. Code §21.124 for Smith's failure to comply with Board orders requiring him to file a pre-hearing memorandum. Because Smith bears the burden of proof in this proceeding, 25 Pa. Code §21.101(c)(1), dismissal is an appropriate sanction. See Mrs. James E. Moyer v. DER, 1985 EHB 367 (January 22, 1985); Benjamin Coal Co. v. DER, 1984 EHB 796 (September 20, 1984).

ORDER

AND NOW, this12th day of February , 1987, it is ordered that the appeal of Victor P. Smith is dismissed pursuant to 25 Pa. Code §21.124 for Appellant's failure to comply with Board orders.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, CHAIRMAN

William A. Roth
WILLIAM A. ROTH, MEMBER

DATED: February 12, 1987

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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

C&L ENTERPRISES, INC., and CAROL ROGERS	:	
v.	:	**EHB Docket No. 86-626-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 12, 1987

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Synopsis

Appellant's Petition for Supersedeas is denied because there is little likelihood that Appellant will prevail on the merits. Appellee derives its power to issue its order from the Clean Streams Law, the Solid Waste Management Act and the Administrative Code. Because DER had the authority to issue its order, Appellant must show the likelihood that it will prevail on all three of the Board's criteria for the granting of a supersedeas. Because Appellant failed to show likelihood of success on the merits, it is not necessary for the Board to consider irreparable harm to the Appellant or injury to the public.

OPINION

Introduction

Appellants C&L Enterprises, Inc., a corporation and Carol Rogers, an

individual (hereinafter jointly referred to as "C&L") initiated this matter by filing a Notice of Appeal on November 10, 1986 from an Order of the Department of Environmental Resources (DER). C&L operates a gasoline service station ("station") from which, DER alleges, gasoline has leaked into the soil and groundwater in the vicinity of the station. DER further alleges that said leak caused pollution of this soil and groundwater and has resulted in the entering of gasoline fumes into two nearby buildings, causing their evacuation. The order requires C&L, inter alia, to retain a hydrogeologist, and to prepare a plan showing first, the extent of gasoline pollution and abatement of pollution in the soil and groundwater and second, the abatement of both the pollution in the soil and groundwater , and the fumes in the two buildings. The order further requires C&L to maintain a ditch to collect groundwater discharges containing gasoline,and place the contaminated water into drums. DER issued its order pursuant to the provisions of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101 et seq.

On November 12, 1986 C&L filed a Petition for Supersedeas seeking to stay DER's order, which petition is the subject of this opinion and order. Hearings were held on November 24 and 25 and December 2, 1986.

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 of 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.

[emphasis added]

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. The showing of a likelihood of success on the merits must be strong and is in many instances the dispositive issue. Here, the claimed cause of irreparable harm is the cost of complying with the order. It is imperative that C&L's likelihood of prevailing on the merits be examined first since, by definition, the cost of compliance with a lawful order can never constitute irreparable harm. William Fiore, supra; Tenth Street Building Corporation v. Commonwealth, DER, 1985 EHB 829.

Preliminary Matters

C&L moved, after the record was closed,to have it reopened because of alleged additional evidence regarding the conditions of the two buildings which had come to light. This evidence, C&L asserted, went to the issue of harm to the public in that C&L asserts that conditions have changed such that the public is no longer being harmed because the buildings have been reopened. The Board now denies C&L's motion to reopen the record because, as the following discussion will demonstrate, regardless of its ruling on this Motion, the Board would not have granted a supersedeas.

For the reasons discussed more fully below, C&L is not likely to

prevail on the merits which obviates the necessity to consider the other factors relating to harm to the petitioner or to the public.

Factual Background and Discussion

On or about October 14, 1986 a situation arose along State Route 8 in Richland Township, Allegheny County. Gasoline fumes were detected in two buildings on the west side of the Route 8: Gibsonia Medical Practice ("medical building") and Downtown Optics North ("optics building"). (See Exhibits C-7 and A-1.) These buildings were evacuated due to the fumes. Immediately south of and adjacent to the medical building gasoline was observed flowing from a "spring" emanating from the hillside towards Pioneer Road. Subsequently, the "spring" was excavated and a terra cotta pipe was discovered. A collection trench was installed at the discharge of the terra cotta pipe to collect the emanating liquid. The collected liquid was transferred into 55 gallon drums, to which "hazardous waste" labels were affixed, to await appropriate disposal.

Although there are several gasoline stations and possible underground gasoline storage tanks in the vicinity of the two buildings which could possibly have caused the gasoline fumes and discharges, testimony received at the hearing persuaded the Board that C&L is the likely source of the pollution. C&L's underground tanks are upgradient of the terra cotta pipe next to the Gibsonia medical building. In addition, gasoline and gasoline fumes were detected in a manhole along the east side of Route 8 and adjacent to the C&L Citgo property. C&L was the only station in the vicinity which replaced its underground storage tanks. Finally, the chemical characteristics of the gasoline in the liquid flowing from the terra cotta pipe had strong similarities to the gasoline contained in C&L's tanks.

Another factor pointing to C&L as the source of the gasoline discharge is its gasoline inventory. Allegheny County Deputy Fire Marshal Edward Babyak, a witness appearing for DER who was admitted as an expert in the area of flammable and combustible liquids and hazardous fumes, introduced an inventory examination of C&L's regular grade gasoline tank. After taking into account allowance for product shrinkage and a factor of error in bulk tank readings, Babyak estimated that 440 gallons were unaccounted for. Neither Mr. Babyak's nor DER's investigations revealed any other likely sources of the gasoline pollution.

Finally, in this context, the Board notes that C&L believes that DER did not adequately investigate other possible sources of the gasoline. On the basis of evidence presented at the hearing, the Board rejects this argument. At this point, the Board finds that DER adequately investigated other potential and possible sources of gasoline.

C&L has failed to show that it will prevail on the merits, i.e., that it is not the likely source of the gasoline pollution. Because it has failed on this, the most important prong of the three pronged supersedeas test, it is not necessary to consider the other two prongs; a supersedeas may not issue. Tenth Street Building Corporation, supra.

Based on the foregoing, the Board can only conclude that C&L has not showed entitlement to a supersedeas.

O R D E R

AND NOW, this 12th day of February, 1987, the Petition for Supersedeas by C&L Enterprises and Carol Rogers is denied. C&L has not satisfied the factors for granting a supersedeas provided by 25 Pa. Code §25.77(a).

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 12, 1987

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MILL SERVICE, INC.	:	
	:	
v.	:	**EHB Docket No. 86-514-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued February 24, 1987
	:	
CONCERNED RESIDENTS OF THE YOUGH, INC., Intervenor	:	

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Appellant's Motion for Summary Judgment is granted. In the absence of specific authority, the Department of Environmental Resources has the authority under the Solid Waste Management Act to require operators of residual waste facilities to obtain environmental impairment insurance, provided DER can justify the requirement. In the instant appeal, DER has not justified the imposition of this requirement.

O P I N I O N

Introduction

On September 5, 1986 Mill Service, Inc. ("Mill Service") initiated this matter by filing a Notice of Appeal with the Board from a condition imposed by Solid Waste Permit No. 301071 ("Permit"). The permit was issued to Mill Service by the Department of Environmental Resources ("DER") on August 6, 1986 under the provisions of the Solid Waste Management Act, the Act of July

7, 1980, P.L. 380, 35 P.S. §6018.101, et. seq. ("Act"). Generally, the permit authorizes the construction and operation of a facility known as Impoundment No. 6 at Mill Service's Yukon site located in South Huntingdon Township, Westmoreland County. Mill Service appealed the requirement that it obtain environmental impairment insurance, which requirement was imposed on it through Paragraph 22 of the permit.

Concurrent with its appeal, Mill Service filed a Petition for Supersedeas. That supersedeas petition was denied by the Board sua sponte for nonconformance to the Board's rules of practice and procedure at 25 Pa. Code §21.77. (See opinion and order issued September 16, 1986 at this Docket No.) On October 2, 1986, Mill Service refiled a Petition for Supersedeas and filed a supplement on October 28, 1986. On the basis of the refiled petition, the Board scheduled a supersedeas hearing for November 18, 1986.

On November 14, 1986, four days prior to the hearing, Concerned Residents of the Yough, Inc. ("CRY") filed a Petition to Intervene in the above captioned appeal.[1] At the outset of the supersedeas hearing, the Board granted CRY intervenor status pursuant to 25 Pa. Code §21.62.

In the Board's consideration of Mill Service's supersedeas petition, it became clear that the resolution of Mill Service's entire appeal turned on a legal issue, namely, whether the Department had the authority to require environmental impairment insurance for a residual waste facility. Accordingly, on December 15, 1986 the Board convened a conference call among the parties to discuss whether the parties would be amenable to disposition of the matter by summary judgment. DER and Mill Service made cross motions for summary judgment based on the record of the supersedeas hearing and all submissions of

[1]CRY has separately appealed the issuance of the permit at Docket No. 86-513-R.

the parties. CRY opposed Mill Service's Motion for Summary Judgment. The Board now rules on these motions.

Issues

The instant appeal is solely concerned with the portion of Paragraph 22 of the permit which requires Mill Service to obtain environmental impairment insurance. Paragraph 22, in its entirety, states:

> 22. Mill Service shall maintain in force during the period of this permit, an ordinary public liability insurance policy in the amount of $1.0 million dollars per occurance [sic] with an annual aggregate of at least $2.0 million dollars or such higher amount as may be prescribed by any hereinafter enacted regulations of the Department. Before accepting any waste for deposition at Impoundment No. 6, Mill Service shall obtain an environmental insurance policy, acceptable to the Department, covering sudden and non-sudden pollutional occurances [sic] arising out of the operation of the Mill Service Yukon Facility in the amount of $3 million dollars per occurrence with an annual aggregate of at least $6 million dollars or such higher amounts as may be prescribed in any hereafter promulgated regulations of the Department.[2]
>
> (Emphasis added)

In its notice of appeal, Mill Service presented two issues to the Board, one factual and one legal, which were (1) whether environmental impairment insurance is commercially unavailable and (2) whether DER has the authority to require environmental impairment insurance for a residual waste facility.

Of the two issues, the second is the issue on which this opinion and order turns. Mill Service argues that there is no specific grant of authority for DER to require environmental impairment insurance. DER agrees, but claims that it has the authority to impose the requirement pursuant to Section 502(f)

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[2]The term "environmental impairment insurance" used in this opinion is the same as and interchangeable with the "environmental insurance policy" referred to in Paragraph 22. Environmental impairment insurance is distinguishable from ordinary public liability insurance in that impairment insurance covers damages from sudden and non-sudden pollutional occurrences.

of the Act, which provides as follows:

> (f) The department may require such other information, and impose such other terms and conditions, as it deems necessary or proper to achieve the goals of this act.
>
> 35 P.S. §6018.502(f)

The sole issue before us in this opinion is whether, in the absence of a specific statutory provision or regulation, Section 502(f) gives DER the power to impose the insurance requirement. For the reasons more fully described below, the Board holds that while DER has the authority to impose a requirement that environmental impairment insurance be obtained for a residual waste facility such as the one authorized by the permit, it must justify the imposition of such a condition. In the instant case, DER has not justified the imposition of this condition. In so ruling, we need not reach the issue of commercial availability of the insurance.

Basis 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. Marlin L. Snyder v. DER, 1985 EHB 671. In ruling upon a motion for summary judgment, the Board is entitled to examine the pleadings, answers to interrogatories, and admissions of the parties. Id. In this instance, with the agreement of the parties, the record developed at the supersedeas hearing has also been considered.

There are two questions the Board must consider in ruling on a motion for summary judgment: (1) are there genuine issues of material fact and (2) is the moving party entitled to a judgment as a matter of law. These factors will, in turn, be considered below.

Genuine Issues of Material Fact

The Board finds that there are no genuine issues of material fact which are in dispute. Though CRY contends that the facility in question is a hazardous waste facility, the conditions of the permit make clear that Impoundment No. 6 is, in fact, a residual waste facility.[3] Factual issues concerning DER's reasons for imposing the environmental impairment insurance requirement appear are undisputed. Based on testimony received at the supersedeas hearing, DER imposed the requirement because it considered the facility to be unique in that this was the first facility to be permitted which authorized the disposal of lime stabilized pickle liquor sludge. DER also felt the condition was necessary to give credence to its permit. Further, DER felt that because of the concerns of local residents, additional protection in the form of environmental impairment insurance was warranted. These factual allegations are not in dispute and hence, the first prong of the inquiry is satisfied.

Entitlement to Judgment as Matter of Law

The Board must now address whether Mill Service is entitled to a judgment as a matter of law. Mill Service argues that DER lacks specific statutory or regulatory authority to impose the environmental impairment insurance requirement on operators of residual waste facilities. Mill

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[3]CRY contends that the facility in question is a hazardous waste facility because the Yukon site on which Impoundment No. 6 is situated also contains facilities which treat or dispose of hazardous waste, and one of the wastes authorized for disposal in Impoundment No. 6 is lime stabilized spent pickle liquor, which, in its raw, untreated form, is a hazardous waste. However, by virtue of 25 Pa Code §75.261(b)(3)(ii), lime stabilized spent pickle liquor is declared a non-hazardous waste.

Paragraphs 2 and 3 of the permit make it quite clear that the facility in question, Impoundment No. 6, is authorized to accept only non-hazardous residual wastes. Furthermore, the permit in no way authorizes any facility at the Yukon site other than Impoundment No. 6.

Service notes that the Act specifically requires a permittee to have in force "an ordinary public liability insurance policy in an amount to be prescribed by rules and regulations promulgated hereunder." 35 P.S. §6018.502(e). Mill Service argues that Section 506 of the Act limits additional insurance requirements to operators of hazardous waste facilities. Mill Service's final argument relies on regulations purported to govern environmental impairment insurance which are located in a subchapter entitled "Financial Responsibility Requirements for Hazardous Waste Storage, Treatment and Disposal Facilities," 25 Pa. Code §75.301, et. seq. Section 75.332 requires hazardous waste facility permittees to obtain environmental impairment insurance. Because there is no corresponding requirement anywhere in the statute or regulations that residual waste permittees obtain such insurance, Mill Service concludes that the legislative intent expressed in 35 P.S. §§6018.502(e) and 6018.506 is that environmental impairment insurance is required for hazardous waste facility operators but not for residual waste operators. Mill Service asserts that DER's interpretation of Section 502(f) improperly favors this general provision of the Act over specific ones, namely, Sections 502(e) and 506, contrary to Section 1933 of the Statutory Construction Act, 1 Pa. C.S.A. §1921, et. seq.

DER admits that it has no specific authority to require such insurance but argues that it has broad discretionary authority under Section 502(f) of the Act to impose the requirement. DER asserts that this interpretation fulfills one of the goals of the Act which is to "protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes."

35 P.S. §6018.102(4). CRY joins in DER's argument.[4]

On its face, the argument presented by Mill Service is persuasive with regard to the intent of the General Assembly relating to environmental impairment insurance. Section 506 of the Act reads as follows:

> The Environmental Quality Board shall adopt such additional regulations to provide for proof of financial responsibility of owners or operators of hazardous waste storage, treatment and disposal facilities, as necessary or desirable for closure of the facility post-closure monitoring and maintenance, sudden and accidental occurrences, and nonsudden and accidental occurrences, and to comply with section 3004 of the Resource Conservation and Recovery Act of 1979, 42 U.S.C §6924.
>
> 35 P.S. §6018.506

If the term "financial responsibility" in Section 506 could be construed to mean "environmental impairment insurance", the Board might find merit in Mill Service's argument. The General Assembly did not define "financial responsibility" but, rather, left to the Environmental Quality Board (EQB) the task of determining the specific forms of "financial responsibility." The regulations adopted by the EQB at 25 Pa. Code §75.301, et. seq., which pertain to hazardous waste facilities, require operators of hazardous waste facilities to obtain not only environmental impairment insurance, but also bond guarantees for the operation, closure and post-closure requirements of such facilities. Clearly, Section 506 does not specifically require environmental impairment insurance even for operators of hazardous waste facilities. Moreover, the term "environmental impairment insurance" appears nowhere in the Act.

Section 502(f) is contained in a section of the Act entitled "Permit

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[4]CRY also believes that DER has an explicit grant of authority because CRY considers the facility in question to be a hazardous waste facility. As noted in Footnote 3, Impoundment No. 6 is a residual waste and not a hazardous waste facility.

and license application requirements." On its face, Section 502(f) gives DER the power to ". . .impose such other terms and conditions, as it deems necessary or proper to achieve the purposes of this act." One of the purposes of the Act is to ". . .provide a flexible and effective means to implement and enforce the provisions of this act. . ." 35 P.S. §6018.102(5).

The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. §1921(a). Because Section 506 merely authorizes additional "financial responsibility" requirements, of which environmental impairment insurance is but one form, for operators of hazardous waste facilities, the Board finds no clear legislative intent that the environmental impairment insurance requirement is intended solely for hazardous waste facility operators. Moreover, the Board finds nothing in the Act or regulations promulgated thereunder which proscribes the imposition of this environmental impairment insurance requirement on operators of residual waste facilities. To the contrary, the ability to impose this requirement pursuant to Section 502(f) allows DER to deal with situations not contemplated or foreseen by the general assembly, thus fulfilling one of the purposes of the Act, Section 102(5), supra. The Board cannot ignore the plain language of Section 502(f) and hence, the Board finds that DER may properly impose conditions on a permittee on an individual basis pursuant to Section 502(f). However, when such conditions, not required by the regulations or the underlying statute, are imposed on an individual basis, DER has the burden of justifying the conditions based on reliable factual information. Lucas, et. al. v. Commonwealth, DER, 53 Pa.

Cmwlth. 598, 420 A.2d 1, (1980).[5]

The Board's decision thus rests on whether DER's has justified its imposition of the environmental impairment insurance requirement on Mill Service. DER's basis for imposing this requirement is contained, in toto, in the following excerpt from the direct testimony of William Pounds, Chief of the Division of Facilities Management, Bureau of Solid Waste Management, DER, at the supersedeas hearing:

> BY MISS STARES:
>
> Q: Can you explain to the Board why you imposed that [environmental impairment insurance] condition?
>
> A: There were several reasons. Number one, we felt that the Mill Service facility was a unique facility of its kind. It was the first time we had permitted an impoundment to take this type of material. The design of the facility is very close to the design requirements for hazardous waste disposal facility. The waste material to be deposited is lime stabilized pickle liquor which is only delisted after it has been neutralized. There are several concerns as to the treatment facility treating hazardous waste and depositing it as a nonhazardous material, and also many of the concerns expressed by the citizens as to the department making the decision to permit this facility, we felt that the permit itself has numerous conditions. There are 69 permit conditions within the permit, and we feel that they adequately provide for construction and operation of that facility. The addition of the environmental insurance was something above and beyond the other conditions, and hopefully by adding it, gave some, I can't think of the term to use, but some credence to the permit and also some comfort to the citizens in the area that they had something other than a DER permit to rely upon provided there was some failure.

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[5]An analogous situation exists with respect to DER enforcement policies which are not specifically authorized by regulations. The Board has held in the past that DER is permitted to adopt policies in the absence of regulations, provided DER can justify its adoption of those policies and the policies are not proscribed by the regulations. Western Hickory Coal Co. v. DER, 1983 EHB 89, aff'd 485 A.2d 877 (Pa. Cmwlth. 1984); Preston Heckler v. DER, 1985 EHB 264; Old Home Manor, Inc. v. DER, EHB Docket No. 82-006-G, Adjudication Issued December 24, 1986.

MISS STARES: I have no further questions for Mr. Pounds.

[Transcript at 85-86]

The Board can find no factual justification in the just stated DER rationale for the insurance condition. Though DER stated that "[t]here are several concerns as to a treatment facility treating hazardous waste and depositing it as a nonhazardous material. . .", DER did not enumerate those concerns to the Board. Nor did DER explain why the insurance condition was needed to "give credence" to a permit whose conditions, DER admits, ". . . adequately provide for construction and operation of that facility."[6] Nothing in DER's rationale has distinguished Impoundment No. 6 from any other residual waste facility. DER has presented no information which shows that, despite conformity with DER's requirements, the instant facility poses any greater risk than any other residual waste facility. With regard to the type of waste to be disposed of, DER has presented no evidence which demonstrates that the permitting of a facility for the disposal of lime stabilized pickle liquor for the first time presents risks which require environmental impairment insurance. Nor has DER explained why the level of design for the instant facility, being ". . .very close to the design requirements for hazardous waste disposal facility. . ." presents any greater level of risk which requires the insurance condition. Finally, DER notes that there was a high level of concern among the public. However, mere controversy is not a basis for compelling an operator of a residual waste facility to obtain

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[6]On cross examination, Mr. Pounds also indicated that the instant facility in some instances exceeds residual waste disposal standards. The following is excerpted from the supersedeas hearing transcript at 90:
BY MR. KALIS:
Q. Now is it true, Mr. Pound [sic], that the proposed Impoundment No. 6, the design meets and in some instances exceeds existing residual waste disposal standards?
A. That is correct.

environmental impairment insurance.

In the face of DER's admission that the facility meets and, in some instances, exceeds existing residual waste disposal standards and in view of the paucity of DER's factual basis for the imposition of environmental impairment insurance, the Board finds that DER has failed to meet the test of Lucas, supra. The Board thus concludes that while DER has the authority to impose an environmental impairment insurance requirement under 35 P.S. §6018.502(f), it has not adequately justified the imposition of the condition in this permit. Accordingly, summary judgment is granted in favor of Mill Service.

O R D E R

AND NOW, this 24th day of February, 1987, it is ordered that the Motion for Summary Judgment by Mill Service, Inc. is granted and its appeal is sustained. Solid Waste Permit No.301071 is remanded to DER for action consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 24, 1987

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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

M. F. FETTEROLF COAL COMPANY, INC. :
:
v. : EHB Docket No. 86-228-R
:
COMMONWEALTH OF PENNSYLVANIA : Issued February 25, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Sanctions are imposed against Appellant pursuant to 25 Pa. Code §21.124 for its failure to file a pre-hearing memorandum. Because DER has the burden of proof in this appeal, the Board precludes Appellant from presenting its case in chief.

OPINION

On April 24, 1986, this action was initiated by M. F. Fetterolf Coal Co., Inc. ("Appellant") filing a Notice of Appeal with the Board. Said appeal was taken from a DER Compliance Order issued on March 24, 1986 which alleged that discharges from Appellant's mining operation failed to comply with the effluent limitations set forth in 25 Pa. Code §87.102.

On April 25, 1986, the Board sent out a pre-hearing order requiring Appellant to file its pre-hearing memorandum by July 8, 1986. On August 29, 1986, the Board, not having received Appellant's pre-hearing memorandum, issued an order directing Appellant, within three weeks, to withdraw its

appeal, file its pre-hearing memorandum or file a statement with which DER agreed to the effect that settlement negotiations were progressing and that Appellant would promise by a specified date, again with DER's agreement, to either withdraw the appeal or to submit the pre-hearing memorandum without further reminder by the Board. This August 29, 1986 order indicated that failure to comply with Board orders could result in the Board imposing sanctions upon the Appellant pursuant to 25 Pa. Code §21.124.

On January 8, 1987, the Board still had received no response to the order of August 29, 1986. The Board then sent out a notice that again threatened sanctions pursuant to 25 Pa. Code §21.124 if no pre-hearing memorandum were filed by January 20, 1987. This letter was sent certified mail, return receipt requested, and was received by Appellant's counsel on January 9, 1987.

To date, Appellant has failed to respond to the Board's orders. Because this is an appeal of a DER Compliance Order in which DER bears the initial burden of proof, 25 Pa. Code §21.101(b)(3), the Board ordinarily avoids imposing dismissal as a sanction. Armond Wazelle v. Commonwealth of Pa., DER 1983 EHB 576 (September 13, 1983); Melvin D. Reiner v. DER. 1982 EHB 183. Consequently, when and if a hearing on the merits is held in this action, Appellant will be precluded from presenting its case in chief. Appellant 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. DER's pre-hearing memorandum is due within fifteen (15) days of the receipt of this Opinion.

ORDER

WHEREFORE, this 25th day of February,1987, it is ordered that Appellant is precluded from presenting its case in chief. The Board further orders that DER shall file its pre-hearing memorandum 15 days from receipt of this Order.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 25, 1987

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vt

KEYSTONE MINING COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 86-280-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 27, 1987

OPINION AND ORDER

Synopsis

Appeal of the Department's failure to act on a completion report requesting release of previously forfeited bonds is dismissed, pursuant to 25 Pa. Code §21.124, due to Appellant's failure to comply with Board orders.

OPINION

On June 2, 1986, Keystone Mining Company (Appellant) initiated this matter by filing a Notice of Appeal with the Board from the Department of Environmental Resources' (DER) refusal to act on Appellant's completion report which requested the release of previously forfeited bonds. On June 5, 1986, the Board sent Appellant a pre-hearing order, requiring that Appellant file a pre-hearing memorandum by August 29, 1986. On December 11, 1986, the Board, not having received Appellant's pre-hearing memorandum, sent Appellant a default letter threatening sanctions pursuant to 25 Pa. Code §21.124. Said letter was sent certified and was received by Appellant's counsel on December 16, 1986.

On January 8, 1987, the Board still had not received Appellant's

pre-hearing memorandum. On this date, the Board sent a second default notice that again threatened sanctions pursuant to 25 Pa. Code §21.124, including possible dismissal, if Appellant's pre-hearing memorandum was not filed by January 20, 1987.

At this time, the Board has yet to receive Appellant's pre-hearing memorandum and must impose sanctions pursuant to 25 Pa. Code §21.124 for Appellant's failure to comply with Board orders requiring it to file a pre-hearing memorandum. Because Appellant bears the burden of proof in this proceeding, Rule §21.101(c), dismissal is an appropriate sanction. See Mrs.James E. Moyer v. DER, 1985 EHB 367; Benjamin Coal Co. v.DER, 1984 EHB 796.

ORDER

AND NOW, this 27th day of February, 1987, it is ordered that the Appeal of Keystone Mining Company, Inc. is dismissed for Appellant's failure to comply with Board orders, pursuant to 25 Pa. Code §21.124.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: February 27, 1987

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BEDFORD COUNTY STONE AND LIME CO., INC. :
v. : EHB Docket No. 86-220-W
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: March 6, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is appropriate in an appeal where the only issue is whether the removal of noncoal minerals from a stockpile on a mine site constitutes surface mining under the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq. ("Noncoal SMCRA") and, therefore, requires a valid operator's license. Having determined that the removal of the stockpiled materials from the mine site is noncoal surface mining and requires an operator's license and that Appellant doesn't possess such a license, summary judgment is granted in favor of the Department of Environmental Resources ("Department").

OPINION

This matter was initiated by the filing of a Notice of Appeal by Bedford County Stone and Lime Co., Inc. ("Appellant") on April 21, 1986. Appellant sought review of a March 24, 1986 compliance order issued by the Department pursuant to §11(b) of Noncoal SMCRA, 52 P.S. §3311(b). The order directed the Appellant to cease the removal of minerals from a stockpile at Appellant's mining site in Napier Township, Bedford County, until Appellant

had obtained a valid operator's license pursuant to §5(a) of Noncoal SMCRA. Mining at the site was authorized by Permit No. 4273NC10.

Appellant, both in its Notice of Appeal and its pre-hearing memorandum, does not contest the fact that it does not possess a valid operator's license, but rather asserts that the removal of noncoal minerals from stockpiles at its mine site does not constitute surface mining operations and, therefore, does not require a license under Noncoal SMCRA. Based on these assertions, the Department has filed a motion for summary judgment, arguing that there being no material facts in dispute, the Department is entitled to judgment as a matter of law because Noncoal SMCRA clearly requires that one possess an operator's license before removing stockpiled noncoal minerals.

Appellant, in its response to the Department's motion, disputes the Department's interpretation of §5(a) of Noncoal SMCRA. It also argues that there are disputes as to material facts, namely whether the stockpiled material was extracted, processed, and placed on the stockpile incident to a once-valid permit and operator's license.

The Board has the authority to grant summary judgment when "the pleadings, depositions, answers to interrogatories on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. DER, 34 Pa. Cmwlth. 574, 383A 2nd 1320, 1322 (1978). Based on the Board's review of the pleadings and analysis of the relevant law, we believe the Department is entitled to summary judgment in its favor.

The necessary starting point in our discussion is §5(a) of Noncoal SMCRA which provides that:

> "No person shall conduct a surface mining operation unless the person has first applied for and obtained a license from the department. The department may require the information in the license application as it deems necessary to carry out the purposes of this act. The application for renewal of a license shall be made annually at least 60 days before the current license expires. The term of the license and shall not exceed one year."

The operative terms, "surface mining" and "operation" are defined in §3 of Noncoal SMCRA:

> * * * * *
>
> "'Operation.' The pit located upon a single tract of land or a continuous pit embracing or extending upon two or more contiguous tracts of land.
>
> * * * * *
>
> 'Surface mining.' The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, dredging, quarrying and leaching and <u>all surface activity connected with surface</u> or underground <u>mining</u>, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings...."
>
> (emphasis added)

At first glance, the definition of "operation" may seem to exclude any extraction activity not directly occurring in a pit. However, the statute broadly defines "Pit" in §3 as "The place where any materials are being mined by surface mining." Thus, the statutory language requires that an operator's license be obtained to remove minerals from a stockpile at a surface mining operation because the removal of stockpiled coal from the site is a

"surface activity connected with surface...mining."[1]

Both the the Department and Appellant cite Ginter Coal Company v. Environmental Hearing Board, 9 Pa. Cmwlth. 263, 306 A.2d 416 (1973) in support of their respective interpretations of the licensing requirements of Noncoal SMCRA. The Board and Commonwealth Court were faced with a rather different situation in Ginter, as they were called upon to decide whether the removal of coal from a culm bank, an area where the residues of underground mining activities were deposited, constituted surface mining. Although the Commonwealth Court alluded to the difference between a stockpile and a culm bank, and much is made of that allusion by Appellant, we believe that the Ginter case is not directly on point. The Ginter case dealt with extraction of mineral material, while the issue before us in this matter is whether activity associated with removing already extracted material from a mine site falls within the definition of a surface mining operation.

Appellant also argues that material facts remain in dispute because

---

[1] While it is unnecessary to resort to expressions of legislative intent where the language of a statute is clear and unambiguous, as we believe it is in this instance, the legislative intent, as expressed in §2 of Noncoal SMCRA is consistent with our interpretation. That section, entitled "Purpose of act" states that:

> "This act shall be deemed to be an exercise of the police powers of the Commonwealth for the general welfare of the people of this Commonwealth, to provide for the conservation and improvement of areas of land affected in the surface mining of noncoal minerals, to aid in the protection of birds and wildlife, to enhance the value of the land for taxation, to decrease soil erosion, to aid in the prevention of the pollution of rivers and streams, to protect and maintain water supply, to protect land, to enhance land use management and planning, to prevent and eliminate hazards to health and safety and generally to improve the use and enjoyment of the lands."

To exempt the removal of minerals from the stockpile at a mine site from licensing requirements under Noncoal SMCRA would only contribute to the environmental degradation sought to be prevented by the statute.

the stockpiled material may have been placed on the stockpile pursuant to a valid, but expired operator's license. This argument, although novel, is also without merit in light of the annual licensing requirement and our holding that removal of stockpiled minerals constitutes surface mining under Noncoal SMCRA.

Having determined that there are no material facts in dispute and that Noncoal SMCRA requires an operator's license for the removal of noncoal minerals from an on-site stockpile, the Department is entitled to summary judgment. Consistent with this determination, we enter the following order.

ORDER

AND NOW, this 6th day of March, 1987 it is ordered that the Department's Motion for Summary Judgment is granted and the appeal of Bedford County Stone and Lime Co., Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 6, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Western Region
For Appellant:
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Ligonier, PA

mjf

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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

RAYMOND WESTRICK :
:
v. : EHB Docket No. 86-417-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: March 6, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appeal of a Department of Environmental Resources civil penalty assessment is dismissed because Appellant failed to post the required appeal bond or to prepay the penalty as required by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.22, and the Clean Streams Law, 35 P.S. §691.605(b).

OPINION

On August 25, 1986, Raymond Westrick ("Westrick") filed an appeal with this Board from an assessment of a civil penalty by the Department of Environmental Resources ("DER"), pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1, et seq. ("Surface Mining Act"), 52 P.S. §1396.22; and Section 605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et seq., 35 P.S. §691.605(b), against Westrick. The assessment, which was in the amount of $9,125.00, was received by

Westrick on July 27, 1986 and pertained to alleged violations at Westrick's surface mining operation.

On page six of the notice of assessment, DER informed Westrick that he was required to pay the assessed penalty within thirty days of receipt of the assessment, or, if he wished to appeal the assessment, he was required to forward the proposed amount of the assessment to the Secretary of DER for placement in an escrow account or post an appeal bond with the Secretary in the amount of the proposed assessment. The notice of assessment warned Westrick that the procedure for appealing a civil penalty assessment as set forth in Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22 and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b) must be followed or the right to appeal the civil penalty assessment would be waived.

On October 21, 1986, DER filed a Motion to Dismiss this appeal on the grounds that Westrick had not perfected his appeal by posting an appeal bond or by prepaying the penalty as required by Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22 and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b). As of this date, Westrick has failed to respond to the motion. Pursuant to 25 Pa. Code §21.64(d), the Board may hold Westrick in default and sanction him by treating all of the relevant facts in the Department's motion as admitted. Thus, we must deem Westrick to have admitted that he failed to forward the amount of the penalty for placement in an escrow account or post an appeal bond in the amount of the penalty.

Section 18.4 of the Surface Mining Act provides, in relevant part, as follows:

> "... The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow

> account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty, such bond shall be executed by a surety licensed to do business in the Commonwealth and be satisfactory to the department . . . Failure to forward the money or the appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.
>
> 52 P.S. §1396.22
>
> [emphasis added]

Section 605(b)(1) of the Clean Streams Law contains an analogous provision. The Board has no jurisdiction over cases where an appellant has failed to perfect its appeal by prepaying the proposed penalty or forwarding an appeal bond within the thirty day appeal period required by law. Boyle Land and Fuel Company v. Commonwealth of Pennsylvania, EHB, 82 Pa. Cmwlth 452, 475 A.2d 928 (1984), aff'd., 507 Pa. 135, 488 A.2d 1109 (1985); Everett Stahl v. DER, 1984 EHB 825.

Since Westrick has failed to file an appeal bond or post the proposed amount of the assessment with the Secretary of Environmental Resources, Westrick has not perfected his appeal as required by law. Boyle Land and Fuel Company, supra,; Everett Stahl, supra. Therefore, the Board has no jurisdiction to hear this appeal and DER's Motion to Dismiss is granted.

ORDER

AND NOW, this 6th day of March, 1987, it is ordered that the appeal of Raymond Westrick at EHB Docket No. 86-417-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 6, 1987

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

M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES E. MARTIN :
:
v. : EHB Docket No. 86-567-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued March 9, 1987

OPINION AND ORDER SUR MOTION TO DISMISS

Synopsis

The Board precludes Appellant from raising the alleged unlawful non-renewal of his surface-mining license as a defense to a Department of Environmental Resources (DER) compliance order. Because Appellant had the opportunity to appeal the non-renewal at the time it occurred, and failed to do so, his raising it as a defense constitutes an impermissible collateral attack.

Decision on the motion to dismiss on grounds that the issue of Appellant's entitlement to a force majeure extension under a consent order and agreement was previously adjudicated is deferred pending submission of an amended pleading by Appellant. The Board must view the motion in the light most favorable to the non-moving party and there is doubt whether Appellant's present claims relating to the force majeure clause are the same as those adjudicated previously by the Board.

OPINION

On October 8, 1986 Appellant James E. Martin ("Martin") filed a

notice of appeal from a compliance order issued by DER on September 10, 1986. The order alleged that violations of DER regulations occurred at Martin's Boarts site in Kittanning Township, Armstrong County. Specifically, the order alleges that Martin removed backfilling equipment from the mining site which was needed to complete restoration of an area affected by mining, in violation of 25 Pa. Code §87.141(d). The order directed Martin to place backfilling equipment on the site which would adequately complete the restoration of the site and further required Martin to utilize only operable equipment found to be capable of meeting his reclamation plan requirements.

Martin asserts various grounds for his appeal, all of which refer back to, or are a result of a Consent Order and Agreement ("Agreement") between Martin and DER executed on October 18, 1983. Martin alleges that, notwithstanding his compliance with the force majeure clause of the agreement, DER illegally failed to renew his mining license, causing him to cease mining activities and, therefore, be unable to make payments on his equipment at the Boarts site.

On October 29, 1986, DER filed a Motion to Dismiss the instant appeal. DER argues that the force majeure issue was previously adjudicated by the Board and that since Martin never appealed DER's decision not to renew his mining license, his current claim that DER illegally failed to renew his license is an impermissible collateral attack on a final DER action.

The Force Majeure Claim

DER contends that the Board has previously decided the issue of Martin's compliance with the force majeure provision of the Agreement in James E. Martin v. DER, EHB Docket Nos. 83-121-G, 84-016-G, 84-028-G, (issued April 10, 1986) (hereinafter the "Board's earlier adjudication") wherein

the Board held that DER was not required to grant Martin additional time for compliance with the Agreement because Martin failed to comply with the procedural requirements which could have entitled him to receive the force majeure extension.

Unless the Board finds that the compliance with the force majeure provision raised by Martin in this matter was, in fact, a reference to another attempt to secure an extension pursuant to the force majeure clause, the Board would be compelled to hold that this issue was precluded as having been decided in the Board's earlier adjudication. Restatement 2d Judgements §27 (1982) and Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa. Super 225, 464 A.2d 1313 (1983); Matson v. Housing Authority of Pittsburgh, 326 Pa. Super 109, 473 A.2d 632 (1984).

There are only two references in Martin's pleadings to attempts at compliance with the Force Majeure Clause addressed by the Board in its earlier adjudication. Paragraph 6 of Martin's Notice of Appeal states in relevant part that "[d]espite the terms of the agreement providing for force majeure excuse which the Appellant complied with, DER . . . illegally failed to renew Martin's mining license . . ." Paragraph 6 of Martin's Answer to DER's Motion to Dismiss states in relevant part that ". . . the adjudication in that previous appeal [the Board's earlier adjudication] is not conclusive in this matter since different permit areas and different facts are involved."

These allegations, while vague and lacking in factual support, cast some doubt on DER's claim that the force majeure issue is the same as that in the Board's earlier adjudication. When ruling on a motion to dismiss, the Board must review the record in the light most favorable to the non-moving party, and all doubts as to the existence of general factual issues must be resolved against the moving party. Herskovitz v. Vespicco, 238 Pa. Super 529,

362 A.2d 394 (1976). Since Appellant alleges that the instance of compliance with the force majeure provision to which he is referring is a different one than was previously adjudicated, the Board cannot grant DER's motion. However, the Board will direct Martin to specify with particularity the different "permit areas" and "facts" involved in this matter and defer ruling on this aspect of DER's motion.

The Mining License Claim

DER contends that its letter of January 4, 1984 ("the January letter") is not a valid basis for Martin's claim that he was illegally denied the renewal of his mining license. The letter stated that Martin's license had expired, and in light of Martin's numerous violations of the agreement, which were enumerated, DER was opposed to granting Martin a new mining license. The letter invited Martin to schedule an informal conference within fifteen days and closed with a declaration that it did not constitute a final action of DER.

DER argues that the January letter is not an appealable action, but that even if it were, Martin's present arguments regarding DER's failure to renew his mining license are an impermissible collateral attack. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976). DER also contends that Martin had an opportunity to renew his license and chose not to do so, and in support of this argument, DER appends seven pieces of correspondence dated between February 16, 1984 and May 7, 1984. And, finally, DER argues that its return of Martin's 1984 license application with its May 7, 1984 letter (the last of the above-mentioned seven letters) was a final action which Martin failed to appeal to the Board, and therefore, any attack on DER's failure to renew Martin's license is a prohibited collateral

attack.

Martin denies that this appeal represents a collateral attack by virtue of the fact that he is raising the January 4, 1984 letter as a defense in this appeal. Martin further alleges that, in addition to violating the Agreement, DER violated the terms of Section 3.1 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.3a(b) ("SMCRA"), which require that DER provide sixty days notice before the denial of a license renewal. Assuming for argument's sake that Martin's interpretation of the statute is accurate, DER should have notified Martin on or before October 31, 1983 that it did not intend to renew his license. However, the Agreement wasn't executed until October 18, 1983, and the incidents described in the January letter which embodied DER's declaration of intent not to renew did not occur until after October 31, 1983. It would be absurd for the Board to opine that DER was prohibited from denying a license if violations arose in the period between the date of expiration of the license and sixty days prior thereto, and the statute itself recognizes such a possibility. Under such circumstances DER must inform the operator of its intent to deny as soon as practicable and provide the opportunity for an informal hearing. The Board believes that DER followed this procedure in the instant case. In fact, DER exerted more than the prescribed effort in attempting to schedule an informal conference to discuss the license denial as well as the other issues raised in its January 4, 1984 letter.

The return of Martin's application for a 1984 license, at Martin's own request, referred to by DER in its letter of May 7, 1984, is the operative event in the determination of whether the instant appeal is a prohibited collateral attack on the license denial issue. If Martin believed that his intent with regard to his 1984 application was misrepresented in DER's May 7,

1984 letter or that DER was wrongfully denying him his license, he had the opportunity to contest it at that time. Having failed to contest it then, he cannot now, two years later, revive this opportunity by raising it as a defense to the order in the instant appeal. Wazelle v. Commonwealth, DER, 1984 EHB 748.

ORDER

AND NOW, this 9th day of March, 1987, it is ordered that decision on DER's Motion to Dismiss on the grounds that the Board previously adjudicated the force majeure issue is deferred. Appellant is ordered, on or before March 30, 1987, to submit an Amendment to Paragraph 6 of its Answer to DER's Motion to Dismiss stating specifically what permit areas and facts are involved in his claim that DER wrongfully denied him a force majeure extension.

It is further ordered that Appellant is precluded from raising any issue relating to the non-renewal of his 1984 operator's license in the instant appeal.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: March 9, 1987

cc: **Bureau of Litigation**
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CONNEAUT CONDOMINIUM GROUP, INC. :
v. : EHB Docket No. 86-553-R
: Issued March 11, 1987
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Sanctions are imposed against Appellant pursuant to 25 Pa. Code §21.124 for its failure to file a pre-hearing memorandum. Because the Department of Environmental Resources has the burden of proof in this appeal, the Board precludes Appellant from presenting its case in chief.

OPINION

On September 29, 1986, Conneaut Condominium Group, Inc. (Appellant) 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 Appellant had caused wetland damage while constructing its condominium complex, in violation of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, No. 325, 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 Appellant to institute corrective action.

On September 30, 1986, the Board sent Appellant a pre-hearing order, requiring that Appellant file its pre-hearing memorandum by December 15, 1986.

On October 31, DER sent a letter to the Board, with Appellant's concurrence, requesting that the discovery period and due date for Appellant's pre-hearing memoranda be extended by thirty days, to January 14, 1987. The Board granted this request in an order dated November 24, 1986. On January 22, 1987, the Board, not having received Appellant's pre-hearing memorandum, sent Appellant a default letter threatening sanctions, pursuant to 25 Pa. Code §21.124, if Appellant failed to submit its pre-hearing memorandum by February 2, 1987. The letter was sent certified and was received by Appellant's counsel on January 23, 1987.

On February 11, 1987, the Board still had not received Appellant's pre-hearing memorandum and sent a second default notice that again threatened sanctions, including dismissal, if Appellant's pre-hearing memorandum was not filed by February 23, 1987.

To date, the Appellant has failed to respond to the Board's orders. Because this is an appeal of an order in which DER bears the initial burden of proof, 25 Pa. Code §21.101(b)(3), the Board ordinarily avoids imposing dismissal as a sanction. Armond Wazelle v. Commonwealth of Pennsylvania, DER, 1983 EHB 576; Melvin D. Reiner v. DER, 1982 EHB 183. Consequently, when and if a hearing on the merits is held in this action, Appellant will be precluded from presenting its case in chief. Appellant 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.

ORDER

AND NOW, this 11th day of March, 1987, it is ordered that Appellant is precluded from presenting its case in chief and that it is to submit a statement of its intent to go forward with this Appeal to the Board on or before March 23 , 1987. Failure to submit a statement of intent will subject Appellant to dismissal.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 11, 1987
cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

TENTH STREET BUILDING CORPORATION	:	
	:	
v.	:	**EHB Docket No. 85-068-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued March 13, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR
MOTION FOR PROTECTIVE ORDER

Synopsis

Department's Motion For Protective Order is denied. The information sought in the taking of a second deposition of the Department official responsible for the issuance of a landfill cleanup order is neither clearly repetitive nor unreasonable, oppressive, or unduly burdensome and, therefore, is not contrary to Rule 4011(b) Pa.R.C.P. In the context of discovery, the area of inquiry as outlined by Appellant is reasonably calculated to produce admissible evidence which may be applicable to Appellant's issue of the fairness of subjecting only the landowners and lessees to the Department's order.

OPINION

This matter was initiated by the filing of a Notice of Appeal on

March 1, 1985 by Tenth Street Building Corporation (Appellant), from a February 2, 1985 order issued by the Department of Environmental Resources (Department). The Parties have filed their pre-hearing memoranda and have engaged in discovery. The present controversy arises as a result of the Appellant's Second Notice Of Taking Deposition on Oral Examination of Mr. Russell Crawford, the Department's Regional Solid Waste Manager, who was responsible for issuing the order.

BACKGROUND

Mr. Crawford was previously deposed by Appellant on October 11, 1985 (the first deposition), pursuant to notice given on August 16, 1985. On January 8, 1987, Appellant filed a second Notice of Taking Deposition of Mr. Crawford. Said notice specified that the area to be covered by the deposition would be Mr. Crawford's decision to make only Appellant and Appellant's lessees, and no other parties, subject to the Department's order. This deposition was scheduled for January 28, 1987. On January 20, 1987, the Department filed a Motion for Protective Order pursuant to Pa. R.C.P. 4012. Because the discovery period had long since expired, the Board informed the parties that additional discovery required leave from the Board. 25 Pa. Code §25.111(a).

On January 28, 1987, the parties filed a Joint Motion to Extend Discovery, which motion was granted by the Board on February 13, 1987. On January 28, 1987, the Appellant refiled its second Notice of Taking Deposition of Mr. Crawford, scheduling the deposition for February 13, 1987 (the second deposition). The Department renewed its Motion For Protective Order in a telephone conference call on January 30, 1987 between the Board and the parties, and the Board now addresses it.

RELEVANCY

The Department contends that the information sought by Appellant in its taking of a second Deposition of Mr. Crawford is irrelevant as it is not calculated to lead to the production of evidence which would tend to prove or disprove a material issue in the appeal.

While the Board agrees that for information elicited during this deposition to be relevant it must be reasonably calculated to lead to the discovery of admissible evidence, the Board has also acknowledged in previous decisions that the concept of relevancy is broadly construed during discovery. Commonwealth of Pennsylvania, DER v. Envirogas, 1982 EHB 328 (April 14, 1982) at 330.

Although the Board denied this Appellant's earlier Petition for Supersedeas, the Board recognized that a substantial portion of the Appellant's case rested on the problem of other parties being subject to the Department's cleanup order. In its opinion denying the supersedeas, the Board noted that:

> "In addition, ...Tenth Street's argument that DER acted unfairly in issuing the order; the unfairness, according to Tenth Street,stems from the allegation that there are more parties responsible for the creation of the conditions existing on the site than those named in the Order. At this stage of the proceeding, no case has been made out sufficient to demonstrate discriminatory enforcement of the law on the part of DER."
>
> (Tenth Street Building Corporation V.Commonwealth of Pennsylvania,DER, 1985 EHB 829 (November 1, 1985) at 842)

The Board is holding here only that information to be elicited from Mr. Crawford is relevant to an issue raised by Appellant. The Board does not intend for either party to interpret this ruling as having any bearing on the

eventual admissibility of this evidence when this matter comes to a hearing.[1] As to admissibility, Pa. R.C.P. 4003.1, incorporated by reference in §21.111 of the Board's Rules, which relates to discovery in general, specifically states "that it is not ground for objection that information sought will be inadmissible at the trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence". Relevancy is, therefore, not to be construed as interchangeable with admissibility.

The information the Appellant is seeking to elicit from Mr. Crawford during this second deposition is reasonably calculated to discover evidence which could tend to prove or disprove one of Appellant's major issues, namely, why the Department chose to confine its order to solely the Appellant and its lessees.

SUBJECT MATTER OF THE DEPOSITION

The Department also contends that because the second deposition would relate to identical matters raised during the first deposition, it would be unreasonable, oppressive and burdensome to the Department and, therefore, pursuant to Pa.R.C.P. 4011(b), should not be permitted.

The Board's ruling in connection with this issue turns on whether the information sought to be elicited in the second deposition of Mr. Crawford is identical to that raised during his first deposition. The Board has reviewed

---

[1] Appellant's argument is that DER was guilty of discriminatory enforcement in making its clean-up order applicable to only the Appellants and their lessees, an issue on which a heavy burden exists if one is to prevail. Further, the issue is complicated by the Board's inability to join parties and its lack of jurisdiction over any claims brought by private parties against each other. Berwind Natural Resources v. Commonwealth, DER, 1985 EHB 356.

the pertinent sections of the first deposition and cannot agree with the Department. It is clear from the transcript of the first deposition that an event, now ripe for discovery by Appellant, had not yet occurred when the first deposition was taken. The transcript reveals that Mr. Crawford was the individual responsible for the decision of whether to make parties other than the Appellant and its lessees subject to the Department's order, and that said decision had been under consideration since the order's issuance and had not yet been made. The first deposition reveals the following:

> Mr. Thompson: Since the time of the issuance of the order, have you considered adding additional parties to the order
>
> Mr. Crawford: We have.
>
> Mr. Thompson: Have you made a decision in regard to that?
>
> Mr. Crawford: We have not.
>
> Mr. Thompson: You're still considering it?
>
> Mr. Crawford: That's right. Correct.
>
> Mr. Thompson: Do you have any idea when that consideration will be complete and you'll make a decision?
>
> Mr. Crawford: I cannot give you a date, no.
>
> Mr. Thompson: Will it be sometime this year?
>
> Mr. Crawford: Possible.
>
> Mr. Thompson: Who else is involved in making that decision?
>
> Mr. Crawford: Well, it's primarily myself.

(Deposition of Russell Crawford, October 11, 1985 at 43-44)

The stated area of inquiry in Appellant's second deposition is clearly regarding a decision made after Mr. Crawford's first deposition. The Department, in its Response to Appellant's Response to its Motion, relies on

Mr. Crawford's first deposition to stress the that Mr. Crawford believed that in all likelihood other parties would not be added and that normal practice was to only hold liable the "landowner and major contributors to the problem" (Deposition of Russell Crawford, October 11, 1985. at p. 41). The transcript, however, does not reveal that Mr. Crawford was certain that no new parties would be subject to the Department's order.

The Board, therefore, holds that the area of inquiry outlined by Appellant for the second Deposition has been calculated to elicit information that could not be obtained in the first deposition. While all deposition-taking is annoying to the deposed party, it is a matter of degree and a second deposition of a party cannot be forbidden when the original deposition is not entirely clear. Lynn Engineering & Manufacturing v. Archey, 73 D.& C. 2d 129 (1976). Additionally, there exists no other avenue through which Appellant could elicit this information. See Al Hamilton Contracting Company v. Commonwealth of Pa., DER, EHB Docket No. 85-392-W (October 2, 1986) Therefore, the Board concludes that the taking of a second deposition of Russell Crawford, for the purpose stated by Appellant, is not unreasonable, oppressive or burdensome, and therefore not contrary to Pa.R.C.P.4011(b), especially in light of the new facts Appellant seeks to obtain.

ORDER

AND NOW, this 13th day of March, 1987, it is ordered that the Department's Motion for Protective Order with respect to the second deposition of Russell Crawford is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 13, 1987

cc: **Bureau of Litigation**
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SAVE OUR LEHIGH VALLEY ENVIRONMENT (SOLVE)	:	
v.	:	EHB Docket No. 86-542-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and CHRIN BROTHERS SANITARY LANDFILL, Permittee	:	Issued March 16, 1987

OPINION AND ORDER SUR JOINT PETITION FOR INTERVENTION

Synopsis

Petition for Joint Intervention is granted. Intervention, however, is limited to the presentation of evidence addressing issues of environmental and public health immediately and directly affected by the permit issuance in the present case. Evidence of a speculative nature will not be admitted in this appeal. Evidence relating to financial and economic harm is irrelevant to the issues in this appeal and will not be admitted.

OPINION

This appeal arose from a complicated procedural background. Initially, the Department of Environmental Resources (DER) issued a civil penalty and compliance order, dated July 18, 1984, to Chrin Brothers (Permittee), owners and operators of Chrin Landfill, located on Industrial Drive in Williams Township, Northampton County. This order directed Chrin to pay certain penalties and perform certain activities in order to eliminate alleged violations existing at the landfill. Chrin Brothers appealed this

civil penalty assessment and compliance order at Docket No. 84-283-M. Shortly thereafter, a joint group of intervenors, comprised of the City of Easton, the Borough of Wilson, the Borough of West Easton, the Township of Palmer, Forks Township, Two Rivers Area Commerce Council, and Easton Area Joint Sewer Authority (herein referred to as joint intervenors), petitioned to intervene on behalf of Chrin Brothers and were granted intervention. Save Our Lehigh Valley Environment (SOLVE), an ad hoc citizens group, was also allowed to intervene on behalf of the DER. Chrin, seeking relief from the DER action, filed a Petition for Supersedeas at Docket No. 84-283-M.

Simultaneous with this activity, Chrin Brothers had submitted a separate application for a solid waste management permit with the DER for expansion of the landfill at Industrial Drive, pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S.§6018.101 et seq. (SWMA). DER failed to either grant or deny Chrin's application for this landfill expansion. Chrin appealed the DER inaction at Docket No. 84-326-G. Subsequently, the intervenors at Docket No. 84-283-M were permitted to intervene at Docket No. 84-326-G.

The Board granted Chrin's Petition for Supersedeas at Docket No. 84-283-M, 1985 EHB 383. Among other things, the Board based its decision on the fact that enforcement of the DER order could result in closure of the Chrin landfill operation, and, as joint intervenors successfullly argued, a garbage crisis would result which could have a detrimental effect on the environment, health, and finances of the citizens and municipalities in the Easton area.

Thereafter, Chrin and DER settled the appeal at Docket No. 84-326-G. This settlement consisted of DER granting Solid Waste Management Permit

No. 10022 to Chrin for its proposed expansion of the Industrial Drive landfill while Chrin and the joint intervenors withdrew their appeal. The appeal at Docket No.84-326-G was withdrawn by the Board's order of September 4, 1986.

Subsequent to this settlement, SOLVE filed this appeal challenging DER's issuance of Solid Waste Management Permit No. 10022 (hereinafter, the permit) to Chrin. In appealing the issuance of the permit, SOLVE asserts that Chrin's history of non-compliance with state environmental laws at other facilities should preclude Chrin from receiving a permit for a landfill expansion. SOLVE also argues that the DER issued the permit prior to the summary of the public hearing testimony, thereby violating DER policies and procedures. Finally, SOLVE asserts that the issuance of the permit violates Article I, §27 of the Pennsylvania Constitution.

On October 20, 1986, the Easton Area Joint Sewer Authority, Two Rivers Area Commerce Council, the City of Easton, the Township of Forks, the Township of Palmer, the Borough of Wilson, and the Borough of West Easton (hereinafter Petitioners), the same intervenors in Dockets No. 84-283-M and 84-326-G, filed a Joint Petition for Leave to Intervene in this matter, which is the focus of this opinion. In support of their petition they argue that Chrin Brothers' proposed landfill expansion will accept sludge, a typical byproduct of the sewage treatment process, from local municipalities. Petitioners also allege that Chrin's landfill is the only local landfill accepting sludge, and that the other landfills in the area are either closed or are unable to accept any more solid waste because they are at "capacity". Thus, it is again argued, a "garbage crisis" would result if Chrin were unable to open its proposed landfill because the citizens and municipalities in the immediate vicinity of Williams Township will not have a landfill available for disposal of garbage and sludge. This landfill space crisis could, they

assert, result in damage to the environment, a threat to the health and safety of the citizens, and severe financial impacts on the local communities and their citizens. Finally, Petitioners argue that the concerns enumerated above are not being represented by any of the parties presently involved in this litigation.

SOLVE opposes Petitioners' request for intervention by arguing that Petitioners do not have any statutorily guaranteed right to intervene in the present controversy. In the alternative, SOLVE also argues that the Board, in its discretion, should deny the petition to intervene because the concerns expressed by Petitioners are not relevant to the issues in this appeal.

Intervention can be guaranteed by a particular statute, or can be granted by discretion of the Board pursuant to 25 Pa.Code §21.62. Petitioners argue that they have a statutory right to intervene in the present proceeding pursuant to §615 of the SWMA, 35 P.S. §6018.615, which states,

> "Any citizen of this Commonwealth having an interest which is or may be adversely affected shall have the right on his own behalf , without posting bond, to intervene in any action brought pursuant to section 604 or 605." (emphasis added).

Section 615 is inapplicable to the facts of this case, as it prescribes a statutory right of intervention in proceedings under §§ 604 and 605 of the SWMA. These sections, respectively, address the imposition of restraining orders for violations of law or existing nuisances, and civil penalties assessments. This appeal, one from the issuance of a permit, has nothing to do with either § 604 or § 605 of the SWMA. Petitioners, therefore, do not have a statutory right to intervene under § 615 of the SWMA. Moreover, Petitioners' assertion in their Reply Memorandum that §604(b) guarantees them a statutory right to intervene is also incorrect. Sections 615 and 604(b) together provide citizens of the Commonwealth a statutory right to intervene in an

action by a solicitor of any municipality to enjoin violations of law or to restrain any public nuisance or detriment to public health. This is not an injunctive action by a municipal solicitor, so Petitioners' reliance upon § 604 (b), therefore, is also misplaced. Petitioners' remaining avenue of intervention is under 25 Pa.Code §21.62.

Intervention under §21.62 is discretionary with the Board. Keystone Sanitation Co., Inc. v. DER, EHB Docket No. 84-349-M (issued January 26, 1987); Franklin Township v. DER, 1985 EHB 853. Generally, the Board will freely grant intervention where the petitioners establish a direct, substantial, and immediate interest in the outcome of the litigation which is inadequately represented by the present parties to the controversy. Keystone Sanitation, supra. The Board, however, will not grant intervention where a petitioner's arguments are overly cumulative or greatly broaden the original scope of the appeal. Franklin Township, supra. A petitioner bears the burden of persuasion in all intervention matters. Sunny Farms Ltd. v. DER, 1982 EHB 442.

Intervention will only be granted if Petitioners seek to present evidence relevant to the present issues of the appeal. The issues raised in the present appeal are whether DER arbitrarily and capriciously ignored Chrin's alleged history of non-compliance with environmental laws and regulations when issuing the permit; whether the issuance of a permit prior to the preparation of a summary of public testimony on the subject was arbitrary and capricious; and, whether DER violated Article I, §27 of the Pennsylvania Constitution by issuing the permit. Petitioners' first argument in favor of intervention is that the local environment and health and safety of the citizenry will be threatened if the proposed landfill expansion is not approved. Second, Petitioners argue that denial of the landfill expansion

would have a detrimental affect on the finances of the area municipalities and citizenry.

The Board will first consider Petitioners' argument that the environment and health and safety of the citizens will be threatened unless the landfill expansion is approved. Petitioners' concerns regarding public and environmental health have no relevance to SOLVE's claim that the DER arbitrarily ignored Chrin's history of non-compliance when issuing the present permit. Furthermore, Petitioners' public and environmental health concerns are also irrelevant to an inquiry into whether DER wrongfully granted a permit prior to the preparation of a summary of public testimony on the subject. These issues are, rather, technical issues of fact, the answers to which are within the control and possession of the present parties to this appeal. Petitioner, therefore, will not be allowed to offer evidence on either of these issues in the appeal. The only remaining issue in the present appeal to which the health and environmental concerns of citizens and municipalities may be relevant is SOLVE's Article I, Section 27 claim.

Article I, §27 imposes a duty upon the Commonwealth, and its various departments, to consider the environmental effects of its actions. Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86 1973. In determining whether Article I, §27 has been violated the courts employ a three part test--has there been compliance with all statutes and regulations relevant to protection of Commonwealth's natural resources, does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum, and finally, does the environmental harm which will result so clearly outweighs the benefits to be derived therefrom that to proceed further would be an abuse of discretion. Id. Petitioners claim that a reversal of the DER permit issuance may result in environmental degradation. This degradation, Petitioners assert, could

lead to a threat to the health and safety of the citizens. Petitioners' concerns are relevant to SOLVE's Article I, §27 claim. Moreover, the Board holds that Petitioners' interests in the local health and safety of its citizens, and the integrity of the local environment, may not be entirely represented by the present parties to this appeal. Petitioners are in a unique position to provide information regarding the effects of the permit issuance upon localities in the vicinity of the Chrin landfill. Petitioners, therefore, are granted leave to intervene in this matter. The scope of Petitioners' intervention, however, will be limited to the presentation of evidence relating to direct and immediate impacts on local environmental and public health pursuant to SOLVE's Article I, §27 claim.[1] Keystone Sanitation Co., Inc. v. DER, EHB Docket No. 84-349-M (Issued January 26, 1987); Delta Excavating and Trucking Co. v. DER, EHB Docket No. 86-266-W (Issued September 17, 1986)(where the Board limited the scope of intervention to issues of groundwater contamination).

The Board now addresses Petitioners' argument that the economy of the municipalities and citizens in the vicinity of the landfill would be adversely affected if the permit were revoked. Petitioners' economic concern is not even remotely related to the issues of whether Chrin has a history of non-compliance or whether DER arbitrarily issued the permit prior to the summary of public hearing testimony. Thus, evidence relating to financial harm will not be accepted on either of these issues. Petitioners argue that a DER permit denial would result in prohibitively expensive disposal costs for citizens and municipalities, leading to possible "midnight dumping" of garbage. This illegal dumping of garbage could potentially harm the

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[1] The Board strongly encourages the Petitioners to coordinate the presentation of evidence so as to eliminate duplicative arguments.

environment in violation of Article I, §27. This argument, although creative, is extremely speculative. Intervention is only granted when the Petitioners can establish a direct and immediate interest in the outcome of the litigation. Keystone Sanitation Co., Inc. v. DER, EHB Docket No. 84-349-M (Issued January 26, 1987); Franklin Township v. DER, 1985 EHB 853. Neither the "possibility" of skyrocketing disposal costs, nor the "potential" for subsequent midnight dumping, is a direct enough interest to allow intervention in this matter. Petitioners, therefore, will not be allowed to introduce evidence of financial detriment relating to SOLVE's Article I, §27 claim.

Finally, there exists authority for the proposition that economic factors must be considered by the DER whenever it takes a discretionary action. Armond Wazelle v. DER and Borough of Punxsutawney, 1984 EHB 748. In Wazelle, Appellant appealed the DER revocation of its solid waste permit and an order requiring closure of its landfill in Jefferson County. The Borough of Punxsutawney, a significant user of the Wazelle landfill, sought to intervene specifically for the purpose of demonstrating the adverse economic effects of DER's action. The Board, limiting its holding to the circumstances before it, ruled that the DER must consider the "reasonably forseeable direct economic effects of its action". Id. The Board relied upon, inter alia, the Commonwealth Court's decisions in Einsig v. Pennsylvania Mines Corp., 69 Pa. Cmwlth 351, 452 A.2d 558 (1982), and East Pennsboro Township v. DER, 18 Pa. Cmwlth 58, 334 A.2d 798 (1975). Consistent with these cases, the Board held that the DER need only consider economic effects of its discretionary, as opposed to mandatory, acts. The Board also limited the application of this ruling by stating that when considering economic factors "the DER is not required to make a detailed economic impact study" before issuing an order.

Wazelle is inapplicable to the facts of this case. First, as noted

above, the holding in Wazelle was specifically limited to the particular circumstances in that appeal, and, neither of the cases relied upon in Wazelle involve questions of intervention. In the Wazelle decision, the Board properly quoted from Einsig stating, "...[i]f ...the Act gives DER discretionary authority to act...we believe DER must consider the economic impact of its actions." Einsig v. Pennsylvania Mines Corp., 452 A.2d 558, 567. The Board concedes that DER has great discretion in granting permits, as in the instant case. But, the Wazelle decision, however, did not recognize an important limiting sentence in Einsig, supra, which states, "[i]t is important to note that...[a]ll they apply to are the economic effects on an industry which must comply with a DER order, where that industry is appealing the order." The instant case is not a situation where an industry is appealing an order, but rather a situation where a potential intervenor desires to contest the economic effects on it of a DER action relating to another party.

The Wazelle decision also relies upon East Pennsboro Township, supra, a case where the Commonwealth Court addressed the propriety of a sewer ban under the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law). The affected township argued that DER did not consider the economic impact to the citizens of the Commonwealth at the time it instituted the ban. In holding for the township, the Court noted that the Clean Streams Law specifically required the DER to consider "[t]he immediate and long-range economic impact upon the Commonwealth and its citizens" where appropriate. 35 P.S.§ 691.5(a)(5). The SWMA, the law at issue in this appeal, does not contain a statutory counterpart requiring consideration of broad economic effects in the issuance of permits. Absent this statutory language, the applicability of East Pennsboro to either Wazelle or the instant case is obviously limited. In conclusion, although stopping

short of overruling Wazelle because this is an interlocutory matter, the holding in Wazelle is of limited precedential value in resolving the present controversy.

O R D E R

AND NOW, on this 16th day of March, 1987, it is ordered that Petitioners are granted leave to intervene in the above-captioned matter. The scope of this right to intervene, however, is specifically limited to the presentation of evidence regarding to the direct and immediate harm to the environment and public health as it relates to Appellant's claim that DER violated Article I, § 27 of the Pennsylvania Constitution in issuing Chrin Brother's solid waste permit.

It is further ordered that Intervenors shall file their pre-hearing memoranda in accordance with the Board's order of December 10, 1986, a copy of which is attached.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 16, 1987

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CLYDE WILSON, t/d/b/a CLYMER SANITARY LANDFILL	:	
v.	:	EHB Docket No. 82-057-M
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 19, 1987

OPINION AND ORDER

Synopsis

Where an appeal before the Board appears moot, and Appellant has failed to prosecute its appeal and failed to respond to an order of the Board, the appeal will be dismissed.

OPINION

This appeal was filed by Clyde Wilson, t/d/b/a Clymar Sanitary Landfill (Appellant) on February 18, 1982. Appellant sought review of the Department of Environmental Resources' (DER) January 22, 1981 denial of an addendum to the solid waste Permit (No. 101019) authorizing operation of Appellant's landfill in Middletown Township, Susquehanna County. The origins of this appeal are contained in an earlier appeal at EHB Docket No. 81-185-M (Clyde Wilson t/d/b/a Clymer Sanitary Landfill v. DER and North Branch Concerned Citizens), which involved a DER order suspending Appellant's solid waste permit.

On May 13, 1982, the Board, in response to Appellant's request, issued an order at this docket granting the parties an extension to three weeks after its adjudication at Docket No. 81-185-M to file their pre-hearing

memoranda. The Board issued an adjudication at Docket No. 81-185-M on September 22, 1983 (1983 EHB 223), which was subsequently modified by the issuance of an amended order and clarification on May 1, 1985. There has been no activity at the present docket since May 13, 1982.

On October 21, 1986, the Board issued a rule to show cause why this appeal should not be dismissed as moot because of the lack of activity at this docket and the Board's final determination at Docket No. 81-185-M. The rule was returnable, in writing, to the Board on or before November 20, 1986. The return receipt indicates Appellant's counsel received the rule on November 3, 1986. As of the date of this opinion and order, the Board has received no response from Appellant.

An appellant has a responsibility to diligently prosecute an appeal before the Board. Springbrook Twsp v. DER, EHB Docket No. 84-122-M (Issued May 8, 1986). The docket in this matter has been totally inactive for almost five years. Final disposition in the related case at Docket No. 81-185-M took place almost two years ago. The Board cannot and will not carry matters on its dockets indefinitely. Glah Brothers, Inc. and FSI Corp. v. DER, EHB Docket No. 82-026-M (Issued June 18, 1986). In addition, the Board's final determination at Docket No. 81-185-M and the continued closure of the site would appear to render the present matter moot. When events occur which render it impossible for the Board to grant any relief, the appeal must be dismissed as moot. Mears Enterprises v. DER, EHB Docket No. 83-200-M (Issued May 5, 1986). To continue this matter further would be pointless and a waste of the Board's time and resources. See, Blake Becker, Jr. v. DER, 1984 EHB 553.

As already noted, Appellant has failed to respond to a rule to show

cause. A rule to show cause is a Board order, the violation of which may result in sanctions under the Board's rules of practice and procedure. 25 Pa.Code §21.124; See, Robert Curley et al., North Branch Concerned Citizens and Middletown Township Board of Supervisors v. DER, EHB Docket No. 81-119-W (Issued December 26, 1986). In light of Appellant's failure to prosecute this appeal, the appeal's apparent mootness, and Appellant's failure to respond to the Board's rule to show cause, this matter must be dismissed.

O R D E R

AND NOW, this 19th day of March, 1987, it is ordered that the appeal of Clyde Wilson, t/d/b/a Clymar Sanitary Landfill at EHB Docket No. 82-057-M is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 19, 1987

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ROBERT C. PENOYER t/a
D.C. PENOYER & COMPANY, Appellant
v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 82-303-M

Issued: March 19, 1987

OPINION AND ORDER

Synopsis

Motion for a summary adjudication is granted where the terms of a consent agreement executed by Appellant and his responses to requests for admissions establish no material facts in dispute and the Department is entitled to judgment as a matter of law. Ambiguous or incomplete responses to averments in requests for admissions will be treated as admitted by the responding party.

OPINION

The Appellant in this matter originally was SRP Coal Company, Inc., a corporation engaged in the surface mining of coal. The Department of Environmental Resources (DER) issued an order on December 1, 1982 directing SRP to abate two alleged acid mine discharges (enumerated as Discharge #1 and Discharge #2) from its mining site in Covington Township, Clearfield County. SRP operated this site pursuant to Mine Drainage Permit No. 4575SM26. SRP appealed this order to the Board on December 23, 1982.

Subsequently, on April 5, 1983, a consent agreement (April Agreement)

was executed between SRP and DER. This agreement contained provisions in which SRP agreed to treat these two discharges in exchange for DER issuing a 1983 mining license to SRP. The specifics of this agreement will be addressed more fully below.

A second consent agreement (October Agreement) was executed on October 18, 1984. In this agreement, SRP, consistent with 25 Pa.Code §86.56, transferred all rights and obligations pertaining to the mining site to Robert C. Penoyer t/a D.C. Penoyer & Company (Appellant). This agreement, signed by SRP, DER and Penoyer, specifically transferred all rights and obligations of this appeal to Penoyer, and Penoyer was substituted for SRP as the appellant in this matter. Penoyer v. DER, 1984 EHB 919.

The DER has filed a Motion for Summary Adjudication in this matter, which is the subject of this order, arguing that Penoyer is fully liable for for interim and permanent treatment of Discharge #1 pursuant to §315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315 (CSL), and by virtue of the language of the April and October Agreements. Moreover, DER also argues that Penoyer has admitted in its pleadings that Discharge #2 emanates from Penoyer's mining site, Discharge #2 is pollutional, and finally, Discharge #2 empties into waters of the Commonwealth. Given these facts, the DER argues, the Board must also hold Penoyer fully liable for Discharge #2 by law. Penoyer, on the other hand, renounces any liability, under law or contract, for Discharges #1 and #2.

Although captioned as a Motion for Summary Adjudication, the Board will treat DER's pleading of May 21, 1986 as a motion 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. City of Scranton v. DER, and Diamond Colliery Company, EHB Docket No. 85-335-W (Opinion and Order issued December 19, 1986). In ruling upon a motion for summary judgment the Board is entitled to examine the pleadings, answers in depositions, and admissions of the parties. Id. These pleadings will be read in a light most favorable to the non-moving party.

The first question which must be answered in resolving this summary judgment motion is whether the agreements are binding upon Penoyer. The April Agreement states, " [t]his Consent Order and Agreement shall bind the parties, their servants, employees, successors and assigns." April Agreement, ¶15. This language is reaffirmed in the October Agreement in which Robert C. Penoyer acquired all of the privileges and obligations of SRP, including the obligations under the April Agreement. October Agreement, ¶13.

From a close review of the agreements, it is indisputable that Penoyer must abide by the terms and conditions of the April Agreement. The April Agreement specifically binds successors in interest of the mine site. Penoyer voluntarily made himself a successor in interest when he accepted all rights and obligations from SRP pursuant to the October Agreement. Furthermore, the primary intent of the October Agreement was to bind Penoyer to the terms of the April Agreement. Penoyer, therefore, is obligated to comply with the terms of the agreements as written and subsequently interpreted by this Board.

In determining the proper substantive interpretation of the April Agreement, the Board will address the terms associated with each discharge separately. Regarding Discharge #1, the April Agreement states,

> a. SRP Coal Company, Inc. shall provide sufficient interim treatment for Discharges #1 to insure that the discharges meet the effluent standards

specified in 25 PA Code Chapter 87.102.

b. SRP Coal Company, Inc. shall continue providing interim treatment for Discharges #1 on an uninterrupted basis until the discharges have been abated or until permanent treatment is installed in accordance with the plan required by Paragraph c. below.

c. SRP Coal Company, Inc. shall submit a discharge abatement plan for Discharges #1 no later than June 1, 1983. The abatement plan shall contain provisions that are sufficient to abate all discharges or to improve their quality to meet the 25 PA Code Chapter 87.102 effluent standards on a permanent basis.

d. Following approval of the abatement plan by the Department, SRP Coal Company, Inc. shall fully implement the abatement plan no later than August 31, 1983.

Penoyer argues that he has only accepted responsibility for treating Discharge #1 on an interim basis under the terms enunciated above. DER, on the other hand, argues that the terms of the April Agreement hold Penoyer responsible for both interim and permanent treatment of Discharge #1. Furthermore, DER infers in its Reply Brief that Penoyer's acceptance of reponsibility for interim and permanent treatment of Discharge #1 is tantamount to admitting full liability for Discharge #1. Finally, the DER argues that, in any event, Penoyer is collaterally estopped from contesting its liability for Discharge #1 by virtue of the Commonwealth Court's Order in DER v. Robert C. Penoyer, 268 C.D. 1986 (May 9, 1986), in which the Court directed Penoyer to begin treatment of Discharge #1 and continue until the discharge met the effluent standards enuciated in the previous consent agreements.

The Board agrees with the DER's arguments regarding Discharge #1 and interprets the April Agreement as imposing full liability upon Penoyer. Neither the April Agreement, nor the Commonwealth Court Order, specifically

states that Penoyer assumes total liability for Discharge #1. A review of all the pertinent language in the April Agreement , however, establishes a clear intent by the parties to have Penoyer assume full responsibility for Discharge #1. First, as admitted by Penoyer, the April Agreement directs interim treatment of Discharge #1 to be performed by Penoyer. April Agreement, ¶9(a). The agreement next directs Penoyer to continue treatment on an uninterrupted basis until the discharge has been abated or until permanent treatment is installed according to an abatement plan consistent with current effluent standards. In essence, Penoyer is directed to perform the same treatment as would be required if he specifically admitted full liability for Discharge #1. The Board does not believe the lack of language holding Penoyer specifically liable for Discharge #1 should allow Penoyer to avoid liability when such an intent is otherwise clearly evidenced in the agreement. Even when read in a light most favorable to Penoyer, the April Agreement reveals an unequivocal admission of liability by Penoyer. Furthermore, Penoyer specifically waived his right to appeal the terms of the April Agreement regarding Discharge #1. April Agreement, ¶ 24. If the parties intended Penoyer's liability for Discharge #1 to be open to debate, they could have left Penoyer with an avenue of appeal, as they did with Discharge #2. See, April Agreement, ¶¶ 9(f) and 9(g) (where consent agreement specifically allows Penoyer to appeal liability for aspects of Discharge #2). The Board, therefore, finds as a matter of fact and law that Penoyer is fully liable for Discharge #1. Penoyer must perform both interim and permanent treatment of Discharge #1 as directed in the consent agreements. Having held this way, the Board need not address DER's collateral estoppel argument. DER is entitled to summary judgment as to all issues regarding Discharge #1.

Turning to Discharge #2, the April Agreement states

f. SRP Coal Company, Inc. shall continue providing interim treatment for Discharge #2 on an uninterrupted basis unless SRP Coal Company, Inc. obtains a final Order from the Environmental Hearing Board which declares that SRP Coal Company, Inc. is not liable for the discharges located at Discharges #2 or unless SRP Coal Company Inc.'s consultant is able to demonstrate to the Department that SRP is not liable for the discharges.

g. If SRP Coal Company, Inc. does not obtain a final judgement (sic) from the Environmental Hearing Board declaring that SRP Coal Company, Inc. is not liable for the discharges at Discharges #2, or if SRP is unable to demonstrate to the Department that SRP is not liable for the discharges, then SRP Coal Company, Inc. shall submit a discharge abatement plan, as required in paragraph c above, for Discharges #2 within ninety (90) calendar days after the final termination of the proceedings now pending before the Environmental Hearing Board.

h. SRP Coal Company, Inc. shall fully implement the abatement plan within sixty (60) days after the Department has approved the plan.

Penoyer admits that he consented to perform interim treatment of Discharge #2. Penoyer, however, disclaims any further liability for Discharge #2. The DER admits that the agreements leave open the issue of liability and permanent treatment of Discharge #2 for the Board's determination. In its Motion for Summary Adjudication, however, the DER alleges that Discharge #2 emanates from Penoyer's mine site, is pollutional in nature, and empties into the waters of the Commonwealth. Thus, despite the fact that the agreements specifically leave unanswered the issue of liability for Discharge #2, DER argues that, given the facts alleged, the Board must hold, as a matter of law, that Penoyer is also fully liable for Discharge #2. Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 87 (1974) (Barnes & Tucker I); Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977) (Barnes & Tucker II); and Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973).

In determining the merits of DER's claim, the Board must first

determine, whether Discharge #2 is, in fact, a discharge emanating from Penoyer's mine site for purposes of §315 of the CSL; next, whether it is pollutional; and finally, whether its empties into the waters of the Commonwealth. Before ruling on these factual questions, a brief description of the geography and layout of the mine site is in order.

The mining site is located in Covington Township, Clearfield County. The site is bisected by Township Road T-648, which generally runs in a north-south direction. Commonwealth Request for Admissions, and Appellant's Response, ¶13. An Unnamed Tributary of Sandy Creek crosses the mine site in an east-west direction. Request for Admissions, and Response, ¶16. Penoyer's mining activity extends somewhere between the boundaries of the unnamed tributary to the north, and the boundary of the permit area to the south. Request for Admissions, and Response, ¶¶17 and 18. The DER avers that alleged Discharge #2 exists on the mine site somewhere to the west of Township Road T-648 and to south of the Unnamed Tributary. Request for Admissions, ¶19. Penoyer seems to be arguing that the hydrogeologic phenomenon alleged by DER does exist but does not constitute a "discharge" for purposes of §315 of the CSL.

The DER alleges, and Penoyer admits, that Discharge #2 is pollutional in nature. Request for Admissions, ¶¶34 and 35; and Response, ¶¶34 & 35. Penoyer, however, in its Memorandum in Opposition to Motion for Summary Adjudication states that data used to determine the water quality of the discharge is questionable in nature. Having admitted that the discharge is pollutional, the Board disregards Penoyer's statistical argument.

The DER also alleges that Discharge #2 empties into the southernmost Unnamed Tributary of Sandy Creek on the mine site. Request for Admissions ¶21. Penoyer reponds that the seep does not discharge "per se" into the

Unnamed Tributary and that there exists little evidence that the seep discharges at all. Response, ¶ 21. The Board does not consider Penoyer's response to be a specific denial of DER's factual averment. Pennsylvania Rule of Civil Procedure 1029 requires all averments in a pleading to be denied specifically or by necessary implication. Failure to comply with this requirement results in the averment being treated as admitted. Ambiguous denials do not comport with Pa.R.C.P. 1029, and therefore, constitute an admission. Willinger v. Mercy Cath. Med. Ctr., Etc., 241 Super.Ct. 456, 362 A.2d 280 (1976). Penoyer's response to ¶21 of the Request for Admissions is ambiguous on its face. Penoyer does not explain what he means when he says that the seep does not discharge "per se". The Board, giving these words their common meaning, interprets Penoyer's response to indicate that, although the discharge in question may not be of a quintessential nature, a flow of water into the Unnamed Tributary, a water of the Commonwealth, is, in fact, occurring. Moreover, Penoyer's response that "little evidence exists" that the area in question discharges at all, is not a specific denial either. The converse of Penoyer's statement is that, in fact, some evidence does exist which reveals a discharge into the Unnamed Tributary. This response is again ambiguous. Id. In conclusion, the Board treats Penoyer's response to ¶ 21 of DER's Request for Admissions as admitted, rather than denied as stated. Thus, the Board finds, by mutual admission of the parties, that some discharge is occurring into the waters of the Commonwealth.

Finally, the Board must determine if the discharge emanates from the mine site. Discharge #2 has been described by both parties as a "seep zone". Commonwealth's Brief in Support of Motion for Summary Judgment, ¶ 20; and Response of Appellant to Commonwealth's Request for Admissions, ¶ 12. Generally, a seep zone is a discrete area of groundwater bleeding from the

earth. Penoyer characterizes the seep as a wet area that intermittently runs in a channelized overland fashion depending upon the stage in the hydrogeological cycle. Response, ¶ 20. Penoyer thus admits that the discharge has the characteristics of being channelized. The discharge, by mutual admission, therefore falls within the definition of point source. Penoyer also argues that the Discharge #2 varies in volume throughout the year, depending on the amount of precipitation. There is not any legal limitation dictating that discharges must be constant in flow. Seasonal or occasional flow will suffice. Most importantly, in ¶19 of the Requests for Admissions, the DER avers that this Discharge #2 is located to the west of Township Road T-648 and to the south of the Unnamed Tributary on the mine site (emphasis added). In its response, Penoyer admits that this seep exists and that it emanates to the west of the township road in question. Response, ¶19. By admitting the existence of the seep, and failing to specifically deny the averment that the seep emanates from the mine site, Penoyer admits to this element of §315. Pa.R.C.P.1029. See also, Rohr v. Logan, 206 Super. Ct. 232, 213 A.2d 166 (1965)(when an answer responds to only a portion of the averments of a paragraph, the remaining portion is thereby admitted). Moreover, during the Deposition of Penoyer's witness, Wilson Fisher, Jr., Mr. Fisher clearly indicated his belief that the location of the seep is at least partially on the mine site in question. Deposition, Wilson Fisher, Jr., February 27, 1985, p.68-72. From a review of this material, the Board finds that Discharge #2 emanates from Penoyer's mine site.

In summary, the Board finds that Discharge #2 is, in fact, a discharge emanating from Penoyer's mine site, is pollutional, and empties into the waters of the Commonwealth. Penoyer, therefore is liable pursuant to §315 for providing interim and permanent treatment for Discharge #2 consistent

with the April and October Agreements.

Penoyer's final arguments are without merit. Penoyer argues that even if the discharges exist, the discharges pre-existed the mining operation and, therefore, he is not liable for treating them. This assertion is contrary to a recent line of Board precedent holding mine operators liable for pre-existing discharges from their permit areas. William J. McIntire Coal Co. v. DER, EHB Docket No. 83-180-M (Adjudication issued July 7, 1986); and Hepburnia Coal Co. v. DER, EHB Docket No. 85-309-G (Adjudication issued May 28, 1986).

In conclusion, even when read in a light most favorable to Penoyer, the DER's Motion for Summary Adjudication must be granted because there are no material facts at issue regarding Discharges #1 and #2 and the DER is also entitled to a judgment as a matter of law.

O R D E R

AND NOW, this 19th day of March, 1987, it is ordered that the Department's Motion for Summary Adjudication is granted and the appeal of Robert C. Penoyer t/a D. C. Penoyer & Company is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 19, 1987

cc: **Bureau of Litigation**
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CARL W. CHRISTMAN :
:
v. : EHB Docket No. 85-358-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and WINDSOR TOWNSHIP, Intervenor : Issued: March 23, 1987

OPINION AND ORDER

Synopsis

Intervenor's Motion to Dismiss for failure to prosecute is granted due to Appellant's untimely filing of pleadings and failure to respond to the motion.

OPINION

On August 28, 1985, Carl W. Christman (Appellant), filed a notice of appeal with the Board from the Department of Environmental Resources' (DER) denial of Appellant's application for a permit pursuant to the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L.380, as amended, 35 P.S. §6018.101 et seq,. Appellant contends that the DER arbitrarily and capriciously denied its permit application, while also denying its constitutional guarantees of due process and equal protection under the law. Windsor Township, the municipality in which the proposed landfill would be located, was granted leave to intervene in this matter on December 6, 1985.

Thereafter, Appellant requested, and was granted, an extension to

file its pre-hearing memorandum until such time as the scope of Windsor Township's intervention could be determined by the Board.

Appellant, on February 3, 1986, directed its counsel to discontinue performing any further activities on Appellant's behalf. Appellant indicated in this correspondence, a copy of which was filed with the Board, that a consent order was being executed with the DER regarding this matter, and counsel's service would no longer be needed. The above appeal was continued pending the filing of status reports by the parties.

During this continuance, Appellant retained new counsel and appeared ready to proceed with prosecuting its appeal. The Board set a date for oral argument addressing the issue of the proper scope of Windsor Township's intervention. Appellant was ordered to file a brief supporting its position on this issue. Appellant failed to timely file its brief, and the oral argument on the issue of intervention was cancelled by the Board on June 9, 1986.

Intervenor filed a Motion to Dismiss the appeal on December 7, 1986, alleging that Appellant had failed to prosecute its appeal. More particularly, Intervenor avers that Appellant's pre-hearing memorandum, originally due on November 12, 1985, still has not been filed with the Board. Moreover, Intervenor also alleges that Appellant has failed to timely file its brief addressing the proper scope of intervention. Finally, Intervenor asserts that Appellant, in fact, sold the landfill property in question, and that the new owner was seeking a separate solid waste management permit. The Board requested a response to this motion from Appellant by January 8, 1987. Appellant failed to respond to the Board's request.

The Board treats Appellant's failure to respond to Intervenor's Motion to Dismiss as an admission of all the factual averments stated

therein. 25 Pa.Code §21.64 (d). Appellant is responsible for resolving or litigating its appeal. Conemaugh Township v. DER, EHB Docket No. 70-061-H (Issued October 1, 1986). The Board cannot allow appeals to linger on its docket for extended periods of time. Appellant's tardy filing of pleadings in this case is considered by the Board as an intention not to prosecute this matter. More importantly, however, Appellant's failure to respond to Intervenor's Motion to Dismiss subjects Appellant to sanctions pursuant to Rule 21.124. 25 Pa.Code 21.124. See also, Mays Corporation v. DER, EHB Docket No.82-065-M (Issued June 18, 1986). This appeal, therefore, is dismissed for failure to prosecute and failure to respond to Intervenor's Motion to Dismiss.

O R D E R

AND NOW, on this 23rd day of March, 1987, it is ordered that Intervenor's Motion to Dismiss is granted and the appeal of Carl W. Christman is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: March 23, 1987

cc: **Bureau of Litigation**
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For Intervenor:
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Harrisburg, PA 17102

mjf

F & S COAL COMPANY :
:
v. : EHB Docket No. 86-617-R
:
COMMONWEALTH OF PENNSYLVANIA : Issued March 26, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER
SUR MOTION TO DISMISS and
SUR CROSS MOTION FOR CONTINUANCE

Synopsis

The Department of Environmental Resources' ("DER") motion to dismiss this appeal is granted. Inspection reports do not constitute appealable actions of DER. Additionally, the Board lacks jurisdiction to hear untimely filed appeals. Consequently, it is unnecessary to rule on Appellant's cross-motion for continuance.

OPINION

Appellant F & S Coal Company ("F & S") initiated this matter on November 3, 1986 when it filed a Notice of Appeal with this Board from the issuance of an inspection report by DER on October 1, 1986. On February 5, 1987 DER filed a Motion to Dismiss ("Motion") this appeal. F & S answered the motion on February 25, 1987 and concurrently cross-filed a Motion for Continuance ("Cross-Motion").

Board Chairman Maxine Woelfling has recused herself from this matter because of a conflict created by her former position with DER as Director of the Bureau of Regulatory Counsel. Because there currently exists a vacancy on the Board, this appeal, including its ultimate disposition, if necessitated, would have to be handled solely by Board Member William A. Roth. By letter dated March 4, 1987, Member Roth advised the parties of this situation and directed that any objections to the handling of this appeal by him alone be filed by March 16, 1987. As of this date, no objections have been received. Under these circumstances, approval of this Opinion and Order, authored by William A. Roth alone, satisfies the requirements of 25 Pa. Code §21.86 concerning final decisions.[1] Accordingly, the undersigned will now rule on the instant matters.

In its motion, DER asserts, inter alia, that "[a]n inspection report is not a final decision of the Department [of Environmental Resources], as such it is not an appealable action." DER's Motion, Paragraph 8. In support of this argument, DER draws the Board's attention to 25 Pa. Code §§21.2 and 21.51(a), Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and, finally, DER v. New Enterprise Stone and Lime Co., Inc., 25 Pa.Cmwlth. 389, 393, 359 A.2d 845, 847 (1976). DER's Motion, Paragraphs 9 and 10. The essence of DER's argument is that the Board is without jurisdiction to hear this matter. Appellant answers, in part, that the instant appeal "...is viable and appropriate, being an Appeal based on the findings and requirements set forth in the Inspection Report..." Appellant's Answer to Appellee's Motion to Dismiss, Paragraph 1. The

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[1]A similar situation arose in Del-Aware Unlimited, et al. v. DER, et al., 1984 EHB 178, where, with only two Board member positions being filled, and one having recused himself, the adjudication was issued by the sole remaining Board member.

remainder of F & S's response refers to a civil penalty consent order which F & S asserts is being developed between the parties and which may moot this appeal.

The Board finds that it must dismiss this appeal. The Board, on numerous occasions in the past, has held that an inspection report prepared by DER is not an appealable action. Most recently, in Bell Coal Company v. DER, EHB Docket Nos. 85-516-W, 85-524-W, 86-026-W and 86-102-W (issued August 8, 1986), the Board applied the Commonwealth Court's precedent in Sunbeam Coal Corp. v. DER, 8 Pa.Cmwlth. 622, 304 A.2d 169 (1973) and its own holdings in Perry Brothers Coal Company v. DER, 1982 EHB 501, and Reitz Coal Company v. DER, 1984 EHB 793, and found inspection reports to be non-appealable DER actions.

Even if the inspection reports were appealable actions, the Board finds that it still would be compelled to dismiss this appeal due to untimely filing. F & S admits to having received DER's inspection report on October 1, 1987. Notice of Appeal, Paragraph 3. Its thirty (30) day appeal period expired on Friday, October 31, 1986.[2] However, F & S did not file its appeal with the Board until Monday, November 3, 1986. It is well established that the Board lacks jurisdiction to hear appeals not filed during the thirty (30) day appeal period. 25 Pa. Code §21.52(a); Commonwealth v. Joseph Rostosky, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Consequently, the Board has no jurisdiction to hear this appeal. Even though DER did not raise this

[2]Friday, October 31, 1986 was not a legal holiday and the Board's offices were open.

issue as it pertains to the instant appeal of the inspection report,[3] matters of jurisdiction may be raised by the Board sua sponte. County of Bucks v. DER, EHB Docket Nos. 83-110-M and 84-321-M (November 20, 1986).

Based on the foregoing, the Board has no choice but to dismiss this appeal. Consequently, the Board need not rule on F & S's cross-motion for continuance.

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[3]DER raised an untimeliness issue with respect to a cease order, which DER asserts was issued on June 27, 1986 and which, it further asserts, was not appealed by F & S. The implication of the first seven (7) paragraphs of DER's motion is that F & S's appeal of the instant inspection report is really an appeal of the cease order. Because of the Board's holdings, supra, it is not necessary to consider these arguments.

ORDER

AND NOW, this 26th day of March, 1987, it is ordered that DER's Motion to Dismiss the above-captioned appeal is granted and the appeal of F & S Coal Company is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 26, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Kimberly K. Smith, Esq.
Central Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA

rm

TENTH STREET BUILDING CORPORATION	:	
	:	
v.	:	EHB Docket No. 85-068-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 27, 1987.

OPINION AND ORDER
SUR
MOTION TO COMPEL AND FOR SANCTIONS

Synopsis

Appellant's Motion to Compel is denied in part and granted in part. The Motion is denied with respect to all interrogatories and documents which DER has agreed to furnish Appellant. The Motion is also denied with respect to those interrogatories that inquire into the preparation of DER's case, violating of Pa. R.C.P. 4003.3. Such interrogatories include requests for the names of potential parties to the litigation, their notification by DER as well as any further communications between DER and these potentially responsible parties. Appellant's Motion to Compel is granted with respect to two interrogatories requesting that DER list all landfills in Erie county and of those landfills, which ones are currently the subject of DER remedial action. DER is ordered to answer these interrogatories. Appellant's Motion for Sanctions is denied.

OPINION

This matter was initiated by the filing of a Notice of Appeal on

March 1, 1985, by Tenth Street Building Corporation (Appellant), from a February 2, 1985 clean-up order issued by the Department of Environmental Resources (DER). The parties have filed their pre-hearing memoranda and have engaged in discovery. The present controversy arises as a result of DER's objections to interrogatories propounded by Appellant.

BACKGROUND

On April 18, 1985, Appellant served its First Set of Interrogatories and Request for Production of Documents on DER. DER filed its answers and responses on July 12, 1985.

Appellant on July 26, 1985, sent a letter to DER requesting additional information and responses as Appellant alleged some of DER's original answers to be inadequate. Appellant alleges it never received a response to this letter. After DER notified Appellant of a change in counsel in this matter, Appellant alleges it issued the new counsel a copy of this letter on August 11, 1985. When Appellant received notice of another change in DER counsel, it alleges that on December 30, 1986 it furnished DER with another copy of the letter and reminded DER about the outstanding interrogatories and request for production of documents. Appellant alleges that DER has not responded to the letter or its requests for more adequate responses.

On February 9, 1987, Appellant filed a Motion to Compel and for Sanctions (Appellant's Motion). On March 4, 1987, DER responded to Appellant's Motion. The Board will now rule.

THE INTERROGATORIES

In its response to Appellant's Motion, DER agreed to provide

Appellant with answers to the information requested in Appellant's Interrogatories Nos. 17, 19, 44, 2(d), 41(b), 41(d), 41(e), 9, 31 and 39(b). Further, DER, in its response to Appellant's Motion appended copies of all information requested by Appellant in its Request for Production of Documents. Therefore, as to these interrogatories, Appellant's Motion is denied.

Appellant's Interrogatories Nos. 32 and 34

Appellant's Interrogatory No. 32 reads:

> "List all landfills which are known to the DER which are located in Erie County."

Appellant's Interrogatory No. 34 reads:

> "If the answer to the proceeding interrogatory [which asked if there were any landfills in Erie County involved in enforcement or remedial action initiated by the DER, E.P.A., etc.] is anything but an unqualified "no", state the following:
> (a) the location of the landfill in question
> (b) the type and nature of the enforcement or remedial action being undertaken
> (c) the date of the initiation of the enforcement or remedial action."

DER, in its original response to Appellant's interrogatories which it reiterated in its response to Appellant's Motion, refused to answer these interrogatories, stating that it would require the making of an unreasonable and unreasonably expensive investigation by DER and further, that these interrogatories were highly irrelevant.

Appellant argues that its fundamental argument in this case is one of discriminatory enforcement by DER and that its ability to assess DER actions being taken elsewhere would be instrumental in building its case. Appellant counters the burdensomeness argument by stating that DER, as the

agency supervising landfills would need only a few minutes to list all the landfills in question.

Appellant relies on Magnum Minerals v. Commonwealth of Pa. DER, 1983 EHB 310 at 313 for its position. The Interrogatory at issue there involved the listing of "the location of any and all surface mines within a one(1) mile radius of the proposed Magnum Operation where the Middle Kittaning coal seam had been mined..." The Board in Magnum,supra, ordered the Interrogatory to be answered. Consistent with Magnum, supra, the Board rules that DER will answer these interrogatories with its "immediately at-hand knowledge with no implication that [DER] is to search ...in its files or elsewhere." Magnum Minerals, supra, at 314. Therefore, DER will answer these interrogatories without making any investigation, utilizing whatever information it can readily and easily obtain.

The Board must also take issue with DER's relevancy argument. Appellant is trying to establish a case of discriminatory enforcement on the part of DER. The information provided in the answers to these two interrogatories is absolutely "calculated to lead to the discovery of admissible evidence." Tenth Street Building Corporation v. Commonwealth of Pa., DER, EHB Docket No. 85-068 (Opinion and Order issued March 13, 1987). Appellant's obtaining a list of these sites and then establishing the enforcement actions being taken at these sites is unquestionably relevant to its case. Further, the Board has acknowledged in previous decisions that the concept of relevancy is broadly construed during discovery. Commonwealth of Pennsylvania, DER v. Envirogas, 1982 EHB 328 at 330; Chernicky Coal v. Commonwealth,DER, 1985 EHB 360 at 363. The Board holds, therefore, that this information is not irrelevant to Appellant's case and DER will be ordered to answer Appellant's Interrogatories Nos. 32 and 34, in the manner prescribed

above.

The Board is holding here only that information to be elicited from Appellant's Interrogatories Nos. 32 and 34 is relevant to an issue raised by Appellant. The Board does not intend for either party to interpret this ruling as having any bearing on the eventual admissibility of this evidence when this matter comes to a hearing.[1] As to admissibility, Pa. R.C.P. 4003.1, incorporated by reference in §21.111 of the Board's Rules, 25 Pa. Code §21.111 which relates to discovery in general, specifically states "that it is not ground for objection that information sought will be inadmissible at the trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Relevancy is, therefore, not to be construed as interchangeable with admissibility.

Appellant's Interrogatories Nos. 35, 36, and 37

Appellant's Interrogatories 35-37 read as follows:

> "35. With respect to the Pontillo site, list all persons or entities whom the D.E.R. has in the past or presently considers as potentially responsible parties.
>
> 36. List all persons or entities whom the D.E.R. has notified as being a potentially responsible party.
>
> 37. With regard to the previous Interrogatory, state:
>
> (a) whether the D.E.R. has received any response to any correspondence directed to a potentially responsible party;
>
> (b) describe any documentation regarding potentially responsible parties.

---

[1]Appellant's argument is that DER was guilty of discriminatory enforcement in making its clean-up order applicable to only the Appellants and their lessees, an issue on which a heavy burden exists if one is to prevail.

DER objected to the above interrogatories, in both its response to Appellant's interrogatories and its response to Appellant's motion, as being prohibited by Rule 4003.3 of Pa.R.C.P., and alleged that answering these interrogatories would require the disclosure of the mental impressions of the DER's attorney or his conclusions, memoranda, notes or summaries, legal research or legal theories. Further, DER stated with respect to other DER representatives, answering these interrogatories would require disclosure of their mental impressions, conclusions or opinions respecting the value or merit of a claim against potentially responsible parties.

Appellant states in its motion that it had not requested DER's opinion of the value or merit of a claim against other potentially responsible parties and that, in fact, that issue would be for the Board to ultimately decide. Appellant accuses DER of being disingenuous and of reading Rule 4003.3 of the Pa. R.C.P. as a "broad exemption" of the discovery rules.

Rule 4003.3 reads in pertinent part:

> "...The discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to a representative of a party other than a party's attorney, discovery shall not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategies..."

The Board rules that the information requested by the Appellant falls squarely within this rule, made applicable to Board discovery procedures through 25 Pa. Code §21.111.

With respect to Appellant's Interrogatories Nos. 35 and 36, Appellant requests names of individuals DER has considered as potentially responsible parties. This clearly falls under the "mental impressions"

category of Rule 4003.3 of Pa. R.C.P. with respect to both DER attorneys and other DER employees. See Kocher Coal v. Commonwealth of Pa.,DER, EHB Docket No. 84-236-G (September 4, 1986). These same two interrogatories ask DER to specify any notification of these parties. This falls under the "memoranda, notes, or summaries" section of Pa.R.C.P. Rule 4003.3, supra.

In connection with Appellant's Interrogatory No. 37, again Appellant is requesting communications from DER which relate to the on-going litigation. These are protected from discovery by Rule 4003.3, supra, and the attorney-client privilege. Kocher Coal, supra, at 2. In all of the interrogatories discussed in this section, but especially in this one, Appellant is requesting that DER reveal its theories as to the parties who may be liable for the existent landfill condition and under what legal theories this liability may arise. The Board cannot compel DER to answer such interrogatories. They violate DER's right to prepare a thoughtful, thorough and private case presentation, as well as Rule 4003.3 of Pa. R.C.P. To force DER to turn over all this material would severely undermine its efforts. As the Board quoted in Bradford Coal Co. V. Commonwealth of Pa.,DER, 1985 EHB 938 at 941, as part of its discussion of the work product doctrine:

> "...It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. [Proper presentation] of a client's case demand that he assemble information, sift what he considers to be relevant, from the irrelevant facts, prepare his legal theories and prepare his strategy without undue and needless interference..."
> (citing U.S. v. Nobles, 422 U.S. 225, at 237 (1975))

Appellant's above interrogatories are violative of this sacred process.

Appellant's Motion to Compel is denied in part and granted in part. At this time, the Board declines to impose sanctions on DER and will

therefore deny Appellant's Motion to Impose Sanctions.

ORDER

AND NOW, this 27th day of March, 1987, it is ordered that Appellant's Motion to Compel is denied for all Interrogatories and Documents requested by Appellant except Interrogatories Nos. 32 and 34. DER is ordered to respond to Interrogatories Nos. 32 and 34, consistent with the foregoing opinion within ten (10) days of this order. Appellant's Motion for Sanctions is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 27, 1987
cc: **Bureau of Litigation**
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INE WOELFLING, CHAIRMAN

.IAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BANKS TOWNSHIP BOARD OF SUPERVISORS	:	
v.	:	EHB Docket No. 83-162-M
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
TRI-COUNTY LAND & COAL CO., Permittee	:	Issued: March 31, 1987

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of prosecution where the matter has been inactive for three and one-half years and Appellant has failed to respond to Board's request for status and rule to show cause.

OPINION

This matter was initiated on August 8, 1983, when the Banks Township Board of Supervisors (Appellant) filed a Notice of Appeal challenging the Department of Environmental Resources' (Department) approval of the use of sewage sludge in reclamation conducted by the Tri-County Land and Coal Company. Appellant and the Department filed their pre-hearing memoranda, respectively, on October 14 and November 23, 1983. The matter lay dormant until July 10, 1985, when the Board requested a status report from Appellant. Appellant never provided the status report, and the Board, on February 19, 1987, issued a rule to show cause why the appeal should not be dismissed for lack of prosecution. The rule was returnable on or before March 16, 1987.

The return receipt indicated Appellant received the rule on February 20, 1987, but no response has been filed with the Board.

We have repeatedly stated that appellants have the duty of going forward with prosecuting their appeals, and that we will not tolerate extended periods of inactivity on the docket. Springbrook Township v. DER, 1986 EHB 306. In addition to letting its appeal lay dormant since 1983, Appellant has failed to respond to two orders of the Board. We have no choice but to dismiss this appeal for lack of prosecution.

O R D E R

AND NOW, this 31st day of March, 1987, it is ordered that the appeal of the Banks Township Board of Supervisors is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 31, 1987

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

.IAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

C. W. BROWN COAL COMPANY, INC. :
:
v. : EHB Docket No. 85-159-G
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: March 31, 1987

OPINION AND ORDER SUR PETITION TO REINSTATE APPEAL

Synopsis

The Board evaluates a Petition to Reinstate Appeal as, alternatively, a request for reconsideration and a request for an allowance of an appeal nunc pro tunc. The Board denies the request for reconsideration as untimely and rejects the petition for an allowance of an appeal nunc pro tunc because Appellant's own actions, rather than any action of the Board, resulted in its improper filing.

OPINION

This matter was initiated by the filing of a Notice of Appeal by C. W. Brown Coal Company (Appellant) on April 29, 1985. Appellant sought review of a March 28, 1985 compliance order issued by the Department of Environmental Resources (Department) pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. Because Appellant failed to include a copy of the appealed-from order in its Notice of Appeal, the Board docketed it as a skeleton appeal pursuant to Rule 21.52(c) and sent Appellant its

acknowledgement and a request for the missing information in a notice dated April 30, 1985.[1] Appellant failed to supply a copy of the order within 10 days of receipt of the notice from the Board, and a second request for a copy of the order was sent on May 22, 1985, this time by certified mail, return receipt requested. When Appellant again did not provide the copy within 10 days, the Board, by order dated June 6, 1985, dismissed the appeal in accordance with Rule 21.124 for Appellant's failure to perfect. The dismissal order was sent to Appellant via certified mail, and the return receipt indicated it was received on June 10, 1985.

Appellant, in a letter dated July 2, 1985, stated that it failed to respond to the Board's requests because "the docket number given in this case by your department did not correspond with the docket number that you have indicated to me." Appellant apparently believed that the Department docket number on the compliance order, and not the Board's docket number, was the correct docket number. After Appellant was advised by the Board that the Department's compliance order docket numbers were of no consequence to the Board, Appellant, by letter dated August 6, 1985, enclosed the additional information required by the Board and requested the Board to either vacate its earlier dismissal or allow its appeal nunc pro tunc. The letter was followed by a Petition to Reinstate Appeal on August 29, 1985, after the Board advised Appellant to file a formal pleading.

Whether we treat this as a request for reconsideration or a request for allowance of an appeal nunc pro tunc, the result is the same. We must

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[1] The Board also indicated that the date of receipt of the order appealed was missing. However, we will regard Line 2 on the Notice of Appeal ("Appeal from Order dated March 28, 1985, and filed April 4, 1985) as complying with the requirement.

deny the requests and affirm our earlier dismissal.

Rule 21.122 of the Board's rules provides that the Board may grant reconsideration of a decision, under certain circumstances, if the application for reconsideration is filed within 20 days of the date of the decision. Whether we regard the Appellant's request for reconsideration as occurring with its letter of July 2, 1985, its letter of August 6, 1985, or its petition of August 29, 1985, the result is the same--it is untimely filed. The request for reconsideration would have had to have been filed on or before June 26, 1985, 20 days after the date of the Board's order of dismissal. Because the request was untimely, we have no jurisdiction to hear it.[2] Del-AWARE Unlimited, Inc. v. DER, et al., 1986 EHB 1179.

Turning now to whether a petition for allowance of an appeal nunc pro tunc will lie, we must also deny it. Although we have some doubt if the instant appeal should be regarded as a nunc pro tunc issue, we will treat it as such. An appeal nunc pro tunc will lie where some fraud on the part of the Board or breakdown in the Board's operation has led to an appellant's untimely filing of an appeal. Since Appellant had no communication with the Board other than the Board's requests for additional information, until after its appeal was dismissed, the Board could hardly be faulted for Appellant's failure to comply with filing requirements in the Board's rules.

Appellant's problems appear to stem from its inability to comprehend that the Board and DER are separate entities. The Department's use of docket numbers similar to the Board's on its compliance orders may result in confusion among the regulated public, especially where the initial of the District Office corresponds with that of the Board member assigned to the

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[2] Even if we were to have jurisdiction, none of the grounds alleged in Appellant's letters or petition are proper grounds for reconsideration.

appeal of the compliance order, as was the case here. However, this action on the part of the Department is of no legal consequence because, as we have repeatedly emphasized, the Board and the Department are separate agencies. C&K Coal Company v. DER, 1986 EHB 1215. In any event, Appellant is charged with knowledge of the law and has the obligation to assure that its filings are in conformity with the Board's requirements.

O R D E R

AND NOW, this 31st day of March, 1987, it is ordered that C. W. Brown Coal Company, Inc.'s Petition for Reinstatement of Appeal is denied and the Board's June 6, 1985 order of dismissal in this matter is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 31, 1987

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

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(717) 787-3483

GLEN IRVAN CORPORATION	:	
	:	
v.	:	EHB Docket Nos. 86-222-W
	:	86-223-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	March 31, 1987

OPINION AND ORDER

Synopsis

The sanction of dismissal is imposed upon a party for failure to comply with the orders of the Board and failure to diligently prosecute its appeal.

OPINION

These appeals were filed by Glen Irvan Corporation ("Appellant") on April 21, 1986. Although they have not been formally consolidated, the Board is here addressing them together, since the appeals deal with Appellant's attempt to obtain bond releases 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 its site in Goshen Township, Clearfield County authorized by Mine Drainage Permit No. 4578BC6.

In the appeal docketed at 86-222-W Appellant sought review of a Department of Environmental Resources' (the Department) letter, dated April 3, 1986, denying Appellant's application for a bond release for the area covered by Mining Permit No. 671-01-0. The bond release was denied because of alleged acid mine drainage at the site. Similarly, in the appeal docketed at

86-223-W Appellant sought review of a DER letter, dated March 19, 1986 denying Appellant's application for a bond release for the areas covered by Mining Permit Nos. 671-3A1, A2, A4 and 15A. The Department refused to release the bonds for those areas because of excessive erosion and water degradation.

On April 24, 1986, at each of these docket numbers, the Board issued its Pre-Hearing Order No. 1-MW requiring Appellant to submit a pre-hearing memorandum on or before July 7, 1986. Upon request of the Appellant, the Board, on July 2, 1986, granted an extension to August 8, 1986 for the submittal of its pre-hearing memorandum at each docket. On August 20, 1986, not having received Appellant's pre-hearing memoranda, the Board sent default notices to Appellant. The notices informed Appellant that it should file its pre-hearing memoranda by September 2, 1986, or the Board might apply sanctions pursuant to 25 Pa.Code §21.124. The Board sent another set of default notices on September 15, 1986, informing Appellant that unless it submitted its pre-hearing memoranda by September 25, 1986, the Board would apply sanctions. On October 27, 1986 the Board issued a rule to show cause why these appeals should not be dismissed for lack of prosecution. The rule was returnable, in writing, to the Board on or before November 18, 1986.

On November 17, 1986 the Board received a letter directly from Appellant, signed by its president, Irvan Stoker, which, oddly enough, asked the Board for a status report on its own appeals. The Board, on November 20, 1986 sent a letter to Mr. Stoker notifying him that the Board had directed all correspondence concerning the appeals to Robert M. Hanak, Esquire, who was indicated on Appellant's notices of appeal as authorized to represent Appellant, and that a Rule to Show Cause why the appeals should not be

dismissed was sent to counsel on October 27, 1986.[1] As of the date of this opinion and order, the Board has received no response, other than the letter inquiring about the status of the appeal, to any of its correspondence with Appellant.

The Board may impose sanctions upon a party for failure to abide by a Board order. 25 Pa.Code §21.124. Such sanctions may include the dismissal of an appeal. 25 Pa.Code §21.124; See, Robert Curley, et al., North Branch Concerned Citizens, and Middletown Township Board of Supervisors v. DER, EHB Docket No. 81-119-W (issued December 26, 1986).

Appellant has ignored four separate Board orders, Pre-Hearing order No. 1-MW, two default notices, and the rule to show cause. This is reason enough to impose the sanction of dismissal. In addition, an appellant has the responsibility to diligently prosecute its appeal before the Board. Springbrook Township v. DER, EHB Docket No. 84-122-M (issued May 8, 1986). No effort has been made by Appellant to go forward in this appeal for almost a year. The Board will not carry matters on its dockets indefinitely. Glah Brothers, Inc. and FSI Corp. v. DER, EHB Docket No. 82-026-M (Issued June 18, 1986).

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[1]It is not the Board's responsibility to ascertain who speaks for an appellant. Although the Board's rules permit the president of a corporation to represent it before the Board, the Board looks to the Notice of Appeal to determine who should be receiving Board orders and correspondence. It must accept Appellant's declaration that counsel is authorized to represent it.

ORDER

AND NOW, this 31st day of March, 1987, it is ordered that the appeals of Glen Irvan Corporation at EHB Docket Nos. 86-222-W and 86-223-W are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 31, 1987

cc: **Bureau of Litigation**
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Central Region
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Reynoldsville, PA

mjf

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INE WOELFLING, CHAIRMAN

IAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

THOMAS E. REITZ :
:
v. : EHB Docket No. 86-638-W
:
COMMONWEALTH OF PENNSYLVANIA : March 31, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER

Synopsis

Appeal is dismissed for lack of jurisdiction because it was filed more than thirty days after the appellant had received notice of the Department of Environmental Resources' decision.

OPINION

This appeal was filed November 20, 1986 by Thomas E. Reitz (Appellant). Appellant sought review of a Department of Environmental Resources' (DER) action entitled "Notice of Requirements to Retain Blasters License" ("Notice") dated September 23, 1986. The notice, which was received by Appellant on or about October 8, 1986, found him in violation of 25 Pa.Code §211.41 (24), and, pursuant to 25 Pa.Code §210.2(f), ordered him to take a blaster's training session, successfully pass a written examination for a blaster's license, and pay a $50 examination fee.

Noting that this appeal had been filed more than 30 days after Appellant received DER's notice, contrary to the requirements of 25 Pa.Code §21.52(a), the Board, on December 5, 1986, issued a rule to show cause why this appeal should not be dismissed as untimely. The rule was returnable, in

writing, to the Board on or before December 26, 1986. As of the date of this opinion and order, Appellant has failed to respond.

Appeals before the Board from a DER action must be filed within 30 days of the receipt of written notice by a party appellant. 25 Pa.Code §21.52(a). Here, since Appellant, by his own admission, received the notice on or about October 8, 1986, that deadline was November 7, 1986. The Board has no jurisdiction to hear appeals filed beyond the 30 day period Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Thus, the Board has no choice but to dismiss this appeal.

ORDER

AND NOW, this 31st day of March, 1987, it is ordered that the appeal of Thomas E. Reitz is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: March 31, 1987

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WILLIAM R. BENNETT COAL COMPANY :
and AMERICAN STATES INSURANCE COMPANY :
:
v. : EHB Docket No. 86-091-W
: (Consolidated with 86-134-G)
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 3, 1987

OPINION AND ORDER SUR MOTION TO DISMISS

Synopsis

The Board will not grant a motion to dismiss for untimeliness where the question of the time of notice is a fact which cannot be resolved on the basis of the pleadings and supporting documentation. The Board must look at such a motion in the light most favorable to the non-moving party.

OPINION

This appeal is from the Department of Environmental Resources' (DER) forfeiture of bonds for a mining site owned by William R. Bennett Coal Company (Bennett Coal), a sole proprietorship, in Conemaugh Township, Indiana County. DER forfeited Bennett Coal's bonds for various alleged violations 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. Bennett Coal filed an appeal from the forfeiture on February 18, 1986. On March 7, 1986, American States Insurance Company (A.S.I.), surety on several of the forfeited bonds, filed a separate appeal at Docket No. 86-134-G. In response to a request by Bennett Coal, the Board consolidated the two appeals at Docket No. 86-091-W on March 20, 1986.

On July 23, 1986 DER requested this Board to dismiss the appeal of A.S.I. for untimeliness. In support of this position, DER avers that A.S.I. received notice of DER's decision to forfeit the bonds for which A.S.I. is surety on February 3, 1986. Since A.S.I. filed its appeal on March 7, 1986, DER claims A.S.I. failed to file its appeal within 30 days of receipt of notice, as required by 25 Pa.Code §21.52(a). DER mailed the notice to "American States Insurance Co., P. O. Box 10893, Pittsburgh, PA 15236." In support of this claim DER has submitted a photocopy of a return receipt slip signed by one Arnold Yeanuzzi, bearing the date February 3, 1986. DER also submitted a copy of an unrelated bond for a different site which indicates A.S.I. is the surety and that A.S.I.'s address is the one to which DER here mailed notice.

A.S.I. asserts that DER used an incorrect address, one which, in fact, belongs to the Tippecanoe Insurance Agency (T.I.A.). A.S.I. further asserts that at no time did it authorize T.I.A. to receive service of process, such as is here involved. A.S.I. argues that it did not receive notice until February 6, 1986, when it received the notice sent to T.I.A. after that company had forwarded it to A.S.I. If February 6, 1986 is accepted as the date of notice, then A.S.I. has met the time requirement of 25 Pa.Code §21.52(a). DER claims that T.I.A. is A.S.I.'s agent in this matter, while A.S.I. asserts the contrary.

When A.S.I. received notice of DER's action hinges upon whether T.I.A. and/or Arnold Yeanuzzi was A.S.I.'s agent. The insertion of an address on an unrelated surety bond does not establish such a relationship. This is an issue of fact which cannot be resolved on the basis of the pleadings and supporting documentation. See, U.S. Coal v. DER, 1985 EHB 923.

Moreover, the Board must look at the motion in the light most favorable to the non-moving party. C.F., Staiana v. Johns Manville Corp., 304 Pa.Super. 280, 450 A.2d 681 (1982). Thus, the Board must deny DER's Motion to Dismiss. DER is given leave, however, to refile the motion should additional information come to light as a result of discovery.

O R D E R

AND NOW, this 3rd day of April, 1987, the Department of Environmental Resources' Motion to Dismiss the appeal of A.S.I. is denied. A.S.I. shall file its pre-hearing memorandum on or before April 20, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 3, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Western Region
For William R. Bennett Coal Co.:
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Pittsburgh, PA
For American States Insurance Company:
Kevin B. Watson, Esq.
PLOWMAN & SPIEGEL
Pittsburgh, PA

bl

GEORGE AND BARBARA CAPWELL	:	
	:	
v.	:	EHB Docket No. 83-081-M
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 7, 1987

OPINION AND ORDER SUR MOTION TO LIMIT ISSUES

Synopsis

The Board grants the Department of Environmental Resources' motion to limit issues and precludes Appellants from raising issues which could have been raised in an appeal of a related Department action which was dismissed as untimely.

OPINION

This matter was initiated on April 25, 1983 by the filing of a Notice of Appeal by George and Barbara Capwell ("Capwells"). The Capwells sought this Board's review of an order from the Department of Environmental Resources ("Department") which was dated April 8, 1983 and directed the Capwells to remove fill allegedly placed by the Capwells in Quaker Lake, Silver Lake Township, Susquehanna County, without the requisite permit under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq. ("Dam Safety Act"). The Department has filed a Motion to Limit Issues, contending that the Capwells are precluded from challenging the propriety of the Department's denial of a permit for the placement of the fill because their appeal of that denial was

dismissed by the Board as untimely filed. George and Barbara Capwell v. DER, 1983 EHB 326. The Capwells have responded to the Department's motion.

The Capwells' earlier appeal at Docket No. 83-019-M challenged the Department's December 15, 1982 denial of a permit application for a fill-stationary dock in Quaker Lake. The Department denied the permit on grounds that the fill would destroy "valuable shallow water fish habitat" and "restrict or impede the movement of aquatic species indigenous to the Lake." The denial letter also stated that the dock would be placed in a wetland area and that the Capwells had not demonstrated a public benefit which would outweigh the destruction of thw wetlands area, as required by 25 Pa.Code §105.411. The Capwells' Notice of Appeal cited 12 reasons for challenging the Department's order, seven (Paragraphs 3C, D, E, F, G, I, and J) of which, in essence, contest the Department's denial of the Capwell's permit application. Similarly, six (Paragraphs 1, 2, 3, 4, 5, and 6) of the eight paragraphs in the Capwells' July 18, 1983 pre-hearing memorandum directly challenge the 1982 permit denial, while three (Paragraphs 1A, B, and C) of the five contentions in the Capwells' August 18, 1983 amendment to their pre-hearing memorandum contest either the necessity for the permit or grounds for its denial.

It is well-established Board precedent that one who fails to appeal a Department action directed to it cannot collaterally attack that action in a subsequent proceeding. Middlecreek Coal Company v. DER, EHB Docket No. 86-250-W (opinion and order issued January 30, 1987). The Capwells cannot now relitigate the Department's denial of their permit application, having lost that opportunity with the Board's dismissal of their appeal at Docket No. 83-081-M as untimely. Accordingly, the Department's Motion to Limit

Issues must be granted.

O R D E R

AND NOW, this 7th day of April, 1987, it is ordered that the Department's Motion to Limit Issues is granted and Appellants George and Barbara Capwell are precluded from raising any issues relating to the propriety of the Department's denial of the Capwells' permit application at the hearing on the merits in this matter.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: April 7, 1987

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IAM A. ROTH, MEMBER

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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
:
v. : EHB Docket No. 85-252-M
:
CANADA-PA, LTD. : Issued: April 9, 1987

PARTIAL
DEFAULT ADJUDICATION

Synopsis

The Board has authority under its rules to issue a default adjudication where a defendant fails to respond to a complaint for civil penalties. That default adjudication will be partial where the Board cannot readily ascertain the amount of penalties, and a separate hearing will be held for that purpose. The statute of limitations is waived as a defense to a civil penalties action where it is not raised as an affirmative defense in a responsive pleading.

INTRODUCTION

This matter was initiated by the filing of a complaint for civil penalties pursuant to §605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 ("the Clean Streams Law") and §21 of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.21 ("the Dam Safety Act") by the Department of Environmental Resources ("Department") on June 19, 1985. The complaint alleged that Canada-Pa., Ltd. ("Defendant") had violated various provisions of the Clean Streams Law and the rules and regulations adopted

thereunder at 25 Pa.Code §102.1 et seq., the Dam Safety Act, and an April 15, 1983 Consent Order and Agreement executed by the Department and Defendant.

A standard Notice to Defend, as required by Rules 21.32(b), 21.56(b), 21.64(b), and 21.65(a) of the Board's rules of practice and procedure and Pa.R.C.P. 1018.1(b), was appended to the complaint. Thereafter, the Department, on July 22, 1985, filed a Motion for Default Adjudication on the grounds that Defendant had failed to answer the complaint within 20 days. The Board, by letter dated July 25, 1985, advised Defendant that it must respond to the Department's motion on or before August 16, 1985.

The Board received a handwritten letter from Defendant on August 1, 1985, alleging that it had never received the complaint and stating that "The statute of limitations ran out on May 26, 1985." The Department again served the complaint by certified mail, return receipt requested. The return receipt indicated that Robert E. Boyce, the individual identified as president of Defendant, received the complaint on August 2, 1985.

After more than 20 days elapsed and no answer was filed, the Department filed an Amended Motion for Default Adjudication on September 4, 1985. The Board, by letter dated September 18, 1985, advised Defendant that it must respond to the Department's amended motion on or before October 8, 1985. As of the date of this opinion, no answer to either the complaint or the Department's amended motion has ever been filed by Defendant.

As a result of the chronology contained in the preceding paragraphs and based on the reasoning enunciated below, the Board is issuing a partial default adjudication in this matter. We make the following findings of fact, taken from the Department's complaint, as part of our default adjudication.

FINDINGS OF FACT

1. Plaintiff is the Department, which brings this action pursuant to §605 of the Clean Streams Law and §21 of the Dam Safety and Encroachments Act.

2. Defendant is Canada-Pa., Ltd., a Pennsylvania corporation engaged in the business of real estate development and timber sales, with its registered place of business at 300 West Fourth Street, Williamsport, Pennsylvania 17701.

3. At all times relevant hereto, Defendant was the owner and an occupier of a tract of land known as Daugherty Hollow, which is located in Chapman Township, Clinton County.

4. An unnamed stream, locally known as Daugherty Run, runs through the Daugherty Hollow tract and discharges into another unnamed stream, locally known as Seven Mile Run, which, in turn, discharges into Young Woman's Creek.

5. Seven Mile Run enters Young Woman's Creek within a specially regulated Fly Fishing Only area, which was removed from the stocked trout program in 1983 due to its ability to maintain an abundant population of salmonid stock through natural recruitment.

6. Defendant, through an independent contractor under its direct supervision and control, harvested forest products and engaged in logging operations on the Daugherty Hollow tract at least from December, 1982 through May, 1983.

7. As early as December 3, 1982, the Clinton County Conservation District discovered that the Defendant's logging operations were causing sedimentation and other environmental damage to the waters of the Commonwealth.

8. On December 17, 1982, a meeting was held between officials of the Clinton County Conservation District, the Bureau of Forestry, the Fish Commission, the Bureau of Dams and Waterway Management, the Bureau of Soil and Water Conservation, and representatives of Defendant.

9. The parties at the December 17 meeting verbally agreed that Defendant would not conduct any further earthmoving activities until an erosion and sedimentation control plan was submitted and approved and until an encroachment permit was applied for and received. The parties also agreed to enter into a Consent Order and Agreement (the "Consent Order") in settlement of Defendant's violations up to that time of the Clean Streams Law and the rules and regulations promulgated thereunder, as well as the Dam Safety Act and the rules and regulations promulgated thereunder. The Consent Order was executed by the Defendant in March or early April of 1983, and signed by the Department on April 15, 1983.

10. Pursuant to the Consent Order, the parties agreed to the following:

a. The Consent Order constituted an Order of the Department issued pursuant to Sections 5, 316, 402, and 610 of the Clean Streams Law; Section 20 of the Dam Safety and Encroachments Act; and Section 1917-A of the Administrative Code, 71 P.S. §510-17.

b. Defendant agreed to pay a penalty of $700.00.

c. Defendant would submit a full and complete erosion and sedimentation control plan before conducting any further earthmoving activity at the Daugherty Hollow site.

d. Defendant would not conduct any further earthmoving activity at the Daugherty Hollow site until the erosion and

sedimentation plan was approved by the Conservation District.

e. Defendant would immediately stabilize all disturbed areas on the Daugherty Hollow site and install immediately the control measures contained in its approved plan. Failure to comply with this requirement would result in an automatic, nonexclusive penalty of $50.00 a day.

f. Defendant would submit a full and complete application for an encroachment permit covering its stream encroachment at the site.

11. The erosion and sedimentation plan submitted pursuant to the Consent Order was approved as submitted, for the most part, on March 2, 1983.

12. On April 5, 1983, an encroachment permit was issued to Defendant, allowing stream encroachment, but only as needed to install and maintain erosion and sedimentation control devices within the stream.

13. Among other things, following the execution of the Consent Order, Defendant constructed a skid trail that was to the west of the primary skid trail and was not designated on the plan, extended the trails that were indicated on the plan in a northernly direction, and conducted operations to the north, west, and south of the boundaries of the disturbed area as depicted on the plan.

14. The earthmoving activities resulting in the construction referred to in Finding of Fact 13 contributed to the accelerated erosion of the site and the accelerated sedimentation of Daugherty Run, Seven Mile Run, and Young Woman's Creek.

15. Following the execution of the Consent Order, Defendant failed to install adequate erosion and sedimentation control measures and failed to stabilize the Daugherty Hollow site. Among other things, Defendant failed to

place water bars on skid trails to prevent accumulation of water on critical grades and prevent erosion, place a durable stone riprap at a spring outlet, divert all surface water away from the project area, adequately direct runoff, revegetate, and apply mulch. The site has never been fully stabilized.

16. Following the execution of the Consent Order, Defendant failed to maintain those erosion and sedimentation control measures that it installed on the Daugherty Hollow site in such a way as to prevent sedimentation of Daugherty Run, Seven Mile Run, and Young Woman's Creek. Among other things, sediment was permitted to build up behind erosion control dams placed in Daugherty Run and provided for in Defendant's plan to the point that the dams were rendered useless as control measures.

17. On at least April 21, May 3, and May 10, 1983, and at numerous other times following the execution of the April 15, 1983 Consent Order, Defendant has caused and allowed sediment, a polluting substance and an industrial waste, to be discharged from the Daugherty Hollow site into Daugherty Run, Seven Mile Run, and Young Woman's Creek.

18. An investigation conducted by the Fisheries Environmental Services on April 26, 1983 revealed that sedimentation resulting from Defendant's logging activity at the Daugherty Hollow site caused significant environmental damage to the local watershed.

19. Defendant was issued an encroachment permit by the Department on or about April 5, 1983 that authorized it to place erosion control devices within Daugherty Run. The permit did not authorize any other water obstructions or encroachments.

20. Following the execution of the Consent Order, Defendant's logging activities caused obstruction and encroachment of Daugherty Run and

changed the course, current, and cross-section of Daugherty Run. Among other things, Defendant stockpiled debris within the Daugherty Run stream bed, skidded lumber within the stream bed, constructed skid trails that interfered with the stream, and operated logging machinery and conducted logging activities within the stream.

DISCUSSION

The Board, in the instant case, is taking the unusual step of entering a default adjudication against the Defendant in a civil penalties case.[1] While we are mindful that the Department bears the burden of proof under Rule 21.101(b)(1) in such cases and recognize that Defendant is not represented by counsel, we believe that the issuance of a partial default adjudication is appropriate under the circumstances. Flagrant disregard for the administrative law process cannot be permitted to serve as the means for hindering or halting the process.

The Board's authority to issue a default adjudication is found in various of its rules of practice and procedure. Rule 21.64(d) of the Board's rules of practice and procedure, which applies generally to pleadings before the Board, provides that:

> Any party failing to respond to a complaint, new matter, petition, or motion shall be deemed in default and at the Board's discretion sanctions may be imposed in accordance with §21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such pleading or motion as admitted.

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[1] See also DER v. Froelhke et al., 1973 EHB 118, where the defendants failed to respond to DER's civil penalty complaint because of their contention that the United States and its agents were immune from suit under state water pollution control laws. The Board entered a default judgment and had a hearing on the amount of penalties.

The rule applying specifically to complaints for civil penalties, Rule 21.66(c), states that:

> Any defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts stated in the complaint for civil penalties may be deemed admitted. Further, the Board may impose sanctions for failure to file an answer in accordance with §21.124 of this title (relating to sanctions).

These two rules must also be construed in light of Rule 21.124 which states:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the Board for repeated or flagrant violations of orders, or such other sanctions as are permitted in similar situations by the Pennsylvnia Rules of Civil Procedure for practice before the Court of Common Pleas.
>
> (emphasis added)

A recognition of the sanctions authorized by the Pennsylvania Rules of Civil Procedure is also necessary in interpreting these rules. Most relevant to the issue before the Board is Pa.R.C.P. 1037, which provides for the entry of a default judgment in instances where a party fails to answer a complaint within the required time. Interpreting these rules in pari materia, we hold that the Board has the authority to issue a default adjudication where a defendant fails to answer a complaint for civil penalties.

Having concluded that we possess the authority to issue a default adjudication, we next turn to the issue of whether the pre-requisites for the issuance of the adjudication have been met. Because the issuance of a default adjudication is a drastic remedy, the Board must be assured that

there has been strict compliance with all rules relating to the entry of the adjudication.

We believe that the Department has satisfied all relevant requirements. Rule 21.56(b) states that an action for civil penalties commences upon filing of the complaint and service of the complaint and a notice to plead upon the defendant. Service may be accomplished by mailing postage pre-paid, under Rule 21.32(a). The complaint, in this instance, had a proper notice to defend and was served via first class mail, postage pre-paid.

We hesitate to hazard a guess as to why Defendant did not receive the complaint filed with the Board on June 19, 1985. The docket in this matter reflects that Defendant received the Department's Motion for Default Adjudication. Indeed, Defendant's August 1, 1985 letter to the Board responding to that motion indicates an awareness of the gravity of a civil penalties complaint and contains a statement, which is rather strange in light of Defendant's allegations that it never received the June 19, 1985 complaint--"The statute of limitations ran out on May 26, 1985."

The Department chose, in light of Defendant's August 1, 1985 letter, to remove any infirmity caused by alleged lack of service. It again served the complaint on Defendant and, that time, the return receipt indicated Defendant received the complaint. However, Defendant chose not to answer the complaint or respond to the Department's amended motion.

Defendant appears to take refuge in its belief that the statute of limitations has run out on its alleged violations of the Clean Streams Law and the Dam Safety Act. But this reliance is misplaced, for the mere fact that a statute of limitations exists for a particular cause of action is not, in and of itself, a guarantee of insulation from liability. This is so

because the statute of limitations is an affirmative defense which must be raised as new matter in a responsive pleading under Rule 21.66(b) and Pa.R.C.P. 1030.[2] Failure to raise it in that manner results in a waiver of the defense. Bartanus v. Lis, 332 Pa.Super.48, 480 A.2d 1178 (1984). Defendant has not filed a responsive pleading to either the June 19, 1985 complaint or the August 2, 1985 complaint and, therefore, has waived this defense.[3]

Rule 1037(b)(1) of the Pennsylvania Rules of Civil Procedure provides that:

> The prothonotary shall assess damages for the amount to which plaintiff is entitled if it is a sum certain or which can be made certain by computation, but if it is not, the damages shall be assessed at a trial at which the issues shall be limited to the amount of damages.
>
> (emphasis added)

While we have established the violations of the Clean Streams Law and the Dam Safety Act committed by Defendant, calculation of the civil penalty amount is not a simple matter of arithmetic. Section 605 of the Clean Streams Law and §21 of the Dam Safety Act require our consideration of a variety of subjective factors in determining the amount of civil penalty, and, because of that, we cannot readily compute that amount based upon our findings in this default adjudication. Therefore, we will set a separate hearing to determine the amount of penalties.

---

[2] The Board's rules mercifully prevent us from analyzing whether the statute of limitations may be raised as a demurrer in preliminary objections under Pa.R.C.P. 1017(b) or as new matter in a responsive pleading under Pa.R.C.P. 1030.

[3] While it is possible to regard Defendant's August 1, 1985 letter as a responsive pleading, it is hardly logical to do so in light of Defendant's claim that it never received the June 19, 1985 complaint.

CONCLUSIONS OF LAW

1. The Board has authority, pursuant to Rules 21.64(d), 21.66(c), and 21.124 of its rules of practice and procedure and Pa.R.C.P. 1037, to issue a default adjudication.

2. All relevant facts in a complaint for civil penalties are deemed to be admitted where a defendant fails to answer a complaint filed in conformance with Rules 21.56 and 21.57 of the Board's rules of practice and procedure.

3. The imposition of the sanction of a default adjudication is appropriate where defendant fails to answer a complaint for civil penalties and to respond to a motion seeking sanctions for its failure to answer the complaint.

4. Daugherty Run, Seven Mile Run, and Young Woman's Creek are waters of the Commonwealth.

5. All drainage within the Young Woman's Creek basin, including Seven Mile Run and its tributaries, is classified as "High Quality" at 25 Pa.Code §93.9.

6. The statute of limitations is an affirmative defense which must be raised in a responsive pleading under Rule 21.66(b) and Pa.R.C.P. 1030.

7. Defendant's failure to file a responsive pleading resulted in a waiver of the statute of limitations as a defense to this civil penalties action.

8. The logging operations conducted by Defendant, including the skidding and transport of logs and the construction, improvement, and use of skid trails, constituted earthmoving activities under 25 Pa.Code §102.1.

9. 25 Pa.Code §102.4 requires that all persons engaged in earthmoving activities prepare and have available on the site at all times an

erosion and sedimentation control plan which sets forth the measures to be used to minimize accelerated erosion and sedimentation.

10. Defendant conducted earthmoving activities that were not covered by its erosion and sedimentation control plan and that were expressly prohibited by the Department.

11. Defendant's unlawful earthmoving activities and failure to maintain a full and complete plan for the Daugherty Hollow site constituted a nuisance, as well as a violation of the Consent Order, 25 Pa.Code §102.4, and Sections 401, 402, and 611 of the Clean Streams Law, 35 P.S. §§691.401, 691.402,and 691.611.

12. 25 Pa.Code §102.4 requires persons engaged in earthmoving activities to implement and maintain adequate erosion and sedimentation control measures.

13. 25 Pa.Code §102.11 requires the erosion and sedimentation control measures and facilities set forth in 25 Pa.Code §§102.12 and 102.13 to be incorporated into all earthmoving activities.

14. 25 Pa.Code §102.12(f) requires that all runoff from a project area be collected and diverted to treatment facilities.

15. 25 Pa.Code §102.12(d) requires that disturbed areas be stabilized as soon as possible after earthmoving is completed.

16. 25 Pa.Code §§102.22 and 102.24 require all disturbed areas to be stabilized to prevent accelerated erosion.

17. Defendant's failure to implement and maintain adequate control measures and failure to stabilize the Daugherty Hollow site contributed to accelerated erosion and sedimentation of the waters of the Commonwealth, constituted a nuisance, a violation of the Consent Order, and a violation of

25 Pa.Code §§102.4, 102.11, 102.12, 102.22, and 102.24, and Sections 307, 316, 401, 402, 503, and 611 of the Clean Streams Law, 35 P.S. §§691.307, 691.316, 691.401, 601.503, and 691.611.

18. Section 401 of the Clean Streams Law, 35 P.S. §691.401, provides that it is unlawful for any person to allow or permit the discharge of polluting substances into waters of the Commonwealth.

19. 35 P.S. §691.307 prohibits the unpermitted discharge of industrial waste into the waters of the Commonwealth.

20. 25 Pa.Code §102.12(g) requires that sediment be removed from runoff before it is discharged into waters of the Commonwealth.

21. Defendant's discharge of pollutants and industrial waste into the waters of the Commonwealth constituted a nuisance, a violation of the Consent Order, and a violation of 25 Pa.Code §102.12(g) and Sections 307, 401, 402, 503, and 611 of the Clean Streams Law, 35 P.S. §§691.307, 691.401, 691.402, 691.503, and 691.611.

22. Section 6 of the Dam Safety Act, 32 P.S. §693.6, and 25 Pa.Code §105.11 prohibit the construction, operation, maintenance, modification, enlargement, or abandonment of any water obstruction or encroachment without a permit from the Department.

23. Section 18 of the Dam Safety Act, 32 P.S. §693.18, makes it unlawful for any person to:

> (1) Violate or assist in the violation of any of the provisions of this act or of any rules and regulations adopted hereunder.
>
> (2) Fail to comply with any order by the department issued hereunder ....
>
> (3) Construct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, water obstruction or encroachment contrary to the terms and conditions of a general or individual permit or the

rules and regulations of the department.

24. 25 Pa.Code §105.44 requires that all work undertaken pursuant to a permit be conducted in accordance with the plans and specifications approved by the Department.

25. The Defendant's construction, maintenance, and utilization of the unpermitted stream obstructions and encroachments and unlawful changing of the course, current, and cross-section of the waters of the Commonwealth constituted a public nuisance and violations of the Consent Order, its permit, Sections 6 and 18 of the Dam Safety Act, 32 P.S. §§693.6 and 693.18, and 25 Pa.Code §§105.11 and 105.44.

O R D E R

AND NOW, this 9th day of April, 1987, it is ordered that judgment is entered against Canada-Pa, Ltd. for the above violations of the Clean Streams Law and the Dam Safety Act and a hearing will be scheduled to determine the amount of civil penalties to be imposed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 9, 1987

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	**EHB Docket No. 84-332-R**
WILBUR GUILE	:	Issued: 4/16/87

OPINION AND ORDER
SUR
RECONSIDERATION OF DENIAL OF SUMMARY JUDGMENT

Synopsis

Upon reconsideration, the Board affirms the prior denial of Defendant's Motion for Summary Judgment. There are material facts in dispute involving Defendant's alleged violations of the Bituminous Coal Mine Act. Therefore, summary judgment, pursuant to Pa.R.C.P. 1035, may not be granted.

OPINION

BACKGROUND

I. The Incident

On July 3, 1983, an explosion occurred at the Helen Mining Company, causing the death of Sylvester Lee Mitsko. A commission, appointed pursuant to Section 124 of the Bituminous Coal Act, the Act of July 17, 1961, P.L. 659, as amended, 52.P.S. §701.101 et seq (the Act), held hearings from July 14-16, 1983, to investigate the incident. On September 11, 1984, the Department of Environmental Resources filed a Complaint against the Defendant seeking revocation of Wilbur Guile's (Defendant's) certificate of qualification,

pursuant to §206 of the Act and 25 Pa. Code §21.65.

II. DER's Complaint

DER's complaint of September 11, 1984, consisted of five counts. Count I alleged that Defendant failed to make proper examinations of the Helen Mine from June 26-July 3, 1983, violating §228(a) of the Act. Allegedly, air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. Count II alleged that Defendant made incorrect entries in the mine examiner's book, because he recorded that "air was traveling its proper course and normal volume", without having taken a reading with an anemometer, in violation of §228(a) of the Act. Count III alleged that Defendant permitted the use of a pump in the area of the number 9 room of the D-butt section of the mine inby the last crosscut for a period in excess of thirty minutes, without making an examination for the presence of methane every thirty minutes, violating §316(h)(3) of the Act. Count IV alleged Defendant violated §316(f) of the Act by leaving the pump in the area of the number 9 room, D-butt section while it was in operation. Count V alleged Defendant violated §279 of the Act, by his violations of §§228(a), 316(h)(3) and 316(f) of the Act.

III. Amendments to the Complaint

On December 31, 1984, Defendant filed his Preliminary Objections. The Board sustained the sufficiency of DER's complaint, but ordered DER to file an amendment to Paragraph 8 of its complaint to supply additional factual allegations which the Board felt were lacking in the original complaint. On August 25, 1986, DER declared its intent to withdraw Count II of its complaint as to this Defendant and did so on September 8, 1986.

IV. Original Summary Judgment Motion

On December 23, 1985, Defendant filed a Motion for Summary Judgment with respect to both DER's original and amended complaints, pursuant to Pa. R.C.P. 1035. DER filed an answer to Defendant's Motion on February 18, 1986. Both sides supplemented their positions with further pleadings. Oral argument was held on this motion on April 3, 1986. On September 17, Defendant filed a Statement of Undisputed Facts to which DER responded on September 25, 1986.

The Board denied Defendant's Motion for Summary Judgment on December 15, 1986 in a simple order stating only that there were material issues of disputed fact.

On January 2, 1987, the Defendant filed a Petition for Reconsideration with the Board, to which DER responded on January 27, 1987. The Board issued an opinion and order on February 9, 1987, granting reconsideration due to the resignation of the Board Member who issued the Summary Judgment Opinion and his consequent inability to clarify that order.

RECONSIDERATION OF THE SUMMARY JUDGMENT ORDER

Pa. R.C.P. 1035 authorizes any party to move for summary judgment after the pleadings are closed. Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Emerald Mines Corporation v. DER, EHB Docket No. 84-280-W (May 30, 1986); Summerhill Borough V. DER, 34 Pa. Cmwlth 574, 383 A.2d 1320 (1978).

In the instant matter, the Board finds that it need not reach the

issue of whether Defendant is entitled to judgment as a matter of law, as there are many material facts in dispute. The following represent only some of those facts. First, there is a question as to whether or not the "patrol runs" which Defendant conducted, as opposed to regular mine examinations as required by §228(a) of the Act, were long-standing practices accepted by DER. (DER's Reply to Statement of Undisputed Facts at 2 (September 25, 1986); Defendant's Statement of Undisputed Facts at 5, f.n.5 (September 19, 1986). This fact is critical to the disposition of Count I of DER's Complaint which alleged that Defendant failed to make proper examination of the Helen Mine violating §228(a) of the Act. DER alleged in Count I that air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. If "patrol runs" were found to be accepted by DER in the past, the strength of its argument in Count I would be diminished.

Second, there is a dispute as to whether the Defendant's air readings were taken in the last open crosscut, where sufficient air velocity might have existed to operate an anemometer, as opposed to the area of the power center. (DER's Reply to Statement of Undisputed Facts, supra, at 3; Defendant's Deposition Transcript at pages 17-18,31,32,34,41, and 50) This is also critical to Count I a DER's Complaint.

Third, there is a dispute between the parties as to whether Defendant was acting in the capacity of a mine examiner from June 26, 1983-July 3, 1983. (DER's Memorandum of Law in Support of Answer to Motion for Summary Judgment at 18 (February 18, 1986); DER's Request for Admissions No. 4, 10, 16, 25, 31, 36, 42, and 48). This is likewise critical in determining Defendant's liability under §228(a) of "The Act" and in the disposition of Count I of DER's Complaint.

A fourth disputed fact is whether §228 (a) of the Act requires and whether it was Defendant's practice to use an anemometer to determine whether the air in each split was traveling in its proper course and in normal volume. (DER's Memorandum, supra, at 20; Defendant's Memorandum in Support of Motion for Summary Judgment at 10-11 (November 23, 1985)). This is a significant and possibly dispositive fact with respect to Counts I and III, of DER's Complaint.

Fifth, there is a dispute between the parties as to whether the pump in the number 9 room of the D-butt section of the Mine was operated inby the last open crosscut and should thus be considered face equipment mandating examination under §316(h)(3) of the Act. (DER's Memorandum supra, at 24; Defendant's Memorandum, supra at 33-35). This fact is crucial to the resolution of Counts III and IV of DER's Complaint.

A sixth disputed fact between the parties is whether the pump in the number 9 room, D-butt section of the mine was located in a working place, pursuant to §316 of the Act. (DER's Memorandum, supra, at 24; Defendant's Memorandum, supra, at 33-35). The resolution of this issue is likewise critical to the Counts III and IV of DER's Complaint.

This case's entire disposition could turn on the resolution of only one of these facts. If DER met the burden of proof on any of these issues, a prima facie case of negligence under the Act might be established against the Defendant.

For this reason, the Board need not reach the second prong of the summary judgment test namely, whether the Defendant is entitled to judgment as a matter of law. While the Board recognizes that the above listing of disputed facts may not be exhaustive, it serves to show that there are genuine disputes of material facts. On this basis we can only affirm the

prior order denying summary judgment.

ORDER

AND NOW, this 16th day of April, 1987, upon reconsideration of all relevant pleadings, it is ordered that the Board's prior order denying Defendant's Motion for Summary Judgment is affirmed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 16, 1987
cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

ROB COAL COMPANY, INC. :
:
v. : EHB Docket No. 86-663-R
:
COMMONWEALTH OF PENNSYLVANIA : Issued: April 16, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER
SUR
MOTION TO QUASH

Synopsis

Pursuant to 25 Pa. Code §21.52(a), the Board has no jurisdiction to hear an appeal from a Department action unless the appeal is filed within 30 days from the date appellant receives notice of such action.

OPINION

Appellant Rob Coal Company, Inc. ("Rob") initiated this matter on December 11, 1986 by filing an appeal from a civil penalty which was assessed by the Department of Environmental Resources ("DER") on August 29, 1986. Rob admits to having received the assessment on September 3, 1986. On January 21, 1987 DER filed with the Board a Motion to Quash this appeal as untimely, which motion is the subject of this opinion and order.

Appeals from a DER action must be filed within thirty (30) days from the date an appellant receives notice of the DER action. The Board lacks jurisdiction to hear appeals not filed during this period. 25 Pa. Code §21.52(a); Commonwealth v. Joseph Rostosky, 26 Pa. Cmwlth. 478, 364 A.2d 761

(1976). Rob's thirty (30) day appeal period expired on October 3, 1986, but Rob did not file its appeal until December 11, 1986, or 66 days after the appeal period expired. Consequently, the Board has no jurisdiction to hear this appeal.

In Paragraph 3 of its answer to DER's motion, Rob avers that it delayed filing its appeal because it was trying to arrange a conference with DER personnel ". . .to set the violations and affected areas straight but was unable to do so. Appellant [Rob] then filed his formal appeal." In Paragraph 7 of its answer, Rob denies that his appeal was untimely and ". . . avers that the faulty reports of the DER themselves [sic] caused the delay in formal filing of an appeal and that [Rob] believes conferences would help straighten out this mess without filing the formal appeal. However, when the local DER office at Greensburg was unwilling or unable to have the proper persons at conferences set up in October or November, 1986, [Rob] then filed his appeal."

The alleged unwillingness of DER officials to confer with Rob in order to correct what Rob considered to be faulty information on which the civil penalty assessment was based cannot excuse its failure to file its appeal within the required thirty (30) day appeal period. Only fraud or breakdown in the Board's operation justifies the late filing of an appeal. C&K Coal Company v. DER, EHB Docket Nos. 86-346-W and 86-361-W (issued November 20, 1986); aff'd. on reconsideration, C&K Coal Company v. DER, EHB Docket Nos. 86-346-W and 86-361-W (issued December 18, 1986). Additionally, Rob's argument suggests that the appealed from order was not final until Rob determined that attempts at informal resolution had failed and that a formal appeal was necessary. The Board rejects this argument because, taken to its absurd conclusion, it would be impossible for the Board to determine when its

jurisdiction attaches. Jurisdiction would be solely dependent on an appellant's perception of when the DER action was truly final. "Such a diffuse, subjective standard for defining the Board's jurisdiction serves neither the Board nor the public." C&K Coal Company, supra.

Under the circumstances of this appeal, the Board has no choice but to grant DER's motion to quash and to dismiss this appeal as untimely.

ORDER

AND NOW, this 16th day of April, 1987, it is ordered that DER's Motion to Quash is granted and the appeal of Rob Coal Company, Inc. is dismissed as untimely.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 16, 1987

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M. DIANE SMITH
SECRETARY TO THE BOARD

SANNER BROTHERS COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 81-107-M
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 21, 1987

ADJUDICATION

By the Board

Synopsis

Appellant failed to demonstrate by substantial evidence that the Department of Environmental Resources' (DER) denial of its mine drainage permit application was an abuse of discretion. In failing to heed DER's instructions regarding the use of overburden analysis, Appellant, at its own peril, employed a methodology which was inappropriate for its circumstances. As a consequence, Appellant could not affirmatively demonstrate that its proposed mining activity would not result in pollution of the waters of the Commonwealth. Appellant also failed to demonstrate that its proposed mining activity in a special protection watershed under 25 Pa.Code §93.9 was economically and socially justified and did not satisfy its burden of proof in attacking the use designation of the watershed.

INTRODUCTION

Sanner Brothers Coal Company (Sanner) has appealed DER's June 26, 1981 denial of its application for a mine drainage permit (No. 56800101). Sanner sought to mine a site in Fairhope Township, Somerset County. Hearings on the merits were held on February 24 and 25, March 16 and 17, and May 20 and 21, 1982 by former Member Anthony J. Mazullo, Jr., who resigned from the Board on January 31, 1986 without having prepared an adjudication. This adjudication has been prepared by the Board.

FINDINGS OF FACT

1. Appellant is Sanner, a partnership engaged in the business of surface mining, located at R. D. 2, Rockwood, Somerset County. (Ex.S-2)

2. Appellee is the DER, the agency entrusted with the administration 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. (SMCRA) and the rules and regulations adopted thereunder, and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (CSL) and the rules and regulations adopted thereunder.

3. On or about January 10, 1980, Sanner, through its agent, Robert W. Cassidy, a registered land surveyor, submitted to DER Mine Drainage Application No. 56800101 to operate a strip mine on a site of approximately 88 acres in Fairhope Township, Somerset County. (N.T. 9, 16, 17; Ex.S-2)

4. DER received the application materials on January 17, 1980. (N.T. 462)

5. On or about February 4, 1980, DER returned the mine drainage permit application to Sanner with a request for the mining permit face sheet,

maps, and Supplement C (ownership certificates). (N.T. 48, 462-64)

6. On or about April 18, 1980, after receipt of the requested mining permit face sheet and Supplement C, DER notified Sanner that the review process had begun. (N.T. 464-65)

7. On or about May 29, 1980, DER sent a corrections letter to Sanner, requesting that 11 items be corrected and/or added to the mine drainage application, including, inter alia, submittal of a complete analysis of all overburden, coal and underclay strata to be affected and submittal of a Social and Economic Justification Statement (SEJS). (N.T. 52; Ex.S-4)

8. Sanner received DER's policy and information letter concerning overburden analysis ("OA") techniques (the "Ercole letter") either as an enclosure to the May 29, 1980 correction letter or separately as a response to a request. (N.T. 81-2, 128, 760)

9. The Ercole letter described overburden analysis techniques and represented the policy of DER on overburden analysis from November, 1979 through at least the time of hearings in this matter. (N.T. 81, 128, 760; Ex.C-1)

10. In a letter dated June 26, 1980, to P. J. Shah, the Chief of the Permit and Technical Review Section of the Ebensburg District Office, Sanner requested an extension to August 15, 1980 to submit the requested corrections. (N.T. 53-54; Ex.S-5)

11. DER granted the extension request. However, DER's practice at this time was not to send a written response unless specifically requested. (N.T. 53-4, 471; Ex.S-5)

12. By letter dated July 17, 1980, Sanner's agent, Thomas L. Nickeson, a geologist and hydrologist, sent DER a proposal to conduct the OA required by DER. The letter outlined the proposal for drilling and

included a map from the original mine drainage application showing the proposed drilling sites. (N.T. 129-31; Ex.C-6)

13. The OA proposal of July 17, 1980 requested an immediate response; however, it also stated that Sanner had elected to proceed with drilling and testing "prior to DER approval." (N.T. 129-31, 834-35; Ex.C-6)

14. Also on July 17, 1980, Nickeson supervised the actual on-site drilling and delivery of soil samples to Ron Schrock of Geochemical Testing, Inc. of Somerset for performance of the OA. (N.T. 129-34, 834-5)

15. The OA proposal was received by DER on July 21, 1980. (N.T. 129-31; Ex.C-6)

16. The analysis of the materials from the two drill holes was completed on July 22 and 23, 1980. (N.T. 129-34, 835)

17. Any response by DER to Sanner's letter of July 17, 1980 would have been nugatory, as Sanner had completed the majority of the OA prior to DER's review of the proposal.

18. The laboratory results of the OA were sent to DER under cover letter dated September 19, 1980. (N.T. 136; Ex.S-10)

19. The laboratory results of the OA were not accompanied by interpretations or a statement of probable hydrologic consequences, as required by the Ercole letter, nor the additional corrections requested in DER's May 29, 1980 letter. (N.T. 136, 839; Ex.S-10, C-1)

20. The remainder of the corrections requested by DER in its May 29, 1980 letter were received by DER on May 5, 1981. The letter transmitting the corrections was dated January 26, 1981, while the attached corrections bore a notarization date of February 19, 1981. (N.T. 413-15; Ex.S-6)

21. On June 26, 1981, DER denied Sanner's application for a mine

drainage permit, stating as reasons:

> 1) You have not demonstrated that pollution of the surface-and-ground waters from, but not limited to, iron and acid mine drainage will not occur.
>
> 2) You have not demonstrated that the existing water quality of the unnamed tributary to Wills Creek will be enhanced or maintained by the individual or cumulative impact of mining.
>
> 3) The proposed operation threatens the environmental and recreational values of this area.
>
> 4) You have not provided social and economic justification to discharge to the unnamed tributary to Wills Creek, which is classified as a High Quality Water.
>
> (Ex.S-11)

22. The surface of the land which Sanner proposes to mine is owned by the Pennsylvania Game Commission and Leo Emerick of Cumberland, Maryland. The mineral rights are reserved to the Robert S. Waters Trust, Mellon Bank, Pittsburgh, and Leo Emerick. (Ex.S-2)

23. The proposed mining site is within the Wellersburg Syncline and lies along the extreme eastern ridge of the Appalachian Province. The site forms a ridge along the side of a larger mountain. Wills Creek runs near its northern side, and an unnamed tributary runs on the southeastern side. Another unnamed tributary, into which Sanner proposes to discharge its drainage, runs on the southern side. (N.T. 17-18, 221-4; Ex.S-2)

24. The site is in a completely wooded area, approximately 2000 feet from Wills Creek and about 300 feet from the nearest unnamed tributary. (N.T. 17-18, 221-24; Ex.S-2)

25. The site is a groundwater recharge area. (N.T. 193)

26. The coal seams proposed to be mined are the Lower and Middle

Kittanning, seams which are historically acid producing. (N.T. 650, 955; Ex.S-2; S-10)

27. The site has never been mined before, although there is some evidence of coal prospecting on the site in the early 1900's. There is evidence of the beginnings of a deep mine at a location over 1000 feet from the site; it is weathered to the point where it is nearly impossible to tell that mining ever occurred there. (N.T. 43-6; Ex.S-2)

28. During wet weather, seeps and other water accumulation have been noted on the site. On March 15, 1982, DER inspector Joseph Kaufman noted at least two springs or other flows within approximately 75 feet of the site. (N.T. 92-3, 198, 509)

29. The mine drainage permit application proposes discharge of the treated drainage to an unnamed tributary of Wills Creek. The tributary is an intermittent stream and lies between 300 to 500 feet south of the proposed site. This unnamed tributary, which is the closest one to the site, flows into a second unnamed tributary which then runs into Wills Creek. The distance from the site through the tributaries to Wills Creek is approximately one mile. (N.T. 18-20)

30. An intermittent stream does not necessarily completely dry up during dry periods; it may dry up only seasonally and may not dry up every year. Even during a dry period when the surface of an intermittent stream may appear dry, it is possible to have flow through the streambed moving through the substrata. Some aquatic communities have the ability to move down into the substrata and live through the dry periods and return to the surface when surface flow returns. (N.T. 555-56)

31. The unnamed tributary to Wills Creek into which Sanner proposes to discharge and the unnamed tributary into which this tributary flows are

classified as a High Quality, Cold Water Fishery (HQ-CWF) in 25 Pa.Code §93.9. Wills Creek is classified as a Cold Water Fishery (CWF). 25 Pa.Code §93.9.

32. A HW-CWF is a stream that has excellent quality waters and environmental or other features that require special water quality protection; it also provides a thermal regime which would support fish species including trout. (N.T. 534)

33. A CWF is a stream capable of supporting trout life and other flora and fauna indigenous to a cold water habitat. 25 Pa. Code §93.3.

34. At the time of this appeal Wills Creek was annually stocked, and there was evidence it was supporting independent fish reproduction including trout, small-mouth bass and rock bass. (N.T. 504, 535-6; Ex.S-14, S-15)

35. Water samples were apparently taken from the unnamed tributary on November 5, 1979 by Sanner's surveyor Robert Cassidy; on July 24, 1980 by DER inspector George Lokitis; again by Robert Cassidy on April 27, 1981; and on March 15, 1982 by DER inspector Joe Kaufman. (N.T. 38-40, 501, 506, 507, 512)

36. Sanner took two samples from the unnamed tributary on December 4, 1979. The first sample was from the headwaters of the stream, and it had a field pH of 6. The point of sampling was approximately 1000 feet upstream from the application site. This sample had a laboratory pH of 4.6, alkalinity of 0.0 mg/l, acidity of 10 mg/l and total suspended solids of 0 mg/l. The second sample was taken approximately 800 feet below the proposed site. It had a field pH of 7, and laboratory analysis showed a pH of 6.6, alkalinity of 10.0 mg/l, negative acidity and 1.0 mg/l of total suspended solids. (N.T. 38-9, 266, 531; Ex.S-13)

37. The unnamed tributary can be characterized as being mildly

acidic and very clear; the lack of total suspended solids is apparently due to the lack of human activity in the area. (N.T. 177, 532-3)

38. The change in pH, acidity, and alkalinity between the two samples taken from the unnamed tributary was not substantial, considering the natural characteristics of the area. The acidity of the headwaters is a natural phenomenon, but acid rain may also be a contributing factor. Farther down, the stream has a higher pH as it flows through more alkaline rock units. (N.T. 177, 532-3, 551)

39. Wills Creek was sampled by DER on July 24, 1980 at a point upstream from where the second unnamed tributary enters and where any possible discharge would enter. Laboratory analysis indicated a pH of 6.7, alkalinity of 26.0 mg/l, and acidity of 0 mg/l. A second sample was taken below where the unnamed tributary enters Wills Creek; laboratory analysis indicated a pH of 6.6, alkalinity of 26.0 mg/l, and acidity of 0 mg/l. (N.T. 504-6, 535; Ex.S-16)

40. Although Wills Creek and its watershed support natural reproduction of fish, they are environmentally fragile; the streams tend to have some natural acidity and have a low buffering capacity. (N.T. 536-7, 552; Ex.S-14)

41. A low buffering capacity stream has the ability to assimilate very little pollution, such as acid mine drainage, without serious environmental damage to the stream. (N.T. 541)

42. Depending upon the concentration of any discharge of mine drainage from the proposed site, damage to the unnamed tributaries and Wills Creek could range from mild degradation to complete destruction of their aquatic communities. (N.T. 536-42)

43. As acidity of a stream increases, the numbers and kinds of

living organisms in the aquatic environment disappear in accordance with their individual abilities to withstand poorer water conditions. Trout are one of the more environmentally sensitive organisms. Any increase in acidity would almost immediately start limiting the diversity of the aquatic communities in this watershed. (N.T. 536-42, 559)

44. An increase in the concentration of metals in the unnamed tributaries and, thus, into Wills Creek, would be deleterious to aquatic life. An increase in the concentration of metals ties up important macro- and micro-nutrients needed to support aquatic life. Metals are also toxic to fish. (N.T. 541-2, 552-3)

45. An OA is a chemical analysis of all strata to be affected by a proposed mining operation. The strata analyzed include the overburden, the coals, and the underclay below the lowest coal to be mined. (N.T. 698-9)

46. An OA provides data to help evaluate the potential environmental impact of mining in a particular watershed. (N.T. 698-9; Ex.C-1)

47. At least through the time of hearings in this matter, DER used OAs to obtain additional data where mining was proposed in environmentally sensitive areas and a permit would otherwise be denied because the mine operator had failed to overcome presumptive evidence of pollution of a watershed. This information was specifically communicated to Sanner and other coal operators in the Ercole letter. (N.T. 698-9; Ex.C-1)

48. DER's policy on the requirement and use of OA remained essentially unchanged from its establishment on November 8, 1979, the date of the Ercole letter, through the time of hearings in this matter. (N.T. 698-703, 760-1; Ex.C-3)

49. DER generally required OA when mining was proposed in the following situations:

a) An application to mine in a sensitive watershed (High-Quality, Cold Water Fishery or Exceptional Value Stream) which requires special protection;

b) Applications to mine within a watershed boundary of a municipal reservoir to protect public water supplies;

c) Applications to mine areas that have not had any mining in the past, or only minimal mining, where DER has no historical data on postmining pollution problems; and

d) Applications to mine areas that have historically been mined resulting in postmining pollution discharge problems.

N.T. 698-9, 704-7; Ex.C-3, C-1)

50. DER does permit mining in High Quality (HQ) watersheds. (N.T. 1037)

51. DER required an OA and sent the Ercole letter to Sanner because HQ-CWF amd CWF streams were involved, there were no other mines in the area, and no historical data was available for the evaluation of possible post mining pollution problems. (N.T. 43-6, 421-2; Ex.S-4)

52. The Ercole letter lists 3 possible techniques for performing OA. However, it makes clear that the techniques are not necessarily without problems and that proposals to use other methods would be considered. It also states, "...<u>overburden analysis should not be considered as a guarantee for obtaining a mine drainage permit</u>; nor is it the single dispositive factor in the decision to issue or deny a mine drainage permit." (Emphasis in original) The letter does not guarantee that any particular technique will be accepted in a particular case or situation, nor otherwise direct which technique to use. (N.T. 127-8; Ex.C-1, C-6)

53. The Ercole letter, as well as the corrections letter, makes

clear that a written proposal is to be submitted for DER approval and/or modification before the OA is actually performed. (N.T. 830-1; Ex.S-4, C-1)

54. DER, through the Ercole letter, specifically requires submission of:

a) A proposal to conduct the OA test;

b) A response to any modifications of the proposal by DER; and

c) Submission of an OA report including data, diagrams, a mining plan on how the acidic rock will be handled to prevent acid mine drainage pollution and a report on the probable hydrologic consequences of the proposed mining operations.

(Ex.C-1)

55. Although Sanner sent an abbreviated OA proposal to DER, Sanner elected on its own to go ahead with an OA technique known as the Acid-Base Accounting (ABA), or Smith-Sobek, technique without prior DER approval. (N.T. 129-31, 831-4; C-6)

56. The ABA technique takes all of the sulfur in a given sample, which is determined by a known analytical method, and converts this by application of a mathematical equation into a maximum acid potential. A split sample of the same material is analyzed for total neutralization potential by the addition of a known strength acid until no further neutralizing is available in the sample material. The unit of measure is tons per thousand calcium carbonate or calcium carbonate equivalents. After the chemical analysis and mathematical conversions are done, the numerical values determined for acid potential and neutralization potential are subtracted one from the other, depending upon which is higher, and the quantity remaining reflects either a net deficiency or a net excess of neutralizer for that horizon which the sample analyzed represented. (N.T. 281-96)

57. OA generally is not considered an exact science. Specifically, the ABA technique was, at least through the time of the hearings in this matter, under scientific scrutiny and had been questioned by many scientists, including DER's experts, as to its accuracy as a predictor of post-mining discharge. (N.T. 741-58)

58. The predictive value of the ABA technique is open to suspicion where the neutralization potentials (alkalinity producing predictability) are low, as they are in this case. As of the time of these hearings, it was not known at what point the neutralization potential value becomes significant in predicting post-mining alkaline drainage, except that it is valid where the values are extremely large. In other words, where the test predicts an extremely acidic or alkaline discharge, it is reasonably reliable; however, where the test indicates a discharge which is in the low range, i.e. slightly acidic or alkaline, it is not particulary reliable. (N.T. 726, 741-58)

59. One of the ABA method's weaknesses lies in its attempt to directly equate the acid producing characteristics of soils with the alkalinity producing characteristics of soils. The values produced do not necessarily correspond to real world values. In the real world acidity is produced more quickly and in greater quantity than alkalinity. In the laboratory the various processes are forced to completion. (N.T. 289-90, 778-98; Ex.C-4)

60. The accuracy of the values reached in the ABA method can also be adversely affected by such things as the use of air chip drilling (which was used by Sanner), as opposed to the core method of drilling to obtain the necessary soil samples. In addition, values for the neutralization potential are affected by the size and the different kinds of alkaline producing material present. Sanner's own expert, Ronald L. Shrock, admitted that

crushing the samples to minus 60 mesh (approximately the consistency of flour) tends to exaggerate both neutralization and acid potentials. (N.T. 289-90, 347, 440, 778-92, 854-6; Ex.C-4)

61. Both Sanner's and DER's experts expressed general reservations about the reliability and accuracy of OA. They specifically expressed doubts as to the reliability of the ABA technique where, as here, the results showed values for both alkalinity and acidity in the low range, and no one extreme was indicated. (N.T. 741-58, 166, 206-14, 300, 335-45)

62. The percent of sulfur in rock is an indicator of possible acid mine drainage problems. Sulfide sulfur specifically is considered important in determining acidity potential. Both measures were used in Sanner's OA test. (N.T. 864-7)

63. Of those strata not to be removed, but to be left as overburden, three samples had relatively high sulfide sulfur values: sample 1147 (1.06%); sample 1130 (0.55%); and sample 1132 (0.68%). The coal, which has the highest sulfide sulfur, was not tested by Sanner because it was to be removed. (N.T. 864-7; Ex.S-10)

64. The neutralization potential values for the strata tested in the OA ranged from negative 0.89 to 27.42 tons per thousand tons in test hole SG-11 to negative 0.51 to 25.99 tons per thousand tons in test hole SG-1. (N.T. 852, 860-1; Ex.S-10)

66. Fourteen strata in Drill Hole SG-11 were tested by Sanner in its OA for neutralization potential. The highest, 27.42, was for a gray underclay which would <u>not</u> be disturbed by mining. The next highest value was 18.64. These values are not high enough to be considered as persuasive evidence of any distinct alkaline producing strata. (N.T. 200-1, 852, 860-1; Ex. S-10)

67. The acid potential values for the strata tested in the OA

ranged from 0.31 to 122.50 tons per thousand tons in test hole SG-11 to 1.25 to 65.63 tons per thousand tons in test hole SG-1. (Ex.S-10)

68. The underclays beneath the lowest coal to be mined cannot, or, at least, will not be disturbed during mining. Thus, any potential alkalinity from this strata will not benefit any discharge, except to the extent there is interaction with its surface. (N.T. 200-2)

69. The highest alkalinity sampled in Drill Hole SG-11 was in the underclay. The sample with the highest sulfur content, other than the coal which is higher still, was SG-11, a clay underlying the upper coal which will be entirely disturbed by mining. (Sample 1147-1.21% total sulfur; 1.06% sulfite sulfur) This acidic clay is also present in SG-1 (sample 1132). Thus, the likelihood of an acid discharge is higher than the values at first glance indicate. (N.T. 200-2, 1036; Ex.S-10)

70. There does not appear to be any limestone or other distinctly calcareous or alkaline producing strata on the site. Such strata might otherwise produce an alkaline drainage, or at least reduce, an acid mine drainage. Along with the rest of the OA, this is specifically indicated by the fact that none of the rock units tested had any "fizz rating." (N.T. 862-3, 1035; Ex.S-10)

71. A "fizz test" is a test involving the application of an acid solution, here 25% hydrochloric acid solution, to a sample rock and the watching and listening for a "fizzing" reaction. (N.T. 203-4)

72. Sanner's OA test did not take into account any coal which might be left behind after mining. (N.T. 214-5)

73. Not all of the coal at the site will be removed. The reasons for this could include the fact that some is unmineable, some unmarketable, some not capable of being handled by available equipment, some as a matter of

choice by the mining engineer, and/or any combination of these reasons. Although this might not consist of more than clingings and pit cleanings, these coal remains would have at least some negative impact on any mine drainage. (N.T. 214-6, 335, 863-5)

74. DER has had experience with at least two other similar mining sites where acid mine discharges developed, even though similar OA results with low values indicated neutralization potential values slightly higher than potential acidity values. (N.T. 729-33, 737)

75. There is at least a reasonable chance that even if this site could be mined without harming the pH levels in local streams, the streams would still be degraded through the introduction of iron, suspended solids, manganese, and sulfates. (N.T. S-72-6, 583)

76. An untreated post-mining discharge emanating from the site would probably not meet pH criteria (6.0 to 9.0), would probably have acidity exceeding alkalinity, and would probably exceed iron limitations (6 mg/l) and manganese limitations (4 mg/l). (N.T. 887-90)

77. Sanner did not provide DER with a written interpretation of the OA, nor a statement of hydrologic consequences considering the OA as requested in the Ercole letter. Sanner provided only the data results and there was no information as to how acid and alkaline units would be handled during mining and reclamation. (N.T. 189-90, 839)

78. The results of an OA are not used solely as a denial tool by DER, and the results of Sanner's OA were not the only reason for DER's denial of a permit for this site. (N.T. 809, 1037)

79. During the time in which Sanner's application was submitted DER's general policy regarding OA was in at least some state of refinement owing to continuing scientific developments. However, the pertinent

considerations of DER's policy remained constant. (N.T. 755-6, 1031-2)

80. Some of DER's internal procedures were also being refined, notably the shifting of OA review (permit review) from DER's central office to its district offices. However, in this particular situation the OA was reviewed at the central office by DER's expert in the area, Roger Hornberger. (N.T. 52, 653, 702-16, 902-7)

81. When considering an application to mine in a special protection watershed, DER requires an applicant to provide more detailed plans and justifications. Special handling plans are considered in such situations and are, in fact, specifically requested in the Ercole letter. (N.T. 1037-9; Ex.C-1; See also, 25 Pa.Code §95.1(b))

82. Degradation of HQ waters may only be allowed where an applicant demonstrates social and economic justification for the degradation. If the community affected will receive a sufficient benefit from the proposed activity, then limited degradation of such a stream may be allowed. (N.T. 583-6; See also, 25 Pa.Code §95.1(b))

83. Although the format used by DER for the SEJS was updated from the time of the initial application to the time of hearings in this matter, the social and economic justification requirements have not changed since the promulgation of 25 Pa.Code §95.1(b) on September 9, 1979. (N.T. 483, 596-600)

84. DER reviewed and subsequently rejected Sanner's SEJS, applying the requirements at the time it was submitted. (N.T. 596-600)

85. DER notified Sanner of the need for an SEJS, and what items Sanner should address in its statement, in item 11 of the May 29, 1980 correction letter. Item 11 read as follows:

> 11. Chapter 95, Section 1 of the Department's Rules and Regulations states "the proposed new, additional or increased discharge or discharges of

> pollutants is justified as a result of necessary economic or social development which is of significant public value." The stream you propose to discharge treated wastes to is classified as High Quality waters under Chapter 93, Section 9 and therefore requires you to address 95.1 through the submittal of a Social and Economic Statement.
>
> I would urge that you address the following in preparation of this Statement: quantity and quality of coal by seam (BTU content, % sulfur, ash content); surrounding land uses and how this operation will affect those uses; water uses of receiving streams and impact of the proposed discharge(2) on stream uses; significant local/regional resources that may be impacted either favorably or adversely); economic benefits to the local economy (jobs provided, employment statistics, royalties, etc.); and a summary of net beneficial vs. net adverse impacts of this operation on the aforementioned topics.
>
> (Ex.S-4)

86. The requirement that the SEJS address, inter alia, the quantity and quality of coal by seam, including information as to BTU content, % sulfur, and ash content, is included for purposes of helping determine the marketability of the coal which might affect an operator's wish or need to store coal at a site. This information is also used for later air quality protection purposes. For example, if high quality, low sulfur content coal is present, its use at a particular burning facility may help that facility to meet Pennsylvania air quality standards. (N.T. 623-5)

87. Sanner's SEJS is one of the reasons DER denied the permit application. The statement is deficient, inter alia, because:

> (a) It fails to provide or discuss information concerning the quality of the coal by seam. The averaging of the quality of the coal resulted in less accurate values and in one instance helped obscure the fact that one of the coals to be mined had a relatively high sulfur content of 4%.
>
> (b) It fails to fully discuss all of the area's current uses such as hunting, hiking, wildlife and other outdoor recreation activities, and the impact

mining might have on them. The statement merely lists timberland, swimming, and fishing without discussing such points as to what extent any of these activities takes place or how they might be affected.

(c) The statement indicates that there are no local lease holders and thus royalty monies will not directly benefit the local economy.

(d) There is an unexplained discrepancy between the statement and the OA concerning the sulfur content of the coal. The OA lists the coal as having a sulfur content ranging from 2.01% to 3.92%. The statement indicates the sulfur content range is from 2.03% to 2.77%.

(e) The statement does not indicate how many people would be employed by the proposed operation.

(f) The statement did not rely upon census or other reliable data for its unemployment figures. The one unemployment figure given was made up by Appellant's engineer without any type of corroborating survey or evidence.

(g) The statement's only reference to an adverse impact resulting from the proposed operation was, "...the transporation of coal by truck." It does not even address such possible common adverse impacts as noise, threat to water quality (here a Cold Water Fishery and a High-Quality Cold Water Fishery), nor other common impacts associated with mining.

(N.T. 377-85, 427-32, 589-95; Ex.S-4, S-7)

88. During the hearings in this matter several alternative mining techniques were described by Sanner's experts. DER's experts considered these techniques inadequate to properly guarantee a safe discharge at this site. One particular special handling plan submitted with Sanner's corrections on May 5, 1981, indicated acid forming material would be buried on the surface mining pit floor; DER's expert, Roger Hornberger, considered it as the worst possible location for burial of such materials. (N.T. 181, 822-5; Ex.S-6)

89. Sanner's unsatisfactory mining plans were another one of the reasons for the permit denial. (N.T. 427)

90. Having considered and reviewed all of the data submitted by Sanner prior to and during the hearings in this matter, DER's expert, Roger Hornberger, continued to believe that Sanner had failed to demonstrate that mining could occur on the proposed site without causing pollution. (N.T. 883-6)

91. Robert Sanner, an owner of Sanner, did not know until the time of his deposition if he had ever mined on an HQ watershed, nor did he appear at the hearing to know what one was. Mr. Sanner simply stated that any mining in such an area would be done as at any other site, with the advice of engineers and geologists. (N.T. 389)

92. The credibility of Sanner's geologist, Thomas L. Nickeson, was brought into doubt by statements in his deposition which appear to be less than complete as to his role in the use and/or development of the technique of using down dip deep mining to provide pollution control upon mine closure. Mr. Nickeson's credibility was further eroded by misleading statements in his deposition and at the hearing concerning his supposed role in the development of the connector well theory. On subsequent cross-examination, Mr. Nickeson changed his description of his role in its use from that of a co-developer to that of simply seeking funds to investigate it. (N.T. 106-125)

93. Sanner's surveyor, Mr. Robert Cassidy, who initially prepared Sanner's permit application, has a personal financial interest in the application and the site. His personal financial interests include a coal lease purchase in advance in the form of an option on the coal, and having bonded a road for the local township. Mr. Cassidy describes the value of his personal financial interest at approximately $20,000, not including payment for his work. (N.T. 87-9)

94. The Pennsylvania Fish Commission recommended disapproval of

Sanner's permit application. (N.T. 537; Ex.S-14)

DISCUSSION

The Board must here decide whether DER abused its discretion in denying Sanner's application for a mine drainage permit. By reason of 25 Pa.Code §21.101(c)(1), Sanner bears the burden of demonstrating to the Board that DER abused its discretion. We will not substitute our discretion for that of DER unless Sanner shows by substantial evidence that DER's denial of the permit was arbitrary, capricious, contrary to law, or a manifest abuse of discretion. Warren Sand and Gravel Co., Inc. v. DER, 20 Pa.Cmwlth 186, 341 A.2d 556 (1975). And, the Board will not overturn DER's decision and mandate the issuance of the permit unless Sanner proves that it is clearly entitled to the permit. Harman Coal Company v. DER, 1977 EHB 1.

Before addressing the major issues in this appeal, the Board feels constrained to comment upon the procedural aspects of the permit application process. Throughout this proceeding Sanner has complained of indecision, uncertainty, confusion, and a general lack of communication on the part of DER. Although Sanner makes no actual claim of having failed to receive due process, it does argue that these shortcomings contributed to the resultant improper denial of its permit application. To the extent that any of these things occurred, they were harmless and, to a large extent, attributable to

Sanner[1] since Sanner's tardiness in its submittals contributed to the length of the review process. The only item from the 11 corrections requested by DER in its May 29, 1980 corrections letter which was submitted within Sanner's chosen extension period was the OA "proposal," which Sanner indicated by its statement and subsequent actions that it intended to undertake without the required approval of DER. The results of the OA were not received until September 19, 1980, over a month past Sanner's self-designated deadline. The rest of the corrections were not received until almost eight months later. Even then, the materials bear a notarization date of February 19, 1981, although the cover letter was dated January 26, 1981. Sanner's expert, Robert Cassidy, testified that he mailed the corrections to DER on January 26, 1981, but they were not notarized until February and DER did not receive them until May!

Sanner also expressed concern with changes in the permitting process which occurred while its application was pending. The record shows that DER's first letter requesting additional information, sent on or about February 4, 1980, addressed this concern and attempted to assist Sanner by permitting it to supplement its application with the newly required information, most notably the face sheet. The May 29, 1980 DER corrections letter, which contained the Ercole letter relating to OA, also demonstrates DER's efforts to apprise Sanner of new requirements in a manner which would enable it to

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[1] Sanner makes much of the fact that DER never responded in writing to its June 26, 1980 letter requesting an extension to August 15, 1980 for submission of corrections. Apparently, it was DER policy at the time to grant the extension but not to respond in writing unless so requested by the permit applicant, which was not the case here. While a written response to an extension may have added to the burdens of the staff, it would have eliminated a possible avenue of misunderstanding. In any event, the Board is not in the practice of adjudicating matters on the basis of unimportant and environmentally inconsequential procedural violations. Coolspring Township et al. v. DER and Higbee Struthers, 1983 EHB 151.

proceed in the permitting process. We are hard-pressed to determine what more, short of preparing the permit application, DER could have done for Sanner.

Any applicant for a mine drainage permit must demonstrate that its proposed mining operation will not result in pollution to the waters of the Commonwealth. Harman Coal Co. v. DER, 34 Pa. Cmwlth 610, 384 A.2d 289 (1978). But, in the instant appeal, because Sanner would discharge into waters of the Commonwealth singled out for special protection under 25 Pa.Code §93.1 et seq., we must also reach the conclusion under 25 Pa.Code §95.1 that either no degradation of the receiving waters' existing quality will occur, or that any such degradation is "justified as a result of necessary economic or social development which is of significant public value." 25 Pa.Code §95.1(b)(1).

Examining the first part of the test in §95.1(b) in concert with the requirements of Harman, we must conclude that Sanner did not demonstrate that its proposed discharge into the unnamed tributary to Wills Creek would maintain and enhance its existing quality, much less not result in pollution to the waters of the Commonwealth. Measurements of stream quality were taken at three places, in the headwaters of the unnamed tributary, downstream on the unnamed tributary and on Wills Creek upstream of its confluence with the unnamed tributaries. The headwaters of the unnamed tributary had a laboratory pH of 4.6; alkalinity of 0.0 mg/l; and acidity of 10.0 mg/l. The downstream point on the unnamed tributary showed a pH of 6.6; alkalinity of 10.0 mg/l; negative acidity; total suspended solids of less than 1.0 mg; total iron of less than 0.1 mg/l, and total manganese of 0.1 mg/l. Upstream of the confluence, Wills Creek had a pH of 6.7; alkalinity of 26.0 mg/l, and no acidity. Assuming that these measurements were representative of Q_{7-10},

as is required by 25 Pa.Code §93.5, and that the dilution ratio was 1:1 because of the flow of Wills Creek, Sanner's discharge would have to be near pristine.

Because of the proposed discharge into HQ-CWF waters and because there was no historical data from the area which could be used to predict the potential for formation of acid mine drainage, DER required Sanner to perform OA. The method of OA chosen by Sanner and its manner of implementing it rendered it virtually useless as a predictive tool. Sanner did choose the ABA technique which was listed in the Ercole letter, but Sanner went forward with this method of OA without securing DER's prior approval, the necessity for which was emphasized in both the May 29, 1980 corrections letter and the Ercole letter. Had Sanner not flaunted its intent to proceed with the ABA method of OA without waiting for DER's approval, it would have become aware of the limitations of the technique.

OA, using any technique, is not an exact science.[2] The ABA technique's accuracy and reliability is particularly questionable where there is a lack of extremes in alkalinity or acidity. In other words, the ABA method is reasonably valid where it predicts a highly alkaline or highly acidic discharge. But, where, as in the present case, the discharge is predicted to be slightly acidic or slightly alkaline, the test has little or

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[2] Both DER's and Sanner's experts indicated that OA is not an exact science. The experts were also unified in their belief that the ABA method chosen by Sanner in particular has several drawbacks, not the least of which is its lack of predictive reliability when the results are in the range of the ones obtained in this instance. DER's expert on OA, Roger Hornberger, who reviewed Sanner's OA, demonstrated his extensive knowledge and experience with OA, generally, and the ABA method, specifically. Mr. Hornberger's testimony took several days and covered well over 300 pages in the transcript. The record indicates that DER's expert drew his testimony from a thorough knowledge of scientific information in the field, including research done by himself and fellow DER employees concerning the ABA method, in evaluating the OA.

no value. Sanner's own expert, Ronald L. Schrock, admitted so on cross-examination:

> Q) Would you be able to say, with any degree of scientific certainty, that there will not be an acid discharge post mining?
>
> A) Not based just on these numbers.
>
> (N.T. 345)

Part of the problem lies with the fact that the ABA method attempts to directly equate the acid producing characteristics of soils with the alkalinity producing characteristics of soils. The resulting values do not necessarily correspond to real world values, because acidity is actually produced more quickly than alkalinity in nature.

A prime predictor of AMD potential in OA is the determination of the amount of sulfide sulfur in the tested soils. Sanner's OA indicates slightly acidic soils overall. Of the strata intended to be left at the site, three stand out, sample 1147(1.06%), sample 1130 (.55%), and sample 1132 (.68%). Each of these would be disturbed in the mining process, thus increasing the chance of AMD formation. In contrast, a gray underclay which has the highest potential for alkalinity (27.42 tons per thousand tons) is not scheduled to be disturbed. This would leave only the surface of the underclay to directly interact with the other soils and possibly produce an alkaline runoff to help neutralize acid from other strata. There is no distinctly alkaline or calcareous strata present at this site, as indicated by the total lack of a fizz rating for any of the strata tested. Also, Sanner did not test the coal, which naturally contains the highest levels of sulfide sulfur. This was not done because Sanner plans to remove all the coal, but, Sanner's expert admitted that, at best, some small amount of coal would remain in the form of clingings and pit cleanings. This could only impact negatively on any

discharge.

Sanner did not provide a written interpretation of its OA, nor a statement of hydrologic consequences, as requested in the Ercole letter. One of Sanner's experts stated that he had believed that the mining plans originally submitted with the application were adequate to deal with any problems. The OA also lacked requested information as to how the acid and alkaline units would be handled during mining and reclamation. Essentially, all that was submitted was the raw data from the OA test.

Sanner argues that whatever the likelihood of an AMD, it could be controlled through "proper mining techniques." This would include the use of a special handling plan and treatment of the area and any discharge with unspecified amounts of lime. Several techniques were alluded to during the hearings, but only one special handling plan appears to actually have been submitted to DER.[3] The plan, which was submitted with the application corrections, rather than the OA, involved placing the acid bearing material on the floor of the mining pit after mining. DER's expert, Roger Hornberger, considered such placement the "worst possible." To the extent the use of lime was discussed during the hearings, it was done so only in general terms. In any event, DER experts believed that liming under these circumstances would be experimental, since it would have to be for an unknown, but long, period of

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[3] Sanner claims that it was given to understand, based on an oral communication betwen Thomas Nickeson and DER's Roger Hornberger sometime after October 20, 1980, that no alternative mining plans were acceptable after the submission of the OA data, and that future expenditures for the development of corrections requested for the completion of the mine drainage permit could be tabled pending the results of the OA. Mr. Nickeson speaks of having been given "to understand" this or to have had such a "belief." The most Mr. Hornberger could attest to was that there "may have" been some discussion about waiting until after review of the OA to see if any cross sections or other diagrams should be mailed. Sanner did submit the special handling plan, though late, along with the other corrections, and these items were all considered by DER.

time, and it would involve amounts that could not be determined until the project was well under way. DER considered such experimentation in an HQ watershed inappropriate, particularly where the site was one that could at best be categorized as marginal. Thus, DER found not only the mining plans which were submitted inadequate, but also, to the extent they were discussed, the plans mentioned during the hearings. Sanner, by using a method of OA which yielded unreliable results, failed to affirmatively demonstrate that no pollution would occur as a result of its proposed mining activity. By failing to demonstrate that it could not mine without causing pollution, it also failed to demonstrate that its mining activity would maintain and enhance the existing high quality of the unnamed tributary to Wills Creek.

Sanner's failure to demonstrate to DER that it could not mine without causing pollution was reason enough for DER to deny the mine drainage permit application. But, if one is to assume, for the sake of argumment, that Sanner could mine without causing pollution, DER was justified in denying the permit because of Sanner's failure, in accordance with 25 Pa.Code §95.1(b), to adequately demonstrate that its mining activity was justified as a result of necessary social and economic development. The specific requirements of an SEJS are not outlined in the regulations; however, DER's corrections letter did outline areas that should be addressed, including the quantity and quality of coal by seam (BTU content, percent sulfur, and ash content); surrounding land uses and how the proposed operation would affect those uses; uses of receiving streams and impact of the proposed discharge on stream uses; significant local/regional resources that might be impacted either favorably or adversely; benefits to the local economy (jobs provided, employment statistics, royalties, etc.); and a summary of net beneficial vs. net adverse impacts of the operation.

Nearly a year after being informed of the requirement, Sanner submitted an SEJS which, first DER, and now the Board, find inadequate. Sanner failed to address the quality of the coal by seam. By lumping the coals together and averaging their quality, Sanner obscured specific facts about the coal seams, such as the fact that one of the coals had a sulfur content of as high as 4%. The SEJS fails to discuss the area's current land uses, such as wildlife preservation, hunting, and other outdoor activities. The only activities or uses listed were timberland, swimming, and fishing. Even this was done without discussing the extent of the uses, and how they would be affected by mining. The SEJS does not indicate whether there are local lease holders through which royalties would directly benefit the local economy. The number of people to be employed at the proposed site is not listed. There are discrepancies between the SEJS and the OA concerning the sulfur content of the coal. The OA lists the coal as having a sulfur content ranging from 2.01% to 3.92%, while the SEJS lists it as 2.03% to 2.77%. The SEJS did not rely upon census or other reliable data for its unemployment figures. Apparently, the unemployment figure was made up out of whole cloth by Mr. Cassidy. Sanner's pre-hearing memorandum indicated that governmental data, as well as testimony, would be presented showing a 15% unemployment rate in the area, but Mr. Cassidy presented his personal estimate of the figure. Finally, the SEJS's only reference to an adverse impact of any type from the proposed operation was cited as being any damage caused by the transportation of the coal through the area by truck. It does not mention other possible impacts.

Sanner would have the Board believe that the denial of its permit application was analogous to the permit denial in Doraville Enterprises v. DER, 1975 EHB 390. In Doraville an application for a mine drainage permit was

denied simply because the site was located in a "conservation area." The Board found that DER's review did not reach the question of whether the proposed operation could be conducted in such a manner as not to adversely affect water quality, but that the permit denial, in essence, implemented an unofficial policy to prohibit all strip mining in what were denoted conservation areas. That is not the case here. The regulatory process for protecting the waters of the Commonwealth has become more sophisticated and complex since the days of Doraville. New regulations designating special protection watersheds and prescribing measures for their protection were adopted in 1979 (9 Pa.B. 3051 (Sept. 9, 1979). It is those requirements which have not been complied with by Sanner.

Sanner also makes claims that the SEJS was judged by a new standard implemented after its submittal. The Board finds no merit to this claim. A new and somewhat more complete request form was apparently put into use soon after this application was received, but the general policy remained the same. DER reviewed the SEJS in accordance with the policy in effect when the request itself was communicated to Sanner. In any event, the SEJS here is so speculative and lacking as to be almost completely useless, no matter what the standard of review.

Sanner argues that a similar SEJS was submitted to DER and accepted for another of its mine sites located at Shoemaker Run. The record indicates that the Shoemaker situation was significantly different in that there were other mining operations going on near the site which could provide needed reference information. It also concerned an area with different coal seams and a different watershed. Even if DER's agents had been mistakenly indulgent or lax in executing the law in the past, which we have no reason to believe occurred, DER could not now be prevented from performing its duties and

responsibilities under the CSL. Lackawanna Refuse Removal, Inc. v. DER, 65 Pa.Cmwlth Ct. 372, 442 A.2d 423 (1982).

Sanner has also cursorily attacked the HQ-CWF classification given in 25 Pa.Code §93.9 to the unnamed tributary of Wills Creek into which it proposes to discharge. While this is the appropriate time for Sanner to challenge the classification of the receiving stream,[4] United States Steel Corporation v. Department of Environmental Resources, 65 Pa.Cmwlth 103, 442 A.2d 7 (1982) and Neshaminy Water Resources Authority v. DER and EQB, 1986 EHB 288, Sanner carries a heavy burden. Section 93.9 was adopted pursuant to a legislative grant of rulemaking authority in §5 of the CSL. As such, §93.9 has the validity of a statute and Sanner must, in challenging its validity, prove that it is so unreasonable as to be merely the expression of a whim, rather than an exercise of sound judgment.[5] Mountain Rest Nursing Home, Inc. v. Com., 73 Pa.Cmwlth 42, 457 A.2d 600 (1983), citing Pennsylvania H. Rel. Com'n v. Uniontown A. Sch. Dist., 455 Pa.52, 313 A.2d 1 (1973). Sanner has not satisfied that burden.

Sanner presented no credible evidence to dispute the propriety of the classifications. The fact that the unnamed tributary is intermittent has no bearing on its classification in 25 Pa.Code §93.9, since the aquatic life indigenous to a cold water habitat may survive by sinking into the substrata where flow may still be present. Furthermore, despite some natural variations in quality over distance and low buffering capacity, the unnamed

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[4] We do not here rule on the issue of whether Sanner was obligated, under the doctrine of exhaustion of administrative remedies, to petition the Environmental Quality Board pursuant to §1920-A(h) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-20(h) to change the classification of the unnamed tributary prior to challenging it here.

[5] Sanner has not contended that DER was without authority to adopt §93.9 or that it was unconstitutional.

tributary exhibited quality consistent with its designation.

Sanner would also have the Board cast aside §§93.9 and 95.1, citing Lucas v. Com., Dept. of Environ. Resources, 53 Pa.Cmwlth 598, 420 A2d 1 (1980) for its claim that water quality standards carry no presumption of validity. Lucas, unlike the instant case, dealt with the imposition of treatment requirements not specifically set forth in DER's regulations. The Commonwealth Court's holding in Lucas has been much abused. Whatever else it stands for, it cannot be interpreted as requiring that the water quality standards in Chapter 93 or the effluent limitations and treatment requirements prescribed in Chapters 87, 95, and 97, for example, must be justified by DER every time they are applied in a permit or order. Adopting Sanner's theory of Lucas would render meaningless a long line of precedent regarding the validity of regulations.

CONCLUSIONS OF LAW

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

2. Sanner has the burden of proof to demonstrate that DER's denial of its mine drainage permit was an abuse of discretion. 25 Pa.Code §21.101(c)(1).

3. Sanner did not meet its burden of affirmatively showing that no acid mine drainage or other pollution would occur as a result of its proposed mining operation.

4. Discharges into waters designated HQ in 25 Pa.Code §93.9 must not degrade those waters unless the proposed discharger demonstrates that the degradation is justified as a result of necessary social or economic development. 25 Pa.Code §95.1(b).

5. Sanner failed to establish by substantial evidence that its proposed mining activity was socially or economically justified.

6. Regulations promulgated under a legislative grant of authority, such as §5(b) of the CSL, enjoy a presumption of validity.

7. One seeking to challenge a regulation adopted under a legislative grant of authority must demonstrate that the challenged regulation is unreasonable.

8. Sanner failed to satisfy its burden in questioning the validity of the classification of the unnamed tributary to Wills Creek as HQ-CWF.

9. Sanner failed to demonstrate that DER abused its discretion in denying its permit application.

O R D E R

WHEREFORE, this 21st day of April , 1987, DER's June 26, 1981 denial of Mine Drainage Permit Application No. 56800101 is sustained and the appeal of Sanner Brothers Coal Company is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 21, 1987

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 80-211-CP-W
LUCKY STRIKE COAL COMPANY and LOUIS J. BELTRAMI	:	Issued: April 22, 1987

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

Synopsis

This matter involves a complaint by the Department of Environmental Resources (DER or Department) against Lucky Strike Coal Company (Lucky Strike) and Louis J. Beltrami (Beltrami), hereinafter referred to jointly as Defendants, for the assessment of civil penalties pursuant to §605 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 (CSL). It was proven by a preponderance of the evidence that wastewater was discharged by Lucky Strike from the Huber Colliery coal sizing plant in violation of §307 of the CSL. Violations of 25 Pa.Code 97.32 alleged by DER merge into the §307 violations because DER can not seek two penalties for one offense. Furthermore, these violations were not continuous in nature because discharges could not occur unless the sizing plant was in operation.

In calculating a civil penalty, the Board did not consider the cost of restoration of the receiving waters, since DER presented no evidence as to such costs. Damage to Sugar Notch Run and Solomon Creek was held to be

moderate, while the discharges were determined to be intentional. Deterrence was also considered in assessing the penalty.

Finally, Defendant Louis Beltrami's actions in this matter reach the requisite level of "participation" as to be held personally and separately liable for the discharges.

INTRODUCTION

Defendants contest a four count complaint for civil penalties filed by DER on December 17, 1980, alleging 55 wrongful discharges of industrial waste from Defendants' Huber Colliery coal sizing plant, including 12 wrongful discharges of suspended solids, 16 wrongful discharges of acidic waste, and 16 wrongful discharges of low pH wastes into waters of the Commonwealth, all in violation of Defendants' Water Quality Management Permit (Permit), the CSL and the regulations promulgated pursuant to it. More specifically, DER alleges that Defendants failed to properly dispose of wastewater generated by their coal sizing plant. DER asserts that, rather than pumping the wastewater into settling lagoons for final discharge into the groundwater as required by the permit, Defendants allowed the wastewater to fill the Preston collection dam, eventually resulting in an overflow of wastewater into the surface waters of the Commonwealth. In response to these charges, Defendants have only contested the sampling results obtained by DER and failed to offer any specific defense to these allegations.

FINDINGS OF FACT

1. The Plaintiff is DER, the agency entrusted with the duty to enforce the provisions of the CSL.

2. The Defendants are Lucky Strike, a Pennsylvania corporation maintaining an office at 109 East First Street, Hazelton, Pennsylvania 18201, and Beltrami, an individual residing at Township Road 341, R.D. #2, Box 303 F, Drums, Pennsylvania 18222. (Answers to Complaint, ¶¶ 2 and 3).

3. Beltrami is President of Lucky Strike and controlled and operated the company on a day-by-day basis at all times material hereto. (Answers to Complaint, ¶¶ 4 and 5).

4. At all times material hereto, Lucky Strike owned, maintained, and operated a colliery in Ashley Borough, Luzerne County (hereinafter the "Huber Colliery"). (Answer to Complaint, ¶ 6).

5. Lucky Strike's operation at the Huber Colliery consists of a coal sizing plant. (Answer to Complaint, ¶ 7).

6. The sizing plant operation involves the separation and segregation of anthracite coal by size. (Answer to Complaint, ¶ 8).

7. The coal is transported to the top of the sizing plant on a conveyor belt and then proceeds through a series of screens to compartments differentiated by size of the coal. (Answer to Complaint, ¶9).

8. Operation of the sizing plant requires the spraying of water onto the coal, whereupon the water thereafter contains coal silt and other refuse. (Answer to Complaint, ¶10).

9. The wastewater containing coal silt and other refuse drains by gravity to a structure known as the Preston Dam. (Response to Request for Admissions, ¶16).

10. Wastewaters collected in the Preston Dam are next collected in a sump and finally pumped to settling lagoons which discharge to underground waters. (Response to Request for Admissions, ¶18).

11. A spillway on the Preston Dam directs excess waters from the

Preston Dam to a small stream running through the Huber Colliery complex known as Sugar Notch Run. (Response to Request for Admission, ¶ 19).

12. Sugar Notch Run is a tributary of Solomon Creek. (Response to Request for Admission, ¶ 20).

13. Solomon Creek is a tributary of the North Branch of the Susquehanna River. (Response to Request for Admissions, ¶21).

14. Solomon Creek is a designated Cold Water Fishery under the provisions of 25 Pa.Code §93.9, and, prior to November, 1979, was stocked with fish by a local sportsmen's club. (T.61, 190).

15. At all times relevant to these proceedings, operation of the Huber Colliery was permitted under Permit No. 4071201-T1. (Response to Request for Admissions, ¶6). This permit was transferred to Lucky Strike from the Blue Coal Corporation on August 6, 1975. (DER Exhibit A).

16. Condition 18 of the Permit states:

> The various structures and apparatus of the industrial waste treatment works herein approved shall be maintained in proper condition so that they will individually and collectively perform the functions for which they were designed. In order to insure the efficacy and proper maintenance of the treatment works, the permittee shall make periodic inspections at sufficiently frequent intervals to detect any impairment of the structural stability, adequate capacity, or other requisites of the herein approved works which might impair their effectiveness, and shall take immediate steps to correct any such impairment found to exist.

17. Special Condition A of the Permit states:

> The permittee shall conduct this operation relative to the disposal of spoil material in such a manner that silt, coal mine solids, rock, debris, dirt and clay shall not be washed, conveyed or otherwise

deposited into the waters of the Commonwealth.

18. Special Condition D of the Permit states:

> The discharge to surface waters of the Commonwealth of any water, which in the preparation of coal, comes in contact with coal undergoing preparation, is hereby forbidden.

19. Lucky Strike conducted the sizing and/or processing of anthracite coal at the Huber Colliery on the following dates:

(a) November 27-30, 1979;

(b) December 3-7, 10-14, 17, 21, 26-28, and 31, 1979;

(c) January 2-4, 7-11, 15, 17-19, 22-23, 25 28, 30, and 31, 1980;

(d) February 4-5, 7, 11, 13-15 18, 20, 22, 25, 27, and 29, 1980;

(e) March 5, 11, 18, 21, 25, and 27, 1980;

(f) April 2-3, 8-11, 14, 16-18, 24-25, and 30, 1980;

(g) May 13, 1980;

(h) June 3 and 9, 1980; and

(i) July 2, 7-8, 18-20, 23, and 24, 1980

(Response to Request for Admissions, ¶ 11).

20. At some time prior to dhe initial start-up of the plant in 1979, employees of Lucky Strike gerry-rigged the wastewater treatment facility at the Huber sizing plant by creating a water recirculating system in an attempt to cut down on the amount of water purchased from the local utility, thereby reducing production costs. No permit modification or amendment was requested from the DER for this change in the approved wastewater treatment facility. (T. 204).

21. In November, 1979, Lucky Strike realized that its gerry-rigged treatment facility could not produce coal clean enough to market. (T. 206,

212-213). The company, therefore, abandoned this gerry-rigged recirculation system and increased the input of raw water to the sizing plant.

22. The DER began receiving complaints from area residents concerning the discharge of black water from the Huber Colliery into Sugar Notch Run in late November, 1979. (T.124, 126, 136).

23. In response to these complaints, DER inspected the Huber Colliery sizing plant on November 20 and 21, 1979. On both days wastewater was discharged from Preston Dam into Sugar Notch Run, a water of the Commonwealth. (T. 127).

24. DER again inspected the sizing plant on December 10, 1979. Wastewater was again being discharged from Preston Dam into Sugar Notch Run. (T.33-35).

25. The DER also discovered during the December 10, 1979 inspection that the pump at the Preston Dam was inoperable. Without an operable pump at Preston Dam it is impossible to direct the wastewater from Preston Dam to the settling lagoons. (T.34-35). Wastewater, thus, overflows from the Preston Dam down the spillway into Sugar Notch Run on any day the sizing plant operates without a functional pump. (T.34-35). When the pump is functional, however, there is no discharge from the operating sizing plant. (T.150).

26. The pump was not rendered operable until January 9, 1980. (T-73); DER Exhibit 4(g).

27. The Huber Colliery sizing plant was in operation on the following dates between the time DER discovered the pump was inoperable on December 10, 1979, and the known date of repair on January 9, 1980: December 10, 11, 12, 13, 14, 17, 20, 21, 26, 27, 28, and 31, 1979 and January 2, 3, 4, 7, and 8, 1980. The Defendants discharged wastewater from the Huber Colliery sizing plant on all 17 days of operation listed above.

28. Defendants discharged wastewater into Sugar Notch Run on three more occasions in January, 1980. The dates of these discharges were January 9, 10, and 17, 1980. (T. 153-156).

29. The DER inspected the Huber Colliery plant on July 18 and 24, 1980 and visually discovered that Defendants were again discharging wastewater from the Preston Dam, in violation of the permit. (T.156-159).

30. In total, Defendants discharged wastewater from the sizing operation into waters of the Commonwealth on twenty-three (23) separate occasions.

31. Beltrami is also President and Chairman of Beltrami Enterprises. (T.193).

32. Beltrami has worked for approximately 30 years in the coal industry. (T.193).

33. During these 30 years, Beltrami was employed as a superintendent at a coal company and also worked in several coal sizing plants. (T.194-195).

34. Beltrami is an expert in all aspects of the coal sizing process. (T.196-198).

35. Beltrami was frequently present at the Huber Colliery during the sizing operation. (T.217). Beltrami controls and operates the day to day activity of Lucky Strike Coal Corporation. (Complaint, ¶ 4 and Response, ¶ 4; Request for Admissions, ¶ 3 and Response, ¶ 3).

36. Beltrami was aware that no discharge was was permitted at the Huber Colliery. (T. 210).

37. Beltrami was aware that DER considered the discharge of wastewater from the Preston Dam to be a violation of the Permit. (T. 216).

38. Beltrami was personally presented with a sample of a discharge into Sugar Notch Run by a DER official on November 21, 1979. (T.131).

39. Beltrami attended a meeting at the Huber Colliery site on December 21, 1979. (T.58-60).

40. DER officials informed Beltrami at the meeting that the discharges from the mine site were in violation of permit restrictions and that the discharges must cease. (T.59-61).

41. In response, Beltrami said that he was in a business squeeze. Beltrami revealed that if he did not meet a certain production deadline, he would lose his contracts. (T. 61-62, 189-190; Commonwealth's Post Hearing Memorandum, ¶73)

42. Beltrami said at the meeting, "Is a little silt going to hurt this creek?" (T.61, 190).

43. Beltrami made a conscious business decision to continue to size coal at the Huber Colliery, despite the inevitable discharges that would occur during the sizing procedure.

DISCUSSION

Anthracite coal, almost singlehandedly, fueled the industrial revolution in the United States. The emergence of the internal combustion engine, however, shifted the nation's energy demand from coal to petrochemicals. Demand for anthracite coal remained negligible until 1979. In 1979, as a result of the limited availability of petroleum caused by the Arab oil embargo, American industry once again began utilizing anthracite coal to power its machinery. Mining operations in northeastern Pennsylvania began gearing up to produce the fuel that made the Keystone State a national power. One of these operations was Lucky Strike's Huber Colliery.

Lucky Strike secured production contracts from organizations such as General Motors and the United States Army. (T-202). These customers, however,

only purchased anthracite of certain sizes. Lucky Strike, therefore, reopened its sizing plant at the Huber Colliery.

Simply stated, the Huber sizing plant operates by shaking coal rubble through numerous screens which capture anthracite of particular sizes. During this process, the anthracite is also washed with a great volume of water. The wastewater from this process is directed from the sizing plant to a dam. The wastewater is finally pumped from the dam to settling lagoons for natural discharge by percolation into the groundwater.

On numerous occasions, DER received complaints from residents in the vicinity of the Huber Colliery stating that black liquid was flowing into local tributaries of the Susquehanna River. Upon investigation, DER discovered that Lucky Strike was not pumping the wastewater from Preston Dam to the settling lagoons. Instead, Lucky Strike allowed the dam to fill to capacity, resulting in an eventual overflow over a spillway into surface waters of the Commonwealth.

After several inspections, including sampling of the discharges, DER filed a Complaint for Civil Penalties on December 17, 1980, alleging that Lucky Strike was prohibited, by permit and statute, from discharging any material into the waters of the Commonwealth. DER seeks penalties to be assessed for continuing violations from November 20, 1979 through January 10, 1980, and separate violations on January 17, 1980, July 18, 1980, and July 24, 1980. Finally, DER requests assessment of penalties against both Lucky Strike and its President, Beltrami.

Defendants failed to offer any defense in their pleadings. A hearing was held before former Board Member Anthony J. Mazullo on November 19, 1984. Defendants did not offer any defense at the hearing, and Defendants also failed to file a post-hearing brief, for which they were sanctioned by the

Board in a March 24, 1986 order.

Adjudicating a "Cold Record"

The hearing in this matter was conducted by Anthony J. Mazullo, Jr. on November 19, 1984. Mr. Mazullo is no longer a Member of the Environmental Hearing Board. Neither of the present members of the Board were members of the Board at the time of the hearing and, therefore, were not able to assess the demeanor of the witnesses at the hearing. Moreover, Defendants' post-hearing request for an on-site view of the Huber Colliery was denied by the Board. Lucky Strike Coal Company, and Louis J. Beltrami v. DER, 1986 EHB 1233. The Board must, therefore, adjudicate this appeal on the basis of a "cold record". The Board does not believe this will impede its adjudicatory ability and is confident a fair result can be gleaned from the record before it.

The Board considered the propriety of adjudicating a "cold record" in Penn Maryland Coals, Inc. v. DER, 1986 EHB 758. In Penn Maryland, Appellant requested the appointment of ex-Board Member Anthony J. Mazullo as an outside hearing examiner for the purposes of adjudicating its appeal. Mr. Mazullo had presided at Appellant's actual hearing in the matter. The Board, in denying Penn Maryland's motion for appointment of a hearing examiner, stated that, "while witness demeanor is an important consideration in determining credibility, it is not the only consideration, and administrative adjudicators are not precluded from determining the credibility of the testimony from reading of a transcript." quoting from, Caldwell v. Clearfield Cty Children and Youth Serv., 83 Pa. Cmwlth 49, 476 A.2d 996, 998 (1984). See also, United States Steel Corporation v. DER, 7 Pa. Cmwlth 429, 300 A.2d 508 (1973). The Board applies this reasoning to the instant case, and is again confident that all relevant evidence can be extracted from the record before

it. **Applicable Version of 35 P.S.§691.605**

DER brings this civil penalty complaint under Section 605 of the CSL. Under the pre-1980 version, the Board, not DER, assessed penalties up to $10,000 per day for each violation, and the action was initiated by complaint. The Board established the violation(s) and the penalty amount under the pre-1980 version. In determining the amount of the assessment the Board was to consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. 35 P.S.§691.605.

Section 605 was amended, effective October 10, 1980, by Act 157 of 1980. The 1980 amendments instituted a new procedure for imposition and appeal of civil penalty assessments associated with mining related violations. Inter alia, the 1980 amendments allow the DER to impose an initial penalty through an assessment. 35 P.S. §691.605(b)(1). Moreover, in order for a person to perfect its right to appeal this DER assessment, the defendant must post a bond or place a sum in an escrow account. Finally, minimum penalties are directed for certain violations. 35 P.S. §691.605(b)(3). The Board only has to review the amount of the penalty under the 1980 version. Before proceeding further, therefore, it is essential to determine which version of Section 605 governs this matter.

The Board has repeatedly held that civil penalties must be assessed according to the law in effect at the time the violations occurred--not the date of the filing of the complaint. Lawrence Coal Company v. DER, 1986 EHB 519, 540. See also, Rushton Mining Company et al. v. DER, 1976 EHB 117. All of the violations alleged in the instant complaint occurred prior to the effective date of the 1980 amendments. In deciding this appeal, therefore, the Board will apply the version of Section 605 in effect prior to the 1980

amendments.

Liability of Lucky Strike under Section 307

The Board will address Lucky Strike's liability for the alleged violations separately from that of Beltrami's. Beginning with Lucky Strike, Section 605 provided in part, that:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.

The Department has first alleged that Lucky Strike violated §307 of the CSL. Section 307 states:

> No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any waters of the Commonwealth unless such a discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department.

The term "person" in the CSL is defined to include any natural person, partnership, association or corporation. 35 P.S.§691.1. Lucky Strike is a corporation, and, therefore, is potentially liable under the CSL. Section 1 of the CSL also defined "industrial waste" to include any liquids and silt resulting from coal processing operations. 35 P.S. §691.1. See also

Trevorton Anthracite Company v. DER, 1978 EHB 8. The wastewater allegedly discharged from the Preston Dam falls within this definition of industrial waste. Id.

Under the terms of the Permit, Lucky Strike was specifically prohibited from discharging any wastewater into surface waters of the Commonwealth. (DER Exhibit A). Lucky Strike, therefore, is liable under Section 307 for any discharge into Commonwealth waters which can be proven by a preponderance of the evidence.

A DER official personally observed illegal discharges of wastewater into Sugar Notch Run on November 20 and 21, 1979. (T.126-130). A sample of the November 20 discharge was obtained and analyzed (DER Exhibit 8(a),(b),(c)), while a sample taken on November 21 was provided to Beltrami (T. 131). Given the fact that Lucky Strike failed to provide any defense to these discharges, the Board finds Lucky Strike liable for the discharges on these dates.

The Board also finds Lucky Strike liable for violations of Section 307 on all dates it operated its sizing plant from December 10, 1979 through January 8, 1980. The Board imposes liability for discharges on these dates because on December 10, 1980, DER officials personally discovered that the pump at the Huber Colliery sizing plant was not in operation. (DER Exhibit 4(a)). Without a properly operating pump, water cannot be directed from the Preston Dam to the settling lagoons. (T.34-35). When the sizing plant operates without a functioning pump, the dam eventually overflows and an illegal discharge goes into Sugar Notch Run. (T.34-35). Lucky Strike admits that the Huber Colliery sizing plant was in operation on the following days: December 10, 11, 12, 13, 14, 17, 21, 26, 27, 28 and, 31, 1979 and January 2,

3, 4, 7, and 8, 1980. (T.218)[1] Furthermore, of the dates listed above, DER officials personally identified and sampled discharges on the following dates: December 10, 12, 13, 14 and, 17, 1979 and January 2, 3, 4, and 8, 1980. Moreover, DER officials personally identified and sampled a discharge from the sizing plant on December 20, 1979. (T.52-53 and DER Exhibit 4(d) and 6(a),(b),(c),(d),(e), & (f)). The Board finds that, between the time the pump was discovered to be inoperable and its date of repair, Lucky Strike illegally discharged wastewater from its Huber Colliery sizing plant on December 10, 11, 12, 13, 14, 17, 20, 21, 26, 27, 28 and, 31, 1979, and January 2, 3, 4, and 8, 1980.

DER acknowledges that the pump at the Huber Colliery was repaired on January 9, 1980. (T.73) Furthermore, DER admits that when the pump operated properly there was no discharge from the Preston Dam. (T.150) Therefore, the Board will not impose liability upon Lucky Strike for discharges occurring after January 9, 1980, unless DER establishes personal knowledge of such discharges. Inspections and sampling on January 9, 10, and 17, and July 18 and 24, 1980 reveal that Lucky Strike was again illegally discharging wastewater from the sizing plant in violation of Section 307. (DER exhibits 4(g); 20(a),(b),(c); 21(a),(b),(c); 22(a),(b),(c),(d),(e),(f); 23 and 24(a),(b),(c),(d)). DER officials also testified to the existence of these discharges. (T.153-160). The Board holds that DER has proven by a preponderance of the evidence that Lucky Strike is liable under Section 307 for illegal discharges on January 9, 10, and 17, and July 18 and 24, 1980.

DER's seeks to impose penalties for so-called "continuing violations"

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[1] Defendants admitted that the sizing plant was in operation on the dates listed in its Response to DER's Request for Admissions, ¶11. This admission was subsequently admitted as a matter of record at the hearing. (T.218)

for the time period between November 20, 1979 and January 10, 1980. (DER Complaint, Count #1, ¶19). Continuing violations are those "violations which allegedly can be inferred to occur over a period of time on the basis of observations of those violations on a number of days during the relevant time period". Lawrence Coal Company v. DER, 1986 EHB 519, 549. In seeking penalties for the period between November 20, 1979 and January 10, 1980, DER requests the Board to impose penalties on dates in which the sizing plant was not, in fact, in operation; and for time periods before the date that DER discovered that the pump at Preston Dam was inoperable.

DER's request to impose penalties for continuing violations is denied. In DER v. Medusa Corporation, 1978 EHB 149, the Board held that civil penalties cannot be assessed for continuing violations of the weight rate standard of the Air Pollution Control Act and 25 Pa.Code §123.13 in the absence of test data to support such an inference. DER admits that the sizing plant did not discharge wastewater unless it was, in fact, in operation. DER seeks penalties for continuing violations for the period between November 20, 1979 and January 10, 1980. There are numerous dates in this period that the sizing plant was not in operation. The present situation is distinguishable from a case where acid mine drainage can continuously discharge from a culvert on a mine site without any additional affirmative action by the defendant. See Lawrence Coal Company v. DER, 1978 EHB 149, 549 (where defendant was liable for continuing violations for acid mine drainage from a mine site). Since DER offers no evidence to support an inference of continuing violations on these idle dates, the Board will only impose penalties for dates which the plant was in operation without a functioning pump, and/or dates in which test data reveals a discharge.

DER also admits that there are no discharges from the sizing plant when the pump operates properly. DER did not discover that the pump was inoperable until December 10, 1979. Other than November 20 and 21, 1979, DER failed to offer any evidence supporting an assessment for civil penalties for dates before December 10, 1979. Consistent with Medusa, supra, the Board, therefore, refuses to impose liability based on an inoperable pump until December 10, 1979.

In summary, the Board finds that DER has proven by a preponderance of the evidence that Lucky Strike violated Section 307 of the CSL on November 20 and 21, December 10, 11, 12, 13, 14, 17, 20, 21, 26, 27, 28, and 31, 1979, January 2, 3, 4, 8, 9, 10, and 17, and July 18 and 24, 1980, a total of 23 separate violations.

Liability of Lucky Strike under 25 Pa.Code §97.32

DER, in its Complaint for Civil Penalties, also charges Lucky Strike with violations of 25 Pa.Code §97.32 for excessive discharge of suspended solids, acid wastes, and pH. (DER Complaint, Counts II, III, & IV). The dates of these alleged violations are the same dates DER alleged, and we have established, violations under Section 307. DER, therefore, not only seeks assessment of civil penalties for the discharge itself under Section 307, but also for the quality of that discharge under 25 Pa.Code §97.32. The Board holds that Lucky Strike is not liable for any violation under 25 Pa. Code §97.32.

In Trevorton Anthracite Company v. DER, the Board addressed the issue of whether the DER could impose two separate penalties for one offense. Trevorton Anthracite Company V. DER, 1978 EHB 8. The Appellant, Trevorton Anthracite Company, was charged with an illegal discharge of industrial waste from its settling basin on December 9, 1975, in violation of Section 307. DER

also sought to assess civil penalties for the December 9 discharge on the basis that the discharge in question also violated pertinent regulations for release of suspended solids. Id. at 14. In applying the doctrine of merger of offenses, the Board held that only one violation could be imposed for the discharge of December 9, 1975. Id. Adopting notions of fairness, the Board reasoned that only one, not two, discharges occurred on December 9, 1975. Id. The facts in Trevorton are nearly identical to those in the instant matter. DER is seeking two assessments of penalties for one discharge. The holding in Trevorton, supra, therefore clearly controls. Furthermore, under the terms of the Permit, Lucky Strike is entirely prohibited from releasing any discharge from the sizing plant into surface waters. The regulations governing effluent limitations, therefore, are irrelevant, and DER's allegations for violations of 25 Pa.Code §97.32 must be dismissed.

Calculation of Civil Penalty Amount

In calculating the magnitude of a civil penalty, the Board is guided by the factors enunciated in Section 605 of the CSL. This section provides that the wilfulness of the violation, degree of injury to waters of the Commonwealth, the cost of restoration, and other relevant factors be considered when determining the magnitude of a civil penalty.

DER failed to present any evidence concerning cost of restoration. Since the Board cannot speculate as to costs, this factor will be disregarded. See Lawrence Coal Company v. DER, 1986 EHB 519, 552.

DER inspections and sample results indicate that Lucky Strike's illegal discharges of wastewater from its sizing plant often contained dangerous levels of pH, suspended solids, and acid waste. These discharges resulted in both physical and biological degradation. In fact, a DER official inspected Sugar Notch Run for the purpose of constructing a biological species

assessment. Sugar Notch Run was so polluted with silt that the official was unable to identify any fish or insects. (T. 51)

Solomon Creek is designated a Cold Water Fishery under 25 Pa.Code 93.9. Although there are indications that Sugar Notch Run and Solomon Creek have been previously polluted from other sources, this fact does not serve as a defense to an action for civil penalties. DER v. Rushton Mining Company, 1976 EHB 117. The Commonwealth is committed to protecting the quality of water in Cold Water Fisheries.

Defendants received numerous complaints from residents in the area of the sizing plant indicating that the discharges, in addition to harming the biology of the area, were visually objectionable. In summary, consistent with the holding in Lawrence, supra, Lucky Strike caused at least moderate degradation to the waters of the Commonwealth.

Turning to the wilfulness factor, the Board has recognized three degrees of wilfulness when imposing civil penalties--negligent, reckless, and intentional. Refiners Transport and Terminal Corp. v. DER, 1986 EHB 400; Southwest Equipment Rental Inc. v. DER, 1986 EHB 465. These degrees of wilfulness are distinguishable by a person's recognition that his conduct may result in a statutory violation. Lawrence Coal Company v. DER, 1986 EHB 519, 554.

Lucky Strike knew that it did not have an operating pump to direct wastewater from the Preston Dam to the settling lagoons. Lucky Strike was notified by a DER official on November 21, 1979 that a discharge was occurring, and that DER considered it a statutory violation. (T.214).

Intentional conduct, as defined by the Restatement (2d) of Torts, §8A, "implies that actor intends or desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to

occur". The Board concludes that Lucky Strike's conduct in this matter was intentional. Rushton, supra. By sizing coal without a pump, Lucky Strike knew a violation would occur. Despite this fact, it proceeded to size coal in an attempt to meet the terms of its production contracts. Installing and maintaining a pump at the sizing plant is a relatively simple technical requirement. Thus, all violations of Section 307 by Lucky Strike will be considered to be "intentional". Lawrence Coal Company, supra at 556.

Finally, the Board will consider "other relevant factors" before arriving at a civil penalty figure. The deterrent value is an appropriate factor when calculating a penalty. Trevorton Anthracite Co. v. DER, 42 Pa. Cmwlth. 84, 400 A.2d 240 (1979). In fact, the Board has even gone as far as indicating "[w]hen a high quality, cold water fishery has been degraded as a result of AMD discharges... we believe that a portion of the civil penalties assessed must necessarily include an amount attributable to the value of deterrence". Deterrence will be considered in assessing this penalty.

Section 605 permited the assessment of a civil penalty of up to $10,000 per day per violation. Having established that Lucky Strike intentionally caused moderate damage to a Cold Water Fishery, the Board will assess a penalty of $2,000 per day for each of the twenty-three (23) violations of Section 307, for a total of $46,000.

Liability of Louis Beltrami

Beltrami is President of Lucky Strike. Beltrami Enterprises, of which Beltrami is President and Chairman, owns 100% of Lucky Strike's stock. Beltrami has been in the coal mining business for over 30 years. During the time period of the violations, Beltrami was in charge of the day-to-day operations of the sizing plant and was frequently on the premises.

Beltrami was well aware of the fact that the sizing plant was

discharging watewater into Sugar Notch Run. Moreover, Beltrami knew that the discharge constituted a violation of Section 307. In fact, a DER official personally provided Beltrami with sample of the discharge and instructed Beltrami that it was illegal. Despite this information, Beltrami continued to operate the sizing plant off and on for six weeks until the inoperative pump was finally fixed. At a meeting with DER officials on December 10, 1979, Beltrami indicated that he was in a business squeeze because he had production contracts to meet, yet at the same time, DER wanted it him to stop production in order to remedy the discharges. Beltrami inquired at the meeting, "Is a little silt going to hurt this creek?" Beltrami continued to operate the sizing plant and discharge wastewater into Sugar Notch Run, despite the concerns enunciated by DER at the meeting of December 12, 1979, and a subsequent letter further reflecting these concerns. The facts outlined above lead the Board to believe that Beltrami personally made a business decision to continue to operate the sizing plant, regardless of the pollutional consequences.

A corporate officer may be held personally liable for a civil penalty under the CSL despite the fact that the corporation also may be found liable. 35 P.S.§690.1. See John E. Kaites, et al. v. DER, 1986 EHB 234. Generally, a corporate officer may be found liable under one of two theories-- piercing of the corporate veil or participation by the officer. Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983). A corporate officer will be found liable under the piercing of the corporate veil theory if the finder of fact determines that the corporation is a "sham" which exists soley to avoid personal liability of the officers. Since DER did not present any evidence as to this theory, Lucky Strike's corporate veil will not be pierced. Instead, DER seems to assert that Beltrami exhibited the requisite

degree of "participation" in causing these discharges to hold him personally liable for their existence.

The Board agrees with DER and will hold Beltrami personally liable for all 23 discharges enumerated above. In Kaites v. DER, supra, the Board identified two authorities for liability under the "participation" theory. First, an officer could be held personally liable under common law if his actions actually further the alleged violations. Id. Under common law an officer cannot be held liable for nonfeasance, however, "a decision to pursue a chosen course of conduct, accompanied by an order carrying that decision into effect, can be sufficient "participation" to subject the officer to personal liability". Id. The Board in Kaites, supra also stated that an officer could be held liable even if he did not personally participate in the act, yet had knowledge of it and consented to the act. Id.

The Board has also recognized corporate officer liability under the "participation" theory where a violation of a statutorily created duty exists. Id. This avenue of liability requires even less affirmative activity by the corporate officer than under common law. The Board recognized that a corporate officer can be personally liable if the officer "had a responsible relation to the situation" and "by virtue of his position had authority and responsibility to deal with the situation". Id. quoting from U.S. v. Park, 421 U.S. 658 (1975). Section 307 of the CSL creates the requisite statutory duty contemplated by Kaites, supra.

Beltrami is liable for all 23 discharges under the common law theory of participation. Beltrami is President and Chairman of Lucky Strike. Furthermore, Beltrami admits that he is in charge of the day-to-day activities of the Huber Colliery. Beltrami's testimony reveals that he knew of the discharges, yet made a business decision to continue sizing coal.

This degree of activity is sufficient to hold Beltrami personally liable for all 23 discharges under common law. In any event, because of his relation to the situation, and by virtue of his authority as President and Chairman, the Board also would not hesitate to find Beltrami personally liable under the statutory-duty participation theory.

In summary, the Board holds that Beltrami is personally and separately liable for 23 days of violations of Section 307. Beltrami's degree of wilfulness for these violations is also considered to be intentional. Beltrami, therefore, is hereby assessed a civil penalty of $2,000 per day for 23 days of violations of Section 307, resulting in a total assessment against Beltrami of $46,000.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties to and the subject matter of this proceeding. 71 P.S. §510-21.

2. These civil penalties sanctions are authorized by Section 605 of the CSL. 35 P.S. §691.605.

3. DER has the burden of proving by a preponderance of the evidence that Lucky Strike and Beltrami violated applicable statutes and regulations and that there is a basis for the Board to assess civil penalties. 25 Pa.Code §§ 21.101(a); 21.101(b)(1); DER v. Federal Oil and Gas Co. and James V. Joyce, t/d/b/a Joyce Pipeline Company, 1975 EHB 186.

4. The Board may adjudicate this appeal despite the fact that it must do so soley on the basis of a "cold record". Caldwell v. Clearfield Cty. Children and Youth Serv., 83 Pa.Cmwlth 49, 476 A.2d 996, 998 (1984).

5. The pre-1980 version of the CSL will govern this appeal since it was the law in effect at the time the alleged violations occurred. Lawrence

Company v. DER, 1986 EHB 519,540.

6. Lucky Strike discharged wastewater from the Huber Colliery sizing plant in violation of Section 307 and the Permit.

7. The effluent limitations found at 25 Pa.Code §97.32 are not relevant to this appeal because Defendants are absolutely prohibited from discharging any wastewater. DER's request for penalties under this section is, therefore, denied.

8. In determining the amount of civil penalties to be assessed for Section 307 violations, the Board must consider: (i) the wilfulness of the violation; (ii) the damage or injury to the waters of the Commonwealth or their uses; (iii) cost of restoration; and, (iv) other relevant factors. 35 P.S. §691.605.

9. The Board will not consider the cost of restoration in determining the amount of penalty because DER failed to present any evidence as to this factor.

10. Sugar Notch Run and Solomon Creek are waters of the Commonwealth. 35 P.S. §691.1.

11. Lucky Strike's 23 discharges from the Huber Colliery sizing plant evidence intentional conduct. Refiners Transport and Terminal Corp. v. DER, 1986 EHB 400.

12. Beltrami intentionally discharged wastewater from the Huber Colliery sizing plant in violation of Section 307 and the Permit.

ORDER

AND NOW, this 22nd day of April, 1987 civil penalties for violations of the CSL are hereby imposed upon Lucky Strike Coal Company in the amount of $46,000 and Louis J. Beltrami in the amount of $46,000.

Each civil penalty is due and payable, in its entirety, into the Clean Water Fund immediately. The Prothonotary of Luzerne County is hereby ordered to enter these penalties as liens against any property of Lucky Strike Coal Company and Louis J. Beltrami, with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the liens on the docket.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 22, 1987

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ALBERT J. HARLOW, JR.	:	
	:	
v.	:	**EHB Docket No. 85-148-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 28, 1987

OPINION AND ORDER

Synopsis

An appeal is dismissed because of repeated failure to comply with the Board's orders.

OPINION

On April 24, 1985, Albert J. Harlow, Jr. (Appellant) initiated this matter by filing a Notice of Appeal with the Board. The appeal was taken from the Department of Environmental Resources' (DER) declaration of intent to forfeit Appellant's bonds due to various violations 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.

Both parties engaged in discovery and have filed pre-hearing memoranda with the Board. The Board, in response to the parties' representations that they were engaged in settlement discussions and negotiations, ordered numerous continuances. On October 2, 1985, the Board issued an order instructing both parties to file status reports by October 31, 1985, accompanied by a request for appropriate Board action, such as a

continuance pending settlement negotiations, or the prompt scheduling of a hearing on the merits. On November 1, 1985 DER filed its status report, requesting a 90 day continuance to allow the reclamation it had witnessed upon inspection of the Appellant's site to continue until Appellant had abated the violations of SMCRA specified by DER in its aforementioned declaration of intent. The Board granted DER's request in an order dated November 4, 1985, which also directed the parties to file status reports by February 3, 1986. After an additional request for status reports was issued by the Board on February 26, 1986, status reports were submitted by both parties. On April 4, 1986, the Board issued another order continuing the matter to July 3, 1986 to permit settlement negotiations between the parties. This order once again instructed the parties to file status reports by July 3, 1986 accompanied by a request for appropriate Board action. On July 7, 1986 Appellant filed its status report indicating that reclamation was proceeding and requesting another three month continuance, which was granted by Board order on July 8, 1986. This order continued the matter until October 3, 1986 when status reports were to be filed by the parties accompanied by a request for appropriate Board action. After default notices were sent to Appellant and DER, Appellant filed its status report on November 21, 1986, along with yet another request that the matter be continued,this time until March, 1987. The Board granted this request on November 25, 1986 and ordered the parties to file status reports by March 9, 1987 along, with either a settlement agreement, withdrawal of the appeal, or a request for a prompt hearing on the merits. The order also stated that if no activity occurred at this docket by March 16, 1987, the matter might be dismissed. This order was sent by certified mail and was received by Appellant's counsel on November 26, 1986.

As of this date, the Board has not received Appellant's response to

its November 25, 1986 order. This Board has always encouraged negotiations between the parties, as the above recitation of events clearly makes evident. However, there comes a point when the Board can no longer waste its precious time chasing after parties which flagrantly ignore its orders.

Because this is an appeal of a bond forfeiture, DER bears the burden of proof, Melvin D. Reiner v. DER,1982 EHB 183 at 193; Western Allegheny Limestone Corporation v. DER, 1986 EHB 1159. Under these circumstances, the sanction of dismissal is not usually applied. However, in a case like this, where there appears to be no way to galvanize the Appellant into action, such a sanction is appropriate. In the past, the Board has dismissed appeals when there was a clearly unresponsive appellant, even though the burden of proof fell initially on DER. Penn Minerals Company v. DER, 1986 EHB 798. Therefore, under the facts presented here and applicable Board precedent, this appeal is dismissed, pursuant to 25 Pa.Code §21.124, for Appellant's failure to respond to Board orders.

ORDER

AND NOW, this 28th day of April, 1987, it is ordered that this appeal is dismissed for Appellant's failure to comply with Board orders.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 28, 1987

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ALBERT J. HARLOW, JR.	:	
	:	
v.	:	**EHB Docket No. 85-206-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued April 28, 1987

OPINION AND ORDER

Synopsis

This appeal is dismissed. After the Board granted repeated continuances for the purposes of settlement negotiations, Appellant failed to comply with the Board's orders.

OPINION

On May 20, 1985, Albert J. Harlow, Jr. (Appellant) initiated this matter by filing a Notice of Appeal with the Board. The appeal was taken from the Department of Environmental Resources' (DER) denial of Appellant's application for a surface mining permit for failure to submit a replacement bond.

Both parties engaged in discovery and filed pre-hearing memoranda with the Board. The Board, in response to the parties' representations that they were engaged in settlement discussions, ordered numerous continuances. On October 2, 1985, the Board issued an order directing the parties to file status reports by October 31, 1985, accompanied by a request for appropriate Board action, such as a continuance pending settlement negotiations, or the

prompt scheduling of a hearing on the merits. On November 1, 1985 DER filed its status report requesting, a 90 day continuance. The Board granted this request in an order dated November 4, 1985, which also directed the parties to file status reports by February 3, 1986. After an additional request for status reports was issued by the Board on February 26, 1986, status reports were submitted by both parties. On April 4, 1986, the Board issued another order continuing the matter to July 3, 1986 to permit settlement negotiations between the parties. This order once again required the parties to file status reports by July 3, 1986 accompanied by a request for appropriate Board action. On July 7, 1986 Appellant filed its status report, indicating that reclamation was proceeding and requesting another three month continuance, which was granted by the Board on July 8, 1986. This order continued the matter until October 3, 1986, when status reports were to be filed by the parties accompanied by a request for appropriate Board action. After default notices were sent to Appellant and DER, Appellant filed its status report on November 21, 1986, along with yet another request that the matter be continued,this time until March, 1987. The Board granted this request on November 25, 1986, and ordered that the parties file status reports by March 9, 1987 along with either a settlement agreement, a withdrawal of the appeal, or a request for a prompt hearing on the merits. The order also stated that if no activity occurred at this docket by March 16, 1987, the matter might be dismissed. This order was sent by certified mail and was received by Appellant's counsel on November 26, 1986.

As of this date, the Board has not received Appellant's response to its November 25, 1986 order. This Board has always encouraged negotiations between the parties as the above recitation of events clearly makes evident. Yet, there comes a point when the Board can no longer waste its precious time

chasing after parties which flagrantly ignore its orders.

Because this is an appeal of a permit denial and Appellant bears the burden of proof in this proceeding, dismissal is an appropriate sanction. Keystone Mining Company, Inc. v. Commonwealth of Pa., DER, EHB Docket No. 86-280-R (issued February 27, 1987). Therefore, under the facts presented here and applicable Board precedent, the instant appeal is dismissed for Appellant's failure to comply with Board Orders.

ORDER

AND NOW, this 28th day of April, 1987, it is ordered that this appeal is dismissed, pursuant to 25 Pa. Code §21.124, for Appellant's failure to comply with Board orders.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 28, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Joseph Reinhart, Esq.
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For Appellant:
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Pittsburgh, PA

dk

NEMACOLIN, INC.	:	
	:	
v.	:	**EHB Docket No. 86-546-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 28, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT OR TO LIMIT ISSUES

Synopsis

DER's Motion for Summary Judgment is granted. The General Assembly intended that condominium pools be regulated in certain areas and be subject to the permitting requirements of §5 of the Public Bathing Law. There is a potentially hazardous design feature in Appellant's pool. This brings the pool within the "safety equipment" category under which condominium pools were intended to be regulated pursuant to the Public Bathing Law's definition of a public bathing place. Because under the Public Bathing Law, Appellant was required to have a permit but failed to procure one, DER acted properly in ordering the pool to be closed until a permit was secured.

OPINION

On September 22, 1986, Nemacolin, Inc. (Appellant) initiated this matter by the filing of a Notice of Appeal from an order (order) issued on August 22, 1986, by the Department of Environmental Resources (DER). The order, which was issued pursuant to Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17,

required Appellant to close and drain the Laurel Pond swimming pool, located at the Maples and Laurel Pond Condominiums in Wharton Township, Fayette County. Appellant operates and maintains the pool. DER further ordered that the pool be kept closed and dry until Appellant applied for and obtained a permit.

The instant matter results from DER's filing a Motion for Summary Judgment or to Limit Issues (DER's Motion). The Board now rules on DER's Motion.

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 threshold issue is one of statutory construction and must be resolved before determining if there exists any genuine issue of material fact.

The statute at issue in this appeal is the Public Bathing Law, the Act of June 23, 1931, P.L. 899, as amended, 35 P.S. §672 et seq. ("Public Bathing Law"). Prior to 1979, 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)

DER contends in its motion and in its closure order the Appellant began construction of its pool in the early summer of 1985 without applying for a permit as required by Section 5 of the Public Bathing Law, 35 P.S. §676. After the pool's completion, Appellant submitted an application for a permit to DER. The application was denied by DER on September 30, 1985 because the pool's design included a slope which began at a point shallower than six feet from the surface (a so-called "hopper bottom") in violation of Section 2.6.5.1 of DER's Bathing Place Manual.[1] No appeal of this permit denial was taken by Appellant. Appellant did, however, continue to operate the pool until the issuance of the closure order. Appellant admits to these facts in its answer to DER's Motion.

The result in DER's Motion turns on whether or not condominium pools require permits under the Public Bathing Law. DER believes that condominium pools, like Appellant's, are included in the permitting requirements of the Public Bathing Law.

DER's argument relies partially on the legislative history of the 1979 amendments to the Public Bathing Law. DER contends that the General Assembly intended to relieve condominium pools of the lifeguard requirement, but that in all other respects condominium pools would continue to be regulated under the law.

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[1] §193.14 of DER's rules and regulations states: "The Department's pamphlet, "Bathing Place Manual", Bureau of Sanitary Engineering Publication No. 16, may be used a guide for determining compliance with the provisions of §§193.11-193.17 of this Title (relating to permits)."

Appellant, on the other hand, contends that Section 2(1) of the Public Bathing Law specifically excludes condominium pools and, therefore, its pool is not subject to the permit requirement of Section 5. It reaches this conclusion in reliance on Commonwealth, DER v. Apple Valley Racquet Club, 20 Cmwlth Ct. 325, 342 A.2d 150 (1975) which held that a pool owned and operated by a non-profit membership club for the use of the club members and their guests was a public bathing place. Appellant implies that the result in Apple Valley, supra, caused the General Assembly to amend the definition of public bathing place to exclude pools at condominiums and clubs from the permit requirements under the statute.

We believe the language of section §2(1) of the Public Bathing Law is inartful and leads to confusion in interpreting the permitting requirements of Section 5 of the Public Bathing Law. Because the language is not explicit, §1921(c) of the Statutory Construction Act permits us to examine:

> "(1) The occasion and necessity for the statute.
> (2) The circumstances under which it was enacted.
> * * * * *
> (5) The former law, if any, including other statutes upon the same or similar subjects.
> * * * * *
> (8) Legislative and administrative interpretations of such statute."

DER's argument, that the legislative history of this ambiguously worded statute reveals an intent to regulate condominium pools in all other respects under the law, except for "with regard to lifeguards", is persuasive. This was explicitly stated by the chief sponsor of the 1979 Amendment when it was under discussion in the House of Representatives. H.R., 163rd General Assembly, 1979 Legislative Journal-House 1390 (June 25, 1979). Since the General Assembly intended condominium pools to be regulated in the areas specified in the statute's definition section, the permitting

requirement of Section 5 of the Public Bathing Law, 35 P.S. §676, also applies to condominium pools. The permit requirement is the vehicle by which DER can regulate condominium pools within the broad areas specified by the statute.

The focus then becomes whether the "hopper bottom" falls within any of these areas. DER believes that it does and reaches its conclusion by arguing that under Section 2(1) of the Public Bathing Law, 35 P.S. §673, DER is authorized to regulate safety equipment of condominium swimming pools and that the pool's structure itself falls into this category. Further, DER alleges that it has the authority under its rules and regulations to insure the reduction of hazards, a category under which it alleges the safety equipment of condominium pools squarely falls. Section §193.41 of DER's rules and regulations provides:

> "Construction, equipment, operation and maintenance at all public bathing places 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 the "hopper bottom" situation falls within the safety equipment area which the General Assembly intended to regulate when it amended the statute, Appellant was required to obtain a permit under Section 5 of the statute. Because no permit was obtained, it is a statutory public nuisance under Section 12 of the Public Bathing Law, 35 P.S. §680(c) and DER's action in issuing an order pursuant to §1917-A of the Administrative Code was proper. 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).

The material facts in this case are whether Appellant constructed and operated a public bathing place without the requisite permit from DER. Appellant does not dispute this. As there are no genuine issues of disputed facts and DER is entitled to judgment as a matter of law, DER's Motion for Summary Judgment is granted.

ORDER

AND NOW, this 28th day of April, 1987, it is ordered that the Department of Environmental Resources' (DER) Motion for Summary Judgment is granted and the appeal of Nemacolin, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 28, 1987

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William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES E. MARTIN	:	
	:	
v.	:	**EHB Docket No. 86-567-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 28, 1987

OPINION AND ORDER

Synopsis

The Department of Environmental Resources' (DER) Motion to Dismiss on grounds of res judicata/ collateral estoppel is granted where Appellant has failed to substantiate its claim that its attempt at compliance with a force majeure clause in a consent order and agreement was different than that previously adjudicated by the Board.

OPINION

On October 8, 1986, Appellant James E. Martin (Martin) filed a Notice of Appeal from a compliance order issued by DER on September 10, 1986. The order alleged that violations of DER regulations, including the removal of backfilling equipment, occurred at Martin's Boarts site in Kittanning Township, Armstrong County. Martin alleged that, despite his compliance with the force majeure clause of a consent order and agreement executed by Martin and DER, DER had failed to renew his mining license. This in turn, caused him

to cease mining activities and, therefore, be unable to make payments on his equipment at the Boarts site.

On October 29, 1986, DER filed a motion to dismiss this appeal, arguing that the force majeure issue was previously adjudicated by the Board and that, since Martin never appealed DER's decision not to renew his mining license, his current claim that DER illegally failed to renew it was an impermissible collateral attack on a final DER action.

On March 9, 1987, the Board issued an opinion and order which summarily disposed of Martin's claim that he was improperly denied his license by holding that Martin failed to timely appeal the license denial. The Board noted Martin's argument that this appeal involves a different attempt at force majeure compliance but also noted that this claim was vague and factually unsupported. Viewing the record in the light most favorable to the non-moving party, as the Board is required, it ordered Martin, by March 30, 1987, to submit an amendment to Paragraph 6 of his answer to DER's motion to dismiss and specifically state what permit areas and facts were involved in the compliance attempt alleged in this appeal that were different than the attempt previously adjudicated by the Board.

On April 1, 1987, Martin filed his amendment. It is nothing more than a full-scale attack on DER's handling of this matter and singularly unresponsive to the request contained in the Board's order of March 9, 1987. Martin did not even mention his prior force majeure argument in this pleading. Since Martin has failed to support his allegation that the attempt at force majeure compliance alleged in this appeal was different than the one previously adjudicated by the Board, we have no choice but to dismiss this appeal.

ORDER

AND NOW this 28th day of April, 1987, it is ordered that DER's Motion to Dismiss is granted and the appeal of James E. Martin at EHB Docket No. 86-567-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: April 28, 1987

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QUENTIN HAUS RESTAURANT :
:
v. : EHB Docket No. 86-543-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: May 5, 1987

OPINION AND ORDER

Synopsis

In dismissing an appeal, the Board holds that a letter advising a restaurant that the Department of Environmental Resources' ("DER") Bureau of Water Quality Management is recommending to its Bureau of Community Environnmental Control that the restaurant be prohibited from using its expansion until adequate sewage facilities are available is not a final, appealable action.

OPINION

Although this matter was initiated by the filing of an appeal with this Board on September 22, 1986 by Quentin Haus Restaurant ("Quentin"), the roots of this controversy are in a prior municipal action. On August 19, 1985, Quentin, which is located in West Cornwall Township, Lebanon County, received a building and zoning permit authorizing the construction of an addition to the restaurant. The West Cornwall Township zoning officer indicated to Quentin that a permit under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. ("Sewage Facilities Act") would not be required because the

existing on-site system, which is of unknown design and pre-dating the Sewage Facilities Act, would not be altered by Quentin.

After Quentin built its addition to the restaurant, DER learned of it and informed Quentin that a sewage facilities permit was required for construction of the addition, since the addition would likely result in increased flows to the system. Quentin submitted its plans and specifications for the addition to DER for review on October 11, 1985. In a letter dated March 21, 1986, DER advised Quentin:

> The Department's review of the information provided indicates the existing system does not have sufficient capacity for an increase in flows and that the existing system does not meet current standards outlined in Chapter 73 of the Department's Regulations... it has been determined [therefore] that a sewage permit from the Lebanon Valley Council of Governments is required for this increase in sewage flows. This establishment is in violation of §7(a) of the Pennsylvania Sewage Facilities Act and Chapter 71, Section 71.45(c) also applies.

Quentin and DER met on April 10, 1986, and DER apparently agreed it would delay a final determination on this matter until it received more information from Quentin regarding water flows. Quentin submitted this information to DER on July 10, 1986, and DER responded in a letter dated August 20, 1986 by reasserting its conclusion that, since a net increase in flow would result from the expansion, a permit should be obtained, and Quentin should not use the expansion until the permit was obtained.

On September 22, 1986, Quentin appealed the August 20, 1986 letter to this Board. Subsequently, DER filed a motion to dismiss, which is the focus of this order, alleging that Quentin failed to timely file this appeal because the letter of March 21, 1986, not the letter of August 20, 1986, was the final DER action. Since Quentin contests an unappealable action, DER

asserts, the Board lacks jurisdiction over this matter. Quentin responds by arguing that DER agreed to delay its final determination until it had reviewed the water flow data provided on July 10, 1986. The final action, Quentin asserts, was taken by DER on August 20, 1986, not March 21, 1986.

The Board dismisses this appeal, but not for the reasons advanced by DER. Before explaining the rationale for our decision, we believe that a discussion of the applicable law would be useful, since neither the letters which DER alleges constituted the appealable actions, nor the pleadings filed by Quentin and DER in support of their respective positions give the slightest indication of the regulatory scheme at issue in this matter.

The March 21 and August 20, 1986 letters give the impression that DER is proceeding under the Sewage Facilities Act. But, local agencies, and not DER, are responsible for administering the permit program set forth in §7 of the Sewage Facilities Act[1] and consequently, we must look to another statute to find the origins of DER's action. Section 2 of the Act of May 23, 1945, P.L. 926, as amended, 35 P.S. §655.2, commonly referred to as the Public Eating and Drinking Place Act, requires that a public eating or drinking place in a second class township not served by a county or joint-county department of health, such as West Cornwall Township, obtain a license from DER to operate the facility. See also, High Sky Inc. v. DER, 1980 EHB 19. There is a broad grant of authority in §6 of the statute to adopt whatever regulations are necessary to effectuate the purposes of the statute.

Regulations relating to public eating and drinking places have been promulgated at 25 Pa.Code §151.1 et seq. The regulations most directly

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[1] DER is responsible for permitting large volume (i.e., capacity in excess of 10,000 gallons per day) on-site disposal systems. 25 Pa.Code §72.2(c)(1). However, we have no evidence here of such a large volume system.

applicable to this matter are 25 Pa.Code §§151.73 and 151.101. Section 151:101 provides that:

> (a) Before work is begun in the construction, remodeling or alteration of an eating or drinking place where food is prepared, stored or served, or in the conversion of an existing establishment to an eating or drinking place, properly prepared plans and specifications shall be submitted to and approved by the licensor.
> (b) The plans and specifications submitted to the licensor by the owner of a future eating or drinking place shall include, where applicable, data relating to the following:
> * * * * *
> (4) Sewage disposal.
> * * * * *

And, §151.73 states that:

> All sewage disposal systems serving public eating or drinking places shall be approved by the licensor. Approval of the sewage disposal system shall be based upon satisfactory compliance with §§73.1-73.77 of this Title (relating to individual sewage disposal systems) and the act of June 22, 1937, P.L. 1987, as amended (35 P.S. §691.1 et seq.

Thus, Quentin's expansion of its restaurant was an alteration, the plans for which required DER's approval under §152.101. Demonstration of the adequacy of the sewage disposal facilities was, in turn, necessary for securing approval of the plans for the alteration of the restaurant.

Having established the precise nature of DER's role in the regulation of Quentin, we next turn to the motion to dismiss. We do not accept DER's argument that untimeliness is the issue. Rather, the real issue is whether the August 20, 1986 letter from DER to Quentin was an appealable action; we hold that it is not a final action and, therefore, not reviewable by the Board.[2]

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[2] Similarly, for the same reasons, the March 21, 1986 letter is not a final action.

For an appeal to lie with the Board, an action must constitute an adjudication. 2 Pa.C.S. §101, 25 Pa.Code §21.2. In determining whether the August 20, 1986 letter constitutes an adjudication, it is necessary to examine the March 21, 1986 letter. The March letter states:

> It is the Bureau of Water Quality Management's recommendation to the Bureau of Community Environmental Control, by copy of this letter, that appropriate legal measures be taken to restrain the use of these new illegally constructed facilities at Quentin Haus Restaurant
>
> (emphasis added)

The August letter reiterates this position:

> The Department stands by its earlier recommendation that use of these illegally constructed facilities be restrained until such time as adequate sewage disposal facilities become available.
>
> (emphasis added)

What the Board now has before it is a letter from one bureau within DER informing Quentin that it is recommending to another DER bureau, the Bureau of Community Environmental Control, that it "restrain" Quentin from using its expansion until "adequate sewage facilities become available." Or, put another way, the letter which Quentin has appealed is nothing more than an intra-agency recommendation from a bureau which is clearly not responsible for the permitting of Quentin's on-site disposal system and apparently not responsible for the approval under the Public Eating and Drinking Place Act of the plans for its expansion. The action which would constitute an adjudication would be the Bureau of Community Environmental Control's disapproval of Quentin's plans under 25 Pa.Code §151.101, and it is not before us. The letter which is before us is neither final nor appealable, and we must dismiss this appeal.

O R D E R

AND NOW, this 5th day of May, 1987, it is ordered that the appeal of Quentin Haus Restaurant is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 5, 1987

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LOWER PAXTON TOWNSHIP	:	
	:	
v.	:	EHB Docket No. 85-547-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 5, 1987

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Synopsis

The Board grants the Department of Environmental Resources' motion for partial summary judgment where there are no genuine issues of material fact.

OPINION

This appeal was filed on December 20, 1985 by Lower Paxton Township (Lower Paxton), which sought review of the Department of Environmental Resources' (DER) November 21, 1985 order alleging that a now closed landfill owned by Lower Paxton had failed to meet effluent limits established in its National Pollutant Discharge Elimination System (NPDES) permit (No. PA0034681) and had not been closed in accordance with DER's regulations. The order also directed Lower Paxton to take certain remedial actions within a specified time frame to correct the violations.

On June 3, 1985, DER filed a motion for partial summary judgment requesting the Board to find that Lower Paxton had failed and continued to fail to comply with the effluent limitations in its NPDES permit. The motion

did not request that the Board render a decision with respect to Lower Paxton's alleged failure to close the landfill properly, nor did it ask for a ruling concerning any of the remedial actions required by DER's order. The motion was accompanied by certification that a copy of the motion had been sent by first class mail to Lower Paxton on June 2, 1986.

On June 5, 1986, the Board sent a motion letter to Lower Paxton advising it that any objection to the motion must be received by the Board no later than June 25, 1986. On July 8, 1986, DER filed a memorandum of law in support of its motion. DER's memorandum was accompanied by certification that a copy of the memorandum had been sent to Lower Paxton on July 7, 1986, by first class mail. As of the date of this opinion and order, the Board has received no response from Lower Paxton.

The 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summerhill Borough v. DER, 34 Pa.Cmwlth 574, 383 A.2d 1320, 1322 (1978). Thus, summary judgment may only be properly granted when it is clear that there are no factual issues that must be resolved at trial. Ambrosia Coal and Construction Co. v. DER, 1986 EHB 333. In addition, summary judgment will be granted only where the legal right to it is clear. Emerald Mines Corp. v. DER, 1986 EHB 605. A decision to render summary judgment must be made by the entire Board. Mathies Coal Co. v. DER, 1984 EHB 524; See, Thomas Fitzsimmons v. DER, 1986 EHB 265.

In ruling upon a motion for summary judgment, the record is viewed in the light most favorable to the non-moving party. Fitzsimmons, supra. Nevertheless, a party failing to respond to a complaint, motion, or other new

matter is deemed in default and, at the Board's discretion, sanctions may be imposed, including treating all relevant facts stated in such pleading or motion as admitted. 25 Pa.Code §21.64(d). Carl W. Christman v. DER and Windsor Township, EHB Docket No. 85-358-W (issued March 23, 1987). Therefore, the Board here will treat the facts alleged by DER in its motion as admitted by Lower Paxton, though still attempting to view them in the light most favorable to it.

The landfill owned by Lower Paxton is located in Lower Paxton Township, Dauphin County, along Conrad Road. Lower Paxton operated the landfill from 1961 to 1983, when it closed the site. DER issued NPDES Permit No. PA0034681 to Lower Paxton on December 14, 1981. The permit authorized a discharge of treated wastewater to an unnamed tributary of Beaver Creek. The NPDES permit established, inter alia, maximum daily effluent limitations for ammonia nitrogen, and both average monthly and maximum daily effluent limitations for total manganese and total iron. The permit required weekly effluent samples and continuous measurement of effluent flows.

Pursuant to its NPDES permit, Lower Paxton submitted Discharge Monitoring Reports (DMRs) and flow data to DER. The DMRs are required by both state and federal law. See, 25 Pa.Code §92.41 and 40 C.F.R. §122.41(2)(4)(i). These DMRs included the period from January 1, 1983 through April 30, 1986. Instruction No. 3 on the DMRs stated "Specify the number of analyzed samples that exceed the maximum (and/or minimum as appropriate) permit conditions in the columns labeled 'No.Ex.' If none, enter '0.'" This information is generally referred to as reported exceedances. For the purposes of its current motion, DER is only concerned with exceedances reported when flows were greater than 50,000 gallons per day,because Lower Paxton apparently discharges up to 50,000 gallons per day of

effluent into the Lower Paxton Township Authority sanitary sewer system,[1] with only the excess on any given day discharged into the unnamed tributary of Beaver Creek. Although DER has not referred to it, 25 Pa.Code §91.33 allows a connection, without a permit, to a sewer system that itself is permitted by DER, provided the system is not overloaded and otherwise capable to conveying and treating the discharge, and is operated in accordance with its permit and applicable regulations. See, The Krawitz Co. v. DER, 1978 EHB 224. DER's compilation of Lower Paxton's DMRs where flows continuously exceeded 50,000 gallons per day indicates there were 65 exceedances for ammonia nitrogen, 59 exceedances for total iron and 31 exceedances for total manganese. Thus, assuming Lower Paxton did use the sanitary sewer system as claimed, Lower Paxton reported 155 such exceedances.

The use of DMRs in determining the existence of no material facts for purposes of rendering a summary judgment is a matter of first impression before the Board. An examination of case law has not revealed any substantially similar cases arising in other self-reporting programs at the state level. However, as DER has pointed out in its memorandum of law, similar cases do exist at the federal level. In a substantial body of cases, various plaintiffs, including the Environmental Protection Agency, sought to hold NPDES permittees liable for permit violations by comparing the effluent limits set forth in the permit with the sampling results reported in DMRs. In each case the courts granted motions for partial summary judgment based upon

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[1] Although DER has not referred to it, 25 Pa.Code §91.33 allows a connection, without a permit, to a sewer system that itself is permitted by DER, provided the system is not overloaded and otherwise capable of conveying and treating the discharge, and is operated in accordance with its permit and applicable regulations.

exceedances of permit conditions reported in the DMRs.[2] e.g., Connecticut Fund for the Environment v. Job Plating, Inc., 623 F.Supp.207 (D.C.Conn.1985) (summary judgment granted for 174 violations of NPDES permit reports in DMRs); see also, Chesapeake Bay Foundation et al. v. Bethlehem Steel Corp., 608 F.Supp.440 (D.C.Md.1985) The Board adopts the reasoning in these cases.

The Clean Streams Law, Act of June 22, 1937, as amended, P.L. 1987, 35 P.S. §§691.301 and 691.307, prohibits the discharge of pollutants into Commonwealth waters other than pursuant to a permit or other prior authorization by DER. An NPDES permit satisfies this requirement. 25 Pa.Code §§92.3 and 92.5. A discharge of industrial wastes contrary to the terms and conditions of a permit also constitutes a public nuisance. 35 P.S. §691.307(c). Each of Lower Paxton's 155 exceedances constitutes a violation of 35 P.S. §§691.301 and 691.307, as well as 25 Pa.Code §92.3.

Having established through Lower Paxton's DMRs that it violated the CSL on numerous occasions, there are no genuine issues as to any material fact. DER is entitled to partial summary judgment as to the 155 violations of Lower Paxton's NPDES permit.

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[2] An argument could conceivably be raised that finding Lower Paxton in violation of the CSL on the basis of its DMRs is prohibited by the right against self-incrimination in the Fifth Amendment of the U.S. Constitution and Article I, Section 9 of the Pennsylvania Constitution. However, the constitutional privilege against self-incrimination is not available to municipalities against the Commonwealth. DER v. Shippensburg Borough, 27 Cumb.L.J. 188, 2 D. & C.3d 417 (1977); See also, DER v. Borough of Carlisle, 16 Pa.Cmwlth 341, 330 A.2d 293 (1974). In any event, the privilege relates only to testimony and hence will not cover a party's records and papers if they are obtained in a lawful manner. Fisher v. U.S., 425 U.S. 391 (1976); See, 1 C.H. Koch, Jr., Administrative Law and Practice, §6.33 (1985). And, under the "required records doctrine," the act of entering or remaining in an activity that has become subject to a required recording or reporting of information constitutes a waiver of the privilege against self-incrimination at least for the purposes of the program concerned. State Real Estate Commission v. Roberts, 441 Pa.159, 271 A.2d 246, cert.denied, 402 U.S. 905 (1970).

O R D E R

WHEREFORE, this 5th day of May 1987, it is ordered that DER's motion for partial summary judgment is granted and DER's order is sustained to the extent it is based on Lower Paxton Township's violations of the Clean Streams Law.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 5, 1987

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William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

ARTHUR BROOKS COAL COMPANY	:	
	:	EHB DOCKET No. 86-253-R
V.	:	EHB DOCKET NO. 86-254-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
ARTHUR BROOKS COAL COMPANY/ FALCO COAL COMPANY	:	
	:	EHB DOCKET NO. 86-285-R
	:	(CONSOLIDATED APPEALS)
V.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 7, 1987

OPINION AND ORDER

Synopsis

Appeals are dismissed due to Appellant's failure to comply with orders of the Board and failure to prosecute.

OPINION

On April 9, 1986, DER issued two compliance orders (hereinafter referred to as "Compliance Order I" and "Compliance Order II") pertaining to Arthur Brooks Coal Company's (Brooks) coal mining operation known as the Honsaker Strip in German Township, Fayette County. Compliance Order I alleged that Brooks was conducting surface mining without having first obtained a surface mining operator's license and was conducting surface mining activities while under a cease order. Brooks was ordered to cease activities until a

license was applied for and issued. Compliance Order I was timely appealed on May 9, 1986 at Docket No. 86-253-R. Compliance Order II alleged there was a discharge of water from an area disturbed by surface mining, which discharge did not meet effluent limitations. Brooks was ordered to immediately provide corrective treatment and, by May 9, 1986, provide a plan and timetable for abatement. Compliance Order II was timely appealed on May 9, 1986 at Docket No. 86-254-R.

Brooks filed what it purported to be pre-hearing memoranda in these two appeals on July 31, 1986. With respect to the appeal at Docket No. 86-253-R, the Board, by order dated August 29, 1986, found Brooks' pre-hearing memorandum totally deficient and ordered Brooks to file a supplement within 30 days. After two requested extensions of time, the Board finally ordered Brooks to submit its supplemental pre-hearing memorandum no later than January 20, 1987.

The pre-hearing memorandum filed at Docket No. 86-254-R was also found to be deficient. By order dated August 29, 1986, Brooks was given 20 days to respond to DER requests concerning exclusion or limitations of certain issues concerning the alleged unlawful discharges and to make certain admissions or denials, as well as statements on certain contentions of law. After Brooks twice requested extensions, the Board finally ordered Brooks to file its supplemental pre-hearing memorandum no later than January 20, 1987.

On April 22, 1986 DER issued a compliance order ("Compliance Order IIA") to Brooks and Falco Coal Company, its contract miner (hereinafter Brooks) alleging that Brooks failed to comply with Compliance Order II and directing Brooks to comply with the order. Brooks timely appealed Compliance Order IIA at Docket No. 86-285-R on June 2, 1986. On May 9, 12, 19 and 20, 1987, DER issued compliance orders ("Compliance Orders IA, IB, IC, and ID",

respectively) alleging that Brooks failed to comply with Compliance Order I and directing Brooks to comply with it. Brooks timely appealed Compliance Orders IA, IB, IC and ID at Docket Nos. 86-286-R, 86-287-R, 86-288-R and 86-289-R, respectively, on June 2, 1986. By order of the Board, these appeals were consolidated at Docket No. 86-285-R. Though Brooks' pre-hearing memorandum was originally due on August 19, 1986, the Board twice granted extensions requested by Brooks and finally ordered that a pre-hearing memorandum be submitted no later than January 20, 1987.

On January 20, 1987, Brooks was required to have filed supplemental pre-hearing memoranda in the appeals at Docket Nos. 86-253-R and 86-254-R and its pre-hearing memorandum for the consolidated appeals at Docket Nos. 86-285-R. On January 28, 1987, with no filings having been received, the Board sent default notices in all of the above appeals, notifying Brooks that its required filings were past due and warning that, unless there was compliance by February 9, 1987, sanctions might be imposed. Brooks received the default notices on January 29, 1987 (Docket No. 86-285-R) and January 30, 1987 (Docket Nos. 86-253-R and 86-254-R). Having received no responses, on February 18, 1987 (Docket No. 86-254-R)[1] and on February 19, 1987 (Docket Nos. 86-253-R and 86-285-R) the Board sent second default notices notifying Brooks that sanctions would be imposed if there was no compliance by March 2, 1987. Brooks received these second notices on February 19, 1987 (Docket No. 86-254-R) and February 20, 1987 (Docket Nos. 86-253-R and 86-285-R). Finally, on March 11, 1987, after still not having received responses, rules were issued upon Brooks to show cause why these appeals should not be dismissed for

[1]The default notice for Docket No. 86-254-R was sent from the Board undated. The "Receipt for Certified Mail" shows that its was deposited in the mail on February 18, 1987. Nonetheless, it set forth the same facts and the same required compliance date as the other default notices.

inactivity (Docket No. 86-253-R and 86-254-R) or lack of prosecution (Docket No. 86-285-R). Brooks received all of the rules to show cause on March 12, 1987. To date, the Board has received no responses from Brooks to any of its orders at any of the three dockets.

DER bears the initial burden of proof in these appeals and because of this the Board has is generally reluctant to impose the sanction of dismissal for an appellant's failure to comply with its orders. However, in view of the Board's clogged docket and limited resources, there are limits to the measures the Board can take to prod an appellant to comply with its orders. Further, it is the appellant, Brooks in this case, which bears the responsibility of prosecuting its appeals by timely filing pleadings or other documents required the Board or requesting extensions of time. Herman Bollinger v. DER, 1986 EHB 99, citing Etna Equipment and Supply Company v. DER, 1984 EHB 607. Finally, the Board's rules of practice and procedure provide for the sanctions of dismissal for failure to heed Board orders. 25 Pa. Code §21.124. In light of the facts presented, dismissal is more than justified.

ORDER

AND NOW, this 7th day of May, 1987, it is ordered that the appeals of Arthur Brooks Coal Company at Docket Nos. 86-253-R and 86-254-R and the consolidated appeals of Arthur Brooks Coal Company/Falco Coal Company at Docket No. 86-285-R are dismissed for failure to comply with orders of the Board and failure to prosecute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A ROTH, MEMBER

DATED: May 7, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Ward T. Kelsey, Esq. and
Joseph K. Reinhart, Esq.
Western Region
For Appellant:
D. Keith Melenyzer, Esq.
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Charleroi, PA

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XINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

TOWNSHIP OF FRANKLIN	:	
	:	
v.	:	**EHB Docket No. 86-661-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 7, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A letter stating what the law requires and that a final decision will be made upon receipt of previously requested information is not a final appealable action.

OPINION

This appeal was filed by the Township of Franklin (Township), York County, on December 10, 1986. The Township appealed a Department of Environmental Resources' (DER) letter dated November 10, 1986 to it from R. Harry Bittle, Deputy Secretary for Environmental Protection. The letter was in response to the Township's application for reimbursement of its expenses in enforcing the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §§750.1 et seq. (SFA). The Township's claim included the expenses of a sewage enforcement officer (S.E.O.), and DER's November 10, 1986 letter specifically challenged charges made by the S.E.O. to the Township for sewage system design.

On January 14, 1987, DER filed a motion to dismiss, arguing that the

Board lacked jurisdiction over this matter because the November 10, 1986 letter was not a final action of DER pursuant to 25 Pa.Code §§21.2 and 21.5(a) and Section 1921-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21. The Township filed an answer to the motion to dismiss on January 26, 1987, in which it reiterated its claim that the November 10, 1986 letter was a "denial and final decision on the matter." After an examination of the entire matter, the Board finds it must agree with DER.

The origin of this matter began earlier in 1986 when the Township submitted its application for reimbursement under the SFA. The record does not indicate the date of submittal, but DER first explained its position concerning the requested reimbursements to the Township in a letter dated August 1, 1986, which letter was signed by Ms. Georgine Adams, an administrative officer within DER's Bureau of Water Quality Management. The August 1, 1986 letter acknowledged the Township's application and explained DER's position concerning reimbursement of certain expenses claimed by the Township, including charges for S.E.O. design of sewage systems which DER did not believe were reimbursable under the SFA. The letter also stated reimbursement would be $232.45.[1] By letter dated August 13, 1986, the Township notified DER that it did not accept the findings in DER's August 1, 1986 letter, that the reimbursement should be in the amount of $4,307.45, and that the amount should be put aside by DER in the Township's name. The Township also sent a copy of its letter to then Lieutenant Governor William Scranton.

On August 26, 1986, Ms. Adams, apparently in response to an inquiry

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[1] Neither this letter nor the subsequent transmittal of a reimbursement check was appealed by the Township.

from State Senator John D. Hopper, sent a second letter to the Township. DER's August 26, 1986 letter stated in pertinent part:

> The Department requests that, within 10 days, a copy of the Township's permit fee schedules be submitted for both the Township's charges to applicants and the charges by the sewage enforcement officer to the Township. Copies were not submitted as requested in Section I on Page 4 of the Application for Reimbursement.

On or about September 3, 1986, the Township forwarded documents purporting to be copies of its fee schedules and minutes from the Board of Supervisors "Re-Organization Meeting." On or about September 24, 1986, DER sent the Township a reimbursement check in the amount of $232.45, the amount stated in DER's August 1, 1986 letter.

The November 10, 1986 letter, now before the Board, was apparently sent after a request by Lieutenant Governor Scranton that a specific reply be made to Township's August 13, 1986 letter. The letter again explained DER's position that expenses for the design of on-lot sewage systems were not eligible for reimbursement under the SFA. The letter also stated that copies of fee schedules as approved by the Township through ordinance or resolution were not provided to DER as required. Making specific reference to the Township's September 3, 1986 letter, DER's November 10, 1986 letter goes on to say that the materials submitted with the Township's September 3, 1986 letter do not qualify as an "ordinance, resolution or otherwise as a fee schedule approved by the supervisors and, furthermore, differ from the rates listed in Section I on the Township's application for reimbursement." The Township, in its answer to the motion to dismiss, claims that all the requested materials in the Deputy Secretary's letter had previously been supplied to DER. Its answer also claims that the materials enclosed in its September 3, 1986 letter are the ones requested by Ms. Adams.

The parties do not agree as to whether the materials thus far submitted by the Township are adequate for DER's purposes. In any event, since DER has given the Township the opportunity to supplement its application in order to qualify its other expenses for reimbursement, it is clear that it has not reached a final decision. The November 10, 1986 letter closes with the statement that, "[u]pon receipt of the information previously requested from the Township, we will be able to make a final decision concerning your reimbursement application." In addition, the November 10, 1986 letter bears no appeal paragraph and contains little other indication of a final action of DER. While these factors, standing alone, would not obviate the finality of an otherwise final action, they must nevertheless be taken in the context of the action in question. Lebanon Valley Council of Governments v. DER, 1983 EHB 273. The November 10, 1986 letter, merely informed Township what information was still required for DER to make its final determination. A letter from an agency stating what the law requires is not a final action or adjudication and is, thus, not appealable. Sandy Creek Forest, Inc. v. DER, ___ Pa.Cmwlth ___, 505 A.2d 1091 (1986).

O R D E R

AND NOW, this 7th day of May, 1987, it is ordered that the appeal of the Township of Franklin is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 7, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Amy L. Putnam, Esq.
Central Region
For Appellant:
Linus E. Fenicle, Esq.
TIVE, HETRICK & PIERCE
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	**EHB Docket No. 84-333-R**
ANGELO SWANHART	:	
	:	Issued: May 8, 1987

OPINION AND ORDER
SUR
RECONSIDERATION OF DENIAL OF SUMMARY JUDGMENT

Synopsis

Upon reconsideration, the Board affirms the prior denial of Defendant's Motion for Summary Judgment. There are material facts in dispute involving Defendant's alleged violations of the Bituminous Coal Mine Act. Therefore, summary judgment, pursuant to Pa. R.C.P. 1035, may not be granted.

OPINION

BACKGROUND

I. The Incident

On July 3, 1983, an explosion occurred at the Helen Mining Company, causing the death of Sylvester Lee Mitsko. A commission, appointed pursuant to Section 124 of the Bituminous Coal Act, the Act of July 17, 1961, P.L. 659, as amended, 52.P.S. §701.101 et seq (the Act), held hearings from July 14-16, 1983, to investigate the incident. On September 11, 1984, the Department of Environmental Resources filed a Complaint against Angelo Swanhart (Defendant) seeking revocation of his certificate of qualification, pursuant to §206 of

the Act and 25 Pa. Code §21.65.

II. DER's Complaint

DER's complaint of September 11, 1984, consisted of five counts. Count I alleged that Defendant failed to make proper examinations of the Helen Mine from June 26-July 3, 1983, violating §228(a) of the Act. Allegedly, air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. Count II alleged that Defendant made incorrect entries in the mine examiner's book, because he recorded that "air was traveling its proper course and normal volume", without having taken a reading with an anemometer, in violation of §228(a) of the Act. Count III alleged that Defendant permitted the use of a pump in the area of the number 9 room of the D-butt section of the mine inby the last crosscut for a period in excess of thirty minutes, without making an examination for the presence of methane every thirty minutes, violating §316(h)(3) of the Act. Count IV alleged Defendant violated §316(f) of the Act by leaving the pump in the area of the number 9 room, D-butt section while it was in operation. Count V alleged Defendant violated §279 of the Act, by his violations of §§228(a), 316(h)(3) and 316(f) of the Act.

III. Amendments to the Complaint

On December 31, 1984, Defendant filed his Preliminary Objections. The Board sustained the sufficiency of DER's complaint, but ordered DER to file an amendment to Paragraph 8 of its complaint to supply additional factual allegations which the Board felt were lacking in the original complaint. On September 8, 1986, DER withdrew Counts III and IV of its complaint as to this Defendant.

IV. Original Summary Judgment Motion

On December 30, 1985, Defendant filed a Motion for Summary Judgment with respect to both DER's original and amended complaints, pursuant to Pa. R.C.P. 1035. DER filed an answer to Defendant's Motion on February 18, 1986. Both sides supplemented their positions with further pleadings. Oral argument was held on this motion on April 3, 1986. On September 17, Defendant filed a Statement of Undisputed Facts to which DER responded on September 25, 1986.

The Board denied Defendant's Motion for Summary Judgment on December 15, 1986 in a simple order stating only that there were material issues of disputed fact.

On January 2, 1987, the Defendant filed a Petition for Reconsideration with the Board, to which DER responded on January 27, 1987. The Board issued an opinion and order on February 9, 1987, granting reconsideration due to the resignation of the Board Member who issued the Summary Judgment Opinion and his consequent inability to clarify that order.

RECONSIDERATION OF THE SUMMARY JUDGMENT ORDER

Pa. R.C.P. 1035 authorizes any party to move for summary judgment after the pleadings are closed. Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Emerald Mines Corporation v. DER, 1986 EHB 605; Summerhill Borough v. DER, 34 Pa. Cmwlth 574, 383 A.2d 1320 (1978).

In the instant matter, the Board finds that it need not reach the

issue of whether Defendant is entitled to judgment as a matter of law, as there are many material facts in dispute. The following represent only some of those facts. First, there is a question as to whether or not the "patrol runs" which Defendant conducted, as opposed to regular mine examinations as required by §228(a) of the Act, were long-standing practices accepted by DER. (DER's Reply to Statement of Undisputed Facts at 2 (September 25, 1986); Defendant's Statement of Undisputed Facts at 5, f.n.5 (September 19, 1986). This fact is critical to the disposition of Count I of DER's Complaint which alleged that Defendant failed to make proper examination of the Helen Mine violating §228(a) of the Act. DER alleged in Count I that air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. If "patrol runs" were found to be accepted by DER in the past, the strength of its argument in Count I would be diminished.

Second, there is a dispute as to whether the Defendant's air readings were taken in the last open crosscut, where sufficient air velocity might have existed to operate an anemometer, as opposed to the area of the power center. (DER's Reply to Statement of Undisputed Facts, supra, at 3; Defendant's Deposition Transcript at pages 41-42,50,51,57-58, and 73.) This is also critical to Count I of DER's Complaint.

Third, there is a dispute between the parties as to whether an anemometer is the most accurate tool for the measurement of the specific volume of air. Defendant argues, based on a scientific journal article, that DER's position as to the accuracy of anemometer readings is incorrect. DER argues first, that this article was never raised in any of the discovery conducted by the parties. Second, DER argues that the bases for its assertions that an anemometer is the most accurate tool available for the

measurement of the specific volume of air and that an anemometer cannot properly be replaced by a methanometer for this purpose, were verified statements made by Defendant and his supervisors. (DER's Reply to Statement of Undisputed Facts, supra, at 2; DER's Response to Defendant's Response to Answer to Motion For Summary Judgment at pps. 10-12, including f.n.5, February 18, 1986; Defendants Statement of Undisputed Facts, supra, at p. 8). This is critical to Count II of DER's complaint because the allegation of Defendant's negligence revolves around the necessity of the use of an anemometer to ascertain the correct measurement of the specific volume of air.

A fourth disputed fact between the parties is as to the precise cause of Mr. Mitsko's death. Defendant alleges that even if the fan was not operating there was enough air flow in the E-butt area and that the cause of the explosion was the failure of the fan's alarm to sound. DER argues that these are conjectural statements rather than facts and that the death occurred because Mr. Mitsko was permitted to enter an unexamined section of the mine which contained an explosive quantity of methane gas. (DER's Reply to Statement of Undisputed Facts, supra, at 3; Defendant's Statement of Undisputed Facts, supra, at 6,7, and f.n.6 .) The resolution of this issue is obviously critical to the disposition of Count I of DER's complaint.

This case's entire disposition could turn on the resolution of only one of these facts. If DER met the burden of proof on any of these issues, a prima facie case of negligence under the Act might be established against the Defendant.

For these reasons, the Board need not reach the second prong of the summary judgment test namely, whether the Defendant is entitled to judgment as a a matter of law. While the Board recognizes that the above listing of disputed facts and issues of law may not be exhaustive, it serves to show that

there are genuine disputes of material facts. On this basis we can only affirm the prior order denying summary judgment.

ORDER

AND NOW, this 8th day of May, 1987, upon reconsideration of all relevant pleadings, it is ordered that the Board's prior order denying Defendant's Motion for Summary Judgment is affirmed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 8, 1987
cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gary Peters and Virginia Davison, Esqs.
Western Region
For Appellant:
Henry Ingram and Henry Moore, Esqs.
Buchanan, Ingersoll
Pittsburgh, PA

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MAXINE WOELFLING, CHAIRMAN
William A. Roth, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 84-334-R
FRANCIS DWYER	:	
	:	Issued: May 8, 1987

OPINION AND ORDER
SUR
RECONSIDERATION OF DENIAL OF SUMMARY JUDGMENT

Synopsis

Upon reconsideration, the Board affirms the prior denial of Defendant's Motion for Summary Judgment. There are material facts in dispute involving Defendant's alleged violations of the Bituminous Coal Mine Act. Therefore, summary judgment, pursuant to Pa. R.C.P. 1035, may not be granted.

OPINION

BACKGROUND

I. The Incident

On July 3, 1983, an explosion occurred at the Helen Mining Company, causing the death of Sylvester Lee Mitsko. A commission, appointed pursuant to Section 124 of the Bituminous Coal Act, the Act of July 17, 1961, P.L. 659, as amended, 52.P.S. §701.101 et seq (the Act), held hearings from July 14-16, 1983, to investigate the incident. On September 11, 1984, the Department of Environmental Resources filed a Complaint against Francis Dwyer (Defendant) seeking revocation of his certificate of qualification, pursuant to §206 of

the Act and 25 Pa. Code §21.65.

II. DER's Complaint

DER's complaint of September 11, 1984, consisted of three counts. Count I alleged that Defendant failed to make proper examinations of the Helen Mine from June 26-July 3, 1983, violating §228(a) of the Act. Allegedly, air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. Count II alleged that Defendant made incorrect entries in the mine examiner's book, because he recorded that "air was traveling its proper course and normal volume", without having taken a reading with an anemometer, in violation of §228(a) of the Act. Count III alleged that Defendant violated §279 of the Act by violating §228(a) of the Act.

III. Amendments to the Complaint

On October 9, 1984, Defendant filed his Preliminary Objections. On December 9, 1984, the Board sustained the sufficiency of DER's complaint, but ordered DER to file an amendment to Paragraph 8 of its complaint to supply additional factual allegations which the Board felt were lacking in the original complaint.

IV. Original Summary Judgment Motion

On January 7, 1986, Defendant filed a Motion for Summary Judgment with respect to both DER's original and amended complaints, pursuant to Pa. R.C.P. 1035. DER filed an answer to Defendant's Motion on February 18, 1986. Both sides supplemented their positions with further pleadings. Oral argument was held on this motion on April 3, 1986. On September 17, Defendant filed a

Statement of Undisputed Facts to which DER responded on September 25, 1986.

The Board denied Defendant's Motion for Summary Judgment on December 15, 1986 in a simple order stating only that there were material issues of disputed fact.

On January 2, 1987, the Defendant filed a Petition for Reconsideration with the Board, to which DER responded on January 27, 1987. The Board issued an opinion and order on February 9, 1987, granting reconsideration due to the resignation of the Board Member who issued the Summary Judgment Opinion and his consequent inability to clarify that order.

RECONSIDERATION OF THE SUMMARY JUDGMENT ORDER

Pa. R.C.P. 1035 authorizes any party to move for summary judgment after the pleadings are closed. Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Emerald Mines Corporation v. DER, 1986 EHB 605; Summerhill Borough v. DER, 34 Pa. Cmwlth 574, 383 A.2d 1320 (1978).

In the instant matter, the Board finds that it need not reach the issue of whether Defendant is entitled to judgment as a matter of law, as there are many material facts in dispute. The following represent only some of those facts. First, there is a question as to whether or not the "patrol runs" which Defendant conducted, as opposed to regular mine examinations as required by §228(a) of the Act, were long-standing practices accepted by DER. (DER's Reply to Statement of Undisputed Facts at 2 (September 25, 1986); Defendant's Statement of Undisputed Facts at 5, f.n.6 (September 19, 1986). This fact is critical to the disposition of Count I of DER's Complaint which

alleged that Defendant failed to make proper examination of the Helen Mine violating §228(a) of the Act. DER alleged in Count I that air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. If "patrol runs" were found to be accepted by DER in the past, the strength of its argument in Count I would be diminished.

Second, there is a dispute between the parties as to whether an anemometer is the most accurate tool for the measurement of the specific volume of air. Defendant argues, based on a scientific journal article, that DER's position as to the accuracy of anemometer readings is incorrect. DER argues first, that this article was never raised in any of the discovery conducted by the parties. Second, DER argues that the bases for its assertions that an anemometer is the most accurate tool available for the measurement of the specific volume of air and that an anemometer cannot properly be replaced by a methanometer for this purpose, were verified statements made by Defendant and his supervisors. (DER's Reply to Statement of Undisputed Facts, supra, at 2; DER's Response to Defendant's Response To Answer to Motion For Summary Judgment at pps. 10-11, including f.n.5, February 18, 1986; Defendants Statement of Undisputed Facts, supra, at p. 8). This is critical to Count II of DER's complaint because the allegation of Defendant's negligence revolves around the necessity of the use of an anemometer to ascertain the correct measurement of the specific volume of air.

A third disputed fact between the parties is as to the precise cause of Mr. Mitsko's death. Defendant alleges that even if the No. 3 fan was not operating there was enough air flow in the E-butt area and that the cause of the explosion was the failure of the fan's alarm to sound. DER argues that the death occurred because Mr. Mitsko was permitted to enter an unexamined

section of the mine which contained an explosive quantity of methane gas. (DER's Reply to Statement of Undisputed Facts, supra, at 3; Defendant's Statement of Undisputed Facts, supra, at 9). The resolution of this issue is obviously critical to the disposition of Count I of DER's complaint.

This case's entire disposition could turn on the resolution of only one of these facts. If DER met the burden of proof on any of these issues, a prima facie case of negligence under the Act might be established against the Defendant.

For this reason, the Board need not reach the second prong of the summary judgment test namely, whether the Defendant is entitled to judgment as a matter of law. While the Board recognizes that the above listing may not be exhaustive, it serves to show that there are genuine disputes of material facts. On this basis we can only affirm the prior order denying summary judgment.

ORDER

AND NOW, this 8th day of May, 1987, upon reconsideration of all relevant pleadings, it is ordered that the Board's prior order denying Defendant's Motion for Summary Judgment is affirmed.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 8, 1987
cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gary Peters and Virginia Davison, Esqs.
Western Region
For Appellant:
Henry Ingram and Henry Moore, Esqs.
Buchanan, Ingersoll
Pittsburgh, PA

dk

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 84-335-R
JAMES MILLIGAN	:	
	:	Issued: May 8, 1987

OPINION AND ORDER
SUR
RECONSIDERATION OF DENIAL OF SUMMARY JUDGMENT

Synopsis

Upon reconsideration, the Board affirms the prior denial of Defendant's Motion for Summary Judgment. There are material facts in dispute involving Defendant's alleged violations of the Bituminous Coal Mine Act. Therefore, summary judgment, pursuant to Pa. R.C.P. 1035, may not be granted.

OPINION

BACKGROUND

I. The Incident

On July 3, 1983, an explosion occurred at the Helen Mining Company, causing the death of Sylvester Lee Mitsko. A commission, appointed pursuant to Section 124 of the Bituminous Coal Act, the Act of July 17, 1961, P.L. 659, as amended, 52.P.S. §701.101 et seq (the Act), held hearings from July 14-16, 1983, to investigate the incident. On September 11, 1984, the Department of Environmental Resources filed a Complaint against James Milligan (Defendant) seeking revocation of his certificate of qualification, pursuant to §206 of

the Act and 25 Pa. Code §21.65.

II. DER's Complaint

DER's complaint of September 11, 1984, consisted of three counts. Count I alleged that Defendant failed to make proper examinations of the Helen Mine from June 26-July 3, 1983, violating §228(a) of the Act. Allegedly, air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. Count II alleged that Defendant made incorrect entries in the mine examiner's book, because he recorded that "air was traveling its proper course and normal volume", without having taken a reading with an anemometer, in violation of §228(a) of the Act. Count III alleged that Defendant violated §279 of the Act by violating §228(a) of the Act.

III. Amendments to the Complaint

On October 9, 1984, Defendant filed his Preliminary Objections. On December 10, 1984, the Board sustained the sufficiency of DER's complaint, but ordered DER to file an amendment to Paragraph 8 of its complaint to supply additional factual allegations which the Board felt were lacking in the original complaint.

IV. Original Summary Judgment Motion

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Statement of Undisputed Facts to which DER responded on September 25, 1986.

The Board denied Defendant's Motion for Summary Judgment on December 15, 1986 in a simple order stating only that there were material issues of disputed fact.

On January 2, 1987, the Defendant filed a Petition for Reconsideration with the Board, to which DER responded on January 27, 1987. The Board issued an opinion and order on February 9, 1987, granting reconsideration due to the resignation of the Board Member who issued the Summary Judgment Opinion and his consequent inability to clarify that order.

RECONSIDERATION OF THE SUMMARY JUDGMENT ORDER

Pa. R.C.P. 1035 authorizes any party to move for summary judgment after the pleadings are closed. Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, admissions, and affidavits, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Emerald Mines Corporation v. DER, 1986 EHB 605; Summerhill Borough v. DER, 34 Pa. Cmwlth 574, 383 A.2d 1320 (1978).

In the instant matter, the Board finds that it need not reach the issue of whether Defendant is entitled to judgment as a matter of law, as there are many material facts in dispute. The following represent only some of those facts. First, there is a question as to whether or not the "patrol runs" which Defendant conducted, as opposed to regular mine examinations as required by §228(a) of the Act, were long-standing practices accepted by DER. (DER's Reply to Statement of Undisputed Facts at 2 (September 25, 1986); Defendant's Statement of Undisputed Facts at 4, f.n.5 (September 17, 1986). This fact is critical to the disposition of Count I of DER's Complaint which

alleged that Defendant failed to make proper examination of the Helen Mine violating §228(a) of the Act. DER alleged in Count I that air measurements were not taken to determine if the air was travelling its proper course and at a proper volume and face areas of the mine were not inspected. If "patrol runs" were found to be accepted by DER in the past, the strength of its argument in Count I would be diminished.

Second, there is a dispute between the parties as to whether an anemometer is the most accurate tool for the measurement of the specific volume of air. Defendant argues, based on a scientific journal article, that DER's position as to the accuracy of anemometer readings is incorrect. DER argues first, that this article was never raised in any of the discovery conducted by the parties. Second, DER argues that the bases for its assertions that an anemometer is the most accurate tool available for the measurement of the specific volume of air and that an anemometer cannot properly be replaced by a methanometer for this purpose, were verified statements made by Defendant and his supervisors. (DER's Reply to Statement of Undisputed Facts, supra, at 2; DER's Response to Defendant's Response To Answer to Motion For Summary Judgment at pps. 9-10, including f.n.4, February 18, 1986; Defendants Statement of Undisputed Facts, supra, at p. 7). This is critical to Count II of DER's complaint because the allegation of Defendant's negligence revolves around the necessity of the use of an anemometer to ascertain the correct measurement of the specific volume of air.

A third disputed fact between the parties is as to the precise cause of Mr. Mitsko's death. Defendant alleges that even if the No. 3 fan was not operating there was enough air flow in the E-butt area and that the cause of the explosion was the failure of the fan's alarm to sound. DER argues that the death occurred because Mr. Mitsko was permitted to enter an unexamined

section of the mine which contained an explosive quantity of methane gas. (DER's Reply to Statement of Undisputed Facts, supra, at 3; Defendant's Statement of Undisputed Facts, supra, at 8). The resolution of this issue is obviously critical to the disposition of Count I of DER's complaint.

This case's entire disposition could turn on the resolution of only one of these facts. If DER met the burden of proof on any of these issues, a prima facie case of negligence under the Act might be established against the Defendant.

For this reason, the Board need not reach the second prong of the summary judgement test, namely whether the Defendant is entitled to judgment as a matter of law. While the Board recognizes that the above listing of disputed facts and issues of law may not be exhaustive, it serves to show that there are genuine disputes of material facts. On this basis we can only affirm the prior order denying summary judgment.

ORDER

AND NOW, this 8th day of May, 1987, upon reconsideration of all relevant pleadings, it is ordered that the Board's prior order denying Defendant's Motion for Summary Judgment is affirmed.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: May 8, 1987
cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Gary Peters and Virginia Davison, Esqs.
Western Region
For Appellant:
Henry Ingram and Henry Moore, Esqs.
Buchanan, Ingersoll
Pittsburgh, PA

dk

COMMONWEALTH OF PENNSYLVANIA
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MAXINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BENASSA INVESTMENTS, INC.	:	
	:	
v.	:	EHB Docket No. 86-208-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 11, 1987

OPINION AND ORDER

Synopsis

Appeal is dismissed for failure to prosecute where appellant has failed to comply with the Board's pre-hearing order despite numerous extensions.

OPINION

This matter was initiated by the filing of a Notice of Appeal by Benassa Investments, Inc. ("Benassa") on April 14, 1986. Benassa was seeking review of the Department of Environmental Resources' ("Department") refusal to order Delaware Township (Pike County) to revise its Official Sewage Facilities Plan to accommodate Benassa's sewage disposal needs in developing its Wild Acres subdivision. The Department had been requested to issue the order under the provisions of §5(b) of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5(b) and 25 Pa. Code §71.17.

The Board issued Pre-Hearing Order No. 1-MW, requiring Benassa to file its pre-hearing memorandum on or before June 30, 1986. Thereafter, Benassa, on May 6, May 20, on or about September 18, and November 18, 1986,

requested extensions of its deadlines, which it was granted. The last extension granted by the Board required Benassa to file its pre-hearing memorandum on or before February 16, 1987. When Benassa failed to meet the deadline, the Board sent a default notice dated March 10, 1987, which warned Benassa that unless its pre-hearing memorandum was filed by March 20, 1986, the Board may apply sanctions pursuant to Rule 21.124. After Benassa failed to heed that warning, the Board sent a second default notice, dated April 2, 1987, informing Benassa that it would apply sanctions unless its pre-hearing memorandum was received by April 13, 1987. As of the date of this opinion and order, Benassa has yet to file its pre-hearing memorandum.

Because the denial of a private request for a plan revision is analogous to a permit denial, Benassa has the burden of proof in this appeal. 25 Pa. Code §21.101(c)(1). As is evident from the above recitation of events, Benassa has no intent to prosecute its appeal. Given the burden of proof, the sanction of dismissal is appropriate. Mary Louise Coal Company v. DER, 1986 EHB 1351.

ORDER

AND NOW, this 11th day of May, 1987, it is ordered that the appeal of Benassa Investments, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 11, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Eastern Region
For Appellant:
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PECHNER, DORFMAN, WOLFFE, ROUNICK & CABBOT

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AXINE WOELFLING, CHAIRMAN

ILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

DELTA EXCAVATING & TRUCKING CO., INC.	:	
and DELTA QUARRIES & DISPOSAL, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	EHB Docket No. 86-266-W
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and FRANKLIN TOWNSHIP BOARD OF	:	
SUPERVISORS, Intervenor	:	Issued: May 11, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A letter from DER merely informing a party of its continued obligations under a consent order and agreement, but not representing a final action or determination of the Department, is not an appealable action. In addition, where a final order in a matter is issued subsequent to an appeal making it impossible for the Board to grant any relief, the appeal is moot.

OPINION

On May 21, 1986, the Delta Excavating & Trucking Company, Inc., and Delta Quarries and Disposal, Inc. (Delta) filed an appeal with this Board from a letter dated April 21, 1986 from Michael R. Steiner, Regional Solid Waste Manager of the Department of Environmental Resources' (DER) Harrisburg Regional Office, to John P. Niebauer, President of the Delta Excavating & Trucking Company, Inc. On September 17, 1986 the Board granted a petition to intervene by the Franklin Township Board of Supervisors.

DER, on October 20, 1986 filed a Motion to Dismiss which is the focus of this opinion and order. DER argues that the April 21, 1986 letter was not

an "adjudication" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101 nor an "action" within the meaning of 1921-A of the Administrative Code, the Act of 71 P.S. §510-21 and 25 Pa. Code §21.2(a)(1). Intervenor subsequently joined in DER's motion. On November 17, 1986 Delta filed a response to the motion to dismiss along with a supporting memorandum of law. Delta, while not specifically arguing that the letter it appealed was a final action, asserts that the April 21, 1986 letter constitutes a violation of a Consent Order and Agreement (C.O.A.) entered into on November 1, 1984 by Delta and DER.

One of the several objectives of the C.O.A. was that a DER approved cap be placed on over-filled portions of the Delta Sanitary Landfill in Huntingdon County. Paragraph four of the C.O.A. called for Delta to submit a capping plan and implementation schedule to DER for its approval. The capping plan was to be implemented within one hundred eighty (180) days after DER approval. The C.O.A. also provided certain minimum standards which such a plan would have to meet and that DER refrain from unreasonably withholding its approval of such a plan.

At some point subsequent to the signing of the C.O.A., but prior to submitting a capping plan, Delta began capping a substantial portion of the landfill.[1] On or about April 16, 1984 Delta submitted to DER a capping plan which indicated that certain areas had already been capped. In addition, on January 4, 1985 Delta submitted additional materials concerning hydrogeological aspects of the capping plan. Delta apparently planned on using various testing procedures to convince DER of the cap's safety and obtain after-the-fact approval. DER responded with a lengthy review letter,

[1] The present record does not indicate precisely when or under what circumstances this was done.

dated January 14, 1985 which, inter alia, expressed concerns over lack of quality control, already observed cracking and buckling of the clay cap, and proper testing where final cover had already been applied.

After DER's initial review, an ongoing process appears to have begun which consisted of a lengthy series of correspondence and meetings between Delta, DER and their representatives. The parties attempted to agree on proper procedures for testing the cap, as well as for interpeting test results done by Delta in order to determine if the cap met DER requirements. Copies of this correspondence, provided in Delta's response to the Motion to Dismiss, show that DER almost continually indicated there were various deficiencies in the capping plans and that Delta had and was proceeding at its own risk in capping without a pre-approved capping plan as called for in the C.O.A.

In response to DER's concerns, Delta appears to have tried several times to modify its plans and, on at least one occasion, submitted a complete set of revised plans which included all of its previous materials and attempted to integrate DER's previous comments and suggestions. DER continued to believe that numerous deficiencies still existed in Delta's materials. This was particularly true after DER examined test results submitted by Delta, which indicated that the existing cap did not meet the permeability requirements of the C.O.A. After Delta had conducted initial tests, which it believed indicated its own earlier tests were invalid, Delta submitted a proposal to do additional testing of the cap to DER in a letter dated January 20, 1986. DER's response to this proposal was its letter of April 21, 1986, stating that it had reviewed Delta's proposal. The letter restated DER's position that Delta undertook the placement of the cap in the absence of an approved capping plan as required by the C.O.A. and that it had done so at its

own risk. The letter went on to say that although DER had in good faith attempted to work with Delta and its consultants in approving cap testing procedures and construction, the process had increasingly varied with procedures that would have been employed had an approved capping plan representing best engineering practice been followed. On the basis of this, DER concluded that it could not entertain any further efforts to approve the current cap. Finally DER stated:

> Compliance with the capping provision of the Consent Order and Agreement can be achieved only by the submission and approval of a capping plan in accordance with the Consent Order and Agreement followed by the construction, testing and certification of that cap in accordance with the approved capping plan.

Delta argues that DER's failure to continue to allow Delta to proceed with its testing in order to show the adequacy of the pre-existing cap amounts to an "unreasonable withholding of its approval of a capping plan in violation of the C.O.A." Delta believes that this amounts to a failure to act upon the part of DER. The Board has made it clear that where a failure upon the part of DER to act has impinged upon the rights of a party the Board will accept an appeal. B. & D. Coal Co. v. DER, 1986 EHB 615. However, the Board will not entertain an appeal on such a basis, where as here, there has been an ongoing process which appears to have moved forward in a timely fashion and a final action seems reasonably likely in the not too distant future.[2]

The April 21, 1986 letter merely notifies Delta, as DER warned it several times before, that DER could only accept a cap which met the requirements of the C.O.A. This imposed no new obligation or duty on Delta.

---

[2] As noted below, DER has taken final action regarding the capping plan and Delta has appealed it at Docket 86-691-W.

In the absence of an adjudication or action which affects the personal or property rights, immunities, duties, liabilities, or obligations of a person no appeal may be allowed. 25 Pa. Code §§21.2(a) and 21.52(a); Sunbeam Coal Corp. v. DER, 8 Pa.Cmwlth. 622, 304 A.2d 169 (1973). In addition, the April 21, 1986 letter bears no appeal paragraph and contains no other indicia of a final action of DER. While these factors, standing alone, would not obviate the finality of an otherwise final action, they must nevertheless be taken in the context of the action in question. Lebanon Valley Council of Governments v. DER, 1983 EHB 273. The appealed from letter simply informed Delta what DER believed was still required in order to reach such a final determination. A letter from an agency stating what the law requires is not a final action or adjudication and is, thus, not appealable. Sandy Creek Forest, Inc. v. DER, ___ Pa. Cmwlth. ___, 505 A.2d 1091 (1986). Similarly, the April 21, 1986 letter only stated what was required by the C.O.A., and is not an appealable action.

In any event, whatever the effect of DER's April 21, 1986 letter, the Board also now believes this matter is moot. While the present appeal was pending, DER issued a final order in the matter dated December 19, 1986. The December 19, 1986 order which Delta has already separately appealed at EHB Docket No. 86-691-W, makes final determinations as to all of the issues here present, including a specific finding that Delta has violated the capping clause of the C.O.A. Even if the Board were to proceed to a final adjudication in the present appeal, Delta's position would be unchanged. When, during the course of an appeal, events occur that render it impossible for the Board to grant any relief, the appeal must be dismissed as moot. Glenworth Coal Co. v. DER, 1986 EHB 1348. DER's April 21, 1986 letter has been effectively superseded by its order of December 19, 1986, which is

clearly a final DER action.

There is also an outstanding motion to consolidate the present matter with Delta's appeal at EHB Docket No. 86-691-W. In light of the Board's above findings, the Board need not reach this issue.

ORDER

AND NOW, this 11th day of May, 1987, it is ordered that DER's Motion to Dismiss is granted and the appeal of Delta Excavating & Trucking Company, Inc., and Delta Quarries and Disposal, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 11, 1987

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

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M. DIANE SMITH
SECRETARY TO THE BOARD

APPALACHIAN INDUSTRIES, INC.,	:	
	:	
v.	:	**EHB Docket No. 86-521-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 11, 1987

OPINION AND ORDER

Synopsis

Appeals not timely filed pursuant to 25 Pa.Code §21.52 will be dismissed. In the absence of fraud or breakdown in the Board's operations or non-negligent acts by a third party not part of the litigation, mere failure to file a notice of appeal with the Board does not warrant the allowance of an appeal nunc pro tunc.

OPINION

This matter involves an appeal by Appalachian Industries, Inc. (Appalachian) of an assessment of civil penalties, pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and the regulations promulgated under these statutes, by the Department of Environmental Resources (DER) for Appalachian's alleged failure to backfill concurrent with mining and its failure to comply with an order of the DER directing backfilling. Appalachian received a copy of DER's civil penalty assessment on July 23, 1986. See Notice of Appeal. After securing the requisite collateral required

to appeal a civil penalty assessment, Appalachian filed its Notice of Appeal "package" on August 21, 1986 with the DER Bureau of Litigation, P.O. Box 2357, 514 Executive House, Harrisburg, PA 17101. Appalachian's Notice of Appeal was routed by the Bureau of Litigation to the Board, where it was received and docketed by the Board on September 8, 1986.

On September 17, 1986, DER filed a Motion to Dismiss, which is the focus of this order, asserting that Appalachian's appeal was filed with the Board more than thirty (30) days after Appalachian had received notice of the action, and, therefore, the Board lacked jurisdiction to consider the appeal. 25 Pa.Code §21.52(a). DER also argued that since Appalachian failed to request an appeal nunc pro tunc, the Board should promptly dismiss the appeal.

Appalachian responded on October 14, 1986 by filing an Objection and New Matter and a brief in support thereof. Appalachian asserted that it was unaware of the relationship between the Board and DER and that the DER received the Notice of Appeal, rather than the Board, because of an "error in transcribing". Appalachian argued that filing its Notice of Appeal with the Bureau of Litigation should be sufficient to confer jurisdiction upon the Board, and, in the alternative, that the Board should allow it to file an appeal nunc pro tunc.

DER responded to Appalachian's New Matter on October 21, 1986, asserting that since Appalachian failed to aver that its tardy filing was a result of either a breakdown in the Board's procedure or fraud, Appalachian's request for leave to file an appeal nunc pro tunc must be denied. Finally, Appalachian and DER filed additional supplemental pleadings on December 16, 1986 and January 7, 1987, respectively.

It is well established, by regulation and caselaw, that jurisdiction of the Board does not attach to an appeal from an action of the DER 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). Contrary to Appalachian's assertion, the filing of a notice of appeal with DER's Bureau of Litigation, rather than the Board, does not confer jurisdiction upon the Board. See Borough of Youngwood v. DER, 1986 EHB 1070. The Board is an adjudicatory body and exercises its powers independently of the DER. See C & K Coal Company v. DER, 1986 EHB 1215 (discussing the origin and independent nature of the Board). Because of this independence, the filing of a Notice of Appeal with DER is not the equivalent of filing with the Board, and the Board, therefore, is without jurisdiction to consider this appeal.

Turning to Appalachian's request in its New Matter for leave to file an appeal nunc pro tunc, the Board's rules provide that upon written request and for good cause shown the Board may grant leave for the filing of an appeal nunc pro tunc. 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. Borough of Youngwood v. DER, 1986 EHB 1070; Petricca v. DER, 1984 EHB 519; East Side Landfill Authority v. DER, 1982 EHB 299. Appalachian fails to aver any circumstance in its pleadings that would warrant the granting of an appeal nunc pro tunc under these standards. The appeal was filed late simply because Appalachian sent the Notice of Appeal to the incorrect address. The notice of appeal form clearly identifies the proper mailing address, as do the rules of the Board. 25 Pa.Code §21.51.

As support for its request to file an appeal nunc pro tunc,

Appalachian relies upon Roderick v. Com., State Civ. Service Comm., 76 Pa. Cmwlth. 329, 463 A.2d 1261 (1983) in which Commonwealth Court observed that standards for the allowance of an appeal nunc pro tunc have been liberalized in recent years. Roderick held that an appeal nunc pro tunc will lie where the non-negligent acts of a third party not part of the litigation process are the cause of the tardy filing. That is not the case here. Appalachian's letter transmitting the appeal is addressed to the Bureau of Litigation, not the Board. Appalachian alleges that an error in transcription in counsel's office and counsel's inability to oversee the preparation of the appeal forms because of involvement as a master in another proceeding were the cause of its erroneous filing. This was precisely the situation addressed in Tony Grande, Inc. v. W.C.A.B. (Rodriquez) 71 Pa. Cmwlth. 566, 455 A.2d 299 (1983) which held, citing Wertman v. Workmen's Compensation Appeal Bd., 57 Pa. Cmwlth 169, 426 A.2d 205 (1981) that "mere administrative oversight or negligence occurring in the office of the appellant's lawyer is not cause for allowing a late appeal...." 455 A.2d at 300. The fact that counsel is involved with other matters cannot be used as a basis for casting aside appeal periods, for, carried to its most extreme conclusion, it would result in chaos in administrative tribunals and the various parts of the unified judicial system, as counsel would assert their routine activities on behalf of their clients or in pursuit of their livelihood as excuses for not complying with filing requirements in statutes or duly adopted regulations. Appalachian's mistake does not justify an appeal nunc pro tunc. The Board, therefore, grants DER's Motion to Dismiss and denies Appalachian's request for leave to file an appeal nunc pro tunc.

O R D E R

AND NOW, on this 11th day of May, 1987, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted and Appalachian's request for an appeal nunc pro tunc is denied, and the appeal of Appalachian Industries, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: May 11, 1987

cc: **Bureau of Litigation**
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