COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME III

(Pages 658—1032)

1987

COUNTY OF WESTMORELAND	:	
	:	
v.	:	**EHB Docket No. 86-515-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
MILL SERVICE, INC., Permittee	:	Issued August 10, 1987

OPINION AND ORDER
SUR
MOTION TO COMPEL

Synopsis

Interrogatories must be responded to if they pertain to information which is confined to a time period beginning after the signing of a consent order to which the Appellant-propounder was not a party and did not formally object. Objections as to the relevance of these post-consent order interrogatories pertaining the facility operated by Permitee that involve the facility adjacent to the one that is the subject of the instant matter are denied as they relate to the heart of the Appellant-propounder's claim--that the permittee committed environmental violations in the operation of its adjacent Impoundment and therefore DER's granting a permit for the purposes of building a new facility was an abuse of discretion pursuant to §503(d) of the Solid Waste Management Act. All requests for admissions pertaining to post-consent order information relating to this adjacent facility must also be admitted or denied by permittee. All documents relating to this adjacent

facility must be produced if they relate to matters which occurred after the consent order was executed even though they are also a matter of public record to the extent that the documents can be furnished from at-hand, available materials.

OPINION

This action was commenced by the filing of a notice of appeal on September 5, 1986 by the County of Westmoreland (the County) from the Department of Environmental Resources' (DER's) issuance of a series of permits to Mill Service, Inc. (Mill Service) authorizing the construction and operation of a residual waste disposal facility known as "Impoundment No. 6" in Yukon, Pennsylvania.

The instant matter arises out of a discovery dispute between Mill Service and the County. On January 21, 1987, the County served its first set of interrogatories, request for production of documents and first requests for admissions on Mill Service. On March 9, 1987, Mill Service responded to the above discovery requests.

On April 1, 1987, the County filed three discovery motions: a motion to compel Mill Service's answers to interrogatories, a motion to compel the production of documents by Mill Service and a motion to compel the answers to requests for admission. On April 20, 1987, Mill Service responded to all three motions. The Board will discuss each motion separately.

MOTION TO COMPEL ANSWERS TO INTERROGATORIES

The County alleges in this complaint that Mill Service's refusal to answer interrogatories concerning Impoundment No. 5, the facility adjacent to the proposed site of Impoundment No. 6, is improper. The County believes that

if the operator of one facility (Impoundment No. 5) fails to operate that facility in a manner consistent with environmental rules and regulations, it should be precluded from receiving permits to operate a second facility (Impoundment 6). Consequently, the gravamen of the County's complaint is that, since Mill Service failed to comply with regulations in its operation of Impoundment No. 5, DER abused its discretion in granting permits for the construction and operation of Impoundment No. 6 to Mill Service unless these violations were corrected. In support of its argument, the County relies on Section 503(d) of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §6018.101, et seq., which provides that "any person or municipality which has engaged in unlawful conduct...shall be denied any permit or license required by this act unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected." (Emphasis added)

Mill Service recited pro forma objections to virtually each and every interrogatory concerning the Yukon facility and claimed the interrogatories propounded by the County, in connection with Impoundment No. 5, were irrelevant.

The County notes that a consent order was entered into between DER and Mill Service on May 25, 1985[1] ("consent order") and that in connection with Impoundment No. 5, the County's main concern is whether, since the date the consent order, supra, was executed, the violations were abated.

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[1]Commonwealth of Pennsylvania, DER v. Mill Service, Inc., No. 1406 C.D. 1985--Yukon facility entered May 25, 1985.

Specific Interrogatories

The County's Interrogatories 3, 4, 5 and 6 read as follows:

3. When was Impoundment No. 5 constructed?
4. Give a detailed chemical and physical analysis of the wastes contained in Impoundment No. 5.
5. Characterize the wastes contained in Impoundment No. 5 as to the following physical traits:
   a) quantity;
   b) toxicity;
   c) phase (e.g., solid or liquid);
   d) moisture content (average %);
   e) grain size distribution (in either tabulation form or graphic form); and
   f) for each physical trait describe the method of which Mill Service determined the physical trait (e.g., sampling at a particular depth, visual inspection during placement).
6. Are the wastes in Impoundment No. 5 homogeneous? If not, please explain.

The County asserts that these are necessary background questions pertaining to Impoundment No. 5. Further, the County believes the responses to these interrogatories would lead to the discovery of factual information relevant to its central argument. That argument is that DER abused its discretion pursuant to the §503(d) of the SWMA, 35 P.S. §6018.503(d) in issuing the permits to erect and operate Impoundment No. 6 when, in fact, Mill Service was in violation of rules and regulations in its building and operation of Impoundment No. 5.

The Board believes that because of the above discussed claim by the County, interrogatories which relate to Mill Service's compliance with environmental regulations with regard to Impoundment No. 5 are relevant. The Board notes that it construes relevancy broadly in the discovery context and would be inclined to do so in this context. Tenth Street Building Corporation v. DER, EHB Docket No. 85-068-R (Opinion and order issued March, 1987. However, this general rule notwithstanding, the Board can only consider as relevant to the County's claim interrogatories calculated to attain

information relevant to alleged violations occurring at Impoundment No. 5 which existed after the executing of the Consent Order, supra. To allow interrogatories pertaining to violations occurring before that time would be improper as the County was neither a party to the consent order nor objected to its terms at the time of its execution.

The Board holds that Interrogatory No. 3 is a relevant background question and that Interrogatories Nos. 4 through 6 are relevant to present, post-consent order, supra, discharges and are germane to the County's case. The Board notes that further, these interrogatories are narrowly drawn and orders Mill Service to respond to these interrogatories.

The County's Interrogatories Nos. 2, 7, 8, 9, 10 and 11 read as follows:

2. Describe the operations of Mill Service at the Yukon facility, including the type of wastes which were accepted at the facility and the manner in which these wastes were stored, disposed or treated.
7. Has Mill Service proposed, authorized or conducted any scientific tests, completed, currently underway or proposed, that test for leakage or groundwater contamination from the Yukon site?
8. If the answer to the preceding interrogatory is affirmative, describe:
   a) the locations of such tests;
   b) the equipment used in such tests;
   c) the frequency with thich the tests are performed; and
   d) the results of such tests.
9. Identify any and all pollutants found in the groundwater near the Yukon facility.
10. Does Mill Service contend that the presence of pollutants in the groundwater near the Yukon facility are attributable to other sources? If so:
    a) state which pollutant(s) Mill Services contends are attributable to other sources;
    b) describe separately and with particularity the other sources to which the pollutants are allegedly attributable; and
    c) each and every basis for Mill Service's contentions.

The County contends that it is entitled to responses to these interrogatories to assist in its inquiry as to whether Mill Service is the source of

pollution in the area and is engaging in unlawful conduct and that DER, as a result, abused its discretion in granting permits to Mill Service to construct and operate Impoundment No. 6. The Board holds that with the County in this regard, except to the extent that answering these interrogatories would cause Mill Service to have to divulge violations which occurred before the consent order was executed. Exclusive of that restriction, Mill Service is ordered to answer the interrogatories fully and completely.

The County's Interrogatories Nos. 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 read as follows:

12. Since the date of the Consent Order, have hazardous wastes been released from Impoundment No. 5?
13. If the answer to the preceding Interrogatory is affirmative, state to the best of your knowledge:
    a) what hazardous wastes have been released from Impoundment No. 5;
    b) the quantity of hazardous wastes which have been released from Impoundment No. 5;
    c) the toxicity of the hazardous wastes which have been released from Impoundment No. 5;
    d) the period of time for which Mill Service forsees that these releases may continue.
14. Since the date of the Consent Order, have hazardous wastes been released from Impoundment No. 5 through dike seepages?
15. Since the date of the Consent Order, have hazardous wastes been released from Impoundment No. 5 through dike seepages into the surface and/or groundwaters of the Commonwealth?
16. What are the chemical constituents of the hazardous wastes which have been released from Impoundment No. 5 through dike seepages?
17. Since the date of the Consent Order, what measures has Mill Service taken to prevent hazardous wastes from being released through the dike wall of Impoundment No. 5?
18. Since the date of the Consent Order, what measures has Mill Service taken to monitor the hazardous wastes which are released through the dike wall of Impoundment No. 5?
19. Since the date of the Consent Order, has leachate from Impoundment No. 5 been released through the floor of the impoundment?
20. Since the date of the Consent Order, has leachate from

Impoundment No. 5 been released through the floor of the impoundment into the underlying coal seam?

21. What are the chemical constituents of the leachate from Impoundment No. 5 which has been released through the floor of the impoundment?
22. Since the date of the Consent Order, what measures has Mill Service taken to prevent leachate from Impoundment No. 5 from being released through the floor of the impoundment?
23. Where is the Pittsburgh coal seam located (a) in relation to Impoundment No. 5 and (b) in relation to proposed Impoundment No. 6?
24. Since the date of the Consent Order, has Mill Service reported through its Discharge Monitoring Reports values that exceed the effluent limitations contained in its NPDES permit? If so, state the date of such Reports and describe the content of such Reports.

The County alleges these interrogatories should be responded to as they refer to the three areas controlled by the consent order, supra.

The Board notes, initially, that these interrogatories are all narrowly drawn and are therefore not oppressive or burdensome to Mill Service. The Board finds the County's argument persuasive once again. The County's case rests on its ability to prove post-consent order, supra, violations on the part of Mill Service in connection with Impoundment No. 5 which would indicate that DER abused its discretion, pursuant to Section 503(d), supra, of the Solid Waste Management Act in the issuance of permits to Mill Service authorizing new construction. Since these interrogatories do not request pre-consent order information, and are relevant to the County's case, the Board orders Mill Service to answer the interrogatories.

The County's Interrogatories Nos. 25 through 43 read as follows:

25. Has mill Service installed groundwater monitoring wells to detect the release of hazardous wastes form Impoundment No. 5?
26. With respect to the above-mentioned groundwater monitoring wells which are to detect releases of hazardous wastes from Impoundment No. 5, describe the following:
    a) the number of the groundwater monitoring well;
    b) the location of the groundwater monitoring well;
    c) the depth of the groundwater monitoring well; and

d) the distance of the groundwater monitoring well from Impoundment No. 5

27. How are the above-mentioned groundwater monitoring wells to be cased so as to maintain the integrity of the monitoring well borehole and protect the monitoring well from damage by heavy equipment?
28. Identify the person(s) at or employed by Mill Service knowledgeable about the above-mentioned groundwater monitoring wells which are to detect releases of hazardous wastes from Impoundment No. 5.
29. Describe Mill Service's plan to pump up to 30 gallons/minute of water for collection and treatment from the coal seam downgradient from the Yukon facility as referenced in Paragraph 18(a) of the Consent Order.
30. Is the purpose of the above-mentioned plan to pump up to 30 gallons/minute of water to collect and treat all of the leachate which may be released from the bottom of Impoundment No. 5?
31. Does Mill Service contend that the above-mentioned plan to pump up to 30 gallons/minute of water shall collect and treat all of the leachate which may be released from Impoundment No. 5? If so, state the factual basis for this contention.
32. Identify the person(s) who formulated, wrote or designed the above-mentioned plan to pump up to 30 gallons/minute of water.
33. Has Mill Service constructed the additional wells and commenced pumping of the water at the required rate of up to 30 gallons/minute as referenced in Paragraph 18(b) of the Consent Order?
34. What is the approximate volume of water pumped per day by the pumps referenced in Paragraph 18(b) of the Consent Order?
35. Has Mill Service continued to pump the water at the monitoring wells without interruption as set forth in Paragraph 18(c) of the Consent Order?
36. If at any time after the date of the Consent Order the pumping of the water at the monitoring wells was discontinued, state the date(s) of such discontinuance and the reasons therefore.
37. What is the approximate cost per month of maintaining and pumping water from the monitoring wells as described in Paragraph 18(b)-(c) of the Consent Order?
38. Has Mill Service collected samples of the well water for analysis as set forth in Paragraph 18(d) of the Consent Order?
39. If the answer to Interrogatory 38 is affirmative, describe:
    a) how many samples have been collected;
    b) how often the samples were collected
    c) by whom the samples were collected; and
    d) by whom the samples were analyzed.
40. Identify any and all pollutants found in the samples of well water referenced in Interrogatory Nos. 38 and 39 above.
41. Do any of the samples of the well water referenced in Interrogatory No. 38 contain (1) a concentration of chlorides of over 250 milligrams per liter or (2) a concentration of nitrates of over 10 milligrams per liter?
42. If the answer to the preceding interrogatory is affirmative,

for each sample in which the concentration of chlorides and/or nitrates exceeds the above-mentioned concentrations, state:

a) the date the sample was collected;
b) the number and location of the monitoring well from which the sample was collected;
c) the concentration of chlorides; and
d) the concentration of nitrates.

43. Identify the persons(s) at or employed by Mill Service knowledgeable about the samples of well water collected for analysis pursuant to paragraph 18(d) of the Consent Order.

The County contends that it is entitled to discovery regarding the groundwater wells referred to in the above interrogatories. The County states that these wells serve two purposes--one is to ascertain whether hazardous wastes are continuing to be released from Impoundment No. 5 into the groundwater and a second purpose is to collect and treat the groundwater contaminated by these releases. The County believes that well samples are utilized by DER and Mill Service as an indication as to whether hazardous wastes are continuing to be released into the groundwater by Impoundment No. 5. The Board agrees that the discovery of these sample results could form part of the County's case and is therefore relevant. However, Mill Service need only concern itself with responses pertaining to post-consent order, supra, sampling. The County's final contention here is that it is entitled to discover whether the efforts taken by Mill Service to date have had any effect whatsoever upon the level of pollution in and around Yukon. The Board takes note that this inquiry as stated is rather broad and further does not relate to the heart of the County's complaint. Mill Service is only required to answer these interrogatories in the narrowly defined terms pertaining to post-consent, supra, order discharges that relate to Impoundment No. 5 and not the global question of whether Mill Service's activities have improved the total Yukon pollution situation. The Board orders Mill Service to respond to these interrogatories within these parameters.

The County's Interrogatories Nos. 44, 45 and 46 read as follows

> 44. Describe the collection ditches and tanks around the perimeter of Impoundment No. 5 referenced in Paragraph R (page 6) of the Consent Order which are to collect the wastes which migrate through the impoundment walls.
> 45. Describe with particularity the wastes (e.g., quantity, toxicity, chemical constituents) which are collected in the collection ditches and tanks referenced in Interrogatory No. 44.
> 46. Identify the person(s) at or employed by Mill Service knowledgeable about the collection ditches and tanks installed around the perimeter of Impoundment No. 5 and/or the waste materials collected therein.

This series of interrogatories pertains to the collection ditches and tanks surrounding Impoundment No. 5, into which wastes allegedly migrate through the wall of Impoundment No. 5. The consent order, supra, found this migration unlawful and the County alleges it is entitled to know whether or not this violation is continuing. The Board believes this series of interrogatories relates directly to the County's central issue as to whether, with respect to Impoundment No. 5, Mill Service failed to be in compliance with environmental rules and regulations such that pursuant to the §503(d) of the SWMA, 35 P.S. §6018.503(d), DER abused its discretion in issuing the permits required to construct Impoundment No. 6. The Board further notes that responding to these interrogatories as propounded by the County will not be burdensome to Mill Service and that none of the information requested delves into pre-consent order, supra, violations. The Board therefore holds that Mill Service must respond to interrrogatories 44, 45 and 46 fully and completely.

The County's Interrogatories Nos. 47, 48 and 49 read as follows:

> 47. Does Mill Service contend that currently no hazardous wastes are released from Impoundment No. 5? If so, state the factual basis for such contention.

48. State Mill Service's contention, if any, as to the reasons hazardous wastes are released from Impoundment No. 5.
49. Identify the person(s) at or employed by Mill Service knowledgeable about the reasons hazardous wastes are released from Impoundment No. 5 and/or Mill Service's measures to stop such releases.

As stated previously the Board finds this requested material as it pertains to the present condition of Impoundment No. 5 and thus inquires only into post-consent order, supra, material relevant to the proving of its case as to DER's abuse of its discretion in its issuing Mill Service's Impoundment No. 6 permits. The Board orders that Mill Service fully and completely answer these interrogatories.

The County's Interrogatories Nos. 50, 51, and 52 read as follows:

50. Since the date of the Consent Order, has Mill Service reported any violations of NPDES Permit No. PA0027715? If so, state the date of each such reported violation and the nature of the violation.
51. Since the date of the Consent Order, has the DER issued to Mill Service, Inc. any citations or imposed any fines or penalties with respect to environmental conditions at Impoundment No. 5? If so, describe in detail the nature of any such citation, fine or penalty, and the date thereof.
52. Since the date of the Consent Order, state the date and describe the nature of each Notice of Violation issued by the DER to Mill Service.

Again, the Board orders that Mill Service must answer these narrowly drawn interrogatories fully and completely as they pertain directly to the proving of the County's case, supra.

The County's Interrogatories Nos. 53 through 60 read as follows:

53. Where is the Klondike Mine located in relation to (a) Impoundment No. 5 and (b) Impoundment No. 6?
54. Where is the Magee Mine located in relation to (a) Impoundment No. 5 and (b) Impoundment No. 6?
55. Is the Pittsburgh Limestone a confined aquifer as that term is defined in 25 Pa.Code §75.260?
56. If the answer to the preceding Interrogatory is affirmative,

56. If the answer to the preceding Interrogatory is affirmative, describe the technical basis for your belief that the Pittsburgh Limestone is a confined aquifer.
57. In what direction does water flow beneath (a) Impoundment No. 5 and (b) Impoundment No. 6?
58. Describe by title and date or any other indices all underground mine maps which indicate the direction of the flow of water beneath Impoundment No. 5 and Impoundment No. 6.
59. What is the current rate and direction of contaminant migration in the Pittsburgh mine void?
60. How did Mill Service determine the rate and direction of contaminant migration in the Pittsburgh mine void?

The County contends that this series of interrogatories merely seeks background information which the County believes Mill Service can furnish. The Board believes these interrogatories are narrowly drawn and that the information to be elicited here pertains to the heart of the County's case, supra, and requests only present-tense information and therefore not information which is pre-consent order, supra, in time frame. Mill Service is ordered to answer these interrogatories fully and completely.

The County's Interrogatory No. 63 reads as follows:

63. Was a waste analysis plan for Impoundment No. 5 developed? If so,
    a) summarize the requirements of the waste analysis plan;
    b) describe the measures taken by Mill Service to comply with the requirements of the waste analysis plan; and
    c) identify the person(s) knowledgeable about the waste analysis plan.

The County considers this interrogatory to be background in nature. The Board believes, however, that this question is non-specific as to a time frame and therefore will require Mill Service to provide information pertaining to events occurring only before the consent order, supra. The Board holds, therefore, that Mill Service must respond to this interrogatory only to the extent that the information involves matters pertaining to Mill

The County's Interrogatories Nos. 64 and 65 read as follows:

64. With respect to activities related to the closure of Impoundment No. 5, state:
    a) the estimated cost to date of closure activities;
    b) the estimated total cost of closure activities; and
    c) the date on which Mill Service expects closure activities to be completed.
65. With respect to activities related to the post-closure monitoring and remedial activities of Impoundment No. 5:
    a) describe the post-closure measures which Mill Service will take to insure the safety of the environment after Impoundment No. 5 is finally closed; and
    b) state the estimated cost of such post-closure activities.

The County asserts that closure is one of the methods by which continuing violations of environmental laws may be abated. Consequently, since the County's case revolves around the alleged continuing environmental violations committed by Mill Service causing DER's alleged improper issuance of permits for Impoundment No. 6, Mill Service is required to answer the above interrogatories.

MOTION TO COMPEL ANSWERS TO REQUESTS FOR ADMISSION

The County's contention here is that Mill Service's refusal to respond to the County's Requests for Admissions (requests) concerning Impoundment No. 5 is improper given the basis of its appeal. See MOTION TO COMPEL ANSWERS TO INTERROGATORIES, supra. Mill Service contends, once again, that all requests pertaining to Impoundment No. 5 are irrelevant and immaterial to the County's appeal of the granting of permits in connection with Impoundment No. 6.

The Board, as stated supra, believes post-consent order, supra material relating to Impoundment No. 5 is relevant to the County's appeal and therefore, in reviewing the requests, will primarily be evaluating whether the

material relating to Impoundment No. 5 is relevant to the County's appeal and therefore, in reviewing the requests, will primarily be evaluating whether the information to be elicited is in connection with post-consent order, supra, material.

The County's Requests for Admissions Nos. 1, 2, 3, 4, 5, 6 and 7 read as follows:

1. Impoundment No. 5 contains hazardous wastes.
2. Impoundment No. 5 is located above abandoned coal mines which have been retreat mined.
3. Since the date of the Consent Order, hazardous wastes have been released from impoundment No. 5.
4. Since the date of the Consent Order, Hazardous wastes have been released from impoundment No. 5 through dike
5. Since the date of the Consent Order, hazardous wastes have been released from Impoundment No. 5 through dike seepages into the environment.
6. Since the date of the Consent Order, hazardous wastes from Impoundment No. 5 have been released through the floor of Impoundment No. 5.
7. Since the date of the Consent Order, hazardous wastes from Impoundment No. 5 have been released through the floor of Impoundment No. 5 into the environment.

The Board holds that Mill Service must respond to all these requests as they are narrowly drawn and deal with post-consent order, supra, information which is relevant to the County's case.

The County's Requests for Admissions Nos. 8, 9, 10, 11, 12 and 13 read as follows:

8. One or more samples of the well water collected for analysis pursuant to paragraph 18 of the Consent Order show that the concentration of chlorides in the well water is greater than 250 milligrams per liter.
9. All of the samples of the well water collected for analysis pursuant to paragraph 18 of the Consent Order show that the concentration of chlorides in the well water is greater than 250 milligrams per liter.
10. One or more samples of the well water collected for analysis pursuant to paragraph 18 of the Consent Order show that the

concentration of nitrates in the well water is greater than 10 milligrams per liter.

11. All of the samples of the well water collected for analysis pursuant to paragraph 18 of the Consent Order show that the concentration of nitrates in the well water is greater than 10 milligrams per liter.
12. The collection ditches and tanks around the perimeter of Impoundment No. 5 referenced in paragraph R (page 6) of the Consent Order do not collect all of the leachate which is released from Impoundment No. 5.
13. Mill Service's pump for collection and treatment of up to 30 gallons a minute of water from the Pittsburgh coal seam as described in paragraph 18 of the Consent Order does not collect all of the leachate which is released from Impoundment No. 5.

Obviously, all the above requests relate to matters connected with the consent order, supra, and further are relevant and material to the County's case. The Board orders Mill Service to admit or deny these requests.

MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Mill Service's response to the County's motion to produce documents was that the documents requested were either irrelevant to an appeal regarding the Impoundment No. 6 permit or readily accessible to parties through public agencies or a matter of public record. Mill Service substantiates its claim by stating that pursuant to applicable law and the consent order, supra, Mill Service has regularly submitted sample releases to the DER.

The County specifically requested production of the following documents:

(i) the environmental conditions at Yukon which gave rise to the Consent Order of May 25, 1985;
(ii) the measures taken by Mill Service to remediate those environmental conditions;
(iii) the current status of measures taken by Mill Service to remediate those environmental conditions;
(iv) sample results and reports describing or analyzing those sample results;

(vii) penalties, fines or violations of environmental rules and regulations;
(viii) studies concerning the environmental conditions at Yukon after the entry of the Consent Order; and
(ix) communications between Mill Service and the DER and/or EPA relating to the environmental conditions at Yukon after the date of the Consent Order.

Pursuant to Pa.R.C.P. 4009(a)(6), the County insists it has a right to inspect these documents and that it is without the ability to even be certain as to whether these documents are a part of any public record.

The Board believes that whereas these documents may in fact be a matter of public record, the County has the right to make this request upon Mill Service as a party in whose custody these documents may definitely be found, unless the request is burdensome. Further, the Board believes that because the County was not a party to nor did it object to the consent order, supra, it is not appropriate to request documents pertaining to that period of time. Consequently, Mill Service is not required to answer requests (i) and (ii) to the extent that it would entail revealing information dating back to the pre-consent, supra, time period. As to the balance of the requests the Board finds that they are not narrowly drawn but that they must be produced by Mill Service. Consequently, Mill Service need only furnish these documents to the extent that they are reasonably accessible and at hand. See Magnum Minerals v. DER, 1983 EHB 310 at 313.

ORDER

AND NOW, this 10th day of August, 1987, it is ordered that:

1. The County of Westmoreland's Motion to Compel Answers to Interrogatories is granted in part and denied in part. Mill Service is ordered to respond to Interrogatories 2, 3, 4, 6, 7 through 60 and 63, 64 and 65. The Motion to Compel Answers to Interrogatories is denied to the extent that it requires Mill Service to furnish information relating to matters which

occurred before the consent order was entered into by Mill Service and the Department of Environmental Resources. The Motion to Compel Answers to Interrogatories is further denied to the extent that it requires Mill Service to respond to matters outside the scope of the Impoundment No. 5 pollution situation and which deal with the entire Yukon area pollution status.

2. The County of Westmoreland's Motion to Compel Answers to Requests for Admissions is granted.

3. The County of Westmoreland's Motion to Compel Production is denied in part and granted in part. It is granted with respect to all documents, but is denied to the extent that these documents relate to pre-consent order, supra, material or necessitate the initiation of an investigation that is beyond the material Mill Service has at hand.

4. Mill Service will respond to the above interrogatories and requests for admission as well as furnish the requested documents by September 9, 1987.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 10, 1987

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ETNA EQUIPMENT & SUPPLY COMPANY, INC. :
:
v. : EHB Docket No. 86-146-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued August 12, 1987

OPINION AND ORDER
SUR
MOTION TO COMPEL
AND
MOTION FOR SANCTIONS

Synopsis

A motion to compel is granted where answers to interrogatories are completely inadequate. The Board chooses not to impose sanctions at this time.

OPINION

On March 14, 1986, Etna Equipment & Supply Company, Inc. (Etna) filed a notice of appeal from a bond forfeiture action by the Department of Environmental Resources (DER) pertaining to Etna's surface mine site in West Pike Run Township, Washington County. DER forfeited bonds posted for various mining permits within Mine Drainage Permit No. 3274SM9 because of numerous alleged violations of law. DER took the forfeiture action pursuant to the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.

The matter now before the Board is a discovery dispute between DER and Etna. On December 22, 1986, DER filed a motion to compel Etna to provide full and complete answers to its first set of interrogatories and to impose sanctions against Etna. On January 8, 1987, Etna filed amended answers and, by order dated January 22, 1987, the Board deferred ruling on DER's motion to permit DER to evaluate the amended answers and advise the Board of the need to rule on the motion. By letter dated April 20, 1987, DER advised the Board that it still considered Etna's response inadequate with respect to Interrogatory Nos. 2, 6, 7, 11 and 12 and renewed its motion. In the alternative, DER requested the opportunity to depose Etna's proffered experts. Etna answered DER's renewed motion on May 11, 1987. The Board now rules.

In this bond forfeiture action, DER bears the burden of proof. King Coal Co. v. DER, 1985 EHB 104. The crux of DER's renewed motion is that Etna has still failed to fully and completely provide the substance of its witnesses'--both expert and lay--expected testimony. For its part, Etna responds that it has fairly answered the still-disputed interrogatories and that it is not required to guess what DER thinks are responses which are "meaningful" or "relevant to the issues in the appeal." DER argues that it cannot be expected and should not be required to go to trial without first having the substance of the expected testimony of Etna's witnesses.

Interrogatory No. 2 requests Etna to describe, in detail, the substance of facts or opinions which constitute the relevant knowledge of persons listed in Interrogatory No. 1 (persons having knowledge of the matters in the appeal). Etna's answer provides the subject of the person's knowledge (e.g., "Carlotta Bohm - Present Financial Status of Etna"), the responsibility of the person (e.g., "Michael Piantka - Etna employee and foreman with primary responsibility for reclamation crew in 1984 and 1985),

or the subject matter of certain individuals' testimony (e.g., "[6 persons] will testify to reclamation efforts referenced in the answers to Interrogatories 13 through 80"). However, these answers do not begin to provide the substance of the facts and/or opinions constituting the person's knowledge. Moreover, wading through 68 interrogatories sheds no light on each person's knowledge. Accordingly, Etna will be ordered to provide an answer which indicates the substance of each person's knowledge.

The Board notes that Etna pleads that it does not know what DER means when it uses the term "relevant." Normally, the Board construes relevancy broadly during discovery. Tenth Street Building Corporation v. DER, Docket No. 85-068-R (Opinion and Order issued March 27, 1987). Because of the complete lack of factual issues raised in its notice of appeal and the generality of its pre-hearing memorandum, the Board will not attempt to define all that is relevant herein. However, Etna will be expected to provide answers which, to the best of its knowledge and ability to do so, are relevant to the issues it is raising in this appeal.

Interrogatory No. 6 asks Etna to state the subject matter to which each expert will testify. Interrogatory No. 7 asks for each expert to state the substance of the facts and opinions of the testimony. Further, DER asks for a summary of the ground for each opinion and, for each expert to sign his answer or report. In its response to 6 and 7, Etna referred to a November 28, 1983 report prepared by Walter N. Heine Associates Inc. together with a December 6, 1987 letter, signed by Walter N. Heine, P.E., which transmitted the report to DER. Etna objects to further answering this interrogatory, arguing that the report provided is the only one available, that it was signed, that no other information is available and, because of bankruptcy, Etna cannot pay fees for development of additional information.

Etna's answers to Interrogatories Nos. 6 and 7 are inadequate. While the attached report purports to discuss the condition of and impacts on Nemacolin Lake and possible remediation, it is impossible to discern what matters each of the experts, Walter Heine and John Ross, will testify about. Furthermore, the report itself has not been signed by either expert.

A strict application of Pa.R.C.P. 4003.5(a) would have this Board grant DER's motion to compel. In view of the averred financial status of Etna, however, ultimate compliance with Rule 4003.5(a) is far from assured, for it is not difficult to envision another spate of discovery motions, e.g., motion for protective order. The purpose of discovery is to foster the free exchange of information between the parties. Though the Board is persuaded that DER indeed is hindered as it prepares its case, it is unnecessary at this point to impose sanctions on Etna. Etna will be afforded an opportunity to augment its answer so that DER can know the substance and scope of each expert's testimony. The Board reminds Etna that, pursuant to Pa.R.C.P. 4003.5(c) and 4009, it can be severely limited in the scope of expert testimony at the hearing on the merits due to its limited answers during discovery.

The final two interrogatories request the subject matter to which non-experts will testify (No. 11) and a summary of the testimony (No. 12). Etna's answer is completely inadequate for it refers the reader to Interrogatory No. 2 which, as discussed supra, sheds little light on the situation. Accordingly the motion to compel will be granted.

ORDER

AND NOW, this 12th day of August, 1987, it is ordered that DER's motion to compel is granted, consistent with the foregoing opinion, and DER's motion for sanctions is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: August 12, 1987

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LOUIS J. NOVAK, SR., HILDA NOVAK and NOVAK SANITARY LANDFILL, INC. :

v. : EHB Docket No. 84-425-M

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: August 13, 1987

PARTIAL ADJUDICATION

By the Board

Synopsis

An appeal of an order relating to the closure of a solid waste disposal facility is sustained in part and denied in part. The Board holds that the Department of Environmental Resources (Department) failed to prove by substantial evidence that the conduct of the corporate officers rose to the level of participation necessary to establish individual liability. The Department also failed to satisfy its burden of proof relating to alleged permit boundary violations, groundwater contamination, daily cover violations and failure to submit erosion and sediment control plans. It was an abuse of discretion for the Department to impose a bonding requirement under §505 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.505 (the Solid Waste Management Act), when the savings clause in §1001 of that same statute preserved the bonding scheme in 25 Pa.Code §101.9 until amended by subsequent adoption of regulations under the Solid Waste

Management Act. The Board holds that the Department's order was not an abuse of discretion as it related to surface water management, completion of a gas venting system, and completion of final cover, grading, and vegetation requirements. The Board substituted its discretion for that of the Department in permitting the facility to reopen under certain conditions and superseded the Department's civil penalty assessment pending a hearing on the propriety of the amount.

INTRODUCTION

This matter was initiated on December 18, 1984, by the filing of a Notice of Appeal by Louis J. and Hilda Novak and Novak Sanitary Landfill (NSL) contesting the Department's December 13, 1984 issuance of an order and civil penalty assessment. The notice was accompanied by a Petition for Supersedeas, the first of three filed in this matter. Hearings on the petitions were held on December 26-28 and 31, 1984; January 2 and 3, 1985; April 3, 1985; and September 4 and 5, 1985. During the course of the September, 1985 hearings, the parties, in an attempt to expedite the resolution of the matter, agreed to allow the supersedeas hearings to serve as hearings on the merits. The parties also agreed during the initial supersedeas hearings to defer adjudication of the civil penalties assessment until the Board had decided the merits of the order.

The appeal was originally assigned to former Member Anthony J. Mazullo, Jr., who conducted all three supersedeas hearings and participated in a view of the premises. Mr. Mazullo resigned from the Board on January 31, 1986, without having drafted a proposed adjudication. Consequently, the Board must adjudicate this matter on the basis of a cold record. In an effort to infuse some life into the record, oral argument was held before Chairman Woelfling on March 25, 1986. But, in any event, we have held on

several recent occasions, that failure of the current Board Members to conduct the hearing and assess the credibility of witnesses does not preclude the Board from rendering an adjudication. DER v. Lucky Strike Coal Company and Louis J. Beltrami, EHB Docket No. 80-211-CP-W (Adjudication issued April 22, 1987). If such were not the case, the Board would be even further impaired in its attempts to resolve the numerous matters before it with the constraints imposed on it by the seemingly continuous vacancies on the Board in recent years. With all of this in mind, we proceed to make the following findings.

FINDINGS OF FACT

1. Appellants are Louis J. and Hilda Novak, husband and wife, R. D. 1, Box 268, Allentown, and Novak Sanitary Landfill, Inc., a Pennsylvania corporation located on Orefield Road in South Whitehall Township, Lehigh County. (N.T. 323)

2. Louis J. and Hilda Novak are president/manager and secretary, respectively, of NSL. (N.T. 323-4)

3. Louis J. and Hilda Novak, jointly, own the landfill property. (N.T. 323)

4. Appellee is the Department, the agency authorized to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the Clean Streams Law) and the rules and regulations adopted thereunder, and the Solid Waste Management Act and the rules and regulations adopted thereunder.

5. The Department issued solid waste management permit No. 100534 (the permit) to Appellants on March 24, 1972. (Ex.A-1)

6. The permit, which incorporated the plans submitted with the permit application (the 1972 plans), authorized the operation of a natural renovation landfill, with waste disposal in distinct locations on the site,

an area fill section on the northerly portion of the site for contiguous surface disposal of waste, and a trench fill section on the southern portion of the site in which waste was to be deposited in five excavated trenches. (N.T. 512-513 and Ex.A-2)

7. Specific grades and elevations for the area fill section were provided for in the 1972 plans and permit. (Ex.A-2)

8. The 1972 plans were subject to several minor revisions, the latest occurring in 1978. (Ex.A-2)

9. Solid waste was deposited solely in the area fill section of the landfill from 1972 until the summer of 1982.

10. In 1982, the Department conducted an assessment of the area fill portion and determined that it was filled beyond the limits allowed in the permit. (N.T. 499-500)

11. The extent of overfill in the area fill section of NSL in 1982 was 625,689.81 cubic yards. (N.T. 487 and Ex.C-2)

12. After learning of this overfill, the Department directed Appellants to shift the disposal of waste to the trench area of NSL. (N.T. 313 and 500)

13. Appellants and the Department held meetings during the summer of 1982 in an attempt to resolve the issues of overfill in the area fill section and operation of the trench fill section of NSL. (N.T. 500)

14. These meetings resulted in the submittal of plans by Appellants to raise the elevation in the trench fill area and set forth new grades and slopes to provide for proper drainage and shedding of water from the overfill in the area fill section (the 1982 plans). The Department approved the 1982 plans. (N.T. 26-27, 527-530, 479-480, and 557 and Ex. A-4 and A-24)

15. The proposed trenches are numbered sequentially, one through

five, on the 1972 plans, with Trench 1 being the northern-most trench and Trench 5 the southern-most trench. (Ex.A-2)

16. The 1972 plans specified a minimum setback of the trench fill area of two hundred (200) feet from the southern-most edge of proposed Trench 5 to the southern boundary of the landfill. (Ex.A-2)

17. Neither the 1972 plans nor the permit provided any other specific longitudinal or latitudinal limitations concerning the location of the various trenches, nor was a grid system employed for proposed placement of the trenches. (N.T. 545)

18. A series of Pennsylvania Power and Light (P.P.& L.) electrical poles run in a north-south direction on the site at varying distances from the eastern edge of the trench fill section of the landfill. (Ex.A-2)

19. The 1972 plans state "Benchmarks shall be marked on P.P.& L. poles in trenching area to serve as control elevations for the trenches." These benchmarks are not relevant to the lateral placement of the trenches. (N.T. 575 and Ex.A-2)

20. Appellants commenced the disposal of waste in the trenches on August 30, 1982, beginning with Trench 2, and then proceeded in the following order to Trench 1, 3, 4 and excavation of Trench 5. (Ex.C-4)

21. Each trench in the trench fill must be separated from the neighboring trenches by a distance of at least eight feet. (N.T. 632-633 and Ex.A-13 and A-14)

22. The actual separation of Trenches 1-5 is approximately 25 feet or greater.

23. Construction of trenches with a separation greater than eight feet does not, in and of itself, result in environmental harm, and may, in fact, be environmentally beneficial. (N.T. 606-607)

24. Due to the separation of Trenches 1-4 being greater than eight feet, proposed Trench 5 is staked out farther south than contemplated by the 1972 plans.

25. The Department requires the trenches to be dug parallel and as shown in the approved plans. (Ex.A-14)

26. The Department was present at the excavation of Trenches 1-4 and the closure of Trenches 1-3. The Department approved the location and separation distances of Trenches 1-4. (N.T. 33-34, 309-3101, 314-315, 449-450, 515-516, 545, 604-605, 679-680, and 720-725)

27. Neither the 1972 plans nor the 1982 plans contained a grid with north-south coordinates precisely depicting the actual locations of the trenches. The only distance specified consistently in all the plans was the 200 foot setback requirement. (N.T. 231-232 and 545 and Ex.A-2 and A-4)

28. Subsequent to the January, 1985, hearings in this matter, a survey of the site was performed to establish the location of the southern property line in relation to the southern-most proposed trench, Trench 5. (N.T. 888-890 and Ex.S-1)

29. Although located farther south than contemplated by the 1972 plans, proposed Trench 5, as staked out, is not within the 200 foot setback requirement. (Ex.S-1)

30. Trench 4 is overfilled beyond the required grade. (N.T. 643, 689-690, and 707-708 and Ex.A-4)

31. The amount of overfill is a matter for speculation. Walter B. Satterthwaite Associates estimated it to be 2000-3000 cubic yards, while the Department, based on hours of operation, estimated it to be 5100-6250 cubic yards over the 2000-3000 cubic yards estimated by Satterthwaite. (N.T. 215 and 327 and Ex.A-11)

32. Prior to Appellants' submission of a solid waste management permit application to the Department in 1969, solid waste had been disposed of in an old surface mine excavation at the site in accordance with applicable surface mine reclamation requirements. Filling of the mine was substantially completed and final cover applied prior to the 1972 issuance of the permits. (N.T. 10, 17-20, 29-30, and 171 and Ex.A-2)

33. The performance of a natural renovation landfill is influenced by the geology and hydrogeology of the site.

34. The soil composition of NSL is a glacially derived, high silt, clay rich soil excellent for use in the natural renovation landfill process. (N.T. 305 and Ex.A-5(a)).

35. The glacial material ranges fromn 0-45 feet in depth. (N.T. 125-126)

36. The bedrock underlying the site is dense dolomite with relatively few fractured surfaces. (N.T. 61-62, 125-126, 418 and Ex.A-5(a))

37. A deep layer of unconsolidated material lies above the bedrock in most areas of the site. (N.T. 62)

38. The bedrock/unconsolidated material unit on the site has a very low water yield capability. (N.T. 62, 418, and 985-987)

39. Although the surface topography slopes from north to south at the site, the direction of groundwater flow is south to north. (N.T. 37-43, 90, and 151-161 and Ex.A-5(a) and A-5(b)).

40. There is a single groundwater flow under the site. (N.T. 37-40).

41. Surface water infiltrating into the surface of the site moves essentially perpendicular to the surface through the unconsolidated material of the site and will not create any significant secondary flow. (N.T. 162

and 459)

42. Four monitoring wells (MW) existed on the site in June, 1984, with MW-1 and 2 located between the completed area fill section and the newly-operable trench fill section to the south, and MW-3 and 4 located in an area north of the landfill. (Ex.A-2)

43. MW-1 and 2 were differently constructed than MW-3 and 4. MW-1 and 2 were constructed with solid casing to a depth of 10 feet. Below 10 feet, the well casings were perforated, thereby allowing any substance in the unconsolidated material below 10 feet to penetrate and contaminate the wells. Furthermore, MW-1 and 2 were located in low-lying areas in close vicinity to the access road to the trench area of the landfill. MW-3 and 4, on the other hand, were solid cased to the bedrock, thus eliminating the potential for contamination in the unconsolidated area. (Ex.A-6)

44. Groundwater samples were taken from the four monitoring wells in June, 1984. (Ex.A-6). Satterthwaite Associates, Inc. performed the sampling in accordance with EPA-approved procedures for quality assurance/quality control. (N.T. 272). Two priority pollutant volatile compounds were reliably found in trace concentrations in MW-2--toluene at 42 to 53 ppb and 1-1-1 trichlorethane at 17 to 34 ppb. (Ex.A-6)

45. Further groundwater sampling was performed on November 20, 1984. (Ex.A-7). In addition to sampling from MW-1-4, Satterthwaite Associates also sampled at two new wells, MW-5 and 6, located in an area north of the landfill. These wells were of solid casing construction, similar to MW-3 and 4. The location of MW-5 and 6 was approved by the Department. (N.T. 434)

46. The November 20, 1984, sampling reliably indicated six organic compounds present in the sample from MW-1, including chlorobenzene (11 µg/l), 1,1-dichloroethane (14 µg/l), toluene (11 µg/l), and vinyl chloride (19

µg/1).

47. The November 20, 1984, sampling did not reveal any reliable indications of contamination in MW-3, 4, 5, and 6.

48. Packer tests were subsequently performed on MW-1 and 2 in an attempt to determine whether the contamination found at MW-1 and 2 was attributable to penetration of contaminants through the perforations of the casings of MW-1 and 2, or a breakdown in the natural renovation process at the landfill. (N.T. 1206)

49. Packers (or well seals) were placed in MW-1 and 2 above the water table at the point where the perforated casing met rock for the purpose of collecting and testing any waters entering the well casings through perforations. (N.T. 1206)

50. The packer tests indicated that the likely source of contamination in MW-1 and 2 is penetration of contaminants through the perforations in the casing. (N.T. 1206)

51. Pursuant to an agreement between the parties subsequent to the hearings in January, 1985, NSL agreed to close and seal MW-1 and 2 and drill two new monitoring wells to replace MW-1 and 2. (N.T. 362)

52. NSL had difficulty with the construction of MW-1-A, the replacement well for MW-1. This well was abandoned by NSL and replaced by MW-1-B. MW-2-A was constructed to replace MW-2.

53. After closing and sealing MW-1 and 2, additional groundwater sampling was performed on May 23, 1985. (N.T. 891 and Ex.C-8 and C-9). Sampling was taken at MW-1-B, 2-A, 3, 4, 5, 6 and several private wells off the landfill site.

54. The only on-site well indicating reliable levels of pollutants was MW-1-B. (Ex.C-8 and C-9)

55. The May 23, 1985, sampling of MW-1-B revealed the presence of trans-1,2-dicholroethylene in the range of 24-30 µg/l and vinyl chloride in the range of 11-14.5 µg/l. Toluene was also detected at concentrations in excess of 35 µg/l. (Ex.C-8 and C-9)

56. Groundwater samples taken from wells on nearby properties revealed some contamination; however, the pollutants discovered had a different "fingerprint" from the pollutants found in MW-1-B and cannot be attributed to the landfill. (N.T. 1164-1166)

57. Surface water samples taken on July 26, 1985, did not reveal any reliable levels of pollutants. (Ex.C-10 and C-11)

58. In all cases, the contaminants found in MW-1 and 2 (or 1B and 2A) are not also found in MW-3 and 4 to the north, the direction of groundwater flow. (Ex.C-8, C-9, C-10, and C-11)

59. Toluene, the compound consistently discovered in MW-1-B, is a common component of gasoline.

60. Vinyl chloride and trans-1,2-dichloroethylene are gases which are common constituents of the gases vented and discharged from municipal waste landfills. (N.T. 1166 and 1189-1192)

61. A gas venting system was part of the approved plans for the site. In August, 1984, the Department filed a complaint before a District Justice alleging 13 violations by NSL, including a failure to install a portion of the venting system located in the northernmost portion of the site. After hearing, the District Justice found in favor of the Department on only one of the alleged violations, namely the failure to install the venting system in the northernmost area of the site. (N.T. 40-41, 105, and 586 and Ex.A-4)

62. Subsequently, NSL proceeded to install the gas venting system in

the designated area of the site. In addition to the portions of the venting system constructed as of this date, there are additional perimeter portions of the gas venting system which have not been completed. (N.T. 623-625)

63. MW-1-B is venting gas from the landfill at a rate of between 1000 and 2000 cubic feet per day. (N.T. 1200)

64. The gases vinyl chloride and trans-1,2-dichloroethylene, when confined over a period of time, are soluble in surface water. (N.T. 1189-1191 and 1201)

65. The contamination discovered during the testing of MW-1 and 2 is not the result of a breakdown in the natural renovation process at the landfill, but rather, the toluene contamination is the result of gasoline mixing with surface water runoff from the access road near MW-1 and 2 which penetrated the defective and outdated casing in MW-1 and 2, while the vinyl chloride and trans-1,2-dichloroethylene contamination is the result of these gases becoming soluble in the surface water in MW-1-B.

66. In July and August, 1985, it was discovered that MW-1-B was dry. (N.T. 1108-1011, 1021, and 1084)

67. With the exception of MW-1-B, the present groundwater monitoring system is adequate to provide accurate appraisals of the status of the groundwater quality at the NSL.

68. With the exception of the area surrounding MW-1-B, the gas venting system is adequate at NSL.

69. The 1:1 ratio of renovating soil to trash, as required by the permit, was maintained in the excavation and filling of Trenches 1-4. (N.T. 516-517)

70. Daily cover is to be applied at the end of the working day to exposed refuse. (N.T. 692)

71. The Department inspector normally visited NSL between 12:00 and 1:00 p.m. (N.T. 691-695)

72. NSL closes at 5:00 p.m. daily. (N.T. 691)

73. A final minimum uniform two foot layer of compacted cover material must be placed on the surface of each trench upon closure. (Ex.C-5)

74. Adequate final cover was initially placed on the area fill portion of the site and Trenches 1-3; however, this cover was subsequently disturbed by a combination of storm water and NSL machinery. (N.T. 62 and 691-695). Uniform final cover does not exist on the site.

75. The surface water management system on the site consists of a stormwater basin in the southern portion of the site. (N.T. 65 and Ex.A-11). A system of swales and berms is utilized to keep stormwater from escaping the site. (N.T. 66)

76. A partially implemented plan devised by NSL utilizes a system of dual basins in the southern corners of the site to augment the volume of stormwater that can be managed at the site. (N.T. 66 and 104)

77. Stormwater escaped from the site on one occasion, due to an intense storm which caused a berm to erode. Moreover, the area surrounding the site was flooded. (N.T. 65)

78. NSL repeatedly attempted to vegetate closed areas of the landfill. Extremely wet weather resulted in the vegetation either not germinating or being washed away. (N.T. 103)

79. Portions of the landfill remain unvegetated.

80. NSL submitted an erosion and sedimentation control plan to DER in January, 1984. (N.T. 57-58 and Ex.A-9)

81. The Department first claimed that the plan was never submitted, yet eventually admitted it received the plan in January, 1984. (N.T. 58)

82. The Department failed to accept, reject, or respond to the plan until September, 1985, when it presented written comments to NSL prior to the September 5, 1985 hearing. (N.T. 104 and Ex.C-19)

83. There was no evidence of malodors leaving the NSL site. (N.T. 536)

84. Louis J. Novak has been cooperative in complying with Department requests regarding the landfill.

DISCUSSION

NSL is a solid waste disposal facility located in South Whitehall Township, Lehigh County. The property upon which the landfill lies is owned jointly by Louis J. and Hilda Novak, husband and wife, and president and secretary, respectively, of NSL (hereinafter collectively referred to as Novaks). The landfill, permitted by the Department in 1972, is divided into three separate areas--a demolition fill section, an area fill section, and a trench fill section.

After filling the area fill section to capacity in 1982, the Department directed NSL to begin disposing of waste in the trench fill section. The trench fill section consists of a group of five adjacent trenches in the southern portion of the landfill which are separated from each other by a minimum of eight feet. Each trench is numbered sequentially, with Trench 1 being the northern-most trench and Trench 5 being the southern-most trench. NSL first began disposing of waste in Trench 2, and, after that was filled, moved to Trench 1, and, thereafter, progressed sequentially southward.

The Department was present at the opening excavation and final closure of Trenches 1 through 3. The Department was notified of the

excavation of Trench 4; however, it chose not to attend. On December 13, 1984--after Trench 4 had been closed, yet before the final Trench 5 was to be excavated--the Department issued an order and civil penalty assessment to NSL directing, inter alia, NSL to cease all solid waste disposal operations, initiate final closure of the landfill, complete installation of a gas venting system, provide further groundwater sampling and present a hydrogeological study, implement an erosion and sedimentation plan, post a bond in the amount of $300,000, and finally, pay a $46,000 civil penalty assessment. NSL responded by denying all of the Department's allegations of violations, asserting that the landfill was in substantial compliance with all rules and regulations of the Department. Moreover, NSL disputed the Department's contention that Trench 5 was outside the boundaries of the permitted area and argued that the bonding requirements were not applicable to its operation.

Because this is an appeal of an order, the Department bears the burden of proof under 25 Pa.Code §21.101(b)(3). FR&S, Inc. v. DER, EHB Docket No. 83-093-M (Adjudication issued June 16, 1987). In reviewing the action of the Department, our duty is to determine whether the Department's action is supported by substantial evidence and whether it is arbitrary, capricious or unreasonable. If the Department is acting pursuant to a mandatory provision of statute or regulation, our only task, after evaluating the evidence, is to either uphold or vacate the Department's action. But, if the Department is acting under a grant of discretionary authority, we may, based on the record before us, substitute our discretion for that of the Department. Warren Sand & Gravel Co., Inc. v. DER, 20 Pa.Cmwlth.186, 341 A.2d 556 (1975). The issuance of orders under the Solid Waste Management Act and the Clean Streams Law is a discretionary act. Therefore, should we find

that the Department abused its discretion, we may substitute our own.

Individual Liability of Louis J. and Hilda Novak

The Department seeks to have the Board hold Louis J. and Hilda Novak individually and personally liable under the order. Louis J. and Hilda Novak are husband and wife and own the land upon which the landfill lies. Louis Novak is the president of NSL and manager of the landfill, while Mrs. Novak serves as secretary (Findings of Fact 2 and 3).

Corporate officers may be held personally liable under the Solid Waste Management Act and the Clean Streams Law, despite the fact that the corporation may also be found liable. Personal liability of corporate officers may be established under two theories--piercing the corporate veil or participation in the action by the officer. DER v. Lucky Strike Coal Company and Louis J. Beltrami, supra.

In order to pierce the corporate veil, the Department must establish that "The corporation was an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fictim and the immunity it carries." Zubik v. Zubik, 384 F.2d 267, note 2 (3d Cir.1967), cert.denied, 390 U.S.988 (1968). To do so, the Department must present evidence of the sort summarized in U. S. v. Pisani, 646 F.2d 83 (3d Cir.1981), as:

> Whether the corporation is grossly undercapitalized for its purpose...failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.

The Superior Court has recently stated in Burton v. Boland, ___ Pa.Super.___, 489 A.2d 243 (1985) that

> Even when a corporation is owned by one person or

> family, the corporate form shields the invididual members of the corporation from personal liability and will be disregarded only when it is abused to permit perpetration of a fraud or other illegality.

Because the Department did not present any evidence regarding the corporate veil theory, we will not look behind the corporate persona in an attempt to establish Louis J. and Hilda Novak's individual liability.

We must then examine the degree of participation of the Novaks in the violations complained of by the Department. In John E. Kaites, et al. v. DER, 1986 EHB 234, we analyzed liability of corporate officers under the "participation" theory. Analogizing to tort law, we stated that an officer is personally liable if his actions actually further the alleged violations. We held that although an officer cannot be held liable for mere nonfeasance, a conscious decision to pursue a certain course of conduct, accompanied by an order implementing that decision, can be sufficient "participation" to establish personal liability. The Board also in Kaites recognized corporate officer liability under the "participation" theory on the basis of a violation of a statutorily created duty, such as under §501 of the Solid Waste Management Act, following the reasoning enunciated in U.S. v. Park, 421 U.S. 658 (1975). The Commonwealth Court has recently overturned this expansive view of corporate officer liability in John E. Kaites, et al. v. DER, No. 1061 C.D. 1986 (Pa.Cmwlth., filed August 6, 1987) wherein it held that evidence of misconduct or intentional neglect is necessary before individual liability will be imposed on a corporate officer under the participation theory.

The Department's post-hearing brief did not contain any arguments relating to the Novaks being held personally liable under the participation theory. Therefore, the Department is deemed to have abandoned this argument.

William J. McIntire Coal Company, Inc., et al. v. DER, 1986 EHB 969. But, even if the Department had not waived this issue, the evidence produced at the hearing does not rise to the level necessary to establish personal liability. The evidence regarding Hilda Novak is virtually non-existent, as it is confined to her co-ownership of the property, her title of corporate secretary, and her performance of clerical duties. Evidence regarding Louis J. Novak, Sr. is very weak. Rather than proving that Mr. Novak violated the Solid Waste Management Act and the Clean Streams Law through either misconduct or intentional neglect, testimony of Department officials characterized Mr. Novak's conduct as being cooperative, much as John E. Kaites' conduct was characterized by the Commonwealth Court in its recent opinion. Since we do not hold the Novaks personally liable, the remainder of the adjudication will refer solely to NSL.

Propriety of the Department's Closure Order

In its December 13, 1984, order and civil penalty assessment, the Department alleged numerous violations of the Solid Waste Management Act, the Clean Streams Law, and 25 Pa.Code §§75.1 et seq. and 102.1. More specifically, the Department alleged that NSL exceeded both the vertical elevations and horizontal boundaries allowed by the permit, polluted the groundwater at the site, failed to implement a proper groundwater monitoring system, failed to provide adequate daily and final cover on the landfill, inadequately managed surface water on the site, did not provide an erosion and sedimentation plan and failed to properly grade or vegetate the site, failed to install a gas venting system, and finally, failed to post a bond for closure of the site. Each of these violations will be addressed individually below.

Lateral Boundaries and Vertical Elevations

The Department alleges that the trench fill section of the landfill, as presently staked out, extends beyond the boundaries set forth in the permit and that NSL has filled above the elevation limits directed in NSL's 1972 permit and plans in violation of §§201(a), 610(1), 610(2), and 610(4) of the Solid Waste Management Act. Section 201(a) of the Solid Waste Management Act prohibits the disposal of municipal waste unless authorized by a permit or the rules and regulations of the Department. Sections 610(1), (2) and (4) declare that it is unlawful for a person to

> (1) Dump or deposit, or permit the dumping or depositing, of any solid waste onto the surface of the ground or underground or into the waters of the Commonwealth, by any means, unless a permit for the dumping of such solid wastes has been obtained from the department; provided, the Environmental Quality Board may by regulation exempt certain activities associated with normal farming operations as defined by this act from such permit requirements.
>
> (2) Construct, alter, operate or utilize a solid waste storage, treatment, processing or disposal facility without a permit from the department as required by this act or in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department.
>
> * * * * *
>
> (4) Store, collect, transport, process, treat, or dispose of, or assist in the storage, collection, transportation, processing, treatment, or disposal of, solid waste contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.
>
> * * * * *

NSL denies that it has exceeded the lateral boundaries of its permit area, but admits to minor violations of the elevation limits.

The plans submitted by NSL to the Department as part of the 1972 permit application contained vague lateral boundaries. The only specific limitation was a 200 foot setback from the southern boundary of the landfill

to the southernmost trench, Trench 5. At the hearing, the Department alleged that, according to measurements taken from P.P.& L. electric poles on the plan, NSL was now in violation of the 200 foot setback requirement. NSL denied this charge and argued that the P.P.& L. poles could not be used as a point of reference because their exact location had not been precisely determined on the 1972 plans.

In an attempt to resolve this conflict, the parties stipulated to have a survey performed during the course of the hearings. (Ex.S-1) The results of the survey indicate that Trench 5 does not violate the 200 foot setback requirement. The Department disputed the results of the survey, and continued, however, to assert that, in relation to the P.P.& L. poles, NSL is beyond the boundaries of the permitted area. The Department, which carries the burden of proof, failed to provide any convincing or credible evidence that the P.P.& L. poles were intended by the parties to control the lateral borders of the site. The Department relied heavily on the testimony of a Mr. Rajkotja here, but we must accord little weight to his testimony because of his lack of expertise in surveying. This is a case where the boundaries of the landfill as established on the initial permit and plans were imprecise and the Department is attempting to establish reference points after the fact. Based on the evidence before us, we cannot conclude that NSL is violating its permit boundaries.

Groundwater Monitoring System

Paragraph I of the Department's order alleged that NSL's groundwater monitoring system "is inadequate under the requirements of the Solid Waste Act and the Clean Streams Law." The Department further alleged that MW-5 and 6 were not installed prior to deposition of solid waste in the trenches, as required by the permit, and that sampling results have not been submitted to

the Department.

We are unaware of any specific requirements relating to the adequacy of groundwater monitoring systems in either the Clean Streams Law or the Solid Waste Management Act, so it is our belief that the Department was, in reality, citing NSL for violations of its permit, which contained terms and conditions relating to monitoring.

We have found that MW-5 and 6 were not installed until November, 1984 (Finding of Fact 45) and that the construction of the upgradient monitoring wells (MW-1 and 2) was deficient (Finding of Fact 43). However, by virtue of an agreement between the parties after the January, 1985, hearings, MW-1 and 2 were replaced by MW-1-B and MW-2-A (Findings of Fact 51 and 52). Subsequently, MW-1-B went dry (Finding of Fact 66), and, with its exception, the monitoring system is adequate.

Therefore, we must conclude that the terms and conditions of NSL's permit were not complied with, to the extent that an additional upgradient monitoring well is necessary.

Groundwater Pollution

The Department's order contends that NSL is causing groundwater pollution as a result of its "excessive" deposits of waste. We find that the Department has not presented substantial evidence in support of its contention and has, therefore, failed to satisfy its burden of proof in this issue.

Despite the deficiencies in the monitoring wells, we can hardly conclude that groundwater pollution, much less contamination, is occurring when there is no reliable evidence of any parameters commonly attributable to landfills. The essence of the Department's argument is that because the Department has established that NSL has exceeded the vertical elevations in its permit and there are some deficiencies in its groundwater monitoring

system, it naturally follows that NSL is causing or threatening to cause groundwater pollution. We cannot reach our findings on the basis of blind faith or tortured or simplistic logic; we require substantial evidence which, in this case, the Department has failed to provide us.

Final Cover and Grading

Paragraph K of the Department's order alleged that completed portions of NSL had not received proper final cover and were not adquately graded and vegetated, in violation of 25 Pa.Code §§75.24(c)(2)(xxi) and (xxii), 75.26(o) and 75.26(p).

Sections 75.24(c)(2)(xxi) and (xxii) provide as follows:

> (c) Phase II. Application Design Requirements
>
> * * * * *
>
> (2) Design criteria
>
> * * * * *
>
> (xxi) A final layer of cover material, compacted to a minimum uniform depth of two feet and having the characteristics specified in (ix) of this section shall be placed over the entire surface of each portion of the final lift.
>
> (xxii) The final cover layer shall be compacted within two weeks after placement of solid waste in the final lift. Completion shall include permanent stabilization of all slopes.

These requirements, although contained in a permit application regulation, are operational requirements.[1] However, the title of a regulation is not necessarily controlling in its interpretation. §1924 of the Statutory Construction Act, 1 Pa.C.S.A. §1924. It is clear that 25 Pa.Code §§75.26(o) and (p), which state that

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[1] We have previously pointed out similar difficulties with the Department's application of Chapter 75 in Globe Disposal et al. v. DER, 1986 EHB 891 and FR&S, Inc. v. DER, supra.

> (o) Completed portions of the landfill shall be graded as specified in this Chapter (relating to drainage of surface water) within two weeks of completion.
>
> (p) Seed bed preparation and planting operations to promote stabilization of the final soil cover shall be done as soon as weather permits and seasonal conditions are suitable for the establishment of the type of vegetation to be used. Reseeding and maintenance of cover material shall be mandatory until adequate vegetative cover is established in PennDOT Form 408 or the current "Agronomy Guide" of the College of Agriculture, Pennsylvania State University, may be utilized.

are operational in nature.

We have found that, although adequate final cover may have initially been placed on the area fill and Trenches 1-3, it was disturbed and does not exist in a uniform condition across the site (Finding of Fact 74). Furthermore, portions of the landfill were not revegetated and others were not successfully revegetated (Findings of Fact 78 and 79). As a result, violations of 25 Pa.Code §§75.24(c)(2)(xxi), 75.24(c)(2)(xxii), 75.26.(o) and 75.26(p) and §§610(2), (4), and (9) of the Solid Waste Management Act occurred at NSL.

Surface Water Management

Section 75.24(c)(2)(xviii) of the Department's regulations provides

that:

> (c) Phase II. Application Design Requirements
>
> * * * * *
>
> (2) Design criteria
>
> * * * * *
>
> (xviii) The site shall be designed and operated in a manner which will prevent or minimize surface water percolation into the solid waste material deposits.

Paragraph L of the Department's order alleges that NSL has violated this regulation and §§610(2), (4), and (9) of the Solid Waste Management Act because improper grading has resulted in ponding of surface water at the site.

We have some of the same difficulties with the Department's citation of §75.24(c)(2)(xviii) as we did with its citations of §§75.24(c)(2)(xxi) and (xxii), largely due to the organization and drafting of Chapter 75. However, despite being placed in a design requirement regulation, subsection (c)(2)(xviii) does directly relate to operation of the site. We have found that NSL has not fully implemented its surface water management system, thereby resulting in problems at the site (Findings of Fact 75 and 76). Therefore, we find that NSL has violated §§610(2), (4) and (9) of the Solid Waste Management Act and 25 Pa.Code §§75.24(c)(2)(xviii).

Erosion and Sedimentation Control Plan

The Department's order cited NSL for failing to have an erosion and sediment control plan, in violation of the Clean Streams Law and 25 Pa.Code §102.4. The pertinent subsection of §102.4, subsection (a), provides that:

> (a) All earthmoving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this, except as provided in subsection (b) of this section, any landowner, person, or municipality engaged in earthmoving activities shall develop, implement, and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation. These erosion and sedimentation

> measures shall be set forth in a plan as set forth in §102.5 of this title (relating to erosion and sedimentation control plan) and be available at all times at the site of the activity. The Department or its designee may, at its discretion, require this plan to be filed with the Department or its designee.

That NSL is being charged with a violation of this regulation is somewhat astounding in light of the evidence that such a plan did exist and was submitted to the Department in January, 1984 (Findings of Fact 80 and 81). We cannot sustain the Department's order as it relates to 25 Pa.Code §102.4.[2]

Gas Venting System

The Department's order alleged that NSL had violated the terms and conditions of its permit by not completing the installation of a gas venting system. We have found that NSL did fail to install the gas venting system provided for in its permit in the northernmost portion of the site (Finding of Fact 61) and in certain portions of the site's perimeter (Finding of Fact 62). Therefore, NSL has violated §§610(2), (4), and (9) of the Solid Waste Management Act.

Adequate Daily Cover

Section 75.26(1) of the Department's regulations states that "a uniform six inch compacted layer of daily cover material shall be placed on all exposed solid waste at the end of each working day." Paragraph O of the Department's order alleged that NSL, on 18 occasions between March 12, 1982 and December 7, 1984, failed to provide adequate daily cover material.

---

[2] While there is no requirement in Chapter 102 that erosion and sediment control plans be reviewed by the Department or its designee--only that the plan be filed, if requested--we find it even more unusual that the Department required nearly two years to even react to NSL's erosion and sediment control plan. We note also that the only issue regarding NSL's erosion and sediment control plan was whether it possessed the plan, and not the plan's adequacy.

While we recognize that the customary working hours of most Department employees are from 8:00 a.m. to 4:00 p.m., we are extremely reluctant to hold NSL liable for violations of 25 Pa.Code §75.26(1) when most of the inspections upon which these violations were based were conducted between 12:00 p.m. and 1:00 p.m. We are not suggesting that Department inspectors must work overtime in order to prove violations of 25 Pa.Code §75.26(1). However, there are other means--such as conducting inspections at the beginning of the working day--to establish violations of this regulation. We cannot hold that the Department proved any violations of §75.26(1) under the circumstances of this appeal.

Bonding Requirement

The Department's order alleged that "Novak has not filed a collateral bond for the land occupied by the Novak Landfill as required Section 505(a)." It went on to require that

> By no later than December 31, 1984, Novak shall submit to the Department an acceptable bond on forms provided by the Department for the closure of Novak Landfill. The bond shall comply with the requirements of Section 505 of the Solid Waste Act, shall be in the amount of $300,000.00 and shall name the Commonwealth of Pennsylvania as obligee.

NSL argues that the bonding requirement in the order is a prohibited retroactive application of the statute, that it conflicts with the requirements of 25 Pa.Code §101.9, and that the Department is estopped from applying a bonding requirement to NSL. The legal arguments aside, NSL also contested the area used to calculate the bond, asserting that the mine area fill and the area fill should not, as the Department suggests, be used to calculate the amount.

The Department offered little in the way of legal argument to

support its bonding requirement. Because the permit was modified in 1982, the Department opines that its 1984 bonding requirement is properly based on authority in the 1980 Solid Waste Management Act. The Department also justified the amount of the bond by advancing the argument that the NSL consultant believes it is proper, if not substantial enough.

The Solid Waste Management Act, although enacted primarily to secure hazardous waste primacy for the Commonwealth under the federal Resource Conservation and Recovery Act, 42 U.S.C.§6901 et seq., also contained a scheme for regulation of municipal and residual waste. The statutory provision relevant to the issue now before us is §505, which reads in pertinent part that:

> (a)...[p]rior to the commencement of operations, the operator of a municipal or residual waste processing or disposal facility...for which a permit is required by this section shall file with the department a bond for the land affected by such facility on a form prescribed and furnished by the department... The department may require additional bond amounts for the permitted areas should such an increase be determined by the department to be necessary to meet the requirements of this act...
>
> * * * * *
>
> (c) The operator shall, prior to commencing operations on any additional land exceeding the estimate made in the application for a permit, file an additional application and bond. Upon receipt of such additional application and related documents and information as would have been required for the additional land had it been included in the original application for a permit and should all the requirements of this act be met as were necessary to secure the permit, the secretary shall promptly issue an amended permit covering the additional acreage covered by such application, and shall determine the additional bond requirement therefor.
>
> * * * * *

Recognizing that a comprehensive solid waste management regulatory program could not be implemented immediately, §1001 of the Solid Waste Management Act

stated:

> The Act of July 31, 1968 (P.L.788, No.241), known as the "Pennsylvania Solid Waste Management Act," is repealed: Provided, however, that all permits and orders issued, municipal solid waste management plans approved, and regulations promulgated under such act shall remain in full force and effect unless and until modified, amended, suspended or revoked.

We must now determine whether the Department's application of bonding requirements based on §505 of the Solid Waste Management Act conflicts with the savings clause in §1001 of the statute. We believe that it does.

The General Assembly was clear in expressing its intent that the framework of permits and regulations existing at the time of passage of the 1980 statute remain in place until a new scheme of regulations was adopted after careful thought and deliberation. One of the applicable regulations adopted under the 1968 statute was 25 Pa.Code §75.22(d), which provided that "When the Department has determined that the application is completed and that the proposed design meets the requirements of the pertinent regulations and acts, a permit will be issued." A "pertinent" regulation was 25 Pa.Code §101.9, which was adopted on May 5, 1978. The relevant portions of 25 Pa.Code §101.9 read as follows:

> §101.9. Bonding requirements for solid waste facilities.
>
> (a) The applicant shall provide as a part of his application for a permit, a bond sufficient to assure closure and final closure of the permitted site in a manner that will abate and prevent pollution of the waters of this Commonwealth. The bond or cash guarantee or performance shall be as set forth in this section. Closure is that condition in which a permitted site is no longer utilized for the disposal or processing of waste. In the case of landfills, closure is when final cover has been placed in accord with Departmental regulations and certified through inspection by the Department. In the case of processing facilities,

closure is when waste is removed from the facility and so certified by Departmental inspection. Final closure is when a facility has been certified by the Department as in compliance with applicable Departmental regulations.

(b) The provisions of this section may not be applicable to the following:

(1) Permittees and permit applicants which are municipalities or municipal authorities.

(2) Those facilities under permit on January 1, 1978. However, those facilities under permit on January 1, 1978 and currently bonded may elect either to continue their current bonding requirements or be governed by the provisions of this section.

(3) Those disposal facilities constructed in mines.

(4) Those disposal facilities accepting only Class I and Class II demolition waste.

(c) The bond may consist of surety or collateral bonds or a cash deposit in escrow.

(1) Surety bonds shall be acceptable when provided by a surety company licensed to conduct business in this Commonwealth.

(2) Collateral bonds shall be on a form provided by the Department and shall be accompanied by negotiable bonds of the United States Government or the Commonwealth, the Turnpike Commission, the General State Authority, the State Public School Building Authority or a municipality within this Commonwealth, by bank savings accounts or certificates of deposit properly assigned to the Secretary and with approval of the assignment by the bank; or by certified, cashier's or trust company's treasurer's check in accordance with the provisions of this section.

(d) Types of facilities requiring bond are as follows:

(1) Sanitary landfills utilizing natural renovation.

* * * * *

(e) Bonding payments shall be made in initial payments and year-end payments.

(1) Initial bonding payments, which are the bonds in the amounts required under the applicable provisions of this section, shall be delivered to the appropriate agent of the Commonwealth at least 10 calendar days prior to the issuance date of the solid waste management permit. The Departmental permits may not be released until an acceptable bond is presented.

(2) Year-end bonding payments, which are those bond amounts due annually as required under the applicable provisions of this section, shall be delivered to the appropriate agent of the Commonwealth no later than 45 calendar days following the anniversary date of the

> solid waste management permit issuance. Failure to provide the year-end payment in a timely manner may result in a suspension, modification, or revocation of the facility permit.
>
> (f) Bonding schedules shall comply with the following:
>
> (1) Natural renovation landfills. The initial bond payment shall be in the amount of $7,500. The year-end bond payments shall be in the amount of $5,000 per acre utilized for the deposit or storage of solid waste during the previous year. The $5,000 amount shall be applied to an acre one time only. When the Department certifies that the permitted site area has been properly closed in accordance with Departmental regulations, an amount of 70% of the amount on deposit with the Department will be released immediately. The remainder, 30%, will be retained for an additional 5-year period following closure and then released after final closure if no further remedial action is required, or forfeited if required action is not undertaken. Remedial action shall mean those activities necessary to maintain a site as required by Departmental regulations.

This regulation has not been modified or repealed, except as it related to hazardous waste facilities, since its adoption. Thus, by virtue of the application of the savings clause in the Solid Waste Management Act, any bond required of NSL should have been required under 25 Pa.Code §101.9.

Having now decided that 25 Pa.Code §101.9 would be applicable to any bonding required of NSL, we now turn to a determination of the area of NSL to which the bond should be applied. Neither party provides us with any legal support for its position regarding the area to be covered by the bond. And, the regulation provides us with no guidance. The NSL permit was originally issued on March 24, 1972 (Finding of Fact 5). The language of 25 Pa.Code §101.9(b)(2) is rather confusing as it relates to facilities pre-dating the regulation. On one hand, the first sentence conveys the impression that facilities permitted before January 1, 1978 are not subject to a bonding requirement. However, the second sentence seems to indicate that bonding requirements were in existence prior to the adoption of 25 Pa.Code

§101.9. We are aware of no regulation predating 25 Pa.Code §101.9, so any such requirements must have been imposed as a matter of discretion. In any event, the Department did not impose any bonding requirement on NSL until the issuance of the order. Although the Department cannot be estopped from enforcing a lawful regulation because of its prior laxity in enforcement, Lackawanna Refuse Removal, 65 Pa.Cmwlth.372, 442 A.2d 423 (1982), we are reluctant in light of the ambiguous language of 25 Pa.Code §101.9 to hold that the amount of the bond should be based on the acreage of the mine area fill, the area fill, and the trench area. Rather, we will hold that the amount of the bond be calculated on the basis of the area devoted to trench fill. While we have some difficulty with the result, we have no difficulty with acknowledging that we are without authority to act in a quasi-legislative capacity and amend or repeal 25 Pa.Code §101.9 to comprehensively address bonding of municipal and residual waste disposal facilities.

Remedial Action Directed by the Department

In light of our holdings that the Department has abused its discretion in several respects in the issuance of this order, particularly those relating to the most serious allegations in the order, we believe that the cessation of all solid waste disposal activities at NSL is a harsh result. We will enter an order which will, inter alia, permit NSL to complete filling Trench 5.

There are outstanding petitions for supersedeas, and because of our partial adjudication, we will supersede NSL's civil penalty assessment pending a hearing and adjudication on whether the amount of the Department's assessment was an abuse of discretion.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter and parties

to this appeal. §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended 71 P.S. §510-21.

2. The Board may adjudicate a matter on the basis of a cold record. DER v. Lucky Strike Coal Company and Louis J. Beltrami, EHB Docket No. 80-211-CP-W (Adjudication issued April 22, 1987).

3. The Department has the burden of proof in an appeal of a closure order issued pursuant to the Solid Waste Management Act. 25 Pa.Code §21.101(b)(3).

4. In reviewing actions of the Department the Board must determine if the Department has abused its discretion by acting arbitrarily, capriciously or unreasonably or contrary to law. Warren Sand & Gravel Co., Inc. v. DER, 20 Pa.Cmwlth.186, 341 A.2d 556 (1975).

5. Where the Department has taken a discretionary action, such as the issuance of an order, the Board may substitute its discretion for that of the Department, if the Board determines that the Department has abused its discretion. Warren Sand & Gravel Co., Inc. v. DER, 20 Pa.Cmwlth.186, 341 A.2d 556 (1975).

6. Corporate officers may be held personally liable for violations of the Solid Waste Management Act and the Clean Streams Law either through piercing the corporate veil or establishing their participation in the violations. John E. Kaites, et al. v. DER, No. 1061 C.D. 1986 (Pa.Cmwlth., Filed August 6, 1986).

7. The Department failed to present any evidence regarding piercing the corporate veil of NSL. Therefore, it failed to satisfy its burden of proof and the Novaks, therefore, cannot be held personally liable for violations of the Clean Streams Law and the Solid Waste Management Act under this theory.

8. Because the Department did not argue the participation theory of corporate officer personal liability in its post-hearing brief, it abandoned the issue. William J. McIntire Coal Company, Inc. et al. v. DER, 1986 EHB 969.

9. Even if the Department had not waived the issue of the Novaks' personal liability under the participation theory, the Department failed to present sufficient evidence to establish the Novaks' individual liability.

10. NSL exceeded the vertical elevations of solid waste authorized by its solid waste management permit, in violation of §§201 and 610(1), (2), and (4) of the Solid Waste Management Act.

11. The Department failed to prove by substantial evidence that NSL had exceeded the lateral boundaries of its permit.

12. Because of the failure of MW-1-B, NSL has not complied with the terms and conditions of its permit, in violation of §§610(2), (4), and (9) of the Solid Waste Management Act.

13. The Department has failed to prove by substantial evidence that NSL is polluting the groundwater, in violation of the Clean Streams Law and the Solid Waste Management Act.

14. Completed portions of NSL have not been properly graded, covered, and vegetated as required by the permit and 25 Pa.Code §§75.24(c)(2)(xxi), 75.24(c)(2)(xxii), 75.26(o) and 75.26(p) and §§610(2), (4), and (9) of the Solid Waste Management Act.

15. NSL failed to implement an adequate surface water management system, in violation of 25 Pa.Code §75.24(c)(2)(xviii) and §§610(2), (4), and (9) of the Solid Waste Management Act.

16. NSL possessed an erosion and sediment control plan as required by §402 of the Clean Streams Law and 25 Pa.Code §102.4.

17. NSL failed to complete the installation of the gas venting system set forth in its permit, in violation of §§610(2), (4) and (9) of the Solid Waste Management Act.

18. The Department failed to establish through the production of substantial evidence that NSL violated 25 Pa.Code §75.26(e).

19. The savings clause in §1001 of the Solid Waste Management Act, 35 P.S. §6018.1001, preserved 25 Pa.Code §101.9 as it related to non-hazardous solid waste.

20. The Department's imposition of a bonding requirement on NSL under §505 of the Solid Waste Management Act, rather than 25 Pa.Code §101.9, was an abuse of discretion.

21. Because the Department has abused its discretion in several respects in the issuance of this order, the Board will substitute its discretion for the Department's and enter the following order

O R D E R

AND NOW, this 13th day of August, 1987, it is ordered that:

1) The appeals of Louis J. Novak, Sr. and Hilda Novak are sustained.

2) The appeal of NSL is sustained in part and denied in part.

a) NSL may complete the filling of Trench 5;

b) The overfill from Trench 4 shall be removed and properly disposed of in Trench 5;

c) The gas venting system near MW-1-B shall be completed in accordance with the 1982 plans;

d) MW-1-B shall be replaced and monitoring reports shall be submitted to the Department in accordance with the requirements of

the NSL permit;

e) NSL shall properly grade, cover, and vegetate those areas which have been completed;

f) NSL shall fully implement the dual basin surface water management plan; and

g) Within 90 days of the date of this order, NSL shall submit a bond in accordance with 25 Pa.Code §101.9, which bond shall cover the trench fill area of NSL.

3) NSL's obligation to pay the civil penalty assessment imposed by the order is superseded pending a hearing and adjudication on the propriety of the amount of the assessment.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: August 13, 1987

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M. DIANE SMITH
SECRETARY TO THE BO

ASSOCIATION OF PROPERTY OWNERS OF THE HIDEOUT, INC.	:	
v.	:	EHB Docket No. 87-052-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 19, 1987

OPINION AND ORDER

Synopsis

Petition for allowance of an appeal nunc pro tunc is denied where the appellant has failed to allege any fraud or misconduct on the part of the Board which may have misled it into not filing a timely appeal.

OPINION

Appellants, the Association of Property Owners of the Hideout, Inc. (Association), filed an appeal on July 21, 1986, contesting the issuance of a Water Obstuctions and Encroachments Permit No. E64-036. The permit, which authorizes wetland excavation work, had been issued to Edward B. and Joseph W. Strasser by the Department of Environmental Resources' (DER) Office of Resources Management. The parties, in the course of discovery, disagreed on the relevance of an earlier water quality certification issued by DER pursuant to §401(a) of the Clean Water Act, 33 U.S.C.A. §1341(a). Notice of final approval of the 401 certification was published at 16 Pa. B. 3989 (October 18, 1986); the Association did not appeal the certification.

In a letter dated January 26, 1987, counsel for the Association wrote to the Board to inquire whether or not the 401 certification issue

could be treated an an integral part of the current appeal or should be handled in a separate appeal. In the alternative, the Association requested leave to file an appeal nunc pro tunc if the water quality issue was found to be a separate issue not part of the current encroachments permit appeal. The Board responded in a letter dated January 30, 1987, stating that it was the Association's responsibility to decide whether to petition for an appeal nunc pro tunc, and that the letter of January 26, 1987, could serve as such a petition if the Association wished.

In a letter dated February 4, 1987, the Association made a formal request for leave to file an appeal nunc pro tunc, asserting several grounds in support of its request. It argued that the October 18, 1986 publication in the Pennsylvania Bulletin does not constitute proper notice and that a full hearing is necessary at this time to address all of the water quality issues which were not discussed in DER's letters to the Association and are germane to the current appeal.

DER responded to these assertions by arguing that the publication in the Bulletin is proper notice, that the period for filing a timely appeal on the water quality issues is long past, the water quality issues are separate and distinct, and hardship and/or injustice due to an untimely appeal do not warrant an appeal nunc pro tunc. Rostosky v. DER, 26 Pa. Cmwlth Ct. 478, 364 A 2d 761 (1976).

The Board lacks jurisdiction to hear the untimely appeal of the 401 certification issue. An appeal from a final action of DER must be filed within 30 days after the party appellant has received notice of a DER action or within 30 days after such notice has been published in the Pennsylvania Bulletin, whichever comes first. 25 Pa. Code §21.52(a) Eldred Township Planning Commission v. DER and Eastern Industries, 1980 EHB 626.

Initial notice of the request for the 401 water quality certification was published at 16 Pa. B. 3156 (August 23, 1986). DER accepted comments in response to the initial notice, including comments sent by the Association. DER responded specifically to the Association's comments and stated its decision to approve this certification. The public notice of final approval by DER was published at 16 Pa. B. 3989 (October 18, 1986). The Association did not appeal this final action by DER and is precluded from doing so at this time pursuant to 25 Pa. Code §21.52(a), unless it can advance grounds to justify an appeal nunc pro tunc.

Board precedent allows the filing of an appeal nunc pro tunc only where some conduct on the part of the Board misled appellant or where a breakdown in the Board's operations resulted in an untimely filing. Alternate Energy Store, Inc. v. DER, No. 3083 C.D. 1985 (Pa. Cmwlth Ct. June 23, 1987). The Association has failed to establish either of these grounds, so we have no choice but to deny its request.

Member William A. Roth has not participated in the disposition of this request for allowance of an appeal nunc pro tunc because of a relative's ownership of property in the Hideout. After being given an opportunity to object to Chairman Woelfling's deciding the request in a Board letter dated July 16, 1987, none of the parties expressed any objections.

ORDER

AND NOW, this 19th day of August, 1987, it is ordered that the petition of the Association of Property Owners of the Hideout for leave to file an appeal nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: August 19, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Vincent M. Pompo, Esq.
Eastern Region
For Appellant:
John Brooks Randle, Esq.
LEVY & PREATE
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For Permittee:
Scott D. Patterson, Esq.
SAUL, EWING, REMICK & SAUL
Philadelphia, PA

mjf

J. P. MASCARO & SONS, INC. and M. B. INVESTMENTS	:	
v.	:	EHB Docket No. 85-434-M
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 21, 1987

OPINION AND ORDER
SUR
MOTION TO SUPPRESS

Synopsis

Voluntary and knowing consent to a search of a non-hazardous waste facility vitiates any claim that the search is violative of the Fourth Amendment and its safeguards against unreasonable search and seizure.

OPINION

This matter arises from a sequence of events initiated by an April 5, 1985 inspection conducted by the Department of Environmental Resources (DER) pursuant to a complaint that hospital isolated waste in red bags was being stored at the MBE property (hereinafter the storage facility) of J. P. Mascaro & Sons, Inc., Joseph Mascaro, Jr. and Pasquale Mascaro (hereinafter Mascaro). DER confirmed that the red bag waste was being stored improperly at this site, and Mascaro explained at this time that the red bags had come from a hospital, how long they had been handled, and how they were going to be disposed.

The red bags were still present on the site when DER made a follow-up inspection on April 26, 1985, in response to a complaint that a fire had occurred on the site. DER did find recent evidence of a fire in several trucks containing other solid waste.

On June 3, 1985, a notice of violation based upon the inspections of April 4 and 26 was sent to Mascaro.

On June 10, 1985, Joseph Mascaro, Jr. and members of DER met to discuss removal of the red bag waste.

Thereafter, on June 17 and 21, and July 10, 1985, DER conducted inspections of the transfer station property where the red bags were now located. The manner of storage of the red bags at this site was found to be improper, a nuisance, and in violation of the law.

On July 15, 1985, DER conducted an inspection of the transfer station at which time Mascaro informed DER that it had disposed of the red bag waste at an unpermitted facility in Bangor, Pennsylvania.

On September 18, 1985, DER issued a civil penalty assessment to Mascaro for alleged violations relating to the improper storage and disposal of the red bag waste. Mascaro filed a Notice of Appeal to the civil penalty assessment with the Environmental Hearing Board, and a hearing on the matter was held on December 11, 1986. A motion was made by Mascaro at this hearing to suppress portions of the evidence obtained by conducting inspections without a warrant. The parties filed briefs in support of their respective positions. We now proceed to rule on Mascaro's motion.

In its brief supporting its motion to suppress evidence, Mascaro argued that the inspections were warrantless and conducted without consent. Also, Mascaro advanced the argument that warrantless inspections of non-hazardous waste facilities are unconstitutional under the Solid Waste

Management Act because the Act does not set forth reasonable legislative or administrative standards regarding these inspections as held in Commonwealth v. Lutz, ___Pa.___, 516 A.2d 339 (1986).

DER, in its brief in opposition to Mascaro's motion to suppress evidence, argues that since consent was given for these inspections, no warrant was required and that the isolated waste involved here was potentially harmful to humans so that it qualified under the hazardous waste site exception for warrantless inspections.

The Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. ("SWMA") contains a section authorizing warrantless searches where solid waste is generated, stored, processed, treated or disposed, 35 P.S. §6018.608(3). Several recent Pennsylvania court cases have interpreted this section.

In the Commonwealth, DER v. Fiore, ___Pa. Cmwlth.___ 491 A.2d 284 (1984), the Commonwealth Court held that the warrantless inspections permitted by §608(3) of the SWMA were unconstitutional under the Fourth Amendment right against unreasonable searches. In Fiore, DER had been denied access to a hazardous waste site for purposes of inspection and DER sought a preliminary injunction to enjoin the owner from refusing access for these warrantless inspections. The Commonwealth Court held that although Fiore was involved in the highly regulated industry of hazardous waste, the SWMA lacked a predictable scheme of inspections as required by the Supreme Court in Donovan v. Dewey, 452 U.S. 594. (1981). The Dewey case upheld a warrantless inspection under the Mine Safety & Health Act of 1977. The Supreme Court relied on the pervasive regulation of mining, the regularity of inspections and the strong federal interest in protecting persons employed in the mining industry. These factors were sufficiently lacking in the background of the

SWMA for the Commonwealth Court of Pennsylvania to find a warrantless search of a hazardous waste site to be constitutional. Fiore has since been remanded to the lower court for review in light of the Pennsylvania Supreme Court's recent ruling in Commonwealth v. Lutz, ___Pa.,___ 516 A.2d 339 (1986).

In the Lutz case, the Supreme Court of Pennsylvania held that the SWMA authorizes warrantless searches, but the Act does not adequately determine the frequency of searches on commercial property or the circumstances which would result in a warrantless search. The Court was careful to limit its holding to non-hazardous waste facilities. The Court reasoned that since ordinary solid waste does not pose the same danger to public health as hazardous waste, the operator of the site has a greater expectation of privacy and freedom from random regulatory searches. Finally, the Lutz Court ruled that "warrantless searches for ordinary solid waste cannot withstand constitutional scrutiny absent proper adoption by the Department of a flexible inspection schedule or a reasonable definition of the circumstances under which such searches will be conducted." Lutz at 345.[1]

Although DER advanced an argument to the contrary, the isolated waste at issue here is not hazardous waste as defined by Pennsylvania statutes or regulations. This Board is without authority to alter the definition of hazardous waste, as that authority rests with the General Assembly or the Environmental Quality Board. DER also argues that without inspecting the red bag waste, it was impossible to determine whether or not its contents were hazardous. Although this argument was advanced by Justice

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[1] Despite the rulings of our Supreme Court in Lutz, the Board found no mention of a more definite basis or schedule for such inspections in the SWMA regulations recently proposed by the Environmental Quality Board.

Larsen in his dissenting opinion in Lutz,[2] it is not a point adopted by the majority opinion. The search conducted here was illegal according to the Lutz rationale. It involved a non-hazardous waste site and was conducted pursuant to a statute that fails to delineate a policy of routine inspections.

However, where voluntary consent is given to a search, no warrant is required. The testimony of the inspector, Mr. Sheehan, and Mr. Mascaro[3] is conflicting with regard to whether or not consent was ever requested or given. According to the brief of Mascaro, Mr. Sheehan testified that he did not request consent (N.T. 9, 61-2)[4] for the inspections of April 4 and 26. Mr. Sheehan could not recall whether or not he requested consent for the inspections on June 17 and 21 (N.T. 63-5). Mr. Mascaro alleges that no such request was made and further he was never advised of his right to refuse consent for the inspection (N.T. 64). Mr. Mascaro also alleges no request for consent was made for the inspection of July 10 (N.T. 226) while Mr. Sheehan recalls specifically asking Joseph Mascaro for consent on that date. (N.T. 65-7).

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court defined the voluntariness of consent for Fourth Amendment purposes. The issue on appeal in this case was whether permission to search could be deemed

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[2] The Lutz case was vacated and remanded to the Pennsylvania Supreme Court for reconsideration in light of U. S. v. Dunn, 107 S.Ct. 1134 (1987). The issue on appeal is the Pennsylvania Supreme Court's rejection of DER's argument that the search should have been upheld under the open fields exception to the Fourth Amendment.

Supplemental briefs were requested regarding the ramifications of the recent Supreme Court ruling in U. S. v. Dunn. One brief, from DER, was received. There is not sufficient evidence on the record to find that this case comes within the purview of the open fields exception as explained in U. S. v. Dunn.

[3] All references herein to Mr. Mascaro are to Mr. Joseph Mascaro.

[4] "N.T." refers to the notes of testimony from the December, 1986, hearing.

voluntary in the absence of an express warning that the suspect had a right to refuse that permission. The Supreme Court rejected petitioner's contention that the right to be free from an unreasonable search and seizure was analogous to the Fifth Amendment provision against self-incrimination and the Sixth Amendment right to counsel and, therefore, it found that no Miranda warning prior to the consensual search was required. The case distinguished the rights that protect a fair criminal trial from the rights guaranteed under the Fourth Amendment.

The Schneckloth case instructs that the test for voluntariness under the Fourth Amendment is a question of fact to be determined from the totality of all the circumstances. Pennsylvania courts have held that some of the factors to be considered in determining the voluntariness of consent are whether the accused has assisted in the search, and the education, intelligence and experience of the person giving consent. Commonwealth v. Markman 467 A.2d. 336, 320 Pa. Super. 304. The consent has been deemed voluntary even when conducted by a police officer who misrepresents his identity and purpose. Markman, at 341. Commonwealth v. Morrison, 418 A.2d 1378, 275 Pa.Super 454.

There has been no evidence presented that Mr. Mascaro has ever denied DER entry onto his properties for purposes of inspection, nor has he ever asked them to leave the property. (N.T.17-18) Mr. Mascaro's waiver was a knowing and intelligent one. Mascaro has known and demonstrated through both its course of conduct and testimony that it was well aware of the purpose of the inspectors' visits. The inspections have been performed by the same inspector for years. (N.T.14-15). Mr. Mascaro's testimony was illustrative of his knowledge about the inspections. He was extremely cooperative throughout the course of the inspections. On the first visit of April 4,

1985, Mr. Mascaro told the inspector where the red bag waste had come from, how long the operation had been collecting such waste and where it would be disposed. (N.T.34-5). Again, at the meeting with DER officials on June 10, 1985, Mr. Mascaro cooperated in trying to find a place of ultimate disposal for this waste. Additionally, throughout the inspections, Mr. Mascaro or his representatives signed and received copies of the inspection reports and any notices of violation. Each report detailed the purpose, findings and scope of the inspection. There were six such inspections during a three month period, and it would be fair to deduce that Mascaro knew the purposes of these frequent inspections.

In Markman, the Pennsylvania Supreme Court decided a case very similar to this one. In that case fire inspectors sought entry to a previously burned building for investigative purposes. The owner of the building was cooperative, entered the premises with the officials and freely answered their questions. The testimony showed she was anxious to learn the cause of the fire and wanted to help with the investigation. The court found no evidence that the consent was the product of trickery or deceit. The court also held there "was nothing to indicate that she would have denied access to the fire officials even if she knew that she did not have to give consent." Markman at 341. In the instant proceeding, Mr. Mascaro was also cooperative and anxious to find a suitable way to dispose of the waste. Again, there was nothing to indicate he would have denied access to DER even if he knew he did not have to consent. Mr. Mascaro's conduct examined in light of his testimony, experience, knowledge of routine inspections and cooperation with DER in its inspections demonstrates that the consent was voluntary under the totality of all the circumstances.

Because a knowing and voluntary consent operates as a waiver, there

is no requirement that the search be made pursuant to a warrant. Schneckloth 412 U.S. 218. The helpful and open conduct of Mr. Mascaro demonstrates his voluntary consent. Mr. Mascaro was very familiar with the purpose of the inspection. He never objected to the frequent and repeated inspections during this three month period, and he exhibited a spirit of cooperation by providing DER with honest and thorough answers regarding the location, storage and disposal of the red bag waste.

The Board finds Mr. Mascaro's words and actions, when viewed in the totality of the circumstances, to be evident of voluntary consent, thus rendering moot very persuasive arguments on the constitutional deficiencies of Section 608 of the SWMA as it now stands without any Department policy or regulation relating to routine inspections for non-hazardous waste sites.

ORDER

AND NOW, this 21st day of August, 1987, it is ordered that:

1. The motion of Mascaro to suppress evidence obtained as a result of the April 4, April 26, June 17, June 21 and July 10 inspections by the Department of Environmental Resources is denied;

2. Mascaro shall file its post-hearing brief in this matter on or before September 21, 1987; and

3. The Department shall file its brief on or before October 30, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: August 21, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Eastern Region
For Appellant:
William F. Fox, Jr., Esq.
FOX, DIFFER, CALLAHAN, ULRICH & O'HARA
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HARRISBURG, PENNSYLVANIA 17101
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THEODORE GENOVESE II :
:
v. : EHB Docket No. 87-066-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued August 21, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss is denied; the Board has jurisdiction to hear appeals of Department of Environmental Resources compliance orders. The substance of an appellant's notice of appeal, and appellants's subsequent clarification, show that the appealed from action is a compliance order. Appellant's error of including with his notice of appeal a copy of a proposed civil penalty assessment instead of the compliance order does not warrant dismissal.

OPINION

On February 23, 1987 Theodore Genovese II (Genovese) filed a notice of appeal with the Board. At the outset of this appeal, there is a dispute between Genovese and the Department of Environmental Resources (DER) as to what DER action in question.

DER contends that Genovese is appealing a proposed civil penalty

assessment. On June 10, 1987, DER filed a motion to dismiss this appeal, asserting that a February 6, 1987 proposed civil penalty assessment is not appealable and cites several Commonwealth Court and Board cases in support of its proposition. It concludes that the Board lacks jurisdiction and requests that the Board dismiss the appeal.

Genovese, on the other hand, responds that he is appealing a January 22, 1987 compliance order, not the proposed civil penalty assessment. In his July 1, 1987 answer to the motion, Genovese attributes the confusion as to the action appealed from to a clerical error at the time the appeal was filed, namely, that a copy of the proposed assessment was attached to his notice of appeal instead of the compliance order.

In his notice of appeal, Genovese states the following with regard to the action to be reviewed, the DER official involved and the project location:

> Failure to provide adequate treatment facilities with automated netralization [sic] capabilities.
>
> Department Officials: Gildo Santella, M.C.I.
>
> Location: Springhill Township, Fayette County, Pennsylvania. (located at a tributary prior to entry into road culvert at township road.

Genovese also stated that he received the action on January 22, 1987.

In his answer to the motion, Genovese included a copy of Compliance Order No.87G041, dated January 22, 1987. Except for the DER official, the statements in Genovese's notice of appeal, supra, comport with the substance of the compliance order.

The confusion in this matter originated when Genovese attached to his notice of appeal, not the compliance order, but a February 6, 1987 letter from George Hartenstein, in which DER proposed a $1,000 civil penalty assessment.

Hartenstien's letter contains only a reference to Compliance Order No. 87G041, issued on January 22, 1987. The letter makes no mention of any specific violations, the on-site location, or the DER official who signed the compliance order.

On June 8, 1987, Genovese filed with the Board a letter which states, in relevant part, as follows:

> This correspondence is designed to clarify the appeal filed on behalf of Mr. Genovese on February 21, 1987. On the aforesaid date we filed an appeal from a Compliance Order No. 87G041, a copy of which is enclosed for your information.
>
> In reviewing the Pre-Hearing Order No. 1-WR issued by your office we noticed that your had made reference to a February 6, 1987 letter regarding a Civil Penalty Assessment. So that there is no confusion concerning the fact that we are appealing from the Compliance Order No. 87G041 on behalf of Mr. Genovese would you please make sure that future documents reflect the appeal of the Compliance order as above stated.

The Board finds that Genovese, in fact, is appealing the January 22, 1987 compliance order. The Board has jurisdiction to hear appeals of DER compliance orders. 71 P.S. §510-21

While the Board sees no confusion as to what action is being appealed, Genovese's errors are to blame for this controversy. First, Genovese erred by attaching the wrong DER correspondence to his notice of appeal. Second, Genovese's June 8, 1987 letter shows no indication that a copy was served upon DER. Had Genovese exercised due care in preparing his appeal documents and adhered to normal service requirements, 25 Pa.Code §21.32(a), this issue may have never arisen in the first place. Nonetheless, we do not see Genovese's errors rising to such significance that the harshness of dismissal is justified. Accordingly, we will deny DER's motion to dismiss this appeal.

ORDER

AND NOW, this 21st day of August, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss this appeal is denied.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: August 21, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Timothy J. Bergere, Esq.
Donna J. Morris, Esq.
Western Region
For Appellant:
D. Keith Melenyzer, Esq.
Virginia L. Desiderio, Esq.
MELENYZER & TERSHEL
Charleroi, PA

KENT COAL MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-433-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	Issued September 3, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

Appellant's failure to appeal a Department of Environmental Resources (DER) compliance order which cited appellant for violations arising under the Surface Mining Conservation and Reclamation Act (SMCRA) bars appellant's challenge to the order's underlying factual or legal basis in this appeal of a civil penalty assessment. The legislative history of the controlling SMCRA section, as well as the rules of statutory construction, demonstrate there was no intent that an exception be created to the doctrine of administrative finality.

OPINION

On September 2, 1986, this matter was initiated by the filing of a notice of appeal by Kent Coal Mining Company (Kent) from an August 4, 1986 civil penalty assessment (assessment) in the amount of $420.00 by the Department of Environmental Resources (DER), pursuant to Section 18.4 of the Surface Mining Construction and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.. The assessment stemmed from alleged violations of DER's blasting regulations at Kent's surface mining operation in Young Township, Indiana County.

On February 25, 1987, DER filed a motion to limit issues (motion), asserting that Kent's failure to appeal Compliance Order 85-E-420-S (CO), which is the basis for DER's assessment, now precludes the challenge of the factual basis of the civil penalty assessment in this proceeding. Consequently, DER alleges the only issue before the Board is the reasonableness of the assessment. Kent, on the other hand, contends that the language of Section 18.4 of SMCRA, 52 P.S. §1396.22, as well as 25 Pa. Code §86.202(a), authorizes Kent to challenge the underlying order, as well as the amount, whether or not it previously appealed the CO.

The Board's holding in this matter hinges on whether the language of SMCRA alters the well-established doctrine of administrative finality. The Board has consistently held that unappealed COs become final DER orders, the basis of which cannot be subject to attack by appellants in later appeals involving identical issues of fact and law. See Dithridge House Association v.DER, EHB Docket No. 86-550-R (Opinion and order issued June 17, 1987); James E. Martin v. DER, EHB Docket No. 86-567-R (Opinion and order issued March 9, 1987).

The section of SMCRA most relevant to this inquiry is Section 18.4,

52 P.S. §1396.22., which states in pertinent part:

> In addition to proceeding under any other remedy at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department may issue a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was willful... The person or municipality charged with the penalty...[has]... thirty (30) days to pay the proposed penalty in full, or if the person or municipality wishes to contest the amount of the penalty or the fact of the violation..."
>
> (Emphasis added)

Kent urges us to construe this language to grant an opportunity to appeal "the fact of the violation" at the time of a civil penalty assessment, even when the underlying CO was not timely appealed. This would represent a definite departure from the Board's generally rigidly applied doctrine of administrative finality.

One of Kent's arguments is that the federal Office of Surface Mining (OSM) rules and regulations permit an appeal of the facts underlying a civil penalty assessment, even if an earlier notice of violation or cessation order involving the same facts were not appealed. 30 CFR §4.1163. Kent's reliance on this regulation is not persuasive. Section 4.1163 pertains to the hearing and appeal procedure where OSM, and not a state, is the program authority. More on point to the issues on hand are the federal regulations at 30 CFR §840.1, et seq., which pertain to the minimum requirements with which a state must comply to administer the federal SMCRA. The OSM regulation, particularly 30 CFR §840.13(d), which provides that:

> "Nothing in the Act or this part shall be construed as eliminating any additional enforcement rights or procedures which are available under state law to a state regulatory authority..."

specifically preserve state remedies and procedures.

The obvious ambiguity present in Section 18.4 of SMCRA, supra, necessitates an investigation into the legislative history of this section to properly construe its meaning. Although, the Section 18.4 civil penalty appeal process on its face appears to contravene the administrative finality doctrine, both the Pennsylvania House and Senate Journals are devoid of any mention that Section 18.4 of SMCRA, 52 P.S. §1396.22, was intended to create an exception to the administrative finality rule. There was virtually no discussion pertinent to the civil penalty assessment appeal procedure.[1] In fact, this section passed in both the House and Senate without any discussion at all.

The rules governing statutory construction under Pennsylvania law clearly point to the upholding of the administrative finality doctrine under SMCRA. Section 1922 of the Statutory Construction Act, 1 Pa. C.S.A. §1922, states that the General Assembly never intends an absurd result in the application of its statutes. The Board believes that it would be absurd to construe SMCRA as having been drafted with two separate appeal structures - one which applies to orders leading to civil penalty assessments and one which applies to orders in circumstances in which civil penalties are not assessed. Administration of such a bifurcated structure would be impossible, since a compliance order would be final only if DER never assessed a civil penalty.

---

[1] HB 1176 at Legislative Journal-House, September 24 and 26, 1984, October 1 and 3, 1984, at Vols. 56-70, pps. 1912, 1984, 2036, 2164; HB 1176 Legislative Journal-State, November 20, 1984 and December 19, 1984 at Vol. III, pps. 2952 and 30245

Finally, Section 18.4 of SMCRA must be construed in pari materia[2] with §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 et seq. Section 1921-A(c) of the Administrative Code provides that:

> "...no such action or the Department [of Environmental Resources] adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board..."
>
> 71 P.S. §510-21(c)

Reading Section 1921-A(c) of the Administrative Code and Section 18.4 of SMCRA in pari materia, one must conclude that the DER CO became final thirty days after its issuance and is not subject to later attack. Kent had the opportunity to challenge the CO at the time of its issuance and failed to do so. It cannot resurrect its appeal right at this time. Consequently, DER's motion is granted and the only issue Kent may challenge in this appeal is the amount of the civil penalty assessment.

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[2] 1 Pa. C.S.A. §1932 reads as follows:

a) Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things.

b) Statutes in pari materia shall be construed together, if possible, as one statute.

ORDER

AND NOW, this 3rd day of September 1987, it is ordered that the Department of Environmental Resources' motion to limit issues is granted.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: September 3, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Katherine S. Dunlop, Esq., and
Joseph K.Reinhart, Esq.
For Appellant:
Thomas C. Reed, Esq.
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CONCERNED RESIDENTS OF THE YOUGH	:	
	:	
v.	:	EHB Docket No. 86-513-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	
	:	
COUNTY OF WESTMORELAND	:	
	:	
v.	:	EHB Docket No. 86-515-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	Issued September 3, 1987

OPINION AND ORDER
SUR
MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Synopsis

Permittee's motions for partial summary judgment are granted. The fact that discovery may not be complete does not preclude summary judgment when the prerequisites for summary judgment are met. Where a permit authorizes only the disposal of non-hazardous waste at a facility, DER did not abuse its discretion by not applying siting criteria which are applicable to hazardous waste facilities. Whether a facility is a hazardous or a non-hazardous waste facility is determined by its permitted uses, not the criteria to which it is sited or designed. That the facility may in the future be approved for use as a hazardous waste facility is an issue not before the Board.

OPINION

These appeals are from the Department of Environmental Resources' (DER) issuance of certain permits authorizing the operation of a residual waste facility by Mill Service, Inc. (Mill Service). Solid Waste Permit No. 301071 (solid waste permit) was issued 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., and the rules and regulations adopted thereunder, and authorized the construction and operation of a facility known as Impoundment No. 6 at Mill Service's Yukon facility located in South Huntington Township, Westmoreland County. DER also issued Water Obstructions and Encroachment Permit No. E65-164, Dam Safety Permit No. D-65-153 and Earth Disturbance Permit No. (65) 65-84-8-2 for the facility to Mill Service.

On September 4, 1986, the Concerned Residents of the Yough, Inc. (CRY) appealed the issuance of the solid waste permit and the related permits at Docket No. 86-513-R. On September 5, 1986 the County of Westmoreland (County) also appealed the issuance of these permits at Docket No. 86-515-R.

On April 13, 1987, Mill Service filed nearly identical motions for partial summary judgment at both dockets. The County responded to the motion on May 4, 1987 and CRY responded on June 3, 1987. Because the motions deal with common issues relating to the solid waste permit, the Board will decide them in this one opinion and order.

In its motions, Mill Service asserts that three of the issues raised by CRY and the County in their respective appeals relate to siting criteria applicable only to hazardous waste treatment and disposal facilities, despite the fact Impoundment No. 6 is a non-hazardous residual waste facility. Mill Service maintains that there is no genuine issue of fact as to the

non-hazardous nature of the waste to be disposed of at this facility and that the siting criteria regulations, specifically 25 Pa.Code §§75.442(g), 75.444(b) and 75.421(a)(3), do not apply to Impoundment No. 6. It concludes that it is entitled, in each appeal, to judgment as a matter of law.

CRY's answer to Mill Service's motion is completely unresponsive, alleging a violation of §2 of the Act of June 25, 1913, P.L. 555, as amended, 32 P.S. §682, which was repealed in 1979[1] and contending that the site of Impoundment No. 6 is a wetland.

The County argues in its response that the Board is without authority to render summary judgment and the summary judgment motion is premature because discovery is still ongoing. The County also contends that there are issue of material fact because of Mill Service's statement that it had complied with the siting criteria for hazardous waste facilities, and because presented no facts in the motion to show that Impoundment No. 6 is not and will never be a hazardous waste facility.

Contrary to the County's assertions regarding the Board's ability to render summary judgment or its appropriateness, 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 of material fact and the moving party is entitled to summary judgment as a matter of law." West Pine Construction Company and Allen Reber and Santino Angelo, Intervenors v. DER, EHB Docket No. 86-236-W (Opinion and Order issued July 31, 1987), quoting Summerhill Borough v. DER, 34 Pa.Cmwlth. 574, 578, 383 A.2d 1320, 1322 (1978). When these conditions are met, summary judgment may be rendered, even if discovery is not

[1]The Act of October 23, 1979, P.L. 204, No. 70.

completed. However, in reviewing a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party. Herskovitz v. Vespico, 238 Pa.Super. 529, 362 A.2d 394 (1976).

In deciding this motion, our task is to determine the existence of issues of fact, which in this case, relate to whether the facility is a hzardous or non-hazardous waste disposal facility. Then, in light of our resolution of the factual issues, we must determine whether the siting criteria apply to the Mill Service facility.

CRY and the County assert that Impoundment No. 6 should be considered a hazardous waste facility, either because the waste disposed of at the facility is hazardous or because Mill Service has designed the facility to meet standards for the design of hazardous waste facilities. We must look to the terms and conditions of the solid waste permit to resolve this question. Paragraph 2 states, in relevant part, that ". . . [t]his permit authorizes the disposal of (1) lime stabilized waste pickle liquor sludge that does not exhibit any of the hazardous waste characteristics and (2) non-hazardous residual waste." Paragraph 2 also explicitly states that ". . . [d]isposal of hazardous waste defined by Pa. Chapter 75.261 is prohibited within Impoundment No. 6 . . ." Paragraph 3(a) of the solid waste permit generally approves for disposal, in addition to lime stabilized pickle liquor, non-hazardous waste water treatment plant residues, grinding wastes and baghouse dusts.

25 Pa.Code §75.261 provides numerous criteria for identifying and listing hazardous wastes. In particular, §75.261(b)(3)(ii) provides, in relevant part, that:

> ". . . [w]aste pickle liquor sludge generated by lime stabilization of spent pickle liquor from the iron and steel industry (SIC codes 331 and 332) is not a hazardous waste even though it is generated from the treatment of a hazardous waste, unless it exhibits one or more of the

> characteristics of a hazardous waste identified in subsection (g) [relating to characteristics of hazardous waste]."

The Board finds that the wording of Paragraphs 2 and 3, with respect to lime stabilized pickle liquor sludge, comports perfectly with 25 Pa.Code §261(b)(3)(ii). Further, the permit explicitly specifies that only non-hazardous residual wastes may be disposed of in Impoundment No. 6. The Board can only conclude that Impoundment No. 6 is a non-hazardous residual waste disposal facility.

The County's assertion that Impoundment No. 6 is a hazardous waste facility because Mill Service designed it to conform to the criteria in Subchapter F is not relevant to the resolution of the question now before the Board. The nature of the facility, i.e., whether it is hazardous or non-hazardous, is determined solely by the use authorized through the solid waste permit, not the standards to which is was designed or sited. The question of whether Mill Service might, in the future, convert Impoundment No. 6 to a hazardous waste facility is also irrelevant, since that would require DER's approval under the SWMA. We will not take up hypothetical questions.

Because we have found that, under the permit, Mill Service is authorized to dispose of only residual wastes, there are no material facts in dispute. We now turn to the question of whether Mill Service is entitled to judgment as matter of law on the question of the applicability of the hazardous waste siting criteria in Subchapter F, Siting Hazardous Waste Treatment and Disposal Facilities, 25 Pa.Code §75.401 et seq. The provisions of Subchapter F were adopted by the Environmental Quality Board on September 21, 1985, pursuant to §§104, 105 and 507 of the SWMA, 35 P.S. §6018.104, 6018.105 and 6018.507. Section 75.411 states, in relevant part, that "[t]he requirements of this subchapter apply to siting of hazardous waste treatment

and disposal facilities . . ." (emphasis added). The Board will not ignore the plain language of §75.411 by applying it to non-hazardous waste facilities. The Board finds that there was no abuse of discretion on the part of DER in not applying these hazardous waste siting regulations to Impoundment No. 6. Accordingly, Mill Service is entitled to judgment as a matter of law on the issues raised by CRY in Paragraphs 6, 7 and 8 and the County in Paragraphs 7, 8 and 9 of their respective appeals.

ORDER

AND NOW, this 3rd day of September, 1987, it is ordered that Mill Service, Inc.'s motion for partial summary judgment on the issues in Paragraphs 6, 7 and 8 in the appeal of the Concerned Residents of the Yough, Inc. and Paragraphs 7, 8 and 9 in the appeal of the County of Westmoreland is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: September 3, 1987

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MAXINE WOELFLING, CHAIRMAN

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SECRETARY TO THE BOA

LAUREL RIDGE COAL, INC. :
:
v. : EHB Docket No. 87-140-R
:
COMMONWEALTH OF PENNSYLVANIA, : Issued September 3, 1987
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A proposed assessment of civil penalty is not an appealable action.

O P I N I O N

Laurel Ridge Coal, Inc. (Laurel Ridge) initiated this matter on April 13, 1987, when it filed a notice of appeal from a Department of Environmental Resources' (DER) proposed assessment of civil penalty. On July 20, 1987, DER filed a motion to dismiss on the grounds that the Board has no jurisdiction in this matter because a proposed assessment is not an appealable action. By letter dated July 22, 1987, the Board advised Laurel Ridge that an answer to the motion was due by August 11, 1987. To date, no response has been received.

The motion to dismiss alleges that Laurel Ridge operated a surface mine, known as the Warrick Strip, in Springfield Township, Fayette County, and that, by letter dated March 23, 1987, DER advised Laurel Ridge that it was proposing a $660 civil penalty assessment for certain violations at the

Warrick Strip. Since Laurel Ridge failed to respond to DER's motion, we will treat all these allegations as admitted by Laurel Ridge. 25 Pa.Code §21.64(d).

In K.M.& K. Coal Company v. DER, 1986 EHB 692, the Board held that a proposed assessment of civil penalty was not an appealable action. See also 25 Pa.Code §21.2(a). As in K.M.&K Company, the proposed assessment here imposes no liabilities or obligations on Laurel Ridge; Laurel Ridge is free to accept or reject DER's proposal. Consequently, the Board has no jurisdiction because there is no appealable action.

ORDER

AND NOW, this 3rd day of September, 1987, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted and the appeal of Laurel Ridge Coal, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: September 3, 1987

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John A. Martucci
LAUREL RIDGE COAL, INC.
Charleroi, PA

cmp

LAUREL RIDGE COAL, INC. :
:
v. : EHB Docket No. 87-173-R
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued September 3, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal of a civil penalty is granted where the appellant failed to post the required appeal bond or to prepay the penalty as required by Section 18.4 of the Surface Mining Conservation and Reclamation Act.

O P I N I O N

On April 30, 1987, Laurel Ridge Coal, Inc. (Laurel Ridge) filed a notice of appeal from a $200 civil penalty assessment by the Department of Environmental Resources (DER). DER took its action pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq and §605(b) of the Cleans Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 52 P.S. §691.1, et seq. The alleged violations leading to the assessment took place at Laurel Ridge's Pleva Strip operation in Perry Township, Fayette County.

On July 24, 1987, DER filed a motion to dismiss this appeal. DER

asserts that Laurel Ridge, while filing its notice of appeal within 30 days of receipt of the assessment, nonetheless failed to post the required appeal bond or prepay the assessment, as required by §18.4 of SMCRA. DER, citing Boyle Land and Fuel Company v. Commonwealth, EHB, 82 Pa.Cmwlth. 452, 475 A.2d 928 (1984), aff'd, 507 Pa. 135, 488 A.2d 1109 (1985) and Everett Stahl v. DER, 1984 EHB 825, concludes that the Board lacks jurisdiction to hear this appeal and requests that it be dismissed.

Laurel Ridge, in its answer, asserts that whatever violations may have led to the civil penalty assessment are due to the actions of a third party. It further asserts that these facts were not known when the order was written and requests that the violation and fine be reversed.

In reviewing a motion to dismiss, the record shall be viewed in a light most favorable to the non-moving party. Heskovitz v. Vespicco, 239 Pa.Super. 529, 362 A.2d 394 (1976) Any doubts must be resolved against the movant.

Section 18.4 of SMCRA, 52 P.S. §1396.22, provides, in relevant part, as follows:

> ". . . The person . . . charged with the [civil] penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person . . . wishes to contest either the amount or the fact of the violation, forward the proposed amount to the secretary [of DER] . . . Failure to forward the money or the appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

Section 605 of the CSL, 35 P.S.§691.605, contains almost identical language. The Board has no jurisdiction to hear appeals of civil penalty assessments where the appellant has failed to perfect its appeal by prepaying the

assessment or posting an appeal bond. within the 30 day appeal period. Boyle Land and Fuel, supra; Everett Stahl, supra.

Laurel Ridge completely ignored the jurisdictional question raised in DER's motion. It in no way disputes DER's assertion that it did not perfect its appeal by prepaying the assessment or filing an appeal bond. Accordingly, the Board has no choice but to grant DER's motion and dismiss this appeal.

O R D E R

AND NOW, this 3rd day of September,1987, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Laurel Ridge Coal, Inc. is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: September 3, 1987

cc: **Bureau of Litigation**
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For Appellant:
John A. Martucci
LAUREL RIDGE COAL, INC.
Charleroi, PA

YORK COUNTY SOLID WASTE & REFUSE AUTHORITY :
v. : EHB Docket No. 87-019-W
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: September 8, 1987
and :
MODERN TRASH REMOVAL OF YORK, INC., Permittee:

OPINION AND ORDER

Synopsis

There is no legal requirement that a permit for a private landfill be consistent with a proposed county solid waste plan. The Department of Environmental Resources and the Permittee are entitled to summary judgment as a matter of law where there are no material facts in dispute and the Department has acted within the bounds of its authority and discretion in approving a landfill permit modification.

OPINION

This matter was initiated on January 12, 1987, with the filing of a notice of appeal by the York County Solid Waste and Refuse Authority (Authority). The Authority challenged the Department of Environmental Resources' (Department) issuance of a permit modification 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), to Modern Trash Removal of York, Inc. (Modern) to provide for the upgrade of an unused 21 acre portion of Modern's landfill

in Windsor and Lower Windsor Townships, York County. The Authority alleged that the Department failed to weigh the environmental and economic implications of the permit modification that the Authority believes are required to be considered under the SWMA; specifically, the effect of expanding a landfill site on York County's proposed solid waste plan which was designed to encourage resource recovery facilities. Second, the Authority complains that the Department failed to restrict Modern's permit so that the landfill can only receive municipal waste from those municipalities not committed to using the proposed resource recovery facilities. Finally, the Authority contends the Department abused its discretion in refusing to hold a public hearing on the permit modification application.

Modern filed a motion to dismiss and/or for summary judgment on March 23, 1987. Modern contended in its motion that the Authority's notice of appeal includes no grounds to overturn the grant of the permit modification, since there is no legal requirement that a private facility permit be consistent with a proposed county solid waste plan or that the permit be conditioned on the permittee's support of resource recovery. Modern explains that the restrictive condition prohibiting Modern from accepting waste committed to a county resource recovery facility is still in effect in accordance with the original permit issued by the Department. Finally, Modern maintains the Department properly exercised its discretion in deciding not to hold a public hearing on this matter.

The Authority filed its response to the motion on April 27, 1987. The response reiterated the objections made in the initial notice of appeal.

On April 22, 1987, the Department filed its response to Modern's motion supporting the arguments put forth by Modern.

The Board may render a summary judgment where there is no genuine

issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and order issued March 19, 1987).

The material facts in this case are as follows. The original solid waste permit (No. 100113) authorizing the construction of a 75 acre natural renovation landfill was issued by the Department on August 17, 1978. A Consent Order and Agreement (CO&A) entered into between the Department and Modern on September 20, 1984, required two modifications to the original permit. The Authority did not appeal the terms of the CO&A.

In fulfillment of the conditions of the CO&A, on July 8, 1985, Modern applied to the Department to modify the landfill design for the unused 21 acres of the landfill to provide for the installation of double synthetic liners and leachate collection facilities and to modify the original contours to allow for vertical expansion. Notice of this application was published at 15 Pa. Bull. 3850 (October 26, 1985).

York County submitted comments on October 9, 1986, recommending that the application be approved subject to procedures for supervision, inspection and quality control. The Authority did not submit comments.

Only two requests were made for a public hearing, according to both parties. On November 25, 1986, Representative Greg Snyder submitted a written request for a hearing on Modern's permit modification. About the same time, the Department received an oral request for a hearing from Mary Jane Rodkey. The Authority never requested a hearing. The two requests that were made were received over one year after the submission of the application to modify the permit.

During this period, York County prepared its draft Solid Waste

Management Plan (draft plan), which was completed in December, 1985. The plan proposes the construction of two incinerators with modifications to allow for the recovery of energy in the form of steam or electricity. This draft plan relies on the existence of the upgraded 21 acre portion of the Modern landfill as an integral part of the County's waste disposal scheme during the interim period while the incinerators are completed. Although the parties disagree on the degree of necessity for the use of Modern's landfill, the County plan does incorporate it. The county resource recovery facility has a target completion date of 1990. In support of its interim plan, the draft plan concludes that if Modern performs all of the proposed remedial actions, it will be an environmentally sound method of disposal and provide long term capacity for all of the County's solid waste. The Authority is required to cease operation of its landfill as a primary disposal facility by 1990 pursuant to a Stipulation, Settlement Agreement and Supplemental Consent Decree entered by the Commonwealth Court in Commonwealth of Pennsylvania, DER et al. v. York County Solid Waste and Refuse Authority, No. 1451 C.D. 1984. If the proposed resource recovery facility is not operational by the 1990 target date, Modern contends its landfill will become a critical and necessary alternative for solid waste disposal in York County.

This draft plan is not final. Only 41 of the 72 municipalities within the County have approved the plan. The Department notified the County in a letter of December 9, 1986, that the draft plan lacks many of the prerequisites for final approval. After a plan receives preliminary approval, the plan must be amended as required by the Department and all necessary ordinances, agreements and other implementing documents must be adopted by each of the municipalities necessary for the implementation of the plan. 25 Pa.Code §75.11(e). The Department is not yet in receipt of these

requirements and it has not issued final approval.

The remaining issue of fact is the existence of a condition prohibiting Modern from taking waste from any municipality that has agreed to use the Authority's resource recovery facility and landfill. The original permit issued in 1978 contains the following provision under Condition No. 5:

> You are prohibited from disposing and/or processing solid waste at your facility from municipalities whose official solid waste management plan designates another facility for receipt of their waste.
> (p.2)

There are no material facts in dispute. The parties agree that a draft county solid waste plan exists and use of Modern's landfill is a part of this plan. The plan has not received final approval from the Department. Only two requests were made for a public hearing over one year after the permit application was filed, and neither of these requests was made by the Authority.

Both the Department and Modern are entitled to summary judgment as a matter of law.

First, the Authority avers that the issuance of the permit modification was unlawful because it was inconsistent with the draft York County Municipalities Solid Waste Management Plan update of December, 1985, due to its failure to evaluate the effect of the modification on resource recovery. The Authority also contends the modification will allow activity contrary to both the local County draft plan and the SWMA. The Authority alleged that the draft plan proposes to encourage resource recovery and decrease the use of landfilling, both of which are goals of the SWMA. And yet, the Authority never appealed the CO&A which authorized the expansion and

upgrading of Modern's landfill. The Authority also made use of Modern's landfill an integral part of its own solid waste draft plan.

The Authority repeatedly uses as its basis for argument its own draft plan as it points to the inconsistencies of the permit modification. This rationale for denying the permit fails for several reasons. First, the SWMA contains no requirement that the permits be consistent with the County plan.[1] Even if it did, the draft plan is not yet final pursuant to Section 201 of SWMA and 25 Pa.Code §75.11(e). Hence, the argument that the permit is inconsistent with the draft plan is, among other things, premature since the plan has not earned final approval. And, the Department is neither required nor authorized to make a permit decision on the grounds that a permit does not encourage the implementation of resource recovery. Again, if the Authority feels so strongly about the Department's obligation to consider the environmental and economic implications of the failure to encourage resource recovery and discourage the increased use of landfills in accordance with the aims of the SWMA, it is curious that it did not appeal the CO&A which authorized the expansion and upgrade of Modern's landfill.

The next objection is that the Department improperly denied requests for a public hearing regarding Modern's application. The Authority explained that a hearing would have provided a forum to evaluate the implications of expanded landfilling for resource recovery facilities and policies favoring resource recovery. The Department responded by claiming the two requests it

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[1] In contrast, consistency is made manifest as a requirement for issuance of water quality management permits by 25 Pa.Code §91.31(b)(2). This section provides that no water quality management permit be issued unless the project authorized by the permit is included in and conforms to a comprehensive program of water management and pollution control, such as an official plan for sewage systems which is required by 25 Pa.Code, Chapter 71 (relating to administration of the Sewage Facilities Act).

received were made at the last minute and to hold a hearing under those circumstances would have caused prejudice, unfairness and unnecessary delay. The Department further points out that the Authority did not ever request a public hearing. Public hearings on municipal waste permits are provided only as a matter of DER policy, leaving the decision of whether or not to hold a hearing entirely at the Department's discretion. For the reasons stated by the Department, the Board finds that the Department appropriately exercised its discretion in refusing to hold a hearing.

Finally, the Authority objects to the Department's failure to condition Modern's permit to prohibit Modern from accepting municipal waste from a municipality committed to using the York County Resource Recovery facility. Both the Department and Modern allege that the permit already includes this condition. The original permit was not amended by the two modifications in 1986 and requires that the landfill accept waste only from municipalities whose DER approved official plans do not designate another operating facility. If any "poaching" of another municipality's waste occurs, it is a violation of Modern's permit and remedies exist under the SWMA to address it.

Since there are no material facts in dispute and the Department has acted on the Authority's permit application within the bounds of its authority and discretion in approving Modern's modification permit, both the Department and Modern are entitled to judgment as a matter of law and a summary judgment in their favor will be granted by the Board.

O R D E R

AND NOW, this 8th day of September, 1987, it is ordered that the motion of Modern Trash Removal of York, Inc. to dismiss and/or for summary judgment is granted and the appeal of the York County Solid Waste and Refuse Authority is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: September 8, 1987

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M. DIANE SMITH
SECRETARY TO THE BOARD

SWATARA TOWNSHIP AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 86-674-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 21, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS
and PETITION TO INTERVENE

Synopsis

A letter merely notifying a township that any future planning module proposals will not be accepted until the current sewage overloading is alleviated, absent any actual rejection of a proposal, is not a final action or adjudication and is not an appealable action.

OPINION

On November 20, 1986, the Department of Environmental Resources (Department) notified the Harrisburg Sewerage Authority (Harrisburg) that it had determined that Harrisburg's sewage treatment plant would become overloaded within five years. The first paragraph of this letter directed Harrisburg to submit to the Bureau of Water Quality Management a written plan outlining the steps it would take to prevent the overload pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §690.1 et seq., and the rules and regulations adopted thereunder at 25 Pa. Code 94.22. The second paragraph of this letter advised that the Bureau of

Water Quality Management would no longer accept additional planning modules for projects tributary to the overloaded Spring Creek Interceptor upstream of manhole 205 located in Swatara Township until bids for construction have been awarded to eliminate the surcharging problems. It also requested that representatives of Lower Paxton, Susquehanna, and Swatara Townships and/or their sewage authorities meet with the Department. Copies of this letter were sent to the township authorities and boroughs which contribute sewage to Harrisburg. Swatara Township (Township) filed an appeal of paragraph two of that letter with the Environmental Hearing Board on December 18, 1986, and the Harrisburg Sewerage Authority filed a petition to intervene on January 23, 1987.

The Department filed a motion to dismiss, or in the alternative, to extend discovery, on March 17, 1987, and the Township filed an answer thereto on March 30, 1987.

The Department avers in its Motion that the letter merely expressed the Township's duty under §7(b)(4) of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.7(b)(4) (the Sewage Facilities Act) and an analogous provision at 25 Pa. Code §94.21 to not issue sewer connection permits where the Department has determined the existence of an overloaded sewer. Applying our decision in York Township v. DER, 1986 EHB 515, the Department contends that since the Township's obligation was self-executing, the Board has no jurisdiction over this matter because the letter to Harrisburg did not, through any Department action, impose any obligation on the Township. The Township, on the other hand, contends that paragraph two of the Department's letter to Harrisburg was, in essence, the imposition on the Township of a ban on connections under 25 Pa. Code §94.31.

While both parties have correctly noted that the essential issue for determination here is whether the portion of the letter from the Department to Harrisburg concerning the Township is an adjudication within the meaning of the Administrative Agency Law, 2 Pa. C.S.A., §101, or "an action" under Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa. Code §21.2(a)(1), neither have accurately characterized the nature of the Department's letter and the statutory provisions authorizing it. While we concur with the Department's conclusion that its letter was not an action which affected the personal or property rights, privileges, immunities, duties, liabilities or obligations of a party, and, therefore, was not appealable to the Environmental Hearing Board, we reach that conclusion for different reasons.

Rather than relating to sewer connections as both the Department and Township state,[1] the letter merely advised the Township that any future applications for planning modules under the Sewage Facilities Act and 25 Pa. Code §§71.15 and 71.16 for subdivisions which would connect to the Spring Creek Interceptor would not be accepted until construction bids had been awarded to eliminate the surcharging problem. This, we believe, is the equivalent of advising the Township that under 25 Pa. Code §§71.16(c)(5) and 94.14 the Department would be obligated to disapprove any planning modules for land development tributary to the Spring Creek Interceptor. At the time of this appeal, no proposed planning module had actually been rejected. The threat or advisement of possible future rejection of a planning module is not a sufficiently final action or adjudication and is, as such, analogous to York

[1] The Department erroneously argues that §7(b)(4) of the Sewage Facilities Act applies to sewer connections. A careful reading of the definitions in the statute reveals that a sewer connection is not, in and of itself, a sewage system.

Township v. DER, 1986 EHB 515. An appealable action arises only at such time that the Department refuses approval of a planning module.[2]

The Board concludes that the Department's letter of November 20, 1986 was not a final action or adjudication and the Board lacks jurisdiction to hear this appeal.

Because this appeal is dismissed, it is not necessary for the Board to rule on the Harrisburg Sewerage Authority's petition to intervene in this matter.

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[2] The Board currently has pending before it two such appeals filed by the Township at Docket Nos. 87-275-W and 87-276-W.

ORDER

AND NOW, this 21st day of September, 1987, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted and the appeal of the Swatara Township Authority is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 21, 1987

William A. Roth

WILLIAM A. ROTH, MEMBER

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MAXINE WOELFLING, CHAIRMAN

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SECRETARY TO THE BOARD

BENJAMIN COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-084-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 21, 1987

OPINION AND ORDER
SUR
PETITION TO INTERVENE

Synopsis

Petition to intervene filed on the first day of a hearing on the merits is denied where the petitioner has unduly delayed in seeking intervention, the interests of the petitioner are adequately represented, and the petitioner is not seeking to produce relevant evidence.

OPINION

This matter was initiated by Benjamin Coal Company (Benjamin) on March 10, 1987, with the filing of a Notice of Appeal seeking review of the Department of Environmental Resources' (Department) February 10, 1987 denial of Surface Mining Permit Application No. 17850126 for a site in Brady Township, Clearfield County commonly referred to as the Stahlman-Ochs operation. Benjamin, on June 8, 1987, filed a motion for an expedited hearing, which was concurred in by the Department. The Board granted the motion and scheduled a hearing on the merits August 3-7, 1987.

The Allegheny Mountain Chapter of Trout Unlimited (Trout Unlimited) filed a petition for leave to intervene on August 3, 1987, the first day of

hearings on the merits. Members of Trout Unlimited make use of the East Branch, Mahoning Creek, which would have been the receiving stream for any discharges from the Stahlman-Ochs operation, for water supply and recreational purposes. While Trout Unlimited contends that its intervention would not be prejudicial for various reasons, the major thrust of its arguments in support of intervention is that the Department will not adequately protect its interests because of its allegedly politically motivated issuance of a permit to Benjamin for an adjacent site known as the Marshall operation. Trout Unlimited has appealed the issuance of the Marshall permit to the Board at Docket No. 86-524-W, and its motion to consolidate that appeal with the instant appeal was denied by the Board in an order dated May 29, 1987.

Benjamin answered the petition on August 14, 1987, claiming that allowing Trout Unlimited to intervene at this stage of the proceedings would be extremely prejudicial to Benjamin, would add undue confusion, and would result in delay in resolution of the matter. It further argued that Trout Unlimited was aware of this proceeding for some time, as evidenced by its attempt to consolidate this matter with Docket No. 86-524-W. Benjamin claimed that Trout Unlimited, by its proposed intervention here, was attempting to relitigate its unsuccessful effort to obtain a supersedeas of the Department's issuance of the Marshall permit. And, it alleged that Trout Unlimited's representation regarding the inadequacy of the Department's efforts to protect its interests was unsubstantiated.

Trout Unlimited responded to Benjamin on August 27, 1987, disputing Benjamin's claims of prejudice and making further claims concerning the Department's political motivations. The Department has expressed no position on Trout Unlimited's petition. The remainder of the hearing on the merits is scheduled for September 28-29 and October 1-2, 1987.

The Board's rules of practice and procedure at 25 Pa. Code §21.62 provide that petitions to intervene must be filed prior to the initial presentation of evidence. They further require that the petitioner must describe its interests in the proceedings and must set forth why those interests are not being adequately represented. Grant of intervention is discretionary with the Board and is subject to such terms and conditions as the Board may prescribe.

Although not exclusive, the Board considers (1) the prospective intervenor's interest; (2) the adequacy of representation provided by the existing parties, Etna Equipment and Supply Company v. DER, 1986 EHB 792; (3) the nature of the issues before the Board, Delta Excavating and Trucking v. DER, 1986 EHB 1010; (4) the ability of the prospective intervenor to present relevant evidence; and (5) the effect of intervention on the administration of the statute(s) under which the original proceeding is brought, Al Hamilton Contracting Co. v. DER, 1982 EHB 387.

There is a threshold question regarding the timing of the petition. Our rules require that a petition to intervene be filed prior to the initial presentation of evidence, while Pa.R.C.P. 2329(3) allow the denial of a petition where the petitioner has unduly delayed in filing it. Applying either requirement, we must conclude that Trout Unlimited's petition was not timely. The petition was received by the Board on the initial day of the hearing on the merits. We must also agree with Benjamin that Trout Unlimited unduly delayed petitioning to intervene, as it was well aware of the pendency of this action by its filing of a motion to consolidate it with its appeal of the Marshall permit at Docket No. 86-524-W. The fact that the hearing on the merits in this matter was expedited is immaterial, as Trout Unlimited's consolidation motion was filed on April 27, 1987, and denied on May 29, 1987.

Trout Unlimited could certainly have petitioned to intervene at that time.

While it is possible that Trout Unlimited's interests and the Department's interests aren't identical, we fail to see how the Department is not adequately protecting Trout Unlimited's interests. The Department is vigorously defending its permit denial in this matter and such a defense protects the interests of both, even though Trout Unlimited may have presented somewhat different evidence.

We must also bear in mind that the issue before the Board is whether the Department committed an abuse of discretion in denying the Stahlman-Ochs permit. Trout Unlimited's petition indicates that much of its prospective evidence relates to the Department's action regarding the grant of the adjacent Marshall permit. We must agree with Benjamin that such evidence is not relevant in this proceeding. Indeed, as Benjamin suggests, it does appear that Trout Unlimited is attempting to relitigate its unsuccessful supersedeas request at Docket No. 86-524-W, which is not a proper basis for intervention. Lewis v. Pine Township, 27 Pa. Cmwlth. 574, 367 A.2d 742 (1976).

ORDER

AND NOW, this 21st day of September, 1987, it is ordered that the petition of the Allegheny Mountain Chapter of Trout Unlimited to intervene at Docket No. 87-084-W is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: September 21, 1987

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For Petitioning Intervenor:
Robert P. Ging, Jr., Esq.
Pittsburgh, PA

mjf

SHIRLEY E. GORHAM	:	
	:	
v.	:	**EHB Docket No. 87-170-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	Issued September 22, 1987
and SKY HAVEN COAL COMPANY, Permittee		

OPINION AND ORDER
SUR
PETITION FOR APPEAL NUNC PRO TUNC AND MOTION TO DISMISS

Synopsis

A petition for appeal nunc pro tunc is denied and a motion to dismiss the appeal is granted where Appellant's only justification for untimely filing is an alleged failure by the postal service to deliver her appeal to the Board.

O P I N I O N

This matter was initiated by the filing of a petition for an allowance of an appeal nunc pro tunc on April 30, 1987 by Shirley E. Gorham (Gorham) seeking leave of the Board to challenge the issuance of a permit by the Department of Environmental Resources (DER) to Sky Haven Coal Company (Sky Haven).

In her petition Gorham claimed that on January 19, 1987, she filed a notice of appeal with the Board, as well as with the Bureau of Litigation, the DER office in Knox, and the Permittee. However, after receiving notice of Sky Haven's blasting schedule, she inquired and discovered on April 24, 1987 that the Board had not received her appeal. As grounds for an appeal

nunc pro tunc, Gorham argues that the breakdown of the postal system caused the untimely filing of her appeal and that allowance of the appeal would not prejudice Sky Haven, as it had received its own copy as required by the Board's rules.

In response, Sky Haven on August 10, 1987, filed a motion to dismiss the appeal as untimely filed. Sky Haven also asserted that a failure of the postal system was not sufficient grounds for the granting of an appeal nunc pro tunc. Gorham answered Sky Haven's motion on August 12, 1987, reiterating the allegations in her petition.

The Board's jurisdiction does not attach unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of an appealable action. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth 478, 364 A. 2d 761 (1976). The Board will allow an appeal nunc pro tunc where fraud or breakdown of the Board's procedures were the cause for the untimely filing of the appeal. Appalachian Industries v. DER, EHB Docket No. 86-521-W (Opinion and order issued May 11, 1987). There is also authority, as we stated in Appalachian Industries that an appeal nunc pro tunc may be permitted in situations where the non-negligent act of a third party not involved in the litigation leads to the untimely filing. Gorham has not alleged that any breakdown in the Board's procedures led to the untimely filing of her appeal. Indeed, the only justification advanced by Gorham is an averment that the postal system was responsible for her untimely filing. Such a situation was considered in Getz v. Com., Pennsylvania Game Com'n, 83 Pa. Cmwlth 59, 475 A.2d 1369 (1984) wherein the Commonwealth Court held:

> "In this case, petitioner's attorney has submitted an affidavit stating he placed the request for a hearing in a mail box on July 1, 1983. The envelope, however, has a postmark

> of July 5, 1983. Petitioner attempts to prove a breakdown in the process of which the postal process is a part, by speculating that the operations of the postal service slowed down because of the upcoming three-day holiday weekend. Such speculation, however is not sufficient to met the requisite burden of proof...As petitioner has failed to meet the burden of proof, we are unable to extend the statutory period. The request for a hearing, therefore, was untimely."
>
> 475 A.2d 1371

What Gorham has proffered as proof of the postal service's culpability for the tardy filing does not even rise to the level of what Commonwealth Court considered to be speculation in Getz. We have no postmarked envelopes, return receipts for mail delivery or any other tangible proof, save Gorham's averment that she mailed the appeal to the Board. It is Gorham's duty, as the petitioner, to satisfy the burden of justifying the allowance of her appeal nunc pro tunc. Because she has not done so, we have no choice but to deny her petition and grant Sky Haven's motion to dismiss.

O R D E R

AND NOW, this 22nd day of September, 1987, it is ordered that Shirley E. Gorham's petition for allowance of an appeal nunc pro tunc is denied and Sky Haven Coal Company's motion to dismiss is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: September 22, 1987

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LIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

McGAL COAL COMPANY, INC.	:	
	:	
v.	:	EHB Docket No. 86-115-R
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued September 28, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT OR TO LIMIT ISSUES

Synopsis

The Board grants partial summary judgment in connection with the issue of an operator's liability for the abatement of discharges emanating from its mine site, whether or not these discharges were preexisting or caused by another operator. The Department of Environmental Resources'(DER) motion for summary judgment in the appeal is denied where appellant raises an issue of material fact relating to whether or not the discharge which is the subject of the appealed-from DER compliance order exceeded effluent limitations on the date sampled.

OPINION

This matter was initiated by the filing of an appeal on February 26, 1986 by McGal Coal Company (McGal) from a Department of Environmental Resources (DER) compliance order (CO) which alleged that the discharge from a sedimentation pond on McGal's operation (the "Jones Mine") in Salem Township,

Westmoreland County, exceeded the applicable effluent limitations in 25 Pa. Code §87.102.

On April 29, 1987, DER filed a motion for summary judgment, or, in the alternative, to limit issues. DER argues that since McGal's sole basis for contesting the CO is its claim that the degraded water entering the company's sediment pond pre-existed its mining operations and was not aggravated by its mining activities, there are no material facts in dispute because McGal constructed the sediment pond pursuant to its permit. Furthermore, DER believes it is entitled to judgment as a matter of law because McGal is responsible for the treatment or abatement of any sediment pond discharge which emanates from McGal's mine site regardless of the source of the water entering the pond. Alternatively, DER contends the issues in this appeal should be limited to whether the discharge that is the subject of the contested CO met the controlling effluent limitations on November 21, 1985, the day the discharge was sampled by DER and that McGal should be precluded from contesting its underlying liability to treat or abate its sediment pond discharge.

McGal's May 18, 1987 answer admits to DER's averments of fact, but contends that it is not responsible for the discharges from its sediment pond because it did not cause them, and that, in any event, the discharges did not exceed the limitations in 25 Pa. Code §87.102.

The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bell v. DER, 1986 EHB 273. The Board will grant summary judgment in DER's favor on the issue of McGal's liability for the discharge from its sediment pond. Section 315(a) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et seq.,("CSL"),

P.S. §691.1, et seq.,("CSL"), prohibits any discharge from a mine which is contrary to the rules and regulations of the Department or to the terms and conditions of an operator's permit. This is even where the operator's mining activities were not responsible for generating all the water in a discharge. William J. McIntire Coal Company v. DER, 1986 EHB 712. McIntire was recently affirmed by the Commonwealth Court (No. 2937 C.D. 1986 Pa. Cmwlth., filed August 13, 1987) which held that an operator cannot avoid liability for acts which worsen water quality or cause additional pollution because a polluting condition existed from a prior operation. Here, although degraded water from pre-existing discharges entered McGal's pond, it mingled there with drainage generated by McGal's operation and finally was discharged from the sediment pond. Consequently, applying the holding of the Commonwealth Court, McGal cannot contest its liability for treatment of the discharge from its sediment pond.

However, the Board cannot grant summary judgment in favor of DER on the issue of whether McGal's discharges met the effluent limitations on the date of DER's sampling, since McGal contests these facts and they are material.

ORDER

AND NOW, this 28th day of September, 1987, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted with regard to McGal's liability for the discharges from its sediment pond.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: September 28, 1987

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.IAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

McKEESPORT MUNICIPAL WATER AUTHORITY	:	
	:	
v.	:	EHB Docket No. 86-671-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: September 28, 1987

OPINION AND ORDER

Synopsis

An appeal from a civil penalty assessment issued by a county health department is dismissed for lack of jurisdiction where the statute authorizing the Department of Environmental Resources to delegate its authority to local health departments does not include specific language conferring upon this Board the authority to hear appeals stemming from actions pursuant to that delegation.

OPINION

This action arises from a notice of appeal and petition for supersedeas filed by the McKeesport Municipal Water Authority (McKeesport) requesting the Environmental Hearing Board (Board) to review a civil penalty assessment issued by the Allegheny County Health Department (Health Department) under the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 et seq. (Safe Drinking Water Act). A penalty in the amount of $9,000 was imposed on McKeesport for its failure to provide

continuous disinfection at its treatment plant, failure to notify the Health Department of chlorination failure within one hour of that failure, and failure to comply with an order issued by the Health Department. The Board, on December 23, 1986, denied McKeesport's petition for supersedeas for failure to conform to the requirements of 25 Pa.Code §21.77.

On December 23, 1986, the Board issued to McKeesport a rule to show cause as to why the appeal should not be dismissed for lack of jurisdiction; McKeesport responded to the rule on January 9, 1987. On January 13, 1987, the Board directed the Department of Environmental Resources (Department) to submit its position to the Board regarding the reviewability by the Board of actions taken by the Health Department under the Safe Drinking Water Act, and the Department did so on February 6, 1987.

As support for its argument that the Board has jurisdiction over this appeal, McKeesport points specifically to language in §5(h)(1) of the Safe Drinking Water Act:

> (h) Delegation of functions and fiscal matters.--The department is authorized to:
>
> (1) Enter into agreements, contracts or cooperative arrangements under such terms and conditions as may be deemed appropriate with other State agencies, Federal agencies, interstate compact agencies, political subdivisions or other persons, including agreements with local health departments to delegate one or more of its regulatory functions to inspect, monitor and enforce the act and drinking water standards. The department shall monitor and supervise activities of each local health department conducted pursuant to such an agreement, for consistency with the department's rules, regulations and policies. A local health department, where it exists in each of the counties of the Commonwealth, may elect to administer and enforce any of the provisions of this act together with the department in accordance with the established policies, procedures, guidelines, standards and rules and regulations of the department. Local health departments electing to administer and enforce the provisions of this act shall be funded

> through contractual agreements within the department whenever program activity exceeds the minimum program requirements established under the former act of April 22, 1905 (P.L. 260, No. 182), entitled "An act to preserve the purity of the waters of the State, for the protection of the public health," adopted by the Advisory Health Board under the provisions of the act of August 24, 1951 (P.L. 1304, No. 315), known as the Local Health Administration Law. The department is authorized to provide funds to local health departments entering into an agreement to contract pursuant to this paragraph which shall be considered to be agents of the department for the purpose of enforcement of this act.
>
> (footnotes omitted)

McKeesport contends that the purpose of the Safe Drinking Water Act is to insure good, potable water to its citizens by establishing a uniform system of administration and enforcement. Although the statute allows the Department to delegate its responsibility to local health departments, it also makes the local health department subject to the control, supervision and supremacy of the Department of Environmental Resources. Thus, McKeesport reasons, review of a delegated local health department's actions by this Board is necessary to achieve this goal of uniformity in the administration and enforcement of the Safe Drinking Water Act.

The Department, in its position paper, states that the language of §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21(a), limits the jurisdiction of the Board to orders, permits, licenses or decisions of the Department of Environmental Resources only. While the Department distinguishes itself here from the Health Department which assessed the penalty, it does not address the import of the language that delegated local health departments "shall be considered agents of the department for the purpose of enforcement of this act." The Department maintains that although §13(g) of the Safe Drinking Water Act, 35 P.S. §721.13(g), authorizes the Department to assess a civil penalty, it does not

authorize a local health department to do the same. The Department contends that it has not delegated its authority to assess civil penalties to local health departments. Hence, the Department asserts that an appeal of this nature should be filed in accordance with the Local Agency Law, the Act of December 2, 1968, P.L. 1133, as amended, 53 P.S. §11301 et seq. (the Local Agency Law), since the action appealed is not a Departmental action.

The Board lacks all powers not explicitly conferred upon it by the legislature. Elias v. EHB of Pa., 10 Pa.Commwlth. 489, 312 A.2d 486 (1973), citing Green et al. v. Milk Control Commission, 340 Pa 1, 316 A.2d 9 (1940), cert. denied, 312 US 108. The Safe Drinking Water Act contains no general provision relating to the Board's scope of review. Indeed, the Board is only mentioned in §3, the definitional section; §12(a), which confers jurisdiction upon the Board over actions to recover the cost of nuisance abatement by the Department; and §13(g), which relates to appeals of civil penalty assessments issued by the Department. However, rather than simplistically resolving the problem through an allusion to §1921-A of the Administrative Code, we must examine the import of the language in §5(h)(1) of the Safe Drinking Water Act conferring the status of Department agent upon local health departments which have entered into agreements with the Department to inspect, monitor, and enforce the Safe Drinking Water Act.

The only other language referring to "agents" is found in §8 of the Safe Drinking Water Act, which provides that:

> (a) Department authorized to inspect, test, etc.--The department is authorized to make inspections and conduct tests or sampling, including the examination and copying of books, papers, records and data, pertinent to any matter under investigation in order to determine compliance with this act and for this purpose, the duly authorized agents and employees of the department are authorized at all reasonable times to enter and examine any property, facility, operation or

activity.

> (b) Department authorized to establish recordkeeping requirements.--The department and its agents are authorized to require any supplier of water to establish and maintain such records and make such reports and furnish such information as the department may prescribe as being necessary to demonstrate that the supplier is complying with the requirements of this act and with the terms and conditions of its water supply permits.
>
> (emphasis added)

It is evident from these sections that the local health department stands in the Department's shoes for purposes of inspecting and imposing recordkeeping requirements on water suppliers. The General Assembly enacted no provision in the Safe Drinking Water Act which would authorize review of local health department actions under a delegation agreement by the Board. It is a principle of statutory construction that where the General Assembly includes specific language in one section of a statute and omits it in another, it cannot be implied where excluded.[1] Patton v. Republic Steel Corp., 342 Pa. Super 101, 492 A.2d 411 (1985). Thus, given the express language regarding delegated local health departments acting as Department agents in §8 of the statute, we cannot create such a right of review for delegated local health departments under §13(g) of the Safe Drinking Water Act, since §13(g) is silent on the issue. As further support for this, we need only turn to §17(c) of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.17(c), which expressly provides for a review mechanism for actions taken by delegated local agencies:

> Any provision of local agency law notwithstanding, any person aggrieved by an action of a county con-

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[1] This canon of statutory construction is expressed by the Latin maxim "expressio unius est exclusio alterius."

> servation district or other agency pursuant to a delegation agreement may appeal such action to the department within 30 days following notice of such action. Any action of the department pursuant to such an appeal may be appealed to the Environmental Hearing Board...

However, since the Safe Drinking Water Act is silent as to the issue of review of local health department actions, much like the analogous scheme in §5 of the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4005 and the rules and regulations adopted thereunder at 25 Pa.Code §133.1 et seq., we must look to §1921-A of the Administrative Code, our organic statute, and conclude that we have no jurisdiction to review the action of the Health Department. The proper forum for such review is the Allegheny County Court of Common Pleas pursuant to the Local Agency Law.

O R D E R

AND NOW, this 28th day of September, 1987, it is ordered that the Board's rule to show cause of December 23, 1986, is made absolute, and the appeal of McKeesport Municipal Water Authority is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: September 28, 1987

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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BO

MEADVILLE FORGING COMPANY :
:
v. : EHB Docket No. 87-221-R
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued September 28, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal of a Department of Environmental Resources (DER) letter is denied where there exists doubt as to the letter's procedural or substantive context with regard to the interaction of DER and Meadville's landfill operation, and where the substance of the letter clearly conveys that the appellant is expected to perform an action within a specific time frame.

O P I N I O N

On June 5, 1987, Meadville Forging Company ("Meadville") filed a notice of appeal from a Department of Environmental Resources (DER) letter concerning groundwater monitoring at Meadville's landfill and lagoon facility in West Mead Township, Crawford County. DER's letter reads as follows:

> I have reviewed a groundwater contour map and the groundwater sampling analytical results submitted by you, to the Department, on April 20, 1987. It has been determined by the Department that at least two additional down-gradient monitoring wells, for a total of 5 wells, are needed to properly monitor the quality of groundwater on the downgradient-

side of the existing landfill and the lagoon. You should propose the locations of monitoring wells and submit to the Department for its approval, within ten (10) days of receipt of this letter.

DER has filed a motion to dismiss Meadville's appeal, asserting that DER's letter is not an "action" within the meaning of Section 1921-A of the Administrative Code, the Act of April 29, 1929, P.L. 177, as amended, 71 P.S. §510.21(c) or an "adjudication" within the meaning of Section 1710.2(a) of the Administrative Agency Law, the Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.2(a). DER argues that it merely advised Meadville that it "...should propose the locations of monitoring wells and submit to the Department for its approval, within ten (10) days of receipt of this letter." (emphasis added) Because of this language, DER concludes that it neither demanded nor ordered that a proposal be submitted. Meadville answered DER's motion by stating that it has no objection to dismissal if the action is, indeed, not appealable.

In determining whether correspondence from DER is appealable, the Board considers the substance of the document. Chester County Solid Waste Authority v. DER, 1986 EHB 1169. DER's letter to Meadville has two effects. First, Meadville is notified of DER's finding that Meadville's facility requires at least two additional down-gradient monitoring wells. Second, the letter clearly conveys the impression that the only issue subject to further discussion is where the wells should be located and that a well location proposal is to be submitted for DER approval within a specified time period. The overall result of the document is that more wells are required and that Meadville has 10 days to propose, for DER approval, locations for the additional monitoring wells.

DER's reliance on Michael G. Sabia, Jr. and The Warehouse 81 Limited

Partnership v. DER, 1984 EHB 850, to support its position is misplaced. In that case, the Board held that a DER letter requesting that the appellant "should" submit a more detailed groundwater abatement plan was unappealable. However the Board noted that the Sabia letter lacked a time frame for the appellant to act. In this case, the letter was sent via certified mail and specified a response "...within ten (10) days of receipt of this letter." Notwithstanding that no sanctions were imposed, threatened or even implied by the letter, the letter's tone makes it clear that Meadville is to respond rather quickly to DER's finding that more wells are required.

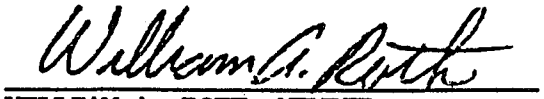
Another aspect of this matter is that the motion is unclear as to the the procedural or substantive context of the letter. DER's letter is encaptioned "Groundwater Monitoring, Meadville Forging Company, West Mead Township, Crawford County." Absent in the letter, or the motion, is an indication of whether Meadville is in the process of applying for a permit, whether a DER-initiated monitoring plan revision is afoot, or precisely what regulatory proceeding is involved. If, for example, the letter is part of the negotiation process leading to DER approval or disapproval of Meadville's groundwater monitoring plan, the letter would most likely be unappealable. However, the first sentence of DER's letter suggests that Meadville is operating under some sort of plan which has produced a groundwater-contour map as well as analytical data. If so, DER could be ordering a revision through its letter.

When reviewing a motion to dismiss, the record must be viewed in a light most favorable to the non-moving party. Heskovitz v. Vespicco, 239 Pa. Super. 529, 362 A.2d 394 (1976). Any doubts must be resolved against the movant. Because of the clear implication of the letter, and the doubt as to its context, the Board will deny DER's motion.

O R D E R

AND NOW, this 28th day of September, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss the appeal of Meadville Forging Company is denied. Meadville is ordered to file its pre-hearing memorandum on or before October 19, 1987.

ENVIRONMENTAL HEARING BOARD



WILLIAM A. ROTH, MEMBER

DATED: September 28, 1987

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M. DIANE SMITH
SECRETARY TO THE BO

C & K COAL COMPANY	:	
	:	
v.	:	EHB Docket No.87-014-R
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued October 5, 1987

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

A motion to limit issues is granted. Pursuant to §315(a) of the Clean Streams Law, 35 P.S. §691.315(a), an operator may be held liable for the treatment of off-site, post-mining discharges, even if the discharge was pre-existing, if a causal connection can be shown between the mining area and the discharge. This statutory interpretation is controlling in the face of inconsistent, unwritten policy.

OPINION

This matter was initiated by the filing of an appeal on January 8, 1987 by C & K Coal Company (C & K) from a December 16, 1986 Department of Environmental Resources (DER) compliance order requiring C & K to treat several off-permit discharges at its surface coal mine ("the Rankin Mine") located in Allegheny Township, Butler County. Along with its appeal, C & K filed a petition for supersedeas on which the Board held a hearing on February

10 and 11, 1987. The request for supersedeas was denied in an opinion and order issued on July 21, 1987.

On June 16, 1987, DER filed a motion to limit issues (motion) requesting the Board to preclude C & K from asserting that DER is estopped from imposing liability on C & K for off-permit, post- mining discharges where those discharges may have existed prior to mining because of an alleged DER policy which would have absolved the operator of liability for the pre-existing discharge if it did not worsen the discharge.

In deciding DER's motion, we must examine the law applicable to discharges of the sort covered by the DER compliance order, what policy C & K contends would estop DER from enforcing 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 law in Pennsylvania regarding the interaction of statutes and policies.

The discharges that were the subject of the DER compliance order were located immediately adjacent to C & K's permit area in some old spoil material left from previous mining. In recent adjudications, the Board has established that an operator may be held liable under §315(a) of the CSL for the treatment of off-site discharges where there is a hydrologic connection between the operator's mining activities on the permit area and the discharge. Hepburnia Coal Co. v. DER, 1986 EHB 563.

C & K makes two arguments, one relying on a regulation and one on policy, in defense of its position that it cannot be held liable for the abatement of pre-existing, off-site discharges. In its memorandum of law submitted with its answer to DER's motion, C & K contends that regulations implementing the 1971 amendments [1] to the Surface Mining Conservation and

[1]Act 147 of 1971

Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. (SMCRA), specifically 25 Pa. Code §77.92, limited an operator's responsibility for pre-existing drainage on its permit area to only the additional pollution load generated by the operator. Although, as C & K properly points out, this regulation was not repealed until six months after C & K applied for its permit [2], its vitality was severely limited by Harmar Coal, infra, shortly after its adoption.

C & K contends in its answer to DER's motion that there was a widespread, unwritten policy in the Bureau of Mining Reclamation that if an operator did not increase the quantity or cause further deterioration in the quality of a discharge, the operator would not be responsible for abating that discharge. C & K then argues that because the Bureau followed this policy and C & K relied on it, DER is estopped from imposing liability on C & K for the post-mining discharges.

Once a statute or regulation is enacted, an agency--DER in this case -- is under an obligation to enforce its provisions. East Pennsboro Township Authority v. DER, 18 Pa. Cmwlth 58, 334 A. 2d 798 (1975). Furthermore, notwithstanding a party's claim that a policy exists or has existed which is inconsistent with the law, the Commonwealth cannot be barred from enforcing the provisions of that statute. Commonwealth of Pennsylvania v. Western Maryland R.R.Co., 377 Pa. 312, 105 A. 2d 336 (1954) and Harmar Coal v. DER, 452 Pa. 77 at pps. 96-97, 306 A. 2d 308 (1973). Thus, the Supreme Court has made it clear that no official of a government agency, by policy or conduct, may affect the Commonwealth's duty to enforce the provisions of a statute. The

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[2] 12 Pa. Bull. 2382 (July 31, 1982)

Board also touched on this issue, in McIntire v. DER, 1986 EHB 969. The Board stated:

> "...such an unwritten policy, even if proved, could not overrule the statutory language which, in the Board's view, makes the appellants responsible for treating the post-mining discharges which is the subject of the appeal..."
> 1986 EHB 969

Accordingly, the rule in Pennsylvania is that as between law and inconsistent, unwritten policy, it is the law which prevails. C & K's policy argument, supra, does not persuade the Board that for the purposes of this appeal, the rule should be modified.

Because liability for the treatment or abatement of an off-permit, pre-existing discharge may be imposed under Section 315(a) of the CSL where there is a hydrologic connection between the mining operation and the off-permit discharge, and DER cannot implement a policy which is inconsistent with that law, we must grant DER's motion and preclude C & K from asserting that DER is estopped from imposing liability on C & K for off-permit discharges because of the Bureau of Mining and Reclamation's policy limiting such liability to instances where the operator has worsened the discharge.

ORDER

AND NOW, this 5th day of October, 1987, it is ordered that the Department of Environmental Resources' motion to limit issues is granted.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: October 5, 1987

cc: **Bureau of Litigation**
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WRAY VERNON CAREY :
:
v. :
: EHB Docket No. 86-566-R
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and :
ZAPPONE CONSTRUCTION COMPANY, Permittee : Issued October 6, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appellant has contended that a proposed Stage II bond release of a bond was improper because of damages to his property, which is off the permitted area The Department of Environmental Resources motion to dismiss the appeal is granted since appellant makes no allegation that criteria for bond release were violated and seeks relief, namely, monetary damages, which the Board has no power to grant.

OPINION

On October 8, 1986, Wray Vernon Carey (Carey) filed a notice of appeal from a September 24, 1986 letter in which a mining specialist of the Department of Environmental Resources (DER) informed Carey that he was recommending[1] Stage II bond release for Zappone Construction Company's

[1] We have some doubt that a recommendation that Stage II bond release occur is a final action, despite the appeal paragraph in DER's letter to Carey. However, DER has not raised this issue and, in any event, we are dismissing the appeal.

(Zappone) Hunter Strip surface mining operation, which is located in Ligonier and Derry Townships, Westmoreland County and operated pursuant to Mine Drainage Permit No. 3475SM36T (MDP) and Mining Permit No. 3475SM36T-01-0 and various amendments thereto. In his notice of appeal, Carey asserts that Zappone encroached on his property and damaged his land by creating erosion, by cutting down oak trees, and by pushing dirt onto his property.

On May 8, 1987, DER filed a motion to dismiss Carey's appeal, arguing that the appeal should be dismissed because the Board has no power to grant the relief requested by Carey, namely, the award of monetary damages to Carey for the alleged intrusion upon or destruction of his property by Zappone's mining operation. Carey's property is adjacent to the Hunter strip. On May 21, 1987, Carey filed his answer to DER's motion. Zappone, the permittee, has not responded to DER's motion.

DER asserts that Zappone fully complied with the criteria for a Stage II bond release contained in Section 86.172(d)(2) of DER's rules and regulations, 25 Pa.Code §86.172(d)(2), which provides, in relevant part, that:

> Reclamation Stage II shall be deemed to have been completed when:
>
> (i) Topsoil has been replaced and revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met.
>
> (ii) The lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the law, the regulations thereunder, or the permit.
>
> * * * * *
>
> (iv) The provisions of a plan approved by the Department for the sound future management of any permanent impoundment by the permittee or landowner have been implemented to the satisfaction of the Department.

Carey makes no allegations that these criteria were not met. Despite

a reference to water flowing onto his property, Carey provides no specific information which suggests that DER's requirements for reclamation for the bonded permit area were violated. Nor does Carey refute DER's assertion that the area of his concern is outside the bonded permit area. In the main, Carey's contentions relate to damages as a result of dirt allegedly pushed onto his property by Zappone and the alleged removal of oak trees located on and near the Carey/Hunter property boundary.

Through his pre-hearing memorandum and his answer to DER's motion, Carey makes it clear that the relief he is seeking is monetary damages. Carey concludes his pre-hearing memorandum by asking the Board to "...enter judgment against defendants [DER and Zappone], double the amount in all three acts, beside the lesser activities and any cost pertaining to this suit." Carey concludes his answer to DER's motion by asking the Board to "...add interest to the damages, since they are using my property every day for their use" and requesting the Board to "...make a true valuation of the damages done to my property by [DER and Zappone]."

This Board only has jurisdiction to review final actions of DER to determine whether an abuse of discretion has been committed. Sunbeam Coal Company v. DER, 8 Pa.Cmwlth. 622, 304 A.2d 169 (1973). In this case, Carey fails to allege that DER has improperly granted Zappone the Stage II bond release. Moreover, Carey does not contend that his allegedly affected land is part of Zappone's MDP or any of the individual mining permits. DER is bound by the regulations which govern the release of bonds. Board of Supervisors of Greene Township v. DER et al., 1985 EHB 965. None of the criteria governing a Stage II bond release include consideration of disputes over ownership of boundary line trees or an alleged trespass on or damage to an adjoining property. These matters are private disputes between Zappone and Carey which

are properly resolved by the Courts of Common Pleas, not the Board.

As to the relief being requested by Carey, the award of monetary damages, we have no authority to make such an award. As we stated in Greene Township, supra, at 968:

> ". . . the Board's powers are circumscribed by those granted to DER; we cannot act in circumstances where DER has been granted no authority to take action, such as the resolution of private parties' disputes among themselves, and we have no power other than that granted by statute. Varos v. DER, EHB Docket No. 85-105-W (Opinion and Order dated November 27, 1985). In other words, appellant's allegations do not state a valid legal basis upon which the Board could act to reverse DER's release of the bond. The dispute between appellant and the permittee will have to be resolved between themselves . . ."

Again, Carey must seek such relief in the Courts of Common Pleas,

Because Carey has not provided any indication that the Stage II bond release criteria were violated and because this Board is unable to grant the relief requested, DER's motion to dismiss is granted.

O R D E R

AND NOW, this 6th day of October, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Wray Vernon Carey is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: October 6, 1987

cc: **Bureau of Litigation**
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C & K COAL COMPANY :
:
v. : EHB Docket No.87-014
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued October 6, 1987

OPINION AND ORDER
SUR
MOTION FOR SANCTIONS

Synopsis

A motion for sanctions is denied where the appellant's interrogatories deal with the question of a mine operator's liability for preexisting discharges and the question of the preemption of statute over policy. Both of these issues are well settled under Pennsylvania law and have been excluded from this appeal. The motion is also denied where DER has already responded to the propounded interrogatory pursuant to Pa. R.C.P. 4006(b) by indicating that the documents requested may be examined at a time mutually convenient to the parties.

OPINION

INTRODUCTION

This matter was initiated by the filing of an appeal on January 8, 1987 by C & K Coal Company (C & K) from a December 16, 1986 Department of Environmental Resources' (DER) compliance order, which require C & K to treat

several discharges at its surface coal mine known as the Rankin Mine, located in Allegheny Township, Butler County. Along with its appeal, C & K filed a petition for supersedeas which was heard by the Board on February 10th and 11th, 1987 and denied in an opinion and order issued by the Board on July 21, 1987.

The present controversy arises out of a discovery dispute between the parties. On June 12, 1987, C & K filed a skeletal motion for sanctions (motion) against DER, pursuant to Pa.R.C.P. 4019(a)(1)(i), for its failure to respond to certain interrogatories. On June 16th, 1987 DER filed its answer with the Board stating that C & K's motion failed to state a legal or factual basis for its requested relief, and stated that any objections to C & K's interrogatories were contained in its responses to C & K's interrogatories.

INTERROGATORIES AT ISSUE

Interrogatories 1, 2, 3, 4, 5, 6, 7, 8, 9, 10

The basis for these interrogatories as written by C & K lies in C & K's belief in the supremacy of some alleged unwritten DER policy. DER contends this alleged policy is not the basis upon which it relied in establishing an operator's liability for post-mining discharges in the appealed-from compliance order. DER contends that instead that it bases an operator's liability for post-mining discharges on the Clean Streams Law, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., as well as the Surface Mining Conservation and Reclamation Act, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, et seq., and not on any such unwritten policy. DER correctly contends that its alleged former policy whether written or unwritten cannot override the statutory liability imposed on a coal operator for the clean-up of post-mining discharges. See DER v.

Harmar Coal Company, 452 Pa. 77, 306 A. 2d 308 (1974). In fact, this issue has been firmly resolved under Pennsylvania law and has been excluded as an issue in this appeal. See C & K Coal Company v. DER, EHB Docket No. 87-014 (Opinion and order issued October 5, 1987). Consequently, DER is not required to respond to these interrogatories.

Interrogatory No. 13

C & K's interrogatory 13 reads as follows:

> 13. Identify every document of or relating to an evaluation of the accuracy of the Department's laboratory for analyzing mine drainage between 1981 and the present.

DER's objection to this interrogatory is that it is overly broad, unreasonably burdensome and not reasonably calculated to lead to admissible evidence. However, DER asserts that, notwithstanding its objections, it would make any documents responsive to this interrogatory available for C & K's inspection at a mutually convenient time. Therefore the Board will not compel DER to respond to this interrogatory because it has already done so. Rule 4006(b) of the Pa.R.C.P. incorporated by reference into the Board's rules through 25 Pa. Code §25.111(c) states:

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

> summaries, provided that a copy of any compilation, abstracts or summaries so made shall forthwith be furnished to the party producing the records.
> (emphasis added)

Based on the foregoing, therefore, DER's response to Mill Service's interrogatories by the mere reference to a document was sufficient. See Concerned Residents of the Yough v. Commonwealth, DER, EHB Docket No. 86-513-R (Opinion and order issued June 4, 1987).

O R D E R

AND NOW, this 6th day of October 1987, it is ordered that C & K's motion for sanctions is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: October 6, 1987

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WILLIAM A. ROTH, MEMBER

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SECRETARY TO THE BO

ROGER E. GERHART, INC.	:	
	:	
v.	:	**EHB Docket No. 87-353-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued October 6, 1987

OPINION AND ORDER

Synopsis

A request to appeal nunc pro tunc is denied where the appellant has failed to show any fraud or breakdown of the Board's operations which resulted in an untimely filing.

O P I N I O N

On August 20, 1987, Roger E. Gerhart, Inc. (Gerhart) filed an appeal nunc pro tunc from Department of Environmental Resources (DER) orders dated June 12 and July 7, 1987. The June order alleged that Gerhart's mining operation in Springfield Township, Fayette County adversely affected the private water supply of William Hensel and directed Gerhart to provide an alternative supply. The July order cited Gerhart for failing to comply with the June order and directed such compliance. Gerhart received the June order on June 16, 1987 and the July order on July 20, 1987. The last dates for timely appeals were July 16, 1987 and August 19, 1987 respectively.

In petitioning for an appeal nunc pro tunc, Gerhart states that he already has pending before the Board appeals of DER's orders directing him to

provide a replacement water supply for another landowner near his mining site.[1] Gerhart alleges that DER's counsel informed his counsel that DER was investigating the matter of Hensel's water supply problem and that if DER decided to issue an order, it would first discuss the problem with Gerhart. Gerhart avers that DER issued the June and July orders without first discussing them with him, and further avers that he assumed they were consolidated with the pending appeals. Gerhart finally states that he did not inform his counsel of receipt of the orders until after he received a July 27, 1987 proposed civil penalty notice related to the June and July orders.

An appeal nunc pro tunc is permitted only where an appellant can show that there was some fraud or breakdown in the Board's operations which resulted in the untimely filing. Eugene Petricca v. DER, 1986 EHB 309. Gerhart has alleged no conduct on the part of the Board which would account for an untimely filing. Gerhart's negligence in not informing his counsel of receipt of the order is insufficient to allow an appeal nunc pro tunc. Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976).

Furthermore, as the Board held in C & K Coal Company v. DER, 1986 EHB 1149, neither DER representations, nor Gerhart's belief that the latter orders were consolidated with the prior order, can constitute grounds for an appeal nunc pro tunc.

Gerhart has failed to show an entitlement to an appeal nunc pro tunc; accordingly, his request is denied.

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[1]EHB Docket No. 85-486-R (Consolidated Appeals).

O R D E R

AND NOW, this 6th day of September, 1987 it is ordered that the request of Roger E. Gerhart, Inc. for an appeal nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: October 6, 1987

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ROBBI	:	
	:	
v.	:	EHB Docket No. 87-225-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 16, 1987
and YORK COUNTY SOLID WASTE & REFUSE	:	
AUTHORITY	:	

OPINION AND ORDER

Synopsis

The Board denies a motion to dismiss objections to a request for production of documents where the requests have been satisfied or the requests are overbroad, irrelevant and not calculated to lead to the discovery of relevant, admissible evidence. The Board grants a motion to dismiss objections where the documents sought are relevant and the appellant is entitled to a full and complete answer.

OPINION

This matter was initiated by the filing of a Notice of Appeal by the Residents Opposed to Black Bridge Incinerator (ROBBI) on June 12, 1987. ROBBI is seeking review of Plan Approval No. 67-340-001, which was issued to the York County Solid Waste and Refuse Authority (Authority) by the Department of Environmental Resources (Department) pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. 4009.1 et seq. (Air Pollution Control Act).

In pursuit of its appeal, ROBBI, on July 14, 1987, requested production of certain documents, in accordance with Pa. R.C.P. 4009 and 25 Pa. Code §21.111(d). The Authority filed objections to this request on August 12, 1987, stating that the requests were generally overbroad and irrelevant to the issuance of the air quality permit. On August 17, 1987, ROBBI filed a motion to dismiss objections to the request for production of documents, arguing that all records requested were public records within the scope of the Act of June 21, 1957, P.L. 390, as amended, 65 P.S. §66.1 et seq., commonly known as the Right to Know Law. On September 8, 1987, the Authority filed an Answer in Opposition to ROBBI's motion to dismiss the Authority's objections to ROBBI's request for production of documents, asserting that ROBBI failed to establish any valid ground upon which to sustain its motion. The Authority again asserted that the documents requested were irrelevant. Also, the Authority averred that many of the documents were not public records within the purview of the Right to Know Law. Finally, it argued that if these documents can be classified as public records, separate mechanisms to obtain them exist under the Right to Know Act.

In its motion to dismiss, ROBBI attempts to discount all of the objections made by the Authority by describing the documents requested as public records within the scope of Pennsylvania's Right to Know Law. In its answer, the Authority avers that the distinction must be made between this statute for obtaining public records and the rules pertaining to discovery under the Board's rules of practice. The fact that a document is a public record as defined in the Right to Know Law does not necessarily mean it is discoverable. And, furthermore, we are not empowered to compel the disclosure of public records under that statute, since, under 65 P.S. §66.4, the Courts of Common Pleas are empowered to review the propriety of a municipal

authority's refusal to permit inspection and copying of public records.

Discovery in proceedings before the EHB is governed by the Pennsylvania Rules of Civil Procedure, 25 Pa. Code §21.111(d). Pa.R.C.P. 4009 provides that discovery of documents is permitted if the documents are within the scope of Pa.R.C.P. 4003.1 which states:

> a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

The Authority contends that many of ROBBI's requests fail to meet this relevancy test.

We will now address the requests individually. No. 1 requests production of any environmental impact statements prepared regarding the incinerator. Although the Authority held this request to be irrelevant and vague, it did agree to provide a copy of the April, 1987 "Multiple Pathway Healthrisk Assessment for the York County Resource Recovery Facility." Because ROBBI did not specifically object to the production of this report, we will treat the Authority's production of it as satisfying ROBBI's request.

No. 2 requests all reports regarding the Japanese incinerator evaluated by the Authority. Although the Authority objected to the request as irrelevant and beyond the scope of the appeal, it did agree to provide a copy of the August, 1987 "Due Diligence Trip to Japan Trip Report." Because ROBBI did not specifically object to the submission of this report, we will assume it satisfied the production request.

No. 3 requests any traffic studies prepared regarding the incinerator. The Authority objected to the request as overbroad and irrelevant. We disagree. Traffic studies and the impact of increased traffic traveling on local roads to the incinerator on air pollution levels in the community are legitimate considerations under §2 of the Air Pollution Control

Act,[1] the policy considerations, and this request is relevant and reasonable.

No. 4 requests production of all contracts between Westinghouse and the Authority. Notwithstanding its objections to this request as overbroad and irrelevant, the Authority agreed to provide a copy of the July 16, 1987 service agreement it signed with Westinghouse. Again, ROBBI failed to address this offer in its motion to dismiss, and we assume that it satisfies ROBBI's request.

No. 5 requests production of all contracts between the Authority and other area municipalities regarding the incinerator. No. 6 requests any other contracts between the Authority and any third parties related to the incinerator. Both of these requests are overbroad and have not been shown to be relevant to any considerations outlined in the Air Pollution Control Act. Neither the statute nor the regulations adopted thereunder contain any provision making issuance of the permit dependent upon potential customer usage.

No. 7 requests any information or reports relating to the bond agreement for funding of the incinerator. The Authority objected to this request as overbroad, not relevant to the issuance of an air quality permit, and not calculated to lead to discovery of relevant admissible evidence, and

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[1] Section 2 of the Air Pollution Control Act provides that:

> It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of the comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; and (iv) development, attraction and expansion of industry, commerce and agriculture.

the Board must agree. Counsel for ROBBI has made no mention of any statutory or regulatory requirement making an appellant's financial condition a factor in issuing the plan approval.

No. 8 requests all correspondence between the Permittee and Westinghouse regarding the construction, maintenance, operation, use or testing of the incinerator. Notwithstanding its objections to the request as overbroad and irrelevant, the Authority did offer to make available all correspondence dated June 9, 1986 and July 14, 1986 between the Authority and Westinghouse regarding air quality matters. Because ROBBI did not specifically object to the submission of this correspondence we will treat it as a satisfactory fulfillment of its request.

No. 9 requests production of all correspondence with third parties and No. 10 requests all internal memoranda regarding the construction, operation, maintenance, use or testing of the incinerator. The Authority objected to these requests as overbroad, and the Board must agree. While we believe the requests to be potentially relevant, as stated they are overbroad and burdensome requests. These requests should be limited to specific parties, dates and subjects of correspondence.

Finally, No. 11 requests the minutes of all meetings of the Authority regarding incinerator issues. The Authority objected to the request as overbroad and irrelevant, but agreed to provide the minutes of all meetings. Again, we assume that the Authority has satisfactorily complied with ROBBI's request, since ROBBI has not indicated otherwise.

ORDER

AND NOW, this 16th day of October, 1987, it is ordered that the Residents Opposing Black Bridge Incinerator's motion to dismiss the objections of the York County Solid Waste and Refuse Authority is denied with respect to Request Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11. On or before November 16, 1987, the Authority shall provide ROBBI with a full and complete production of documents requested in No. 3.

It is further ordered that ROBBI shall file its pre-hearing memorandum on or before November 30, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 16, 1987

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For Permittee:
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mjf

CHARLES A. KAYAL	:	
	:	
v.	:	**EHB Docket No. 87-223-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 21, 1987

OPINION AND ORDER SUR MOTIONS FOR SANCTIONS AND TO DISMISS AND REQUEST FOR ALLOWANCE OF APPEAL NUNC PRO TUNC

Synopsis

The Board denies a motion for sanctions where appellant received approval of the Board to file its response to a motion to dismiss one day late. An appeal nunc pro tunc is denied where an appellant has failed to establish that the non-negligent act of a third party was responsible for an untimely filing.

OPINION

This matter was initiated by Charles A. Kayal on June 10, 1987, with the filing of a notice of appeal seeking review of an order dated May 5, 1987 from the Department of Environmental Resources (Department) directing Kayal to abate groundwater contamination allegedly caused by leaking underground storage tanks on the site of Kayal's service station in Whitehall Township, Lehigh County.

On June 18, 1987, the Department filed a motion to dismiss Kayal's appeal, contending that since Kayal indicated in paragraph two of his notice

of appeal that he received the Department's order on May 9, 1987, and the appeal was not received by the Board until June 10, the appeal was untimely. The Board notified Kayal by letter dated June 24, 1987, that any response to the Department's motion must be received no later than July 14, 1987.

Kayal filed his response to the Department's motion on July 15, 1987, after being granted verbal approval to do so by the Secretary to the Board. Kayal argued that paragraph two of his notice of appeal did not state that he, Charles Kayal, received notice of the Department's order on May 9, 1987, and that Yasmina Kayal signed the certified mail receipt for the order. He further alleged that he did not receive notice of the order "until on or about Monday morning, May 11, 1987." In the alternative, Kayal requested that he be permitted to file his appeal nunc pro tunc because the late filing was attributable to the "U.S. Postal Service or some other agency over which he exercises no control and the Department suffered no prejudice."

The Department then filed a motion for sanctions, requesting that the Board, pursuant to 25 Pa. Code §§21.64 and 21.124, deem all facts in the Department's motion as admitted as a sanction for Kayal's failure to timely respond to the motion to dismiss. The Board advised Kayal that if he wished to respond to the motion for sanctions, he must do so by August 24, 1987, and Kayal responded on August 24, 1987, asserting that sanctions were inappropriate in light of the extension the Board granted to him.

We will first deny the Department's motion for sanctions, since Kayal's late filing was done with the knowledge and assent of the Board.

It is without doubt that the Board has no jurisdiction over appeals which are filed more than 30 days after a party has received notice of the Department's action. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). In order for us to make a determination whether Kayal's

appeal was timely, he puts us in the unenviable position of choosing between his notice of appeal and his response to the Department's motion to dismiss. While we are understandably reluctant to make such a choice, we are even more hesitant to engage in the semantic hairsplitting regarding the meaning of his statement in paragraph two of the notice of appeal which Kayal wishes us to perform. Nor do we wish to accept Kayal's thinly-disguised reconstruction of the date of notice which is set forth in his response to the motion to dismiss. We must be guided by the plain language in the notice of appeal form. Since Charles A. Kayal is named as the appellant, we must assume that the date of notice in paragraph two of the form is the date the appellant, Charles A. Kayal, received notice of the Department's order. As a result, the appeal was filed more than 30 days after Kayal received notice of the order, and we must dismiss it as untimely filed, unless Kayal has established sufficient cause for the allowance of an appeal nunc pro tunc.

The Board will allow an appeal nunc pro tunc where fraud or breakdown of the Board's procedures were the cause for the untimely filing of the appeal. Appalachian Industries v. DER, EHB Docket No. 86-521-W (Opinion and Order issued May 11, 1987). There is also authority, as we stated in Appalachian Industries, that an appeal nunc pro tunc may be permitted in situations where the non-negligent act of a third party not involved in the litigation leads to the untimely filing. Kayal's grounds for allowance of an appeal nunc pro tunc fall into the latter category. He alleges that since his notice of appeal was dated June 4, 1987, and mail delivery between Allentown and Harrisburg normally takes two days, the late filing was the result of the act of a third party - the Postal Service - over which he had no control.

The Board recently addressed breakdown in the postal system as grounds for an appeal nunc pro tunc in Shirley E. Gorham v. DER and Sky Haven

Coal Company, EHB Docket No. 86-170-R (Opinion and Order issued September 22, 1987) wherein we cited Getz v. Com., Pennsylvania Game Commission, 83 Pa. Cmwlth. 59, 475, A.2d 1369 (1984). In Getz, an affidavit from the petitioner's attorney stating that a request for a hearing was placed in the mail on a certain date and the postmarked envelope, with no stronger evidence of problems with postal delivery, were held to be insufficient justification. The justification provided in Gorham was even sketchier, and we dismissed the petition.

Kayal's allegations here are no more substantial than those in Gorham and Getz. While the Board, in this case, has the envelope in which the notice of appeal was placed,[1] it provides no more explanation. The envelope, which is reproduced in the attachment at the end of this opinion, contains two postmarks. The earlier, which is from a Pitney Bowes postage meter, has a postmark of Allentown, June 4, 1987. The second postmark is a Postal Service postmark from Lehigh Valley and dated June 8, 1987. Kayal has provided us with no explanation of the reason for the two postmarks and why the dates are not identical, a burden which is his if he seeks the allowance of an appeal nunc pro tunc. A mere allegation is not sufficient, and, therefore, we must dismiss the appeal.

---

[1] The Board does not normally retain the envelopes in which it receives correspondence.

ORDER

AND NOW, this 21st day of October, 1987, it is ordered that:

1. The Department's motion for sanctions is denied;

2. The Department's motion to dismiss is granted; and

3. Appellant Charles A. Kayal's request for allowance of an appeal nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

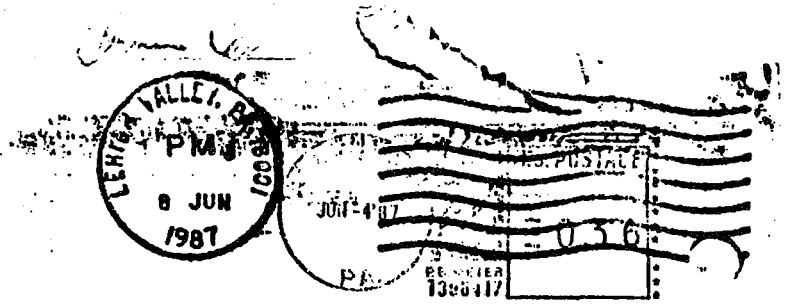
DATED: October 21, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Vincent M. Pompo, Esq.
Eastern Region
For Appellant:
John P. Karoly, Jr., Esq.
Allentown, PA

Attachment

mjf

215/434-4010
KAROLY LAW OFFICES
A PROFESSIONAL CORPORATION
141 N. 7TH STREET
ALLENTOWN, PENNSYLVANIA 18101
JOHN P. KAROLY, JR.



Commonwealth of Pennsylvania
Environmental Hearing Board
221 North Second Street
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Harrisburg, PA 17101

914

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BIG "B" MINING COMPANY	:	
	:	
v.	:	EHB Docket No. 83-215-G
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
and	:	
	:	Issued: October 26, 1987
TROUT UNLIMITED, Intervenor	:	

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

By the Board

This adjudication is based on a draft prepared by former Board Member Edward Gerjuoy, now serving the Board as a hearing examiner. It is being issued after the Board's review and revision.

Synopsis

25 Pa.Code §95.1(b) requires that high quality waters be maintained at their existing quality unless the applicant for a permit to discharge to such waters affirmatively demonstrates that, under §95.1(b)(1), the discharge has social or economic justification and that, under §95.1(b)(2), present uses of the waters will not be precluded and applicable numerical water quality criteria will not be violated. If both criteria are satisfied, some degradation of water quality is permitted. For the purposes of §95.1(b)(1), justification is shown when the applicant demonstrates that net economic benefits of significant public value are likely to be realized. In the instant appeal, the Appellant has shown that its proposed mining operation

will yield net economic benefits of significant value to the public. The Appellant has also shown that uses of the receiving watershed will not be precluded by its proposed mining where its operational history at an adjacent mining site in the same watershed has been established, where the record shows that stream uses were maintained during and after mining, and where contravening opinion evidence is unsupported by any analytical evidence. Where an applicant can make the showing with regard to justification and stream uses, DER is obligated to also consider the matter of applicable numerical water quality criteria, before establishing effluent limitations.

INTRODUCTION

This matter has had the following procedural history. On or about December 16, 1981 Big "B" Mining Company (hereinafter "BigB") filed application No. 10810124, for a mine drainage permit. On December 22, 1982 BigB filed an appeal with this Board in connection with said application; this appeal, docketed at 82-307-G, alleged that DER unreasonably had failed to act on application No. 10810124.

DER's pre-hearing memorandum, filed at 82-307-G in compliance with the Board's routine Pre-Hearing Order No. 1, claimed that as of May 23, 1983 BigB had not submitted all the information DER required to evaluate application No. 10810124. Thereafter, on September 16, 1983 DER denied application No. 10810124. DER's denial letter reiterated the claim that BigB had not submitted all the information required by the regulations, notably in 25 Pa.Code Chapters 86 and 87; according to DER, BigB's failure to furnish this information precluded DER from issuing the permit. DER's denial letter also gave BigB two new substantive reasons for denying the permit; these reasons are listed in Finding of Fact 23 infra.

This denial action by DER obviously mooted the appeal at 82-307-G, which was withdrawn by BigB on December 13, 1983. In the meantime, BigB had timely appealed DER's denial of permit application No. 10810124, at the 83-215-G docket number which captions this adjudication. On January 20, 1984 the Board granted the petition by Trout Unlimited (the "Intervenor") to intervene in the 83-215-G appeal; the Board reserved the right to limit the Intervenor's participation in the appeal, however, as permitted by 25 Pa.Code §21.62(b). Eventually, in an Order dated November 21, 1984, the Board--deeming the Intervenor's posture in this matter as wholly adverse to BigB and fully in support of DER's claims--limited Intervenor's participation in the to-be-held hearing on the merits as follows. Intervenor would be permitted to cross examine BigB's witnesses only, and would not be allowed to object to any questions asked of any witness by DER; correspondingly, DER would not be permitted to cross examine Intervenor's witnesses, or to object to questions asked by BigB. In the actual event, the Intervenor attended only the first day of the hearing on the merits and presented no witnesses.

On August 23, 1984, after considerable discovery by all parties, DER filed a stipulation which has been incorporated into the record as Board Exhibit 2. The entire substantive portion of this stipulation, which was agreed to by BigB but was not signed by Intervenor, reads:

> 1. The Department hereby revokes the second reason set forth in its letter of September 16, 1983, wherein it denied Big "B"'s application for a mine drainage permit, which reason is as follows:
>
> > Big "B" Mining Company has shown a lack of ability or intention to comply with the Clean Streams Law and Surface Mining Conservation and Reclamation Act as indicated by violations...
>
> The Department will not rely upon this reason in the litigation on the appeal from the permit denial.
>
> 2. The Department reserves the right to

> introduce into the record evidence of any violations by Big "B" of the Surface Mining Conservation Act and the Clean Streams Law for the purpose of determining whether Big "B" Mining Company's application fails to demonstrate social and economic justification for all discharges to the Silver Creek watershed.

DER's pre-hearing memorandum, filed October 5, 1984, was consistent with the just quoted stipulation. As of October 5, 1984, therefore, paragraph 2 of DER's appealed-from September 16, 1983 denial letter (quoted in Finding of Fact 23 infra) was no longer the reason for DER's denial of the permit. Accordingly, on February 25, 1985 the Board ordered the parties to file memoranda of law addressing the two issues:

> a. In order to establish "social and economic justification," what elements is it the appellant's burden to prove?
>
> b. What testimony, in the context of the present appeal, will be germane to this burden?

BigB filed its memorandum of law in response to this Board Order; DER and Intervenor did not. The Board's subsequent analysis of these issues has been published in an Opinion and Order of December 18, 1985 at this docket number (1985 EHB 925, hereinafter "BigB I"), which we herewith affirm in part and amend in part, see infra.

In view of DER's stipulation that it would not rely on reason 2 in DER's September 16, 1983 denial letter, the Board's February 25, 1985 Order included the paragraph:

> 6. The Board rules provisionally...that the appellant's compliance history is not relevant to the "social and economic justification" issue, except insofar as the frequency and type of previous violations by the appellant--and other mine operators--shed light on the risk of stream degradation by mine operations the appellant seeks a permit to perform.

This provisional ruling, which we herewith affirm, this time unconditionally, was a basis for evidentiary rulings at the hearing on the merits.

The hearing on the merits involved eight days of testimony in February and March 1986, before then Board Member Edward Gerjuoy. During those hearings DER and BigB agreed and stipulated that if the Board rules in favor of BigB in this matter, then "submission by Big "B" Mining Company of a repermitting module" would satisfy the Department's needs for information required by the regulations in 25 Pa.Code Chapters 86 and 87, as set forth in the letter dated September 16, 1983 (Tr.608-610). In other words (referring once again to Finding of Fact 23), DER no longer claims that lack of information required by the regulations would preclude DER from issuing the applied-for permit 10810124, assuming the Board would rule in favor of BigB on the substantive issues in this appeal, and further assuming that BigB then would submit a repermitting module.

Also during the hearings, the Board, with the agreement of the parties, issued an Order (dated March 3, 1986) which consolidated--under Docket No. 83-215-G--the original appeal at Docket No. 83-215-G with a later appeal at Docket No. 85-330-G. The 85-330-G appeal had been taken from a July 25, 1985 letter to BigB, denying BigB's so-called repermitting application for mining on a site which formerly had been permitted under mine drainage permit MDP No. 1079101, but which had not previously been mined by BigB; DER's reason for denying repermitting application No. 1079101 is stated in Finding of Fact 25.

With the foregoing procedural history in mind, we now can proceed to the main body of this Adjudication, which has been prepared with the benefit of post-hearing briefs from BigB and DER; only DER, however, has prepared proposed Findings of Fact, as called for in 25 Pa.Code §21.116(b). The Intervenor, though given several extensions of time, has neither filed a post-hearing brief nor renewed its request for an extension.

FINDINGS OF FACT

1. The appellant in this consolidated appeal is Big "B" Mining Company ("BigB"), a Pennsylvania corporation whose address is R. D. #1, West Sunbury, PA 16101.

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the Rules and Regulations of the Environmental Quality Board ("EQB") adopted thereunder.

3. The Intervenor is Trout Unlimited, an unincorporated association whose address is 230 Homewood Drive, Butler, PA 16001, and whose stated purpose is the protection and enhancement of the cold water fisheries in western Pennsylvania.

4. BigB, whose president at the time of the hearings on the merits was Robert Keith Hilliard, is engaged in the business of surface mining; Robert Hilliard's address is 547 Dick Road, Butler, PA (Tr.15, 193).

5. On or about December 16, 1981 BigB filed application No. 10810124 for a mine drainage permit on a thirty acre site located in Washington Township, Butler County (Tr.5, 17-19; Ex.1);[1] this site

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[1]BigB's exhibits are numbered; we here are making reference to BigB Exhibit 1. DER's exhibits are lettered; thus Ex.A will denote DER's first exhibit. Intervenor offered no exhibits. There are three numbered Board Exhibits, which will be designated by the prefix Bd., e.g., Bd.Ex.2 denotes the second Board exhibit.

henceforth will be referred to as the "Gould site."

6. BigB proposes to mine the Upper Freeport coal seam at the Gould site (Ex.2).

7. All mine drainage from the Gould site would discharge to an unnamed tributary (hereinafter "UT#1) to Silver Creek (Tr.40-41; Ex.1).

8. UT#1 enters Silver Creek at a point just downstream from the bridge at Walley Mill (Tr.543-5; Ex.1; Bd.Ex.1).

9. Silver Creek flows in a generally southeast direction (Tr.544; Ex.1)

10. The Silver Creek watershed, which is situated in Butler County, consists of the main branch of Silver Creek and various unnamed tributaries (Tr.710-14; Exs.G and H).

11. The Silver Creek watershed downstream from Walley Mill, including UT#1, is classified as "high quality" under 25 Pa.Code Chapter 93 (Tr.580-1; Bd.Ex.1; Ex.C).

12. During 1980 and 1981, BigB conducted surface mining operations on another tract of land located in Washington Township, Butler County, under the authorization of mine drainage permit MDP No. 1079101; this tract henceforth will be referred to as the "Fleming site" (Tr.4-5, 17-18; Ex.1).

13. BigB mined the Upper Freeport coal seam on the Fleming site (Tr.115).

14. An approximately two acre area on the Fleming site never was mined, though it was permitted under MDP No. 1079101 (Tr.117-118).

15. This two acre area lies on the southeast portion of the Fleming site, immediately contiguous to the northwest portion of the Gould site (Tr.17-18, 116-117; Ex.1).

16. BigB regards this two acre area as an integral part of the

Gould site, and wants to mine the Gould site and this two acre site at the same time (Tr.116-117).

17. In 1982 BigB filed repermitting application No. 1079101, seeking permission to repermit--and ultimately to mine in conjunction with the Gould site--the Upper Freeport coal seam on the aforesaid two unmined acres described in Finding of Fact 14.

18. BigB believes that the two acre area, if mined, would discharge into UT#1 (Tr.132-139; Exs.1 and 9-D through 9-N).

19. The appeal originally docketed at 83-215-G is from DER's September 16, 1983 letter denying BigB's repermitting application No. 10810124.

20. The appeal originally docketed at 85-330-G is from DER's July 25, 1985 letter denying BigB's repermitting application No. 1079101.

21. DER did not contest BigB's claim--made by BigB while arguing that the appeals originally docketed at 83-215-G and 85-330-G should be consolidated--that the aforesaid two acre area, if mined, would discharge into UT#1 (Tr.5-6, 616-17).

22. In general the evidence heard in this consolidated appeal, though originally couched primarily with reference to the Gould site, pertains equally well to the consolidated site formed by adding to the Gould site the two acre area described in Findings of Fact 14 and 15; henceforth the term "the site" will refer to this consolidated site.

23. In substantive part, DER's September 16, 1983 denial letter (recall Finding of Fact 19) reads:

> The reasons for the denial include the following:
>
> 1. Your mine drainage application has failed to demonstrate that all discharges from the proposed operation to the Silver Creek Watershed

will comply with all of the effluent limitations set forth in the Department's letter of January 7, 1983 to Big "B" Mining Co. wherein the Department found that Big "B" Mining Co.'s application had failed to demonstrate social and economic justification for all discharges to the Silver Creek Watershed.

2. Big "B" Mining Company has shown a lack of ability or intention to comply with the Clean Streams Law and the Surface Mining Conservation and Reclamation Act as indicated by past violations; therefore, the Department is precluded by Section 609 of the Clean Streams Law, 35 P.S. §691.609, and Section 3.1(b) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.3b(b), from issuing this permit application.

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

24. The effluent limits set forth in DER's January 7, 1983 letter are that the pH be between 6.0 and 9.0 at all times, that the acidity be less than the alkalinity, and that the concentrations in milligrams/liter ("mg/l") of the following effluent parameters be no greater than the following maximum values (Ex.C):

Parameter	Maximum Concentration
Total Iron	0.15
Total Manganese	0.06
Aluminum	0.10
Total Dissolved Solids	150.
Total Suspended Solids	10.

25. In substantive part, DER's July 25, 1985 denial letter (recall Finding of Fact 20) reads:

The reason for the denial is:

Your mine drainage application has failed to demonstrate that all discharges from the proposed operation to the Silver Creek Watershed will comply with all of the effluent limitations set forth in the

Department's letter of June 7, 1985, to Big "B" Mining Company wherein the Department found that Big "B" Mining Company's application had failed to demonstrate social and economic justification for all discharges to the Silver Creek Watershed.

26. BigB offered no evidence which could be regarded as supporting "social" justification of the proposed mining operation [see the language of 25 Pa.Code §95.1(b)(1), as construed infra].

27. BigB's post-hearing brief concentrates solely on purported economic justifications for the proposed operation.

28. The coal seam which BigB proposes to mine has 1.52% sulfur content, 13,016 BTU/lb, and 5.76% ash (Ex.2).

29. DER's hydrogeologist, Michael Smith, testified that coal having a sulfur content less than 2%, a BTU value of 13,000 or greater, and an ash content of less than 12% is considered to be "good quality" coal (Tr.677).

30. A compilation by DER of Freeport seam coal quality data, submitted to DER by various mining companies in connection with attempts to provide social or economic justification for proposed coal mining discharges into high quality waters in Butler County, had a mean sulfur content of 2.02%, a mean BTU value of 12,905 and a mean ash content of 9.55% (Tr.679-80, 703-7; Ex.E).

31. Only two of the 15 individual coal samples listed in the aforesaid compilation (which did not include the coal on the BigB site) had sulfur content less than or equal to 1.52%; only 6 out of the 15 had a BTU value exceeding 13,000; none had an ash content as low as 5.76% (Ex.E).

32. Low sulfur coal is advantageous because it produces less air pollution when burned (Tr.677, 769).

33. DER's Michael Smith has not seen any Freeport seam coal with sulfur content less than 0.97% (Tr.769).

34. DER's Michael Smith agreed that the 1.52% sulfur content of the coal on the site is comparatively low for Freeport seam coals (Tr.769).

35. The coal market is depressed at present (Tr.179).

36. Presently the coal market is especially poor for coals having more than 2.2% sulfur content; producers of such coals are mostly shut down (Tr.36, 61).

37. On the other hand, there is a good present market for low sulfur, good quality coal of the sort BigB proposes to mine on the site (Tr.37, 175-7).

38. One important advantage of coal with a sulfur content much below 2.2% is that such coal can be blended with high sulfur coal to produce a composite averaging 2.2% (Tr.36-7).

39. BigB presently expects that about half the coal mined on the site will be sold to Canadian users (Tr.175-7).

40. Since 1980, BigB generally has operated only one surface mine at a time; to do so, the company employs about twenty full-time employees (Tr.181-2).

41. At the time of the hearings on this matter, in February-March 1986, BigB was operating a mine known as the Tinker mine, in Cherry Township, Butler County (Tr.154).

42. At the time of the hearings on this matter, BigB expected to receive a permit to operate a surface mine known as the Black mine, in Clearfield Township, Butler County (Tr.61-62, 168-170, 1275).

43. BigB expects to remove about 100,000 tons of coal from the site (Tr.19).

44. BigB's proposed mining operation will affect 20-25 acres (Tr.141-2, 187-8).

45. The proposed mining operation will last a year to a year and a half (Tr. 37-8).

46. If BigB receives its requested permit to mine the site, the BigB employees who have been working at the Tinker mine probably would move over to the site as the Tinker mine is phased out (Tr.183).

47. Most of the coal in the Black mine has 2.5-3.0% sulfur content (Tr.169).

48. Because the Black mine coal has so high a sulfur content, BigB expects that selling this coal will be difficult (Tr.182).

49. Because the market for coal with a 2.5-3.0% sulfur content is uncertain, BigB does not expect to be able to keep the Black mine operating on a continuous basis, unless BigB is able to blend the Black mine coal with very low sulfur coal, e.g., coal from the site (Tr.62, 182).

50. BigB will employ at most eight to ten people at the Black mine (Tr.182-3); these will be new employees only if the Black mine is operated at a time when BigB also is mining the site or its presently operating Tinker mine (Tr.182-3).

51. BigB's payroll costs averaged seven dollars per ton in 1985 (Tr.67-8).

52. Excluding income tax, in 1985 BigB's total payments to governmental entities amounted to $3.79 per ton, for items such as the black lung tax, the land reclamation fund, employee withholding taxes, etc. (Tr.69-72).

53. The owners of the land surface at the site will receive a royalty of $2 per ton for every ton of coal that is stripped (Tr.53-4).

54. BigB expects to sell coal mined at the site for a price of about $29 per ton (Tr.67-8).

55. BigB expects to make a profit of $3 to $4 per ton from its mining operations at the site (Tr.71).

56. All BigB employees live within 20 miles of the site (Tr.68-9).

57. Approximately 500 persons living in Butler County are employed in the mining industry (Tr.242-4).

58. The very large majority of BigB's employees spend a very large portion of their earnings (perhaps as much as 90%) in the City of Butler and its surrounding area (Tr.184-5).

59. The population of Butler County is about 150,000 (Tr.259).

60. At the time of these hearings, approximately 5,300 persons in Butler County were unemployed, corresponding to an 8.7% unemployment rate (Tr.242).

61. The City of Butler is about eight miles from the site (Tr.184).

62. In 1985, BigB's drilling and blasting costs were $143,000, or about $3 per ton, excluding the salaries paid to BigB's regular employees (Tr.70).

63. Fuel costs in 1985 were $280,000, i.e., about twice as much as drilling and blasting costs (Tr.70).

64. The landowners who will receive the royalties mentioned in Finding of Fact 53 reside in Petrolia, Butler County (Exs.2 and G).

65. The vice president of BigB is the brother of Robert Keith Hilliard, the president (Tr.195).

66. Daniel Hilliard, who is Robert K. Hilliard's father, has been a consultant to BigB ever since BigB was formed in 1970 (Tr.194-6); Daniel Hilliard's address is 550 Dick Road, Butler, PA, which is next door to Robert Hilliard's address.

67. The corporation secretary is Daniel Hilliard's sister, Helen Shubert (Tr.195).

68. Robert Hilliard is an owner of BigB (Tr.19-20).

69. Robert Hilliard and Robert's cousin have been responsible for management of the Fleming mine (Tr.144-5).

70. Robert Hilliard will be responsible for managing the mining on the site (Tr.193).

71. The Black mine operation will discharge into Little Buffalo Creek, which also is a high quality stream (Tr.170).

72. The population of the City of Butler is about 17,000 [U.S. Census 1980, Bureau of the Census, of which we may take official notice, Uniform Rules of Evidence, Rule 803(17)].

73. During the fishing season Silver Creek is visited by numerous fishermen (Tr.1093, 1243-6; Ex.Q).

74. One of the special attractions of Silver Creek to fishermen is its trout population (Tr.1096-7, 1131).

75. The Pennsylvania Fish Commission stocks trout in (i.e., adds trout to) Silver Creek (Tr.1198).

76. In addition to the stocked trout, "native" trout are found in Silver Creek (Tr.1093, 1188-90).

77. Native trout can be distinquished from stocked trout by their appearance (Tr.1096-1189).

78. Some trout observed in the Silver Creek watershed have been smaller than the minimum size stocked; such trout must be native (Tr.1190, 1223).

79. The existence of native trout in the Silver Creek watershed means that natural trout reproduction is taking place in that watershed.

80. Except possibly for Little Connoquenessing Creek, Silver Creek (including its watershed) is the only stream in Butler County that has natural trout reproduction (Tr.1197).

81. Natural trout reproduction is occurring in at most half a dozen streams in the five county area surrounding Butler County (Tr.1197-8).

82. Special stream bed conditions are required to support the natural reproduction of trout; in particular, the stream bed "substrate" should not have too many fine particles (less than two millimeters in diameter) covering and filling the interstices between the larger particles (greater than two millimeters in diameter) trout spawning and successful fingerling growth demand (Tr.1182-7).

83. The substrate conditions in the tributary UT#1 (recall Finding of Fact 7) appear to be superior to the substrate conditions in Silver Creek itself, for the purpose of supporting natural trout reproduction (Tr.1185-8).

84. DER's expert witness, John Arway, a fisheries biologist for the Pennsylvania Fish Commission, believes that the natural trout found in Silver Creek actually have been spawned in UT#1, by adult trout which have migrated into UT#1 from Silver Creek in search of superior spawning substrates (Tr.1186-8).

85. The introduction of additional fine suspended particles into UT#1, which might deposit on the present substrates in UT#1 and in Silver Creek itself, could seriously adversely affect natural trout reproduction in the Silver Creek watershed (Tr.344-5, 1190).

86. Mr. Arway was unable to state precisely how much additional siltation the stream bed of UT#1 could absorb without serious adverse effect on natural trout reproduction (Tr.1190-1); BigB's experts offered no opinion on this score.

87. Mr. Arway felt that mining at the proposed site would result in enough additional sediment accumulation on the UT#1 substrate to be a serious risk to natural trout reproduction (Tr.1191, 1240).

88. Whether sediment, once deposited in a stream, remains on the stream substrate for a long time depends on a variety of factors, including the particle size and the stream velocity (Tr.1193-4).

89. BigB's expert witness, Dr. Fred J. Brenner, believes that a discharge into UT#1 containing 35 milligrams/liter ("mg/l") of suspended solids would produce siltation sufficient to adversely affect natural trout reproduction in the upper reaches of UT#1 only, where, however, he does not think trout reproduction presently is occurring (Tr.344-5).

90. DER and BigB have stipulated as follows:

> Based upon a review of the overburden data, the other hydrogeological and geological and other drill hole records, the Department found that the site could be mined without causing acid mine drainage pollution or heavy metals, provided that the mine is operated in accordance with the requirements of the permit and all requirements of the Rules and Regulations. Acid mine drainage and heavy metal pollution is (sic) defined in Section 87.102 of the Rules and Regulations of the EQB.
>
> (Tr.12-14; Bd.Ex.1)

91. There was no evidence that the proposed mine operation posed any threat to the Silver Creek watershed other than the threat that sediment would accumulate in UT#1, thereby interfering with natural trout reproduction.

92. Surface mines are required to install erosion and sedimentation ("E&S") controls (Tr.948).

93. E&S controls are designed so that surface water runoff at the mine is directed to and collected in collection ditches, which in turn route the water to sedimentation ponds, where particles settle out. The water then

is discharged from the ponds, in a non-erosive manner, to the receiving stream (Tr.952).

94. Even when functioning as designed, the sedimentation ponds are not expected to remove all suspended solids from the water leaving the ponds; such residual suspended solid concentrations are allowed for in the EQB regulations governing discharges from the mine (Tr.503-505, 951).

95. The standard effluent limitations for suspended solid discharges from a surface mine are: a maximum of 70 mg/l at any instant, and no more than 35 mg/l on a monthly average (Tr.951).

96. E&S controls must be closely monitored and carefully maintained to ensure they will operate as designed (Tr.957-8).

97. Failures of E&S controls can occur in a variety of ways, e.g.: a collection or diversion ditch may breach, allowing surface water to enter the receiving stream without having gone through the sedimentation ponds, or a heavy rain may fall at a time when the sedimentation ponds already are almost full, causing discharges of water that had not resided in the sedimentation ponds long enough to effectively settle out suspended solids, etc. (Tr. 448, 959, 975, 987).

98. Dr. Brenner testified that it is difficult to decide where fish actually are spawning without seeing them do so (Tr.367-8).

99. Mr. Arway did not testify that he actually had seen trout spawning in UT#1.

100. Dr. Brenner believes that trout are spawning in Little Silver Creek itself, but agreed that trout spawning also may be occurring in UT#1 (Tr. 367).

101. It is likely that many of the natural trout found in Silver Creek actually were spawned in UT#1.

102. Scott Horrell, Chief of Permits and Technical Services, DER Bureau of Mining and Reclamation, Greensburg Office, supervised his Bureau's review of the mining permit application which is the subject of this appeal (Tr.372-4).

103. Mr. Horrell's ultimate decision to recommend denial of the permit largely was influenced by his belief that the proposed mine's E&S controls would not sufficiently prevent silt accumulation in UT#1, with the result that natural trout reproduction in UT#1 would be seriously at risk (Tr.386-9, 393-5).

104. Joel Koricich, who reviews all surface mine E&S control plans that come into DER's Greensburg Office, also felt that the E&S controls would not prevent significant silt accumulation in UT#1, and so informed Mr. Horrell before Mr. Horrell made his decision to deny the permit (Tr.935-6, 962-7, 972-5).

105. Dr. Brenner offered no opinion as to the likelihood that the suspended solids in the mine discharge into UT#1 always would be under the 35 mg/l figure mentioned in Finding of Fact 89.

106. All mine drainage from the Fleming mine discharged into another unnamed tributary of Silver Creek (hereinafter "UT#2") (Tr.411, 577-9; Ex.1).

107. UT#2 enters Silver Creek at a point north of Walley Mill (Ex.1).

108. Not earlier than mid-1984, and well after mining had been completed on the Fleming site, Silver Creek north of Walley Mill was upgraded to "exceptional value" water status under 25 Pa.Code, Chapter 93 (Tr.579-80).

109. In 1982, the responsibilities of DER's Mine Conservation Inspector Ralph Parks included the Fleming mine (Tr.1001-2).

110. Mr. Parks inspected the Fleming mine on April 16, 1982 (Tr.1004).

111. On that date, Mr. Parks observed various E&S controls violations, including numerous gullies deeper than nine inches (Tr.1005-7; Exs.K and N).

112. On April 16, 1982, the E&S controls required by the permit were in place and functioning satisfactorily; to control the observed gullies, lateral ditches not called for in the permit should have been installed (Tr.1006-7).

113. According to Mr. Parks, it is not unusual to discover, after mine operations have begun, that the E&S controls called for in the permit are insufficient to prevent erosion and must be supplemented by additional controls (Tr.1007).

114. Between 1979 and 1981, the responsibilities of DER's Mine Conservation Inspector Marvin Snyder included the Fleming site (Tr.1057, 1073; Ex.4).

115. Mr. Snyder inspected the Fleming site on a number of occasions between March 11, 1980 and September 21, 1981 (Ex.4).

116. The report of Mr. Snyder's inspection on September 21, 1981 states there is "some erosion" and required the operator "to clean the erosion ditch" (Ex.4).

117. The September 21, 1981 inspection report also says, "This permit is a good example of the excellent results that can be obtained when filter cloth is properly used" (Ex.4).

118. At no time during his inspections of the Fleming site did Mr. Snyder issue a violation notice to BigB (Tr.1075).

119. Mr. Snyder testified that in his experience, "even good operators have problems with E&S controls" (Tr.1059).

120. Mr. Parks' April 16, 1982 inspection report covering the Fleming

mine stated that the sedimentation ponds on the site were adequate to control runoff from the site (Ex.K).

121. Mr. Parks testified that the erosion gullies he observed on April 16, 1982 (Finding of Fact 111) merely discharged water into the regular sedimentation ponds (Tr.1041).

122. On August 8 and 15, 1980, Mr. Snyder observed no visible sediment leaving the Fleming site (Tr.1083; Ex.K).

123. During the night of August 14, 1980 and the early morning hours of August 15, 1980, there was a very severe rainstorm in Butler County and neighboring counties; the storm caused heavy flooding and loss of life in the Butler County region served by the "Butler Eagle", published in the City of Butler (Tr.118; Exs.7 and 8).

124. The storm was severe in the immediate vicinity of the Fleming mine, and produced unusually high levels in Silver Creek at Walley Mill (Tr.111).

125. On August 15, 1980, shortly after the severe rainstorm, Mr. Snyder's inspection of the Fleming site found that all the E&S controls were functioning normally, with no signs of overflow induced by the storm (Ex.4).

126. Mr. Snyder's August 15, 1980 inspection report comments: "When any strip operator can survive a storm of this magnitude, without any damage to the surrounding environment, then we have accomplished something."

127. From the standpoint of compliance with E&S control requirements, BigB's operation of the Fleming mine has been unusually exemplary.

128. Mr. Horrell believes that the possibility of operational E&S control failures, of the sort listed in Finding of Fact 97, cannot be ignored (Tr.393-5, 447-8).

129. Mr. Koricich also believes that the possibility of such E&S control failures cannot be ignored (Tr.974-5).

130. DER has no data to support the belief that surface mine E&S controls--even when properly maintained and not suffering from problems of the sort listed in Finding of Fact 97--necessarily will discharge within the suspended solids standard set forth in 25 Pa.Code §87.102 (Tr.509).

131. Mr. Koricich testified that he had been present on occasions when measured suspended solid concentrations in discharges from apparently properly functioning E&S controls were "very high" (Tr.976-7).

132. On November 17, 1982, Michael Smith walked the entire length of UT#2 (recall Finding of Fact 106) (Tr.742).

133. Mr. Smith testified that UT#2 is heavily silted, and offered a photograph in support of this testimony (Tr.742-3; Exs.1 and I-3).

134. Mr. Arway accompanied Mr. Smith on this walk up UT#2 (Tr.1194-5)

135. Mr. Arway observed many areas of UT#2 which were too heavily silted to support natural trout reproduction, although other portions of UT#2 were suitable for trout spawning (Tr.1195-6).

136. Neither Mr. Parks nor Mr. Snyder ever sampled the discharges from the Fleming mine sedimentation ponds (Tr.1012, 1060).

137. Neither Mr. Parks nor Mr. Snyder ever conducted any investigations of conditions in UT#2, before, during or after the Fleming mine operations (Tr.1012-13, 1060-1).

138. There is a large amount of bank erosion in UT#2, which Mr. Arway was unwilling to attribute to Fleming mine activities (Tr.1196-7).

139. The bank erosion contributed to sediment accumulation in UT#2 (Tr.1196).

140. The maximum concentrations listed in Finding of Fact 24 were

determined by Rick J. Buffalini, who is a sanitary engineer in DER's Bureau of Water Quality Management (Dep.Tr.4, 29).[2]

141. Mr. Buffalini averaged the measured parameter concentrations in six water samples taken on a number of different dates; three of these samples were taken from Silver Creek and three from UT#1 (Dep.Tr.29-31; Ex.J).

142. For unexplained reasons, not all the six samples measured every parameter listed in Finding of Fact 24, so that many of Mr. Buffalini's averages actually were based on fewer than six samples (Tr.858-60; Dep.Tr.29-31; Ex.J).

143. Except for the total dissolved solids limit, the maximum concentrations listed in Finding of Fact 24 are precisely the averages determined by Mr. Buffalini via the procedure described in Findings of Fact 141 and 142 (Ex.J).

144. The total dissolved solids limit listed in Finding of Fact 24 was DER's estimated value of the average total dissolved solids concentration; an estimate was made because no sample measurements of the total dissolved solids concentrations in Silver Creek and/or UT#1 were available (Ex.J).

145. The maximum discharge parameter concentrations listed in Finding of Fact 24 were intended to be DER's best determinations (in the fashion described supra) of the actual concentrations of these parameters in the portion of the Silver Creek watershed near the junction of UT#1 and Silver Creek (Tr.860-870; Dep.Tr.31-34; Ex.J).

146. Fishing for native trout tends to be a different and more challenging experience to fishermen than fishing for stocked trout (Tr.1100).

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[2] "Dep.Tr." refers to the transcript of the April 24, 1984 deposition of Mr. Buffalini, portions of which were admitted into evidence (Tr.228-33, 625-643).

147. Mr. Arway has estimated the economic value, in dollars, of the trout fishing activities in Silver Creek (Tr.1132-1161).

148. Except for Mr. Arway's testimony described in Finding of Fact 147, DER has presented no evidence of economic losses to the public which possibly might result from operation of the proposed mine.

149. No evidence (other than the stipulation embodied in Finding of Fact 90) was offered by either side which might be relevant to estimating the changes the proposed mine operation would induce in the present in-stream concentrations of the parameters listed in Finding of Fact 24, for any hypothesized operating and discharge treatment procedures.

150. DER decided that BigB had not demonstrated economic justification on the basis of information submitted by BigB, data from public agencies (including DER itself), and information provided by the general public (Tr.441-2, 456-8, 526-8; Exs.2 and 6).

151. DER evaluated this information with the aid of a form entitled "Social and Economic Review Guidelines for High Quality Waters" (Tr.419-425, 908; Exs.12 and J).

152. The aforementioned Guidelines have not been promulgated as regulations, nor have they been published for comment by the public (Tr.411-415).

153. In deciding that BigB had not demonstrated economic justification for the proposed mine, DER balanced the economic benefits to the public against the threat to continued use of the Silver Creek watershed for native trout fishing; according to DER, this threat was too great.

154. In arguing that there was economic justification for the proposed mine, BigB also balanced the economic benefits to the public against

the threat to continued use of the Silver Creek watershed for natural trout fishing; according to BigB, this threat was insignificant.

155. Dr. Brenner claimed the Silver Creek in-stream parameter averages determined by Mr. Buffalini and listed in Finding of Fact 24 were unreliable, mainly because DER used too few samples (Tr.346, 358-9).

156. BigB did not offer any sampling data of its own on in-stream parameter concentrations in the Silver Creek watershed.

157. DER interpreted 25 Pa.Code §95.1(b) to mean that in the absence of social or economic justification the effluent limits for the discharge cannot exceed the corresponding in-stream concentrations (Tr.809-811; Ex.J).

DISCUSSION

Board Ex.2, taken together with the stipulation (Tr.608-610) described in the Introduction concerning BigB's originally alleged failure to submit all required information, means that paragraph 1 of DER's September 16, 1983 denial letter (Finding of Fact 23) is DER's sole remaining reason for denying application No. 10810124. This remaining reason for denying application No. 10810124 is word-for-word identical with DER's proffered reason (Finding of Fact 25) for denying BigB's repermitting application No. 1079101 seeking to mine the two acre area described in Findings of Fact 14 and 15. Referring now to Findings of Fact 6, 7 and 16-22, it is evident that for the purposes of this Adjudication the two permit denials which are the subject of this consolidated appeal can be treated as the equivalent of a single denial of a single BigB request, to mine the Upper Freeport seam on the consolidated site defined in Finding of Fact 22. Unless otherwise noted infra, the two permit denials will be so treated, and the unqualified phrase "the denial" will refer to the "equivalent" single denial just described.

Our adjudication of this matter is to determine whether the denial was an abuse of DER's discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975); Ohio Farmers Insurance Co. v. DER, 1981 EHB 384, aff'd 73 Pa.Cmwlth. 18, 457 A.2d 1004 (1983). In the context of the present appeal an arbitrary exercise by DER of its duties or functions would be an abuse of its discretion as well, so that--following well-established Board precedent--we may and will use the phrase "abuse of discretion" to denote our complete scope of review. Commonwealth of Pa. Game Commission v. DER, 1985 EHB 1 at 8; Old Home Manor v. DER, 1986 EHB 1248 at 1280. The burden of showing that the denial was an abuse of discretion falls on BigB. 25 Pa.Code §21.101(c)(1).

More particularly, BigB's specific burden in this matter is to convince us, by a preponderance of the evidence, that DER's refusal to permit mining for the reason stated in paragraph 1 of DER's September 16, 1983 letter was an abuse of DER's discretion. BigB's post-hearing brief has reformulated this burden in terms of the following two questions (slightly rephrased by us):

> A. Did DER abuse its discretion in determining that BigB failed to establish social or economic justification for conducting mining operations which will discharge into the Silver Creek watershed?
>
> B. Even if the Board concludes that BigB did not establish the requisite social or economic justification, did DER correctly set the maximum allowable effluent limits for BigB's proposed discharges?

BigB will meet its burden if it can convince us either (a) that the answer to question A is "yes," or (b) even if we are not so convinced, that the answer to question B is "no."

This is a case of first impression regarding DER's review of the social or economic justification of mining which will produce discharges to a

high quality stream. The governing regulation in the instant matter, 25 Pa.Code §95.1(b), reads as follows:

> (b) Waters having a water use designated as "High Quality Waters" in §§93.6 and 93.9 (relating to general water quality criteria and designated water uses and water quality criteria) shall be maintained and protected at their existing quality or enhanced, unless the following are affirmatively demonstrated by a proposed discharger of sewage, industrial wastes, or other pollutants:
>
> (1) The proposed new, additional, or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of significant public value.
>
> (2) Such proposed discharge or discharges, alone or in combination with any other anticipated discharges of pollutants to such waters, will not preclude any use presently possible in such waters and downstream from such waters, and will not result in a violation of any of the numerical water quality criteria specified in § 93.9 which are applicable to the receiving waters.

Section 95.1(b) sets a policy concerning the degradation of high quality waters by providing a qualified prohibition of any degradation of a high quality water. We note that §95.1(b) does not prohibit a discharge to a high quality water; rather, it merely requires the setting of effluent limitations which will maintain and protect (or enhance) the existing quality.

While anti-degradation is specified in §95.1(b), an exception is, nonetheless, possible. Section 95.1(b) provides criteria whereby the numerical quality of a high quality water may actually be lowered to a certain level. In order to qualify for this exception, a discharger to a high quality water will have to affirmatively demonstrate that: (1) the discharge is justified as a result of necessary economic or social development which is of a significant public value [§95.1(b)(1)]; and (2) the discharge will not preclude any presently possible uses in the high quality water or waters downstream and will not result in a violation of any numerical water quality criteria applicable to the high quality water [§95.1(b)(2)].

At first glance, this appeal involves a DER determination that BigB failed to affirmatively demonstrate the criterion in §95.1(b)(1), or that it ". . . failed to demonstrate social and economic justification for all discharges to the Silver Creek Watershed" (see Finding of Fact 23). If this was indeed the case, DER was required to set BigB's effluent limitations at a level which would maintain the existing stream quality, since the failure to satisfy either §§95.1(b)(1) or (b)(2) necessarily means that no degradation is permissible. Because DER concluded that BigB could not meet these effluent limitations, it denied the permit applications. For the reasons which will be discussed in greater detail below, this appeal actually involves both criteria, §§95.1(b)(1) and (b)(2), notwithstanding DER's use of only the phrase "social and economic justification" in its denial letter.

The implications as well as the construction of §95.1(b)(1) have been discussed in BigB I. In particular, BigB I explained that DER's permit denial language, to the effect that BigB "had failed to demonstrate social and economic justification for all discharges to the Silver Creek Watershed," was an overly strict application of 25 Pa.Code §95.1(b); §95.1(b)(1) merely requires social or economic justification.

BigB I, making reference to Maskenozha Rod and Gun Club v. DER, 1981 EHB 224, aff'd Marcon v. DER, 76 Pa.Cmwlth. 56, 462 A.2d 969 (1983), described the kinds of evidence which might be offered in support of "social" justification. BigB did not offer any evidence of this sort, and its post-hearing brief concentrates solely on economic justification. We conclude, therefore, that BigB has not demonstrated any social justification for its proposed mining discharges into the Silver Creek watershed. The justification, if any, for these discharges must come from "necessary economic development which is of significant public value" [language of §95.1(b)(1)].

BigB I construed this language by holding that §95.1(b)(1) requires that BigB show its proposed mining operation satisfies a public need and has a high probability of producing significant economic benefits to the public. Assuming BigB can make this showing, BigB I held that BigB still must show that the proposed mining operation is "justified," i.e., that the highly probable significant economic benefits to the public outweigh whatever environmental degradation of the high quality Silver Creek watershed the proposed mining discharges are expected to cause. With these preceding considerations in mind, we necessarily start with a consideration of BigB's economic justification.

Is there Public Need?

Sources of energy are an indispensable requisite for our civilized society. Almost by definition, therefore, this nation's coal mining industry satisfies an important public need. This assertion need not imply that this particular proposed BigB mining operation satisfies more than a de minimis public need at this time; BigB's own witness, Daniel Hilliard, testified that the coal market is depressed at present, so much so that producers of high sulfur coal are shutting down (Finding of Fact 35). The coal on the site is of good quality, however, with a comparatively low sulfur content (Findings of Fact 28-31, 33-4). Consequently, BigB should not have any difficulty in selling the coal it proposes to mine (Findings of Fact 37-8). Certainly BigB itself expects to sell the mined coal at a reasonable profit; otherwise BigB hardly would have pursued this appeal so doggedly for four long years. It is true that much of the coal BigB will mine presently is expected to be sold to Canada (Finding of Fact 39), but we are not disposed to be so parochial as to assert that the public needs with which we are concerned must be those of

United States citizens only. In sum, the coal BigB is proposing to mine apparently will satisfy more than a de minimis public need.

In so ruling, we recognize that we have been measuring the public need for coal by the ability of the coal to command a good market price. While this criterion surely can be questioned, we have been able to think of no better alternative; the parties have suggested no alternatives at all. For an energy source like coal it is not unreasonable to measure the public need by market price; we are not attempting to measure, e.g., the public need for private yachts.

Are there Economic Benefits to the Public?

DER contends (post-hearing brief, pp.48-9) that before we can decide whether the analysis of the preceding paragraph establishes any "significant" [language of §95.1(b)] economic benefits to the public, we first must decide what communities are included in this "public." We agree with this contention.

Who is the "Public"?

We are dubious, however, about DER's proposal that for the purposes of this appeal our "public" should be no less than the population of Butler County. Although on the facts of this appeal it is reasonable that the relevant community equated to the "public" should not exceed the population of Butler County, it is far from obvious that the significance of the economic benefits ascribable to the proposed mining operation must be measured solely by their possibly very diluted impact on the average resident of Butler County. There are many important components of Butler County's "public" (e.g., the City of Butler or the County's mining industry) for whom

the economic benefits of the mining operation may be much more significant than for Butler County as a whole. We are not aware of any legal precedents which usefully can help us to accurately identify the relevant "public" in this particular appeal. Pennsylvania Environmental Management Services, Inc. v. DER, 94 Pa.Cmwlth 182, 503 A.2d 477 (1986), which DER cites, stresses the importance of taking into account broad regional effects (e.g., the effects on Butler County as a whole), but does not gainsay the importance of taking into account the effects on more local communities as well, should such effects exist. Under the circumstances, the best we can do, we feel--and what we shall do--is to equate the "public" of this appeal not merely with the population of Butler County as a whole, but also with those legitimate subcommunities of Butler County on whom the economic impacts of BigB's proposed mining operation will be concentrated.

The Economic Impact on Butler County

Insofar as Butler County as a whole is concerned, we conclude (for reasons to be explained in a moment) that Findings of Fact 40-70--which are based on almost unchallenged BigB testimony and which largely also have been proposed by DER itself (post-hearing brief, pp.21-24)--establish that BigB's intended mining operation at the site will result in the following economic benefits:

> (i) There will be an additional 12 to 18 months of employment for 20 of the 500 mine workers living in Butler County.
>
> (ii) At least $1,000,000 (though probably not more than $2,000,000) in 1985 dollars will be infused into the public stream of commerce in Butler County.

The just-stated benefit (i) follows immediately from Findings of Fact 40, 41, 45, 46 and 57. Benefit (ii), which is a less immediate

implication of our Findings of Fact, is reached as follows. The proceeds from the sales of coal mined at the site will be about $2,900,000 (Findings of Fact 43 and 54). After subtracting BigB's profit and landowner royalties from this sum, at least $2,300,000 will remain (Findings of Fact 53 and 55). This remaining sum will be used by BigB to defray its various operating expenses at the site, such as payroll, taxes, fuel, drilling and blasting costs, etc. (Findings of Fact 51, 52, 62 and 63). The payroll is expected to be $700,000 (Findings of Fact 43 and 51), of which a very large portion--which we do not believe can be much less than $500,000=72%=80%x90% --will be spent in Butler County (Finding of Fact 58). Fuel costs plus drilling and blasting costs will amount to about $9 per ton, or a total expenditure of $900,000 (Findings of Fact 43, 62 and 63), which--we think it extremely reasonable to assume--will be spent very like the payroll, i.e., 72%=$650,000 will be spent in Butler County. It additionally is extremely reasonable to suppose that much of the $200,000 in royalties to the landowners (Findings of Fact 43 and 53), as well as the $300,000 to $400,000 profits to BigB (Finding of Fact 55), also will be spent in Butler County; the landowners all are residents of Butler County (Finding of Fact 64) as apparently are the Hilliard family members who own and manage BigB (Findings of Fact 65-70).

Although we would prefer that there had been more direct testimony on the fraction of the total $2,900,000 in coal sales proceeds which will be spent in Butler County, on the evidence we feel it is very likely that this fraction will exceed 50% of the sum payroll plus fuel, drilling and blasting costs plus royalties plus minimum expected profits ($700,000 plus $900,000 plus $200,000 plus $300,000 = $2,300,000), which figures have been discussed in the preceding paragraph. $1,000,000 is less than half of this $2,300,000

sum, and is only one third of the $2,900,000 total proceeds. On this basis we believe the economic benefit (ii) listed supra is highly probable. The economic benefit (i) listed supra is an immediate consequence of undisputed Findings of Fact, and therefore assuredly can be termed "highly probable." Moreover, we see no basis for doubting that these are economic benefits to the public, as the "public" has been defined for the purposes of this appeal.

BigB has admitted that it intends to mine the site with the workers now operating the Tinker mine (Finding of Fact 46); at most 10 new employees will be hired, and these only if the Black mine and the site are operated simultaneously (Finding of Fact 50). On these grounds DER argues that the benefits (i) and (ii) supra are vitiated, in that granting the site permit will not create nearly as many as 20 "new" jobs, or infuse "new" wealth into Butler County much beyond the level presently being infused by operation of the Tinker mine. This argument is specious, however. Irrespective of what BigB does with its Black mine, if the site permit is denied the jobs and monies described in benefits (i) and (ii) will not be available to Butler County; unless there are other mines in Butler County which are unable to find mine workers right now, the jobs and moneys which would accrue from mining the site will be lost now, to be regained only when and if a permit to mine the site is granted at some future time. There is no evidence that mine workers are hard to find in Butler County. Rather, the evidence is that the coal industry presently is depressed (Findings of Fact 35 and 36) and that the ten or so workers hired at the Black mine (whether new workers or workers transferred from the Tinker mine) will not be employed continuously (Finding of Fact 49). We reiterate that (i) and (ii) supra are highly probable benefits to the public from BigB's intended mining operations at the site.

The Net Economic Benefits

The economic benefits (i) and (ii) discussed, supra., are equal to the net benefits. DER has not shown us that the proposed mining operation will cause economic losses to the public, which must be subtracted from the economic benefits BigB demonstrated. DER's testimony about economic losses concentrated solely on the purported economic value of the fishing activities in Silver Creek as computed by Mr. Arway; DER has equated this purported economic value of the fishing to the economic losses which must be subtracted from the economic benefits (DER post-hearing brief, pp.54-56). Evidently this equation assumes that permitting the proposed mine will cause the loss of the Silver Creek trout fishing activities, or at least will make such loss highly probable. This assumption is false, however, because, as we discussed above, under 25 Pa.Code §95.1(b)(2) the permit cannot be granted unless preservation of Silver Creek's native trout fishing activities is assured. Therefore, DER's claimed economic losses to the public from the proposed mining operation must be rejected,[3] irrespective of the merits (or lack thereof) of Mr. Arway's calculation of the economic value of Silver Creek's trout fishing activities.

Are the Benefits to the Public "Significant"?

BigB I has stressed that the expected economic benefits to the public which are to be balanced against any expected environmental degradation of the

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[3] Since the parties obviously have been confused about the sorts of economic losses which would not automatically be rejected by virtue of §95.1(b)(2), it may be helpful to hypothesize a (assumedly demonstrated) net economic benefits determination. Suppose, for instance, that Silver Creek were used by a public water authority to supply drinking water to a community. Suppose further that the proposed mine discharges would not preclude such use of Silver Creek and would not violate pertinent water quality criteria, but nevertheless would require additional water treatment by the authority, e.g., to reduce heavy metal concentrations. Then such additional treatment costs would not be excluded by §95.1(b)(2), and should be subtracted from the mine's economic benefits.

Silver Creek watershed must be net, i.e., that in the instant appeal the anticipated economic losses to the public caused by such expected environmental degradation must be subtracted from the economic benefits (i) and (ii) we have been discussing. But BigB I also stressed that it is DER's burden to persuade the Board that such economic losses may be anticipated. DER has not met this burden in the instant appeal for reasons explained infra. Thus the immediate question now before us is whether those economic benefits (i) and (ii) to the public can be said to be "significant."

BigB I construed the phrase "significant public value" in 25 Pa.Code §95.1(b)(1) to mean that the economic benefits to the public must be "unquestionably important." Although BigB naturally argues otherwise, we are not convinced that (i) and (ii) can be said to be unquestionably important to the public. Indeed it is not clear that these economic benefits even are important, much less unquestionably important, to Butler County as a whole. Supposing arguendo that the 5800 unemployed and 8.7% unemployment rate in Butler County (figures taken directly from the testimony, Finding of Fact 60) are exact numbers, loss of the 20 jobs listed in benefit (i) will increase the number of unemployed from 5800 to 5820, corresponding to an increase in the unemployment rate from 8.7% to 8.73%, a change it is difficult to term "important."[4] The maximum--according to (ii)--$2,000,000 infusion of moneys into the economy of Butler County's 150,000 population (Finding of Fact 59) amounts to less than $14 per person over a period no shorter than 12 months (Finding of Fact 45); once again, it is difficult to term such an infusion "important."

Thus it appears from our discussion supra that the economic benefits

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[4] As we have remarked in the past, we believe the Board is entitled to take official notice of elementary arithmetical manipulations. Lower Paxton Township Authority, 1982 EHB 111 at 143.

(i) and (ii) can be unquestionably important to the public only by virtue of their effects on selected subcommunities within the County. In our view, the evidence supports the conclusion that there are legitimate subcommunities within the County for whom (i) and (ii) should be important benefits, but we are doubtful that the evidence can support the conclusion that the benefits to these subcommunities will be unquestionably important. For instance, the evidence indicates that most of BigB's employees spend their earnings in the immediate vicinity of the City of Butler, rather than throughout Butler County (Finding of Fact 58); for reasons given earlier--in connection with our explanation of how we reached benefit (ii)--it seems very legitimate to assume that much of the remaining (after subtracting employee payroll) proceeds from the coal mined on the site also will be spent in the immediate vicinity of the City of Butler. For this subcommunity of the City of Butler, whose population is about one ninth the population of Butler County (Findings of Fact 59 and 72), the infusion of moneys per person becomes about $125 (9 x $14), which--for an average family of four--begins to be deservedly termed "important," though hardly overwhelmingly so. To the families of the 500 mine workers in Butler County, the 20 jobs secured by benefit (i), whose loss will increase the unemployment rate among Butler County mine workers by 4%, scarcely can be termed "unimportant," even though benefit (i) postpones this increase in the unemployment rate for at most eighteen months. On the other hand, it is arguable that making 20 additional jobs available to these 500 mine workers for a period possibly no more than a year should not be termed unquestionably important.

Construction of "Significant" in 25 Pa.Code §95.1(b)(1)

To summarize, we are convinced that the economic benefits (i) and

(ii) are important to the public; we are not sure these benefits should be termed unquestionably important. According to BigB I, if these benefits are not unquestionably important to the public, they do not have significant public value under 25 Pa.Code §95.1(b)(1). But we are very reluctant to conclude that the economic benefits (i) and (ii) to the public are per se not significant, a conclusion which would imply that BigB and other Butler County mining companies approximately of BigB's size never could meet the 25 Pa.Code §95.1(b)(1) economic justification criterion for mining in the vicinity of a high quality stream, even if the threatened degradation of the high quality stream is utterly minuscule; §95.1(b)(1) clearly implies that no amount of degradation, however small, can be justified unless it is first determined that the proposed economic development "is of significant public value." We do not believe it was the intention of the EQB, nor of the federal regulation on which §95.1(b) is modeled [40 C.F.R. §131.12], that a mining company like BigB never would be able to justify mining near a high quality stream, however minor the environmental degradation threatened, solely because BigB's mining operations are too small to convey unquestionably important economic effects onto Butler County and its legitimate subcommunities. Neither, apparently, does DER so believe. The Black mine in Butler County, for which BigB had just received a permit at the time of the hearings (Finding of Fact 42), also discharges into a high quality stream (Finding of Fact 71). When questioned about the seeming anomaly--namely that DER, though unwilling to allow BigB to discharge into the Silver Creek watershed, was willing to let BigB discharge into the also high quality Buffalo Creek--DER's counsel replied that Buffalo Creek had "less sensitive resources" than the Silver Creek watershed (Tr.171-2), clearly implying that DER might have been willing to concede economic justification for the instantly disputed permit

application if the Silver Creek watershed's resources were as "insensitive" as Buffalo Creek's.

We infer from the preceding paragraph that our insistence on BigB I's construction of the term "significant" in §95.1(b)(1) as "unquestionably important" would unduly and unfairly restrict BigB's chances of demonstrating economic justification for its desired permit to mine the site. BigB I was written to provide a guide as to the admissibility of evidence at the hearing on the merits of this appeal, without any knowledge of the details of that evidence. As we stated in BigB I [at 931], we believe the intent of the EQB in promulgating §95.1(b) was that "significant" be given a strong rather than weak interpretation. We continue to adhere to that belief, but we now see that the construction "unquestionably important" is too strong, and leads to anomalies of the sort described in the preceding paragraph. We now rule, therefore, that "significant" in §95.1(b)(1) means "important," but not "unquestionably important." In this respect, BigB I is hereby amended by this Adjudication. We add that 40 C.F.R. §131.12(a) [quoted in BigB I]--by which DER and we are bound in evaluating the merits of BigB's permit application--admonishes DER that Pennsylvania's "antidegradation policy and implementation methods shall, at a minimum" [emphasis added] be consistent with the strictures of §131.12. 40 C.F.R. §131.12(a)(2) then uses the phrase "important economic or social development" [emphasis again added] when stating the criteria for allowing degradation of high quality streams. Therefore, we are not permitted to construe "significant" in §95.1(b) any less weakly than "important."

In short, we conclude that BigB's mining operations will yield significant economic benefits to the public.

BigB I and the Balancing Test

As discussed above, BigB I held that even if BigB could show that its mining operation would yield significant economic benefits to the public (which it has done), it would still have to show that the proposed mining operation is "justified," that is, the significant economic benefits to the public outweigh whatever environmental degradation of the high quality Silver Creek watershed may occur as a result of the mining. On the basis of this construction of §95.1(b)(1), considerable evidence was presented at the hearing concerning the siltation threat, the effects of the adjacent Fleming mine, and stream uses and degradation. In following the BigB I construction of §95.1(b)(1), the Board would now take up consideration of the environmental degradation which might occur as a result of BigB's mining and then balance that degradation against the demonstrated economic benefits to determine whether BigB's proposed discharges are "justified."

Section 95.1(b)(1) asks the question of whether the discharges will be "...justified as a result of necessary economic or social development which is of significant public value. The Board, sua sponte, has rethought its interlocutory construction of §95.1(b)(1) and finds that a substantial adjustment is required.

Although we are dealing with a regulation adopted by the Environmental Quality Board (EQB), a quasi-legislative body, this Board is guided by the rules of statutory construction in amending its construction of §95.1(bO(1) in BigB I. 1 Pa.Code §1.7. The object of interpretation and construction of statutes is to determine and carry out the intent of the General Assembly. 1 Pa.C.S.A. §1921(a). In ascertaining intent, it is presumed that the legislature did not intend a result that is, inter alia, unreasonable. Furthermore, when the words of a statute are clear and free of

all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S.A. §1921(b).

The wording of §95.1(b)(1) clearly states that the criterion of "justification" for a proposed discharge is "a result of" significant economic or social benefits to the public, which we have already construed, supra. (Phrases equivalent to "a result of" could include "by virtue of", "because of" or "due to".) The Board sees no ambiguity as to object of the §95.1(b)(1) "justification" criterion, namely, "necessary economic or social development which is of significant public value." Under this clear language, the justification flows solely from this object. The construction in BigB I effectively added words to §95.1(b)(1), to the effect, ". . . which exceeds potential environmental degradation" and significantly expanded its scope. When the words of a statute are clear and unambiguous, the Board is not free to insert words when the legislature has not done so. Fisher v. Comm., Dept. of Public Welfare, 82 Pa.Cmwlth. 116, 475 A.2d 873 (1984).

If the EQB had intended a balancing test within §95.1(b)(1), it could have easily included the appropriate words. However, as §95.1(b) is now crafted, a two-prong test which considers both the social/economic benefits and the degradation issue is provided. Section 95.1(b)(1) provides for a consideration of the social or economic benefits. Environmental quality issues are explicitly provided for in §95.1(b)(2), which demands a consideration of the uses of a high quality water and the applicable numerical water quality limitations. Implicit in the consideration of the uses of the stream is degradation which may affect such uses. It would be unreasonable to include a consideration of degradation twice, first in the context of §95.1(b)(1), and again when the degradation consideration implicit in the consideration of stream uses is taken up in §95.1(b)(2).

Through the two criteria in §95.1(b), the EQB has provided an effective balance between social or economic development interests, on the one hand, and environmental quality, on the other. A mechanism is in place which specifically allows a lesser quality in a high quality water when the public has the opportunity to enjoy significant economic or social benefits, provided, however, that the uses of the high quality water are maintained. Essentially, each criterion can be viewed separately, but both must be satisfied in order to allow any degradation.

In view of the foregoing analysis, the Board now narrows its construction of §95.1(b)(1) in BigB I. We herewith hold that the burden to be shown under §95.1(b)(1) is that of showing significant economic or social benefits of value to the public, of the sort described, supra., and as construed herein.

DER's Denial Action and Silver Creek Uses

At this juncture, we again look at DER's rationale in denying BigB's permit application. Though the ultimate reason was because BigB was unable to meet the effluent limitation in Finding of Fact No.24, the decision was rooted in DER's conclusion that BigB failed to demonstrate "social or economic justification". In the course of the hearings, considerable evidence was presented as to the uses of Silver Creek and the question of siltation, which could affect the use as a native trout fishery.

As we noted earlier, DER's use of the phrase "social and economic justification" implies that only the criterion in §95.1(b)(1), whose construction we have herein amended, was considered. If this indeed was the case, we could end the discussion at this point and rule in favor of BigB on this issue. If DER's review included a consideration of stream uses, in

addition to the economic factors, then we must still examine the mass of evidence which has been introduced into the record regarding the use of Silver Creek as a native trout fishery.

DER decided that BigB had not demonstrated economic justification on the basis of information submitted by BigB, the Fish Commission and the public, as evaluated via a DER form entitled "Social and Economic Impact Review Guidelines for High Quality Waters." See Exhibits 12 and J. Both Mr. Horrell and Mr. Buffalini used the guidelines in their respective evaluations. See Exhibits 12 and J, respectively. There are two items on the form which make reference to water uses, namely, items 3 and 5. Within item 3, an indication is given whether the watershed represents an important local or regional fishery. Item 5 inquires as to the risk of cumulative water quality degradation and damage to water uses.

In an attachment to Mr. Horrell's evaluation (Exhibit 12), it is indicated that the threat to native trout fisheries is excessive sedimentation and the risk of damage to water uses is not minimal. We thus have a clear indication that DER considered the question of water uses in its evaluation. As Mr. Horrell, when attempting to explain his decision that economic justification had not been demonstrated, testified, "I saw no public--real public benefit to the Big "B" Mining operation in comparison to the use that it was presently receiving." (Tr.517). DER's post-hearing brief repeatedly makes much the same point. We conclude that the question of uses of Silver Creek figured into DER's evaluation of BigB's applications. (However, we make no conclusion at this point as to the depth or correctness of that evaluation.) Accordingly, we now take up the considerable evidence concerning the question of the uses of Silver Creek.

Stream Uses

The evidence is incontrovertible that Silver Creek is an unusual Pennsylvania stream, in that it is not merely "high quality" under 25 Pa.Code chapter 93, but also is capable of supporting naturally reproducing trout (Findings of Fact 10, 79-81). The existence of natural trout in Silver Creek, plus the fact that the Pennsylvania Fish Commission stocks Silver Creek with trout, makes Silver Creek an important recreational resource for fishermen (Findings of Fact 73-76). Moreover, fishing for native trout tends to be a more challenging experience for fishermen than fishing for stocked trout (Finding of Fact 146). We have no doubt whatsoever that the Silver Creek watershed's capability of supporting natural trout reproduction is very much worth preserving.

This said, we also must express our surprise at the thrust of the evidence on the subject of the effects of the discharges on the uses of the Silver Creek Watershed which has been put before us. In eight days of testimony, we heard absolutely nothing about the levels of possible chemical pollutants, e.g., of heavy metal concentrations, that the Silver Creek trout can tolerate. Instead, both parties appear to have tacitly agreed that the only relevant measure for determining the effect on stream uses is the amount of fine particle siltation that the proposed mining operation would induce in the Silver Creek watershed, since--as explained below--the presence or absence of such siltation directly affects trout spawning behavior and reproductive success. The matter of fine particle siltation induced in the Silver Creek watershed may not be the only relevant measure of environmental degradation for the purpose of this appeal. Nevertheless, because there are no other factors to discuss, based on the evidence, we begin our discussion of the

effect on stream uses by examining the parties' evidence on the potential siltation threat to natural trout reproduction in the Silver Creek watershed.

The Siltation Threat

It is not entirely clear where the trout found in Silver Creek are spawning. DER's expert, Mr. Arway, believes that the natural trout found in Silver Creek actually were spawned in the unnamed tributary of Silver Creek which we have designated as UT#1 (Findings of Fact 83 and 84); Mr. Arway did not testify, however, that he ever actually had seen trout spawning in UT#1. Largely for this reason--that Mr. Arway has not seen spawning in UT#1--BigB's post-hearing brief (p.10) terms Mr. Arway's testimony that trout spawn in UT#1 "pure speculation." We agree that the evidence in favor of this assertion of Mr. Arway's could be considerably stronger. Still, we do not find Mr. Arway's logic--in reaching the conclusion that spawning is occurring in UT#1--unreasonable. Moreover, BigB's own expert, Dr. Brenner, though stating he believed that trout are spawning in Silver Creek itself, was willing to agree that trout also may be spawning in UT#1 (Finding of Fact 100). For these reasons, we believe our Finding of Fact 101 is warranted, namely that it is likely many of the natural trout found in Silver Creek actually were spawned in UT#1; certainly BigB, which has the burden of proof in this appeal, did not --in its reliance on Dr. Brenner's testimony alone--present sufficient evidence to convince us that our comparatively weak evidentiary inference (Finding of Fact 101) from Mr. Arway's testimony is erroneous.

The last paragraph suggests that our discussion of the siltation threat to the Silver Creek watershed's natural trout reproduction posed by the proposed mine operation can focus solely on the threat to natural trout reproduction in UT#1, which will be the immediate recipient of the mine

discharges. If the smaller UT#1 stream will not be seriously adversely affected by the proposed mine operation, then logically the larger Silver Creek--which will be farther than UT#1 from the actual mine discharge points--should also not suffer serious adverse affects; on the other hand, if natural trout reproduction in UT#1 will suffer serious adverse affects, then Finding of Fact 101 means that serious adverse effects on the natural trout population in Silver Creek are likely. Our subsequent discussion is focused as just suggested, thereby considerably simplifying our task of organizing the evidence.

Fine particle silt--whose deposition on the stream bed is the primary threat to natural trout reproduction stemming from discharges containing suspended solids (Findings of Fact 82 and 85)--can be carried into UT#1 from the mine operation in two ways:

> (a) Via the unavoidable residual suspended solids in the discharges to UT#1 from the mine's sedimentation ponds, here assumedly functioning as designed; and
>
> (b) Via unplanned discharges arising from various conceivable failures of the mine's erosion and sedimentation controls, e.g., overflowing sedimentation ponds, breached collection ditch walls, etc.
>
> (Findings of Fact 93-97).

DER believes each of these potential routes (a) and (b) for silt deposition poses a threat to UT#1. In particular, DER's Mr. Horrell and Mr. Koricich, who reviewed the permit application, both testified that the possible occurrences of operational problems of type (b) above cannot be ignored (Findings of Fact 128 and 129). Moreover, Mr. Horrell testified that DER had no data to support the belief that surface mine E&S controls--even when properly maintained and not suffering from problems of type (b)--necessarily will discharge within the suspended solids standard set forth in 25 Pa.Code

§87.102. Mr. Koricich testified even more positively, to the effect that on occasion measurements of the suspended solid concentrations in discharges from such apparently properly functioning E&S controls had been found to be "very high."

Neither DER's nor BigB's experts were able to state quantitatively how much additional siltation UT#1 could absorb without seriously adversely affecting its natural trout reproduction. Nevertheless, both parties' experts were willing to offer opinions on the magnitude of the threat that siltation from the proposed mine operation will post. Mr. Arway felt that mining at the proposed site would result in enough additional sediment accumulation in the UT#1 substrate to constitute a serious risk to natural trout reproduction (Finding of Fact 87); this sentiment was shared by DER employees who testified, notably Mr. Horrell and Mr. Koricich (Findings of Fact 102-104). Dr. Brenner testified in effect that a discharge into UT#1 containing no more than 35 mg/l of suspended solids would not significantly adversely affect natural trout reproduction in UT#1, but offered no opinion as to the likelihood that the mine discharge suspended solids concentration always would be less than 35 mg/l (Findings of Fact 89 and 105).

The Fleming Mine

Both DER and BigB sought to bolster their opinions concerning the siltation threat to UT#1 by offering evidence about BigB's E&S controls compliance history during BigB's operation of the Fleming mine (Finding of Fact 12). In particular DER's Mine Conservation Inspector Ralph Parks, whose responsibilities in 1982 had included the Fleming mine, testified that on April 16, 1982 he observed various E&S control violations on the Fleming site. Although these violations included a number of erosion gullies deeper than

nine inches, the E&S controls called for in the Fleming permit were in place and functioning. DER's Mine Conservation Inspector Marvin Snyder, whose responsibilities for a time also had included the Fleming site, similarly testified that erosion had been observed on the Fleming site (this time on September 21, 1981) although the terms of the permit had been met and he had issued no violation notices. Mr. Parks and Mr. Snyder also supported the testimony by Mr. Horrell and Mr. Koricich described in Findings of Fact 127 and 128. Mr. Parks said it is not unusual to discover, after mine operations have begun, that the E&S controls called for in the permit are insufficient to prevent erosion and require supplementing by additional controls. Mr. Snyder agreed that "even good surface mine operators have problems with E&S controls." Moreover, according to DER the unnamed tributary of Silver Creek we have termed UT#2, into which the Fleming mine discharged, presently contains many areas which are too heavily silted to support natural trout reproduction (Findings of Fact 106 and 132-135).

Counters to the DER testimony described in the preceding paragraph are as follows. Mr. Parks' April 16, 1982 inspection report stated that the sedimentation ponds on the site were adequate to control any runoff from the site; Mr. Parks' testimony amplified this statement with the explanation that the erosion gullies he observed (and cited BigB for, see Ex.K) on April 16, 1982 merely discharged water into the regular sedimentation ponds. On several inspection reports (August 8 and 15, 1980) Mr. Snyder specifically stated that he had not observed visible sediment leaving the Fleming site. Moreover, on August 15, 1980, the inspection of the Fleming mine was performed shortly

after an unusually heavy rainstorm (Findings of Fact 123 and 124);[5] nevertheless, Mr. Snyder found the E&S controls were functioning normally, with no signs of overflow induced by the storm. Mr. Snyder was so impressed with these observations that his August 15, 1980 inspection report comments, "When any strip operator can survive a storm of this magnitude, without any damage to the surrounding environment, then we have accomplished something." Furthermore, whatever may have been the deficiencies of the E&S controls on the Fleming site, they did not prevent Silver Creek from continuing to harbor naturally reproducing trout, nor did those deficiencies prevent Silver Creek north of Walley Mill from being upgraded to "exceptional" water status (Finding of Fact 108). Also, DER never demonstrated any connection between the Fleming mine operation and the claimed siltation in UT#2. There was no evidence on the amount of pre-mining siltation in UT#2; DER never measured the suspended solids concentrations actually being discharged into UT#2 from the Fleming mine; DER never directly investigated the condition of UT#2 while the Fleming mine was operating; and UT#2 has a large amount of bank erosion, which contributed to the observed siltation, but which Mr. Arway would not attribute to Fleming mine activities (Findings of Fact 136-139).

The Evidence Summarized

Our discussion to this point, lengthy though it is, still has not fully covered the immense mass of evidence on the record concerning the

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[5] Exs. 7 and 8 respectively are copies of the "Butler Eagle" of August 7 and 8, 1980. They were offered by BigB to bolster Mr. Daniel Hilliard's testimony (Tr.111) that there had been a very severe storm at the Fleming site the night before Mr. Snyder's August 15, 1980 inspection. These Exhibits have been admitted into evidence under the authority of 25 Pa.Code §21.107(a), which gives the Board discretion to entertain credible hearsay evidence, as well as under the authority of Rule 803(24) of the Uniform Rules of Evidence, which permits the court to admit--as exceptions to the hearsay rule--statements having inherent circumstantial guarantees of trustworthiness, as these newspaper stories certainly have.

siltation threat to the Silver Creek watershed[6] posed by the proposed mining operation, a mass which we cannot possibly completely detail. We believe, however, that our Findings of Fact and preceding discussion have covered all arguably salient points respecting this threat. We have found that the only threat posed to the uses of Silver Creek by BigB's proposed mining lies in the discharge of sediment which can interfere with natural trout reproduction. The question of the effects of chemical pollutants has not been extensively addressed although the parties have stipulated that the mine could be operated without causing acid mine drainage or heavy metal pollution. Finding of Fact 90.

With respect to the prospects of increased sedimentation which, in turn, may pose a threat to the use of Silver Creek as a native trout fishery, the parties have presented evidence on both sides. DER--relying on its extensive field experience with surface mine E&S control problems, and noting that not even an operator as unusually exemplary (from the standpoint of compliance with E&S control requirements) as BigB has avoided E&S control violation notices--believes that the suspended solids in discharges from the proposed mine will be a significant risk to natural trout reproduction in the Silver Creek watershed. BigB--relying on its almost E&S violation-free operation of the Fleming mine, and noting that whatever suspended solids were discharged from the Fleming mine did not cause any deterioration of the Silver

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[6] Here we once more are couching our discussion in terms of the threat to the Silver Creek watershed, rather than the threat to UT#1. In effect, we now are proceeding as if we had not relied on Finding of Fact 101 to organize the evidence concerning the threat to natural trout reproduction in the watershed Reliance on Finding of Fact 101 was a matter of convenience only, however, to better focus our discussion of the evidence. As foreshadowed earlier when we mentioned our intention to reply on Finding of Fact 101, it will be quite obvious to the reader that our failure to adopt Finding of Fact 101 would not have altered by a syllable any paragraphs of this Adjudication from this point on.

Creek's watershed's ability to support natural trout reproduction--believes that the suspended solids in discharges from the proposed mine will not be a significant risk to natural trout reproduction in the watershed.

Certainly, additional evidence could have been presented to bolster either side of the argument. For example, the average concentration of suspended solids in the discharges, as well as the expected quantity of discharge when the E&S controls are operating properly could have been presented, as well as an indication of how these would be altered during operational failures of the sort listed in Finding of Fact 97. Estimates of the likelihood of such failures could have been made. The tolerance of trout spawning areas to siltation could have been presented. As the record stands, such factors are beyond our grasp and we must base our decision on the evidence before us in determining the effect of BigB's discharges on the uses of Silver Creek as a natural trout stream.

The absence of any hard quantitative evidence makes any but qualitative conclusions about the gravity of the siltation risk to natural trout reproduction in the Silver Creek watershed little more than guesses. On the basis of the evidence, however, we find that the record of BigB in its operation of E&S controls at its Fleming site is a more persuasive indication as to the ability, while BigB mines the Gould site, to continue to use of Silver Creek as a native trout fishery than DER's suppositions that E&S controls could fail. Notwithstanding DER's lack of data, BigB's Fleming site E&S controls were operated such that even in a severe storm, no signs of overflow were observed. Furthermore, no adverse effects to either UT#2 or Silver Creek were attributable to the Fleming site. In addition, the operation of the Fleming site, which affects Silver Creek above Walley Mill

(see Findings of Fact 106-108), did not prevent that portion of Silver Creek from being upgraded to an exceptional value water.

We cannot ignore BigB' operational record. Essentially, our choice is between DER's worst case assumption, i.e., that the E&S controls are likely to fail, and BigB's demonstrated record at the Fleming site. In the absence of hard quantitative data or even estimates of impact, we believe that BigB's operational record in connection with the efficiency of its E&S controls is a stronger factor that DER's conjecture of failure. We therefore conclude that BigB has met its burden of proof with regard to showing that the uses of Silver Creek can be maintained while it mines the Gould site.

We hasten to add that we are not ruling that all an applicant need do is point to a prior record. Nor are we saying that an exemplary record creates a presumption as to future performance. (We note that the matter of a prior record cuts both ways. For example, DER can and does use an operator's prior record in its decisions on whether to renew operator licenses.) Had there been more quantitative evidence of the sort suggested, supra, perhaps a different result would have been reached. Based on the record as developed by the parties, however, we must weigh demonstrated performance heavier than even a regulator's opinion.

Numerical Quality Criteria and Required Discharge Parameters

The conclusion we have just reached pertains to only one part of the criterion of §95.1(b)(2). While extensive evidence has been considered concerning the question of stream uses, the matter of conformance with applicable numerical water quality criteria appear not to have been addressed at all. The form on which BigB supplied its information to DER (see Exhibit

2), as well as DER's own internal guideline for evaluation, makes no mention whatsoever of the applicable numerical water quality criteria.

When DER decided that BigB failed to show social or economic justification, it was required to establish discharge limitations which would maintain the existing quality of Silver Creek. DER accomplished this by establishing the effluent concentration limits listed in Finding of Fact 24. DER's specific reason for denying the permit was that BigB had failed to demonstrate that it could meet those limitations. In view of the stipulations between the parties described in the Introduction, this is the only reason for denying the permit which now lies before us. The concentration limits listed in Finding of Fact 24 are DER's best approximations to the actual concentrations of these parameters in the portion of the Silver Creek watershed near the junction of UT#1 and Silver Creek (Finding of Fact 145). Except for the total dissolved solids limit, the concentrations specified in Finding of Fact 24 are based on averages of actually measured parameter values (Findings of Fact 140-144).

As we have found, BigB has shown that its proposed mining operation will yield economic benefits which satisfy §95.1(b)(1) and can be conducted in a manner which will not preclude the uses of Silver Creek. Because the question of applicable numerical water quality criteria has not been addressed, we conclude that the procedure for establishing BigB's effluent limitations is incomplete. We are not concluding that BigB is entitled to effluent limitations which are less stringent than the ones DER have imposed in Finding of Fact 24, because it is possible that BigB's discharge might result in violations of applicable numerical water quality criteria. We can conclude, however, in light of our conclusions with regard to justification and uses, supra, that DER should have examined the matter of applicable

numerical water quality criteria. For this reason, and notwithstanding the stipulation of the parties (recall Introduction, supra.), we remand the matter to DER for consideration of this issue and the setting of alternative limitations, if warranted. We note that under §95.1(b)(2), it is BigB's task to affirmatively demonstrate that its proposed discharge will not result in a violation of applicable numerical water quality criteria. Because the record is silent as to what showing may have already been made in this area, if any, we make no ruling as to what DER's remand evaluation need consist of or what further BigB should submit.[7] We only rule that the matter must be considered so that the proper effluent limits can be set.

Concluding Remarks

Before concluding this already lengthy discussion, we must comment that DER's implementation of §95.1(b) leaves much to be desired. In general, we find a muddled and shallow approach to the whole question of §95.1(b). First, neither the form on which DER elicits information from the applicant nor DER's internal evaluation guidelines reflect the true nature of the analysis to be performed or the applicant's burden. The regulation is quite clear that the applicant must "affirmatively demonstrate" both criteria in §95.1(b). Nothwithstanding that DER has no obligation to prompt information from an applicant and that applicants are charged with knowing the law, the information elicited by DER from BigB and DER's evaluation is, at best, a shallow treatment of an important matter. For example, the applicant's form in no way elicits information which may show whether or not

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[7] We observe that the evaluation may likely be along the lines described by DER's Peter Yeager at Tr. 839. We also observe that the outcome may hinge more on mathematical caluculations than on judgements of the sort considered in this Adjudication.

the proposed discharges would preclude stream uses. The only water use-related questions are atlas-type questions, e.g., name of stream, water uses specified in 25 Pa.Code §93.9, whether the stream is stocked and with what species. Though the form includes with a request for the applicant's opinion as to net benefits vs. impacts, nowhere does it suggest that hard analytical information is necessary or even desirable.

A second flaw is that the process used in this case has improperly merged two distinct criteria. As discussed, supra., §95.1(b) requires consideration of two distinct and independent criteria. In reviewing the forms, it is difficult to detect that the crucial questions concerning streams uses are being asked. The forms are completely silent as to numerical water quality criteria. The whole question of §95.1(b)(2) is treated, at best, superficially.

DER would be well advised to reconsider the manner in which it elicits information from applicants for discharges to high quality waters, as well as the types of information it solicits. At a minimum, the forms should be redesigned to give proper emphasis to each of the criteria in §95.1(b). By the same token, applicants would be well advised to know and understand their special burden under the §95.1(b) regulation and place reliance on the DER-provided forms only at their peril.

Despite the length of this Adjudication, we have not explicitly discussed all contentions made in the parties' post-hearing briefs. We have carefully examined all such contentions, however, and herewith state that all contentions not explicitly discussed herein are either irrelevant to this Adjudication or meritless. We deem waived any issues not addressed in the parties' post-hearing briefs. Robert Kwalwasser v. DER, 1986 EHB 24 at 39. Board Chairman Maxine Woelfling has recused herself from this matter; the

Board presently has only two members. The parties have agreed that under the circumstances this Adjudication can be issued over the signature of the sole remaining Board Member William A. Roth, i.e., the parties have agreed to waive any claims that this Adjudication may have been issued in violation of the Board's regulation stating, "All final decisions shall be decisions of the Board decided by majority vote." 25 Pa.Code §21.86. This Board has issued Adjudications under similar circumstances and agreements in the past. Del-AWARE Unlimited, Inc. v. DER, 1984 EHB 178. In accepting the aforesaid agreement by the parties to this appeal, this Board does not concede that Mr. Roth's signature on this Adjudication fails to comply with the requirements of 25 Pa.Code §21.86 when--because of Board vacancies and recusals--Mr. Roth is the only Board member who can sign.

CONCLUSIONS OF LAW

1. For the purposes of this Adjudication the two permit denials which are the subject of this consolidated appeal can be treated as the equivalent of a single denial of a single BigB request to mine the Upper Freeport seam on the consolidated site defined in Finding of Fact 22.

2. The burden of showing that the appealed-from permit denial was an abuse of DER's discretion falls on BigB.

3. In this appeal, BigB's general burden of proof under 25 Pa.Code §21.101(c)(1) is spelled out by the language of 25 Pa.Code §95.1(b)(1), which imposes two distinct burdens--namely, the burdens described in §95.1(b)(1) and in §95.1(b)(2)--on a proposed discharger into a high quality stream.

4. 25 Pa.Code §95.1(b)(1) requires Big B to affirmatively demonstrate that its proposed discharge to the high quality Silver Creek

watershed is justified as a result of necessary social or economic development which is of significant public value.

5. BigB has not demonstrated any social justification for its proposed mining discharges into the BigB watershed.

6. The coal BigB is proposing to mine will satisfy more than a de minimis public need.

7. For an energy source like coal, it is not unreasonable to measure the public need by market price.

8. The "public" of this appeal is the population of Butler County as a whole, together with the legitimate subcommunities of Butler County on whom the economic impacts of BigB's proposed mining operation will be concentrated.

9. The proposed mining operation will generate the following highly probable economic benefits to the public:

> (i) There will be an additional 12 to 18 months of employment for 20 of the 500 mine workers living in Butler County.
>
> (ii) At least $1,000,000 (though probably not more than $2,000,000) in 1985 dollars will be infused into the public stream of commerce in Butler County.

10. DER has not demonstrated that there are any economic losses to the public which should be subtracted from the aforesaid economic benefits.

11. The phrase "significant public value" in 25 Pa.Code §95.1(b)(1) has been construed here to mean that the economic benefits must be "important."

12. The social or economic justification for a discharge which may degrade the quality of a high quality water flows solely from a determination of whether the development will yield economic or social benefits of a significant public value.

13. 25 Pa.Code §95.1(b)(1) implies that no amount of degradation, however small, to a high quality receiving stream can be justified unless it is first determined that the proposed economic development which will produce the discharge to such a stream is of significant public value.

14. The economic benefits to the public listed in Conclusion of Law 9 are significant and, accordingly, BigB has demonstrated that, for the purposes of 25 Pa.Code §95.1(b)(1), its proposed discharges are justified as a result of necessary economic development of significant public value.

15. 25 Pa.Code §95.1(b)(2) requires the proposed discharger to affirmatively demonstrate that the discharges will not preclude any existing water uses, such as the fishing for native trout presently possible in Silver Creek, and that applicable numerical water quality criteria will not be violated.

16. Thus, in the instant appeal, no matter how great the economic benefits of BigB's proposed mining operation could be shown to be, no degradation of Silver Creek would be permissible unless, under 25 Pa.Code §95.1(b)(2), BigB can also show that its uses, i.e., native trout fishing, will be preserved.

17. The only threat posed by BigB's proposed discharges to the uses of the Silver Creek watershed as a native trout fishery, downstream from the proposed mine operation, is the risk of excessive sediment from malfunctioning erosion and sedimentation facilities.

18. An operator's record in operating erosion and sedimentation control facilities at an adjacent mine and in the same watershed, in the absence of any contravening quantitative evidence, and where such mining operations did not affect the use of Silver Creek as a native trout fishery and did not prevent another portion of the Silver Creek watershed from being

upgraded to an exceptional value water, can be introduced to demonstrate that uses of Silver Creek downstream from the site can be maintained.

19. On the evidence, BigB has shown its ability to operate the necessary erosion and control facilities at its mine in such a manner that the uses of the Silver Creek watershed as a natural trout fishery will be maintained; in part, its burden under 25 Pa.Code §95.1(b)(2) has been met.

20. Conclusion of Law 18 is a conclusion about the ability to maintain current stream uses of Silver Creek; it is not a conclusion as to whether BigB will be able to conform to applicable numerical water quality criteria, which is also a condition to be met under 25 Pa.Code §95.1(b)(2).

19. When an applicant can show economic justification and maintenance of stream uses, the matter of applicable numerical water quality criteria must also be considered in establishing discharge limitations.

20. DER improperly set BigB's discharge limitations as being equal to instream parameters because it incorrectly concluded that BigB had failed to demonstrate economic justification for its proposed discharges; because BigB has shown economic justification and has shown that uses will not be precluded, DER must also have considered the matter of applicable numerical quality standards in order to set the proper effluent limitations.

21. In view of Conclusion of Law 20, it was an abuse of DER's discretion to deny BigB's permit.

O R D E R

AND NOW, this 26th day of October, 1987, it is ordered that the permits are remanded to the Department of Environmental Resources for re-evaluation of the effluent limitations consistent with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: October 26, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Michael E. Arch, Esq.
Western Region
For Appellant:
Bruno A. Muscatello, Esq.
STEPANIAN & MUSCATELLO
Butler, PA
For Intervenor:
Michael Boyle, Esq.
MEYER, UNKOVIC & SCOTT
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BETHENERGY MINES, INC.	:	
	:	
v.	:	**EHB Docket No. 86-624-R**
	:	**(Consolidated Appeals)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 27, 1987

OPINION AND ORDER
SUR
PETITION FOR LEAVE TO INTERVENE

Synopsis

A petition for leave to intervene in an appeal is denied where the petitioner fails to state why its interest is or may be inadequately represented by an existing party in such appeal. A petition may also be denied where the petitioner fails to describe what relevant issue it will present at the time of hearing.

O P I N I O N

This appeal was initiated by BethEnergy Mines Inc.'s ("BethEnergy") November 10, 1986 filing of a notice of appeal from an action of the Department of Environmental Resources ("DER") in the form of a November 6, 1986 letter. That letter presented DER's interpretation that Section 228 of the Bituminous Coal Mine Act, the Act of July 17, 1961, P.L. 659, as amended 52 P.S. §701.101, et seq. ("the Act") required a pre-shift examination of areas of the mine which have been "dangered-off" but which also have

energized electrical cables. The letter also ordered BethEnergy to comply with DER's interpretation. The letter pertained to BethEnergy's underground mine ("84 complex") in Washington County, Pennsylvania. BethEnergy also appealed a March 6, 1987 DER directive (EHB Docket No. 87-081-R) that it conduct pre-shift examinations of areas of the mine where energized power cables were present but where persons did not normally enter or were not permitted to enter. This letter was intended to clarify the letter of November 6, 1986. By order dated July 14, 1987, the Board consolidated this new appeal with the earlier one at Docket No. 86-624-R.

On October 2, 1987, District 5 of the United Mine Workers of America (UMW) filed a petition for leave to intervene in this appeal. In presenting its petition, the UMW asserts that it is the collective bargaining representative for all non-supervisory employees at the 84 Complex and that all such employees are UMW members. The UMW also states that it is intimately concerned with the issues in this appeal since they involve the safety of its members, not only at the 84 Complex, but at other mines in Pennsylvania. DER did not respond to the motion and BethEnergy has no position.

Intervention is discretionary with the Board and is subject to those terms and conditions which the Board may prescribe. 25 Pa.Code §21.62(b). The factors which the Board considers in ruling upon a petition to intervene include but are not limited to (1) the prospective intervenor's relevant interest; (2) the adequacy of representation provided by the existing parties; and (3) the ability of the prospective intervenor to present relevant evidence. Franklin Twp. v. DER, 1985 EHB 853.

A prospective intervenor must show that its interests are relevant and would not be adequately represented by an existing party in the case.

Etna Equipment and Supply Company v. DER, 1986 EHB 792. Further, the ability of the prospective intervenor to the present relevant evidence must be shown. Benjamin Coal Company v. DER, EHB Docket No. 87-084-W (Opinion and order issued September 21, 1987.

The UMW has demonstrated its relevant interest in this matter, namely, the safety concerns of its members who work in the 84 Complex. However, its interest appears to coincide with that of an existing party, DER, which is defending the validity and vitality of its pre-shift inspection orders. In this regard, the UMW has not shown in any way that DER's defense of its actions is anything other than adequate. Furthermore, the UMW has given the Board no inkling as to the relevant evidence its would seek to introduce at the hearing on the merits. For these reasons, the Board denies the UMW's petition.

O R D E R

AND NOW, this 27th day of October, 1987, it is ordered that the petition of District 5 of the United Mine Workers of America to intervene in the appeal at Docket No. 86-624-R is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: October 27, 1987
cc: **Bureau of Litigation**
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Michael D. Bedrin, Esq.
Western Region
For Appellant:
R. Henry Moore, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA
For District 5, UMWA
Michael J. Healey
HEALEY & DAVIDSON
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BENSON & REYNOLDS GAS COMPANY	:	
	:	
v.	:	EHB Docket No. 85-190-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 29, 1987
and COMMISSIONERS OF POTTER COUNTY,	:	
Intervenor	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS AND/OR MOTION FOR SANCTIONS

Synopsis

An appellant's continued failure to produce witnesses for deposition and its failure to respond to requests to arrange for the deposition after the issuance of a Board order to produce the witnesses is grounds for the Board's issuance of an order pursuant to 25 Pa. Code §21.124 prohibiting the introduction of evidence on the topics on which these witnesses were to testify.

OPINION

Benson & Reynolds Gas Co. (Benson) appealed from the Department of Environmental Resources' (DER) April 4, 1985, denial of a Water Quality Management Part II Permit for a proposed brine injection and gas recovery project in Hebron Township, Potter County on May 7, 1985. On August 23, 1985, the County of Potter petitioned the Board for leave to intervene in this matter. This petition was granted on November 4, 1985. The Board, after

pre-hearing memoranda were filed, scheduled a hearing in this matter for August 4-8, 1986. Since there were outstanding discovery matters, the Board, on July 3, 1986, issued an order requiring that discovery be completed on August 1, 1986.

On July 9, 1986, DER served a notice of deposition on Benson, requiring the appearance of James Reynolds and Robert Benson, both officers of the company, Tom Hungerford, a petroleum engineer, and Art VanTyne, a geologist, on July 17 and 18, 1986. The notice also requested that each deponent bring any documents he wrote or relied upon and any documents in any way relevant to the proceeding, including all water quality data gathered at or near the site. DER had contacted Benson to solicit acceptable dates for these depositions. The notice sent was in compliance with Pa. R.C.P. 4007.1 and 25 Pa. Code §21.111.

On July 16, 1986, the day before the scheduled depositions, Benson notified DER that it could not produce its representatives at the time and place specified in the notice of deposition. The parties agreed on the phone to seek a continuance of the hearing and to reschedule the depositions. DER confirmed this phone conversation in writing in a letter dated July 18, 1986, and included in that letter a request that depositions be scheduled for the week of August 4, 1986. Benson never responded to this request.

On December 31, 1986, the Board issued a notice of hearing for the week of March 13, 1987, seven months after the original hearing date. Between January 2, 1987 and January 26, 1987, DER made several calls in an attempt to reschedule the depositions. On January 26, 1987, DER received a message that Benson would produce two of its representatives on January 30, 1987. On January 29, 1987, Benson notified DER that it could not produce all of the witnesses the following day, but agreed to produce all of them on February 5

and 6, 1987. DER immediately filed a motion to compel discovery, requesting the Board to compel Benson to produce its representatives and to impose sanctions against Benson.

On February 2 and 3, 1987, DER made repeated attempts to contact Benson and confirm the depositions for February 5 and 6. Late on February 4, 1987, Benson again notified DER that it could not produce its representatives for deposition. On February 5, 1987, DER filed its motion for sanctions and request for dismimssal for Benson's failure to diligently prosecute its case.

The Board, on July 8, 1987, issued an opinion and order deferring ruling on DER's motion for sanctions pending the service of subpoenas on Benson's two, expert, non-party witnesses central to the controversy and ordering Benson to produce the four witnesses to be deposed by August 7, 1987.

Upon receipt of this order, DER sent a letter to Benson requesting dates on which Messrs. Benson, Reynolds, Hungerford and VanTyne would be available for deposition explaining that once these dates had been determined, the appropriate subpoenas would be obtained. Benson never responded to the Departments's letter.

The Department, on August 31, 1987, filed a new motion for sanctions requesting dismissal.

Benson, on September 28, 1987, filed an answer to the motion for sanctions stating that DER had failed to forward notices of deposition by the date set forth in the Board order, and that its witnesses indicated they would be available for deposition at any time selected by DER.

The Board, pursuant to 25 Pa. Code §21.124, may impose sanctions, including dismissal, upon a party for his or her failure to abide by a Board order or a Board rule of practice and procedure. Additionally, when a party or person fails to make discovery or to obey a court order respecting

discovery, a court, on motion, may make such order regarding the failure to make discovery as is just. Pa. R.C.P. 4019(c)(5). This provision of the Pennsylvania Rules of Civil Procedure authorizes a court to make an order refusing to allow the disobedient party to support or to oppose designated claims or defenses, or prohibiting him or her from introducing into evidence designated documents, things or testimony, or from introducing evidence of physical or mental condition. In the absence of a showing that the non-complying party has acted in bad faith, a court may enter a judgment of non pros only if the party seeking sanctions shows that he or she has been so prejudiced by a violation of a discovery order that a non pros is the only apropriate remedy. All Pro Realty, Inc. v. Daniel J. Damratoski, No. G.D. 80-01194, Allegheny County Discovery Opinions (1982).

We can find little Board precedent on the exclusion of testimony as a sanction, but decisions of the courts of common pleas provide ample precedent for imposing such sanctions. In Glen Coal Company v. DER, 1985 EHB 887, the Board held that the appropriate sanction for appellant's repeated failure to respond to discovery requests was to preclude the appellant from presenting any evidence bearing upon the interrogatories filed by the Department at a hearing on the merits of that appeal. The courts of common pleas held in a case where a defendant failed to answer interrogatories for several months, the court could enter a sanction order forbidding the defendant from entering any defense at trial. Carter v. Pa. Banking & Trust Co. (1969) 47 D&C 2d 473. In another case, where the court had given a plaintiff several opportunities to answer a defendant's interrogatories on the details of damages, and had twice continued the case for this purpose, the court invoked Rule 4019(c)(2) and refused to admit evidence on this issue. Calderaio v. Ross (1958) 45 Del. Co. Rep. 86, aff'd 395 Pa. 196, 150 A.2d 110. Finally,

upon a defendant's failure to answer discovery inquiries, a court prohibited the defendant from offering any evidence in the case in support of his or her defense. Automobile Banking Corp. v. Hadden, 40 D&C 2d 544 (1966).

Here, the Board is reluctant to impose a sanction as severe as dismissal where the opposing party has not shown that it suffered any prejudice as a result of non-compliance with the Board's order. The Department has not alleged or proven any prejudice was caused by Benson's failure to respond to requests to arrange depositions. Benson bears the burden of proof in this appeal pursuant to 25 Pa. Code §21.101(c)(1). Since no prejudice has been shown, dismissal is inappropriate. But, pursuant to 25 Pa. Code §21.124, the following sanctions are imposed. At a hearing on the merits of this appeal, if and when held, Benson will be precluded from introducing any testimony relating to geology and/or petroleum engineering, which were the subjects to be addressed in testimony by Messrs. Hungerford and VanTyne, the witnesses Benson and Reynolds failed to produce for deposition.

ORDER

AND NOW, this 29th day of October, 1987, it is ordered that the Department of Environmental Resources' motion to inmpose sanctions is granted and Benson and Reynolds Gas Company is precluded from presenting any testimony relating to geology or petroleum engineering at a hearing on the merits of this matter.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 29, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Western Region
For Appellant:
William J. Kubiak, Esq.
Bradford, PA
For Intervenor:
D. Bruce Cahilly, Esq.
Coudersport, PA

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INE WOELFLING, CHAIRMAN

.IAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BELL COAL COMPANY	:	
	:	
v.	:	EHB Docket Nos. 86-027-W
	:	86-101-W
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 29, 1987

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

The Board will not dismiss as moot an appeal from an abatement order despite the fact that Appellant has complied with that order, since, in assessing future penalty assessments, one factor to be considered is prior violations. Hence, Appellant has a stake in the outcome and cannot be precluded from litigating the propriety of the abatement order.

OPINION

On December 23, 1985, the Department of Environmental Resources (Department) issued a compliance order 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. (SMCRA), directing Bell Coal Company (Bell) to begin reclamation and erosion control in the areas of Mining Permit Nos. 121-03 and 121-04. This compliance order was appealed by Bell on January 21, 1986, and docketed at 86-027-W.

On January 21, 1986, the Department issued another order to Bell requiring it to comply with the December 23, 1985 order. Bell filed an appeal from this order on February 20, 1986, and it was docketed at 86-101-W.

In a letter dated April 14, 1986, the Department requested that the Board dismiss six appeals filed by Bell,[1] including the two at issue here. The Board granted the motion to dismiss with respect to four of those appeals after determining that those four appeals were based on Departmental inspection reports which are not final actions of the Department, and, therefore, not reviewable by the Board. Bell Coal Company v. DER, 86 EHB 818. The two remaining appeals, 86-027-W and 86-101-W, were not dismissed because they were based upon compliance orders which are appealable actions.

The Department inspected Bell's site on March 18, 1987, and determined that Bell had satisfied the requirements of the December, 1985 and January, 1986 orders. As a result of these inspections, and Bell's compliance, the Department, on April 20, 1987, filed a motion to dismiss, arguing that there is no relief which the Board can grant to Bell and, therefore, the appeals should be dismissed as moot. Bell did not file a response to this motion.

In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of a stake in the outcome. In Re Gross, 476 Pa. 203, 382 A.2d 116 (1978), or whether the court (or agency) will be able to grant effective relief. Commonwealth v. One 1978 Lincoln Mark V, 52 Pa.Commonwealth Ct. 353, 415 A.2d 1000 (1980).

The Department has cited the case Highway Auto Service v. DER, 1980 EHB 10, as authority for its contention that under similar circumstances the

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[1]Docket Nos. 85-516-W, 85-524-W, 86-026-W, 86-027-W, 86-101-W, and 86-102-W.

Board has dismissed appeals as moot. However, in making its argument that Bell's appeals are moot, the Department has ignored Commonwealth Court precedent directly on point, Al Hamilton Contracting Company v. DER, 83 EHB 574, 494 A.2d 516 (1985). In the Hamilton case, an operator appealed this Board's dismissal of its appeal of an abatement order as moot because the operator had complied with it. The Commonwealth Court held that the penalty provisions of 25 Pa.Code §86.194 did give the operator a stake in the outcome because this regulation requires that any prior violations be considered by the Department when assessing penalties under SMCRA and that precluding the company from litigating the propriety of the abatement order immediately was unfair. The Court, therefore, reversed the Board's opinion and remanded the matter to us.

Similarly here, although Bell did comply with the orders it received, Bell remains subject to 25 Pa.Code §86.194, which provides that:

> System for assessment of penalties.
>
> (b) Civil penalties shall be assessed as follows:
>
> * * * * *
>
> (6) History of previous violations. In determining a penalty for any violation, the Department will consider previous violations of the applicable laws for which the same person or municipality has been found to have been responsible in any prior adjudicated proceeding, agreement, consent order, or decree which became final within the previous two year period. The penalty otherwise assessable for each violation shall be increased by a factor of 5.0% for each previous violation. The total increase in assessment based on history of previous violation shall not exceed $1,000.
>
> * * * * *
>
> (iii) Each previous violation shall be counted without regard to whether it led to a civil penalty assessment.

Thus, Bell could be put in the position of having to disprove its earlier alleged violations up to two years after they occurred in order to protect its interest in minimizing any future penalty assessments.

In this case, absent evidence that the Department has withdrawn the orders which are the subject of the appeals, the Board must follow the precedent in the Al Hamilton case and find that the penalty escalation provision in 25 Pa.Code §86.194 gives Bell a definite stake in the outcome sufficient to defeat the Department's argument that the appeal is moot.

O R D E R

AND NOW, this 29th day of October, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss the appeal of Bell Coal Company is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 29, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Eastern Region
For Appellant:
Lloyd George Parry, Esq.
HARRIS, DAVIS, RITER & PARRY
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AM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN J. KARLAVAGE, M.D.	:	
	:	
v.	:	EHB Docket No. 87-213-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 30, 1987
and PAGNOTTI SIGNAL CORP., Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Motion by a permittee to dismiss an appeal as untimely filed is denied where appellant is seeking review of a different action than is alleged in the motion to dismiss.

OPINION

This matter was initiated on May 11, 1987, with the filing of a notice of appeal by John J. Karlavage, M.D. Karlavage is seeking review of Plan Approval No. 54-306-002 which was issued to Signal Frackville Energy Company, Inc. (Signal) by the Department of Environmental Resources (Department) on February 5, 1987. The plan approval, which was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq., authorized the constuction of a fluidized bed boiler in Mahanoy Township, Schuylkill County.

On July 22, 1987, Signal filed a motion to dismiss Karlavage's appeal as untimely filed, arguing that he was appealing a plan approval originally

issued to Fluidized Energy Frackville Associates by the Department on December 26, 1985; notice of issuance of the permit was published at 16 Pa B 353 (February 1, 1986). The plan approval was then transferred to Signal. The Department joined in Signal's motion. Karlavage was advised by the Board that any answer to the motion must be filed by August 17, 1987, and he did not file an answer.

It is apparent from the copy of the Department action appealed provided to the Board by Karlavage that the notice of appeal relates to a plan approval with a different date than the plan approval addressed in Signal's motion to dismiss. We can hardly dismiss Karlavage's appeal as untimely when it relates to another Department action.[1]

---

[1] We have devoted an inordinate amount of resources to deciding this motion. We have even searched the Pennsylvania Bulletin issues from January to May, 1987 for evidence of the Department's plan approval issuance. While it is not our responsibility to plead a party's case and provide evidence in support of it, Signal is at some disadvantage here because Karlavage is proceeding pro se and has apparently failed to serve copies of relevant correspondence on it. It is also conceivable that this appeal may be dismissed or limited on other grounds and Signal may, of course, file other appropriate motions.

ORDER

AND NOW, this 30th day of October, 1987, it is ordered that Signal Frackville Energy Company's motion to dismiss is denied. Appellant John J. Karlavage shall file his pre-hearing memorandum on or before November 16, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 30, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Eastern Region
For Appellant:
John J. Karlavage, M.D.
Mahanoy City, PA
For Permittee:
Harry B. Crosswell, Esq.
Pottsville, PA

mjf

JOHN J. KARLAVAGE, M.D. :
:
v. : EHB Docket No. 87-215-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 30, 1987
and READING ANTHRACITE COMPANY, Permittee :

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Motion by a permittee to dismiss an appeal as untimely filed is denied where appellant is seeking review of a different action than is alleged in the motion to dismiss.

OPINION

This matter was initiated on May 11, 1987 with the filing of a notice of appeal by John J. Karlavage, M.D. Karlavage is seeking the Board's review of Plan Approval No. 54-306-003, which was issued to Schuylkill Energy Resources, Inc. (Schuylkill) by the Department of Environmental Resources (Department) on January 6, 1987. The plan approval, which was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq., authorized the construction of a fluidized bed boiler and associated facilities in Mahanoy Township, Schuylkill County.

On June 29, 1987, the Reading Anthracite Company, which formed Schuylkill to own and operate the fluidized bed cogeneration plant, filed a motion to dismiss Karlavage's appeal as untimely filed. Reading Anthracite contended that since Schuylkill's permit was issued on February 4, 1987, the last date for Karlavage to file a timely appeal would have been March 6, 1987. The Board advised Karlavage that any response to Reading Anthracite's motion must be received on or before July 22, 1987, and Karlavage did not file an answer to the motion.[1]

Although both Karlavage and Reading Anthracite have provided few facts to the Board, one fact is certain -- the action appealed by Karlavage, a copy of which was provided to the Board, was a January 6, 1987 plan approval, not a February 4, 1987, air quality permit. Since the motion to dismiss does not relate to the Department action appealed by Karlavage, we have no choice but to deny the motion.

---

[1] We have spent an inordinate amount of time in reviewing and deciding this motion. We have even combed the Pennsylvania Bulletin from January to May, 1987 for evidence of the Department's plan approval issuance. While it is not our responsibility to plead a party's case and provide supporting evidence, Reading Anthracite is at some disadvantage here because Karlavage is proceeding pro se and has apparently failed to provide copies of relevant correspondence to it. It may be that the appeal may be dismissed or limited for other reasons, and Reading Antracite may, of course, file appropriate motions.

ORDER

AND NOW, this 30th day of October, 1987, it is ordered that the Reading Anthracite Company's Motion to Dismiss is denied. Karlavage shall file his pre-hearing memorandum on or before November 16, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 30, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Eastern Region
For Appellant:
John J. Karlavage, M.D.
Mahanoy City, PA
For Permittee:
Edward E. Kopko, Esq.
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NE WOELFLING, CHAIRMAN

AM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN J. KARLAVAGE, M.D. :
:
v. : EHB Docket No. 87-216-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: October 30, 1987
and GILBERTON POWER COMPANY, Permittee :

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Motion by a permittee to dismiss an appeal as untimely filed is denied where appellant is seeking review of a different action than is alleged in the motion to dismiss.

OPINION

This matter was initiated on May 11, 1987 with the filing of a notice of appeal by John J. Karlavage, M.D. Karlavage is seeking the Board's review of Plan Approval No. 54-306-001, which was issued to the Gilberton Power Company (Gilberton) by the Department of Environmental Resources (Department) on February 11, 1987. The plan approval, which was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq., authorized the construction of two fluidized bed boilers in West Mahanoy Township, Schuylkill County.

Gilberton, on August 17, 1987, filed a motion to dismiss Karlavage's appeal as untimely, contending that Karlavage's appeal was an appeal of Plan

Approval No. 54-306-001, which was originally issued to Electrodyne Research Corporation on June 3, 1985, and subsequently transferred to Gilberton on November 15, 1985. The Department joined in Gilberton's motion by letter dated September 9, 1987. Karlavage did not respond to Gilberton's motion.

In perfecting his appeal, Karlavage provided the Board with a copy of Plan Approval No. 54-306-001, issued to Gilberton Power Company on February 11, 1987. Since that plan approval differs from the June 3 and November 15, 1985, Plan Approvals appended to Gilberton's motion, we can hardly grant Gilberton's motion.[1]

---

[1] We have devoted an inordinate amount of resources to reviewing and deciding this motion. We have even searched the Pennsylvania Bulletin from January to May, 1987 for evidence of the issuance of this plan approval. While it is not the Board's responsibility to plead a party's case and produce evidence in support of it, Gilberton is at some disadvantage here because Karlavage is proceeding pro se and has apparently failed to serve copies of all relevant correspondence on it. It is also conceivable that this appeal may be dismissed or limited on other grounds than those contained in Gilberton's motion and Gilberton may, of course, file other appropriate motions.

ORDER

AND NOW, this 30th day of October, 1987, it is ordered that Gilberton's Motion to Dismiss is denied. Appellant John J. Karlavage shall file his pre-hearing memorandum on or before November 16, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: October 30, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Eastern Region
For Appellant:
John J. Karlavage, M.D.
Mahanoy City, PA
For Permittee:
M. Melvin Shralow, Esq.
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mjf

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MAXINE WOELFLING, CHAIRMAN

WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BO

JOHN J. KARLAVAGE, M.D.	:	
	:	
v.	:	EHB Docket No. 87-180-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 3, 1987
and READING COMPANY, Permittee	:	

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Motion by permittee to dismiss third party appeal as untimely filed is granted where appeal was filed nine months after notification of permit issuance was published in the Pennsylvania Bulletin.

OPINION

This matter was initiated on May 11, 1987, with the filing of a notice of appeal by John J. Karlavage, M.D. Karlavage is seeking review of Plan Approval No. 54-306-006 (plan approval) which was issued to Northeastern Power Company (the Reading Company) by the Department of Environmental Resources (Department) on June 27, 1986. The plan approval, which was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq., authorized the construction of a cogeneration plant with a fluidized bed boiler and associated pollution control devices in Kline Township, Schuylkill County.

On August 31, 1987, the Reading Company filed a motion to dismiss Karlavage's appeal as untimely filed, contending that since notice of issuance of the plan approval was published at 16 Pa B 2876 (August 2, 1986) and Karlavage's appeal was not filed until May 11, 1987, the Board had no jurisdiction to hear Karlavage's appeal. Karlavage was advised that any answer to the Reading Company's motion must be received by the Board no later than September 28, 1987; he did not respond to the motion.

An appeal from a final action of the Department must be filed within 30 days after a party appellant has received notice of the Department's action or within 30 days after such notice has been published in the Pennsylvania Bulletin, whichever comes first. 25 Pa. Code §21.52(a) and Association of Property Owners of the Hideout, Inc. v. DER, EHB Docket No. 87-052-W (opinion and order issued August 19, 1987). Since Karlavage's appeal was filed nine months after notification that the Department had issued the plan approval was published in the Pennsylvania Bulletin and over ten months after the plan approval was issued, it was untimely and must be dismissed for lack of jurisdiction.

ORDER

AND NOW, this 3rd day of November, 1987, it is ordered that the Reading Company's motion to dismiss the appeal of John J. Karlavage, M.D. as untimely filed is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 3, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Louise S. Thompson, Esq.
Eastern Region
For Appellant:
John J. Karlavage, M.D.
Mahanoy City, PA
For Permittee:
James D. Morris, Esq.
Philadelpha, PA

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NE WOELFLING, CHAIRMAN

AM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

G. SCHEIB COAL	:	
	:	
v.	:	EHB Docket No. 87-330-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 3, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

An appeal is dismissed because the Board has no jurisdiction to hear an appeal filed more than thirty days after an appellant has received written notice of the Department action.

OPINION

The matter was initiated on August 3, 1987, by the filing of an appeal from a civil penalty assessment issued by the Department of Environmental Resources (Department) to G. Scheib Coal Co. (Scheib) on June 30, 1987, for 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. (SMCRA) in Tremont Township, Schuylkill County. The Notice of Appeal stated that Scheib received the assessment letter on July 1, 1987.

The Department, on September 10, 1987, filed a motion to dismiss, alleging that the appeal was filed by Scheib more than thirty days after receipt of the civil penalty assessment and, as a result, the Board lacked jurisdiction to hear the appeal.

In its response to the motion to dismiss, Scheib admitted that it received the notice of civil penalty assessment on July 1, 1987. While Scheib admitted that the appeal was received by the Board on August 3, 1987, it denied that the thirty day appeal period had previously expired. Scheib offered no explanation for this conclusion. Scheib also alleged that Gary Scheib, owner of Scheib Coal Co., had been trying unsuccessfully since July 15, 1987, to reach Roger Hornberger, the Department's Acting District Mining Manager, to dispute and to discuss the assessment.

The Board's jurisdiction does not attach unless an appeal is in writing and is filed with the Board within thirty days after the party appellant has received written notice of an appealable action. 25 Pa. Code §21.52(2) and Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

The thirty day period ended on Friday, July 31, 1987. Since Scheib filed its appeal in the instant matter more than thirty (30) days after receiving the assessment of civil penalty, this Board is without jurisdiction to hear Scheib's appeal.[1]

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[1] Although Scheib has not requested that we permit its appeal to be filed nunc pro tunc, its unsuccessful attempts to arrange for a conference on the matter with Mr. Hornberger at the Department do not constitute grounds for allowance of the appeal nunc pro tunc. C & K Coal v. DER, 1986 EHB 1149, 1986 EHB 1215.

ORDER

AND NOW, this 3rd day of November, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of G. Scheib Coal Co. is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 3, 1987

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Pottsville, PA

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

THEODORE GENOVESE II	:	
	:	
v.	:	**EHB Docket No. 87-334-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued November 3, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A motion to dismiss an appeal of a civil penalty assessment is granted where the appellant failed to post the required appeal bond or to prepay the penalty within 30 days of receipt of the civil penalty assessment.

O P I N I O N

On August 5, 1987, Theodore Genovese II (Genovese) filed a notice of appeal from a $1,000 civil penalty assessment by the Department of Environmental Resources (DER). DER alleged that Genovese failed to provide adequate discharge treatment facilities at his mine known as Black Nugget II, which is located in Springhill Township, Fayette County. DER assessed the civil penalty pursuant to the provisions of the Clean Streams Law (CSL), 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 (SMCRA), the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.

On September 2, 1987, DER filed a motion to dismiss this appeal,

asserting that Genovese did not file his appeal bond until August 17, 1987, some 40 days after his July 8, 1987 receipt of DER's civil penalty assessment. DER argues that because the appeal bond was not filed within the 30 day period required by §18.4 of SMCRA, 52 P.S. §1396.22 and §605(b) of CSL, 35 P.S. §691.605(b), its filing was untimely and the Board lacks jurisdiction to hear Genovese's appeal. In response, Genovese asserts that the appeal bond was in the process of being forwarded during the 30 day appeal period, which is all the statutes required, and, therefore, the Board has jurisdiction over this appeal. Genovese also denies having stated that he received the assessment on July 8, 1987.[1]

Section 18.4 of SMCRA, 52 P.S. §1396.22, requires that if a person wishes to appeal a civil penalty assessment, he must post an appeal bond in the amount of the assessment or must forward the amount to be placed in an escrow account. It also provides that failure to prepay the civil penalty within 30 days of receipt of the assessment results in a waiver of all legal rights to contest the assessment. Section 605(b) of the CSL, 35 P.S §691.605(b) contains a similar provision.

In an appeal of a civil penalty assessment, prepayment, either through an escrow or an appeal bond, is a jurisdictional pre-requisite. Boyle Land and Fuel Company v. Com., EHB, 82 Pa.Cmwlth. 452, 475 A.2d 928 (1984), aff'd 507 Pa. 135, 488 A.2d 1109 (1985). If an appellant fails to pre-pay the civil penalty assessment within 30 days of receipt of the notice, the Board has no jurisdiction to hear the appeal. Everett Stahl v. DER, 1984 EHB 825. More specifically, both the notice of appeal and the appeal bond or escrow deposit must be filed within the 30 day period. Thomas Fitzsimmons v.

---

[1] Genovese filed a petition for supersedeas on September 28, 1987. In light of our disposition of DER's motion, it is unnecessary to rule on the petition.

DER, 1986 EHB 1190.

Genovese stated in his notice of appeal that he received the assessment on July 8, 1987, and we must hold him to that representation. Accordingly, for the Board to exercise jurisdiction over this matter, we must have received both Genovese's appeal and the bond/escrow deposit on or before August 7, 1987. Since Genovese's escrow deposit was not received by the Board until August 17, 1987, we are without jurisdiction to hear this appeal.

O R D E R

AND NOW, this 3rd day of November, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss is granted and the appeal of Theodore Genovese II is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 3, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
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Virginia L. Desiderio, Esq.
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Charleroi, PA

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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE B

T.R.A.S.H., LTD. and PLYMOUTH TOWNSHIP	:	
v.	:	EHB Docket No. 87-352-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
DRAVO ENERGY RESOURCES, Permittee and COUNTY OF MONTGOMERY, Intervenor	:	Issued: November 5, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Partial summary judgment is granted where one of the grounds for an appeal is that the Department of Environmental Resources abused its discretion in granting a permit for the construction and operation of a solid waste resource recovery facility in the absence of a finally adopted solid waste management plan. The Board finds no statute or regulation prohibiting the Department from reviewing a permit application or issuing a solid waste management permit in the absence of a final solid waste management plan.

OPINION

This matter was initiated on August 20, 1987, with the filing of a notice of appeal by The Residents Against Solid Waste Hazards (T.R.A.S.H.) at Docket No. 87-352-W. Plymouth Township also filed a notice of appeal on August 20, 1987, and it was docketed at 87-355-W. The two appeals were consolidated by the Board at Docket No. 87-352-W on September 1, 1987. The Township and T.R.A.S.H. are challenging the Department of Environmental Resources' (Department) issuance of air quality, solid waste, and National

Pollutant Discharge Elimination System (NPDES)[1] permits to Dravo Energy Resources, Inc. of Montgomery County (Dravo) for the construction and operation of a resource recovery facility on land owned by Montgomery County (County) in Plymouth Township, Montgomery County. The permits were issued pursuant to, respectively, the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. 4001 et seq.; the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA); and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (the CSL). The County filed a petition to intervene which the Board granted on September 1, 1987. The Township and Dravo have filed motions for summary judgment, and we will rule on both of these motions at this time.

In its motion for summary judgment the Township argues that the Department abused its discretion in issuing the permits to Dravo because the permits, in essence, represented the implementation of that portion of the County's solid waste plan (plan) relating to the Township Districts 1 and 2. That portion of the plan received preliminary approval from the Department on May 6, 1986. More specifically, the Township contends that the plan is wholly deficient by reason of its failure to include the duly enacted resolutions of adoption by each municipality to which the plan relates, and, therefore, the Department was without authority to review Dravo's permit or to act on or implement the deficient County plan through its permitting action.

Dravo argues in its motion that it is entitled to summary judgment

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[1] The appeal of the NPDES permit has since been discontinued by a stipulation of the parties filed October 27, 1987.

on paragraph 12 of the Township's notice of appeal[2] because there are no statutes or regulations prohibiting the Department from issuing a solid waste permit in the absence of a finally approved solid waste management plan or requiring the Department to issue solid waste permits in accordance with the provisions of a solid waste plan.

The Department did not oppose Dravo's motion and expressed no position on the Township's motion. The County joined Dravo in opposing the Township's motion, and T.R.A.S.H. filed a memorandum in opposition to Dravo's motion.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Robert C. Penoyer v. DER, Docket No. 82-303-M (Opinion and order issued March 19, 1987). The parties do not dispute the facts relating to the plan, and, as a result, there are no genuine issues of material fact and we can dispose of this controversy as a matter of law.

While the Township correctly interprets §201(b)[3] of the SWMA and 25

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[2] Paragraph 12 of Township's notice of appeal states:

> The proposed facility represents the implementation of the Montgomery County Solid Waste Plan (Plan), which Plan has not yet been approved by DER and is legally incapable of being approved by DER.

[3] Section 201(b) of the SWMA requires that:

> "Whenever a county prepares and adopts such a Solid Waste Managment plan and revisions thereto, it shall provide for the participation and review of all affected municipalities."

Pa. Code §75.11[4] as requiring the participation and review of affected municipalities in the preparation of a county solid waste management plan and mandating the adoption of a plan by each municipality to which it relates prior to the Department's final approval of the plan, we can find no support for the proposition advanced by the Township that the Department is somehow proscribed in taking action on permit applications in the absence of a final solid waste management plan in conformance with the requirements of 25 Pa. Code §75.11. Indeed, we can find no scheme in the SWMA and the regulations adopted thereunder which creates such a relationship between the planning and permitting process.

We have recently considered an analogous situation in York County Solid Waste & Refuse Authority v. DER and Modern Trash Removal of York, Inc., EHB Docket No. 87-019-W (Opinion and order issued September 8, 1987) in which we held that there is no legal requirement that a permit for a private landfill be consistent with a proposed county solid waste plan. There, the York County Authority challenged the issuance of a permit to Modern Trash

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[4] The regulations promulgated by the Environmental Quality Board found at 25 Pa. Code 75.11(c) provide that:

> (a) Requirements. Official plans shall be submitted by and for municipalities, to the Department in accordance with the provisions of this chapter.
>
> * * * * *
>
> (c) Joint submissions. Joint submissions shall be made in accordance with the following:
>
> (1) "...a county unit...may submit jointly a single Official Plan, which may be prepared by one of the designated bodies and submitted on behalf of all participating municipalities...
>
> (2) Such Official Plan shall be adopted by each municipality to which it relates, and certification of the adoption shall accompany the Official Plan submitted to the Department for approval." (emphasis supplied)

Removal for the expansion and upgrading of a landfill because it believed the permit was inconsistent with a proposed county solid waste management plan designed to encourage resource recovery facilities. The county plan in that case lacked adoption by the affected municipalities and had not received final approval from the Department. We concluded that the SWMA contains no requirement that permits be consistent with solid waste management plans. By contrast, we noted the intricate relationship between sewage facilities planning and water quality management permitting existing in the Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. and the rules and regulations adopted thereunder at 25 Pa. Code §71.1 et seq. and the CSL and the regulations adopted at 25 Pa. Code §91.31.

Prior to that, in Pennsylvania Environmental Management Services, Inc. v. Commonwealth of Pennsylvania, DER, 1984 EHB 98, rev'd on other grounds, 94 Pa. Cmwlth. 182, 503 A.2d 477 (1986), we recognized that conformity with the provisions of a municipal solid waste management plan is not germane to the issuance of solid waste management permits. In dismissing intervenor Chester County's claims that the Department had abused its discretion by issuing a solid waste permit authorizing a landfill not provided for in the Chester county solid waste plan, former Member Mazullo recognized the absence of any relationship between planning and permitting in the SWMA and noted that:

> "The argument proposed by Chester County, if extended to its logical conclusion, would preclude DER from exercising any discretion in its permitting process as to the location of a site for a municipal landfill. Such a situation is in complete derogation of the provision of past and present solid waste legislation" 1984 EHB at 140-141.

Since the solid waste permitting process and the solid waste plan approval decisions have long been recognized by this Board as separate and distinct processes, we will grant Dravo's motion, deny the Township's motion and enter partial summary judgment in Dravo's favor on the issue of Paragraph 12 of the Township's notice of appeal.

ORDER

AND NOW, this 5th day of November, 1987, it is ordered that:

1. Plymouth Township's motion for summary judgment is denied;
2. Dravo Energy Resources' motions for summary judgment and in limine are granted; and
3. Partial summary judgment on Paragraph 12 of Plymouth Township's notice of appeal is entered in Dravo's favor.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 5, 1987

cc: **For the Commonwealth, DER:**
Winifred M. Prendergast, Esq.
Eastern Region
For Appellant:
Jerome Balter, Esq./T.R.A.S.H., Ltd.
Arthur Lefkoe, Esq./Plymouth Township
Anthony J. Mazullo, Jr., Esq./Plymouth Township
For Permittee:
Ronald S. Cusano, Esq./Dravo Energy Resources
For Intervenor:
Bruce W. Kauffman, Esq.)
John F. Smith, III, Esq.) - Montgomery County
Sheryl L. Auerbach, Esq.)
Michael L. Krancer, Esq.)

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PENGROVE COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 87-070-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	November 10, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The Department of Environmental Resources motion to dismiss this appeal as moot is denied where it may be possible for the Board to grant the requested relief. An auger mining application was filed, including a mine map which included a 300 feet area around a dwelling; later, in response to a DER request for information, another mine map was filed without such area. There is doubt as to whether the Appellant withdrew the earlier mine map and the doubt must be resolved in the appellant's favor.

O P I N I O N

This matter was initiated by the February 27, 1987 filing of a Notice of Appeal by Pengrove Coal Company (Pengrove), a division of Adobe Mining Company (Adobe), from a Department of Environmental Resources (DER) grant of an auger mining permit. Pengrove is appealing the issuance of the permit only insofar as the permit did not include a 300 foot area around a dwelling

within its mining area. Involved here is Pengrove's Schull Mine located in Irwin Township, Venango County.

On May 4, 1987, DER filed a motion to dismiss this action for mootness. DER avers that on or about October 30, 1986, Pengrove applied to DER for permission to auger mine at the Schull Mine, which it was operating pursuant to Surface Mining Permit No. 618440106. As part of its auger mining application, Pengrove sought to auger mine within 300 feet of the dwelling of M.J. Poole. On December 8, 1986, DER wrote to Pengrove, requesting additional documents to complete its application, including a letter from Poole specifically agreeing to Pengrove's auger mining, because the authorization from Poole contained in the original application to auger mine did not refer to auger mining. Adobe, responding on Pengrove's behalf, submitted a new mine map from which the area within 300 feet of Poole's dwelling was deleted. DER's district mining manager then informed Pengrove, on January 20, 1987, that its request to revise its permit for auger mining had been granted, subject to field approval, which occurred on March 10, 1987. The DER approval, however, did not authorize auger mining within 300 feet of the Poole dwelling. DER contends that there is no relief that the Board can grant, since it was Pengrove that deleted the area within 300 feet of Poole's home from its auger mining application. Therefore, DER concludes, the appeal should be dismissed as moot.

In response, Pengrove alleges that in a letter sent to DER on December 31, 1986, it stated that it considered its earlier release from Poole to be adequate and that no specific reference to auger mining in such a release was required. However, in the interests of expediency, Pengrove submitted a new map from which it deleted the 300 area around the Poole dwelling from the proposed auger mining site. It then requested DER to choose

between the two versions of the mine map. Pengrove contends that it was never its intent to waive any right or claim to auger mine in the 300 foot area around the Poole dwelling area when it sent DER the new mine map.

In deciding a motion to dismiss, the Board must view the record in the light most favorable to the non-moving party. Herskovitz v. Vespicco, 238 Pa. Super, 529, 362 A.2d 394 (1976). There is some doubt here whether Pengrove withdrew its first mine map, i.e., that which involved auger mining within 300 feet of the Poole residence, and that doubt must be resolved in Pengrove's favor. In this instance, if the first map, which included the 300 foot area around the Poole dwelling, was never withdrawn, DER's action was a choice between two versions of the mine map rather than simply considering a revised application. If this is the case, then relief may possible for Pengrove. Accordingly, we will deny DER's motion.

O R D E R

AND NOW this 10th day of November, 1987, it is ordered that the Department of Environmental Resources motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 10, 1987

cc: **Bureau of Litigation**
Harrisburg
For the Commonwealth, DER:
Katherine S. Dunlop, Esq.
For Appellant:
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BASKIN FLAHERTY ELLIOTT and MANNINO
Philadelphia, PA

PHILIP R. JAMISON :
:
v. : EHB Docket No. 87-083-W
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 10, 1987

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

Appeal of the 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 March 9, 1987, Philip R. Jamison (Jamison) filed an appeal with this Board from the February 11, 1987 assessment of a civil penalty in the amount of $20,000 by the Department of Environmental Resources (Department). The penalty was assessed as a result of unpermitted discharges from Leechburg Mining Company's Foster No. 65 deep mine in Kiskiminetas Township, Armstrong County; Jamison is the president and owner of Leechburg Mining Company. The Department assessed the civil penalty pursuant to Section 18.4 of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22 (the Surface Mining Act), 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) (the Clean Streams Law). The notice of assessment directed Jamison to pay the penalty within thirty days of receipt of the assessment, or if he wished to appeal the assessment, forward the amount of the assessment to the Secretary of the Department for placement in an escrow account or post an appeal bond with the Secretary in the amount of the assessment. The assessment letter emphasized that the procedures for appealing the 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 July 31, 1987, the Department filed a motion to dismiss this appeal on the ground that Jamison had not perfected his appeal by filing either a properly executed appeal bond or cash equal to the full amount of the assessment with the Board.

In his response to the Department's motion, Jamison averred that requiring the posting of bond in advance of the hearing, is "confiscatory, a denial of substantive due process, procedural due process and equal protection of the law as guaranteed by both the United States and Pennsylvania Constitutions." In his Notice of Appeal, Jamison also stated he is unable to pay or post bond for the fines assessed.

Section 18.4 of the Surface Mining Act, 52 P.S. §1396.22, clearly dictates that a person post an appeal bond or forward the same amount of money to an escrow account if he wishes to contest the penalty before the Board. That section specifically states:

> Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the vio-

lation or the amount of the penalty.

Section 605(b) of the Clean Streams Law contains an analogous provision and regulations implementing these requirements have been promulgated at 25 Pa.Code §86.202(c), which provides that:

> No appeal from a penalty assessment shall be deemed to be perfected unless a properly executed appeal bond or cash equal to the full amount of the assessed penalty is received by the Environmental Hearing Board within 30 days of appellant's receipt of the assessment.

The constitutionality of these regulations was upheld by the Commonwealth Court in Boyle Land and Fuel Company v. Com., Environmental Hearing Board, 82 Pa.Cmwlth. 452, 475 A.2d 928 (1984). The Court held that the bond requirement is a reasonable condition on the right to appeal an assessment despite the appellant's contention that the bond requirement was a violation of the right of appeal under Article V, Section 9 of the Pennsylvania Constitution and violative of due process rights under the Pennsylvania and United States Constitution.

The Board has consistently held the pre-payment requirement for appeals of civil penalties assessments under §18.4 of the Surface Mining Act and §605(b) of the Clean Streams Law to be a jurisdictional prerequisite. Thomas Fitzsimmons v. DER, 1986 EHB 1190. If an appellant fails to prepay the civil penalty, or to post a bond in that amount with the Department, his rights are not preserved by the appeal and the Board lacks authority to hear the appeal. See Stahl v. DER, 1984 EHB 825.

A case directly on point is Anthracite Processing Co., Inc. v. DER, 1986 EHB 1173. There, Anthracite opposed a similar motion to dismiss an appeal from a civil penalty assessment based on constitutional grounds and the financial inability of the operator to comply with the pre-payment

requirements. Citing supportive dicta from the Boyle case, as well as federal cases upholding the constitutionality of the pre-payment of civil penalties under 30 U.S.C. §1268(c), we concluded that we had no power to determine the constitutionality of the statutory provisions mandating pre-payment of civil penalties assessments and would have to presume their constitutionality in ruling on the Department's motion to dismiss. Similarly here, we must reach the same result and dismiss this appeal.

Since Jamison has failed to perfect his appeal by prepaying the proposed penalty or forwarding an appeal bond within the 30 day appeal period required by Section 605 of the Clean Streams Law and Section 18.4 of the Surface Mining Act, the Board has no jurisdiction over this appeal. Rosio Coal Company v. DER, EHB Docket No. 86-430-R (opinion and order issued February 3, 1987). Therefore, the Department's Motion to Dismiss is granted.[1]

---

[1] In light of our dismissal of this appeal for lack of jurisdiction, it is unnecessary for us to address Jamison's contention in its Notice of Appeal that the Department should not have held him personally liable for the assessment.

O R D E R

AND NOW, this 10th day of November, 1987, it is ordered that the Department of Environmental Resources Motion to Dismiss is granted and the appeal of Philip R. Jamison at EHB Docket No. 87-083-W is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 10, 1987

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WARRINGTON TOWNSHIP MUNICIPAL AUTHORITY	:	
	:	
v.	:	EHB Docket No. 86-203-W
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	: :	Issued: November 17, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is granted in the Department of Environmental Resources' favor where an authority contends that the Department is estopped from contending that construction costs for house lateral sewers were eligible for Clean Water Act construction grants because of the contrary representations of a Department employee. The EPA definition of collector sewers explicitly prohibits funding for construction of lateral sewers, and since, in executing the grant agreement, the authority is bound by the Clean Water Act and the regulations promulgated thereunder, it is charged with constructive knowledge of the contents of those regulations. Therefore, the authority cannot invoke the doctrine of estoppel to create funding eligibility for lateral sewers where none exists in law.

OPINION

Warrington Township Municipal Authority (Authority) initiated a sewer project known as the "Little Neshaminy Interceptor Sewer." Pursuant to Title

II of the Clean Water Act, 33 U.S.C. §1251 et seq., the Authority received a Step 3 federal grant from the United States Environmental Protection Agency (EPA) for construction of the project. The grant agreement, which was signed by the Authority on September 24, 1984, described the project as the construction of an interceptor sewer along the Little Neshaminy Creek and seven collector sewer systems.

Shortly thereafter, the Authority's engineer inquired about the grant eligibility of costs for construction of house laterals from the main sewer to the end of the Authority's right of way; such laterals connect houses and other individual structures to the main sewer by means of a "Y" connection. The Authority was informed by letter dated December 6, 1984, from the Department of Environmental Resources' (Department) project manager, John Fabian, that the costs of those facilities were grant eligible.

On or about July 9, 1985, the Authority submitted its "Part B" documents to the Department requesting approval of funding as reflected in the accepted bids on the project. The Part B documents included as allowable costs 10,455 linear feet of house laterals for existing dwellings. On August 9, 1985, EPA approved the Authority's Part B documentation. The Authority began construction of the sewer collection system on September 3, 1985.

The U.S. Army Corps of Engineers conducted an evaluation of the project in early 1986 and questioned the grant eligibility of the house laterals. The Department project manager consulted with his supervisors and on March 10, 1986, informed the Authority that the house laterals were not grant eligible under 40 C.F.R. §35.2005 and that the Authority's grant would be decreased accordingly.

The Authority, on April 10, 1986, filed a notice of appeal, contending that the Department's eligibility determination was an incorrect

application of 40 C.F.R. §35.2005, that the federal regulations were arbitrary, capricious and contrary to the intent of the Clean Water Act, and that the Department was estopped from denying grant eligibility due to its prior determination of eligibility for the same facility.

On January 22, 1987, the Board conducted a pre-hearing conference in the matter, during which the possibility of resolution without hearing was discussed. In response to the Board's order, the Department filed a motion for summary judgment and supporting brief, and the Authority responded with a brief in opposition.

In its summary judgment motion the Department argued that house lateral sewers were clearly ineligible for grant funding under the Clean Water Act and the regulations thereunder by which the Department, the Authority, and this Board are bound. Hence, the Authority could not invoke the doctrine of estoppel to create grant eligibility for the house laterals when it did not exist in the law. Finally, the Department asserted that the Board lacks jurisdiction to review the validity of a federal construction grants program regulation.

The Township responded that genuine issues of fact remain, including whether or not lateral sewers were eligible and whether equitable estoppel could be invoked against the Department under the circumstances of this appeal. The Authority also maintained that it has not had an opportunity to develop a record concerning its reliance on the Department's original declaration of eligibility.

The Board is empowered to grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment

as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and order issued March 19, 1987).

The Township has argued that summary judgment is inappropriate here, since the Department's motion is more of a motion for judgment on the pleadings under Pa. R.C.P. 1034. Rule 1034 gives a party the opportunity to question the legal sufficiency of an opponent's pleadings prior to trial. The motion for summary judgment is designed to supplement the motion for judgment on the pleadings to provide for an equivalent summary disposition of the case where the pleadings may be sufficient, on their face, to withstand a preliminary objection but where, in actuality, there is no genuine issue of fact and this can be conclusively shown through depositions, answers to interrogatories, admissions, or affidavits. 6th Standard Pennsylvania Practice 2d §32.1.

Here, whether the motion is treated under Rule 1034 or 1035, the result is the same since, there are no material factual issues. The issue for the Board to decide is whether the Department is entitled to judgment as a matter of law, which, in turn, requires us to address three separate legal questions. The first is a question of our authority to interpret federal regulations. Then, we must determine whether the house laterals are grant eligible under the Clean Water Act and its implementing regulations. And, then finally, we must address whether a theory of estoppel can be maintained, as a legal matter, against the Department.

The Department has argued that we are without jurisdiction to hear this appeal because it involves a challenge to the validity of federal construction grants regulations. However, we view this appeal as requiring us to interpret those regulations and, as a result, believe jurisdiction does lie

with us. We are reviewing an action taken by the Department, which, pursuant to its Construction Management Assistance Grant with EPA, is responsible for administering the Clean Water Act's construction grants program in Pennsylvania. We have held in Borough of Lewistown v. DER, 1985 EHB 903, 904, that "Where the federal legislative scheme delegates responsibility to the state environmental agency...the consequence must normally be to subject the state agency's action to the state's administrative review process." While this Board does not have the power to declare these EPA regulations invalid, it does have the authority to determine whether the Department's application of them is arbitrary, capricious, unreasonable, or contrary to law.

The Clean Water Act authorizes the award of grants to municipalities for the construction of publicly owned treatment works. 33 U.S.C.A. §1281(g)(1). The term "treatment works" is defined in §212(2)(A) of the Clean Water Act, 33 U.S.C.A. §1293(2)(A), as:

> (2)(A) The term "treatment works" means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature to implement section 1281 of this title, or necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewer collection systems, pumping, power, and other equipment, and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process (including land used for the storage of treated wastewater in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment.

While the Clean Water Act does not define the term "collection system," the term "collector sewer" is defined in the regulations implementing the construction grant program found at 40 C.F.R., subpart I. Specifically,

40 C.F.R. §35.2005(10) defines collector sewer as:

> (10) Collector sewer. The common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive wastewaters directly from facilities which convey wastewater from individual systems, or from private property, and which include service "Y" connections designed for connection with those facilities including:
>
> (i) Crossover sewers connecting more than one property on one side of a major street, road, or highway to a lateral sewer on the other side when more cost effective than parallel sewers; and
>
> (ii) Except as provided in (b)(10)(iii) of this section, pumping units and pressurized lines serving individual structures or groups of structures when such units are cost effective and are owned and maintained by the grantee.
>
> (iii) This definition excludes other facilities which convey wastewater from individual structures, from private property to the public lateral sewer, or its equivalent and also excludes facilities associated with alternatives to conventional treatment works in small communities.
>
> (emphasis added)

This definition of a collector sewer does not include any pipe between the "Y" connection and the property being served. Since this regulation specifically includes "Y" connections, it must follow that all facilities beyond the "Y" connections fall outside the definition of collector sewers, and, therefore, are ineligible for grant funding.

It is a well known principle of statutory construction in both the Pennsylvania courts and the federal courts that, unless clearly erroneous, an agency's interpretation of the statutes and regulations it administers is entitled to great deference. National Freight, Inc. v. Larson, 760 F.2d 499 (3rd Cir. 1985) and SmithKline Beckman Corp. v. Com., 85 Pa. Cmwlth. 437, 482 A.2d 1344 (1984), aff'd 508 Pa. 359, 498 A.2d 374 (1985). The regulatory record associated with the construction grant regulations and the opinions of

the EPA Board of Assistance Appeals evidence a clear and consistent interpretation that the facilities in question in this appeal are not grant eligible.

The September, 1978 revision of the construction grants regulations is illustrative. The preamble to the regulations discussed the prior definition of sewage collection system found at 40 C.F.R. §35.905:

> "Two commenters questioned the policy of EPA which prohibits funding of sewer system rehabilitation beyond the 'Y' fittings which convey wastewater from individual structures or private property. They suggested we consider as eligible all sewer rehabilitation costs for any part of a line lying in a public easement. EPA considers eligible for new construction only those parts of the line up to and including the 'Y' fittings. Therefore, in accordance with the definition of sewage collection system in Section 35.905-19, EPA cannot fund rehabilitation work beyond the 'Y' fittings."
>
> 43 Fed Reg. 44045 (1978) (emphasis added)

And, again in the November, 1985 amendments to the construction grant regulations, EPA interpreted the definition of collector sewer, 40 C.F.R. §35.2005(10) and reiterated that house laterals, whether for conventional treatment works or for small system projects, were not grant eligible.

> "Agency policy is that for small systems, as for conventional treatment works, the cost of house laterals is not eligible. As indicated by the legislative history underlying section 211 of the Clean Water Act, this policy is consistent with the intent of Congress: 'Sewer lines financed under this authority (Title II) are to be limited to the main lines constructed by the public agency and does not include the connection to such lines by households and others.' H.R. Report No. 92-911, 92nd Cong. 2nd Sess. (1972). House laterals were explicitly excluded from the applicable definition of a sewage collection system in previous regulations. 40 C.F.R. 35.905. House laterals are likewise explicitly excluded from the present definition of collector sewer, 40 C.F.R. 35.2005 (10)(iii), and are specifically made ineligible for

> funding under small system projects pursuant to Appendix A(b)C.2.b. 50 Fed. Reg. 45893-94 (1985)." (emphasis added)

It is clear that house laterals beyond the "Y" connectors are not within the meaning or the definition in 40 C.F.R. §35.2005(10) for collector sewers.

This interpretation has also been adopted by EPA's Board of Assistance Appeals in its October 4, 1979 decision reviewing the grant eligibility of collector sewer costs in Wheaton Sanitary District, (EPA Docket No. 77-2). The legislative history of the 1972 Amendments to the Federal Water Pollution Control Act was cited as a basis for holding house laterals as ineligible:

> "In passing those amendments, Congress modified the prior statutory definition of 'treatment works', and included, for the first time, sewage collection systems within that definition as being grant eligible. One of the chief reasons for this was the Congressional recognition that a primary reason for delays in the national water pollution control effort was the inability of local agencies to arrange for financing of collection systems. Nevertheless, in bringing sewage collection systems within the reach of possibility for a Federally funded 'treatment works', Congress not only enacted certain stringent statutory criteria which are not at issue (in this appeal), but went on to caution:
>
> > Sewer lines financed under this authority are to be limited to the main lines constructed by the public agency and does not include the connection to such lines by households and others."
> >
> > Wheaton, p. 6 (Emphasis in original; footnotes omitted)

Thus, we do not believe that there is, or has been, any doubt concerning the grant eligibility of house laterals. They are not grant eligible under either the Clean Water Act or its implementing regulations.

The only issue remaining is whether an estoppel may be maintained against the Department as a result of Mr. Fabian's representations. We

believe that our decision in Borough of Lewistown v. DER, supra, is directly on point. In the Lewistown case, the Borough sought to estop the Department from relying on a prior denial of grant eligibility based on the Borough's allegation that a Department representative had misinformed the Borough that it could obtain a review of the decision at the completion of the project. The Board rejected this argument, citing Pennsylvania law which holds that the government cannot be bound by the acts of its agents and employees if these acts are outside the agent's powers, or in violation of positive law. We noted that since both the Department and EPA regulations prohibited funding for projects without prior approval, allowing an estoppel would violate these regulations. This was also founded in the rationale that because the Borough was charged with constructive knowledge of the regulations, the Borough could not have reasonably relied on the Department representative's assertions.

We find a similar situation here. This introduction to the special conditions appended to the construction grant agreement executed by Warrington stated that "The grantee is subject to all the requirements of 40 C.F.R. Part 35 Subpart I, Part 30, Part 33 and other pertinent regulations." Special Condition 9 of the Grant Agreement also stated that:

> 9. Review
>
> The grantee recognizes that approval of any part of this grant, change orders, grant increase amendments, subagreements, any specific items or eligibility of any other costs will be subject to final review, including project officer review, audit review, and final determintion of the Grant Approving official.

And, the text of the grant agreement immediately preceding Warrington's signature, stated:

> This Agreement is subject to applicable U.S. Environmental Protection Agency statutory provisions and assistance regulations. In accept-

> ing this award or amendment and any payments made pursuant thereto, (1) the undersigned represents that he is duly authorized to act on behalf of the recipient organization, and (2) the recipient agrees that the award is subject to the applicable provisions of 40 CFR Chapter I, Subchapter B and of the provisions of this agreement (Parts I thru IV), and (b) that acceptance of any payments constitutes an agreement by the payee that the amounts, if any, found by EPA to have been overpaid will be refunded or credited in full to EPA.

The Authority is charged with actual and constructive knowledge of all applicable statutes and regulations through its signing of the grant agreement, and, given the explicit language in the grant agreement, it can hardly be surprised by the explicit declarations in the law and implementing regulations that house laterals are not grant eligible. Because the house laterals are ineligible, neither Mr. Fabian's representations nor the Department's approval of the Part B documents can bind it or EPA to fund the house laterals since there is no legal authority to fund the facilities.

Consequently, because there are no material facts at issue and the Department is entitled to judgment as a matter of law, we will enter summary judgment in the Department's favor.

O R D E R

AND NOW, this 17th day of November, 1987, it is ordered that the Department of Environmental Resources' Motion for Summary Judgment is granted and the appeal of the Warrington Township Municipal Authority is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 17, 1987

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SUGAR HILL LIMESTONE COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-353-R**
	:	**86-428-R**
COMMONWEALTH OF PENNSYLVANIA,	:	**86-429-R**
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued November 17, 1987

OPINION AND ORDER

Synopsis

A motion to limit issues is granted. Appellant is precluded from challenging the factual or legal basis of a civil penalty assessment when it failed to appeal the underlying compliance order. In this appeal, Appellant may only challenge the amount of the assessment.

O P I N I O N

Sugar Hill Limestone Company ("Sugar Hill") initiated each of the above-captioned appeals from actions of the Department of Environmental Resources (DER). On July 17, 1986, Sugar Hill filed an appeal from DER's $360 civil penalty assessment (Assessment 1) for alleged unauthorized discharges of acid mine drainage from Sugar Hill's Lewis Pit mine site. This appeal was docketed at No. 86-353-R.[1] On August 29, 1986, Sugar Hill appealed from

[1] The appeal at Docket No. 86-353-R was dismissed by the Board for Sugar Hill's failure to perfect its appeal. However, upon Sugar Hill's petition for reconsideration and in view of Sugar Hill's pro se status, the Board reinstated this appeal.

DER's $750 civil penalty assessment (Assessment 2) for alleged failure to stabilize rills and gullies on regraded and replanted areas at Sugar Hill's No. 5 mine site. This appeal was docketed at No. 86-428-R. Finally, on August 29, 1986, Sugar Hill appealed from DER's $633 civil penalty assessment (Assessment 3) for alleged failure to maintain a certain sediment pond at Sugar Hill's Lewis Pit site. This appeal was docketed at No. 86-429-R. Both Sugar Hill mine sites are located in Windslow Township, Jefferson County. DER took these actions pursuant to Section 18.4 of the Surface Mining Conservation in these appeals of civil penalty assessments, and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 35 P.S. §1396.1 et seq., 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. These appeals have not been consolidated.

DER has filed motions to limit issues in each of the appeals. DER alleges that each civil penalty assessment was based on a prior, unappealed compliance order.[2] Because the prior orders were not appealed, DER argues they became final DER orders and are impervious to challenge in these appeals. Accordingly, DER concludes, Sugar Hill may challenge the amount of the assessments but not the underlying factual bases. Sugar Hill filed a totally unresponsive answer to DER's motion.[3]

---

[2] Assessment 1 was based on Compliance Order (CO) K-84-030, issued January 31, 19894. Assessment 2 was based on CO K-85-204S, issued July 2, 1985. Assessment 3 was based on CO 86-K-085S, issued March 6, 1985.

[3] In whole, Sugar Hill responded as follows:

> We object to statements in "Motion to Limit Issues" saying we did not appeal civil penalty. We answered every motion received. It was extremely hard to follow the number system used by DER. They seem to change Docket numbers without any system. To the best of our ability we have complied with all requirements. We have all correspondence in our files. We'll forward if necessary.

As DER correctly points out, unappealed compliance orders become final DER orders, the bases of which cannot be challenged in later appeals. James E. Martin v. DER, EHB Docket No. 86-567-R (Opinion and order issued March 9, 1987). A search of the Board's docket reveals no appeals of the underlying compliance orders stated in DER's motions. Because Sugar Hill did not appeal the underlying compliance orders, it may only challenge the reasonableness of the amount in these appeals of civil penalty assessments. Kent Coal Mining Company v. DER, EHB Docket No. 86-433-R (Opinion and order issued September 3, 1987). Therefore we will grant DER's motion.

O R D E R

AND NOW, this 17th day of November , 1987, it is ordered that the Department of Environmental Resource's motion to limit issues is granted. It is also ordered that the three above captioned appeals are consolidated at Docket No. 86-353-R.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 17, 1987

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GLOBE DISPOSAL COMPANY and WASTE TECHNIQUES CORPORATION	:	
v.	:	EHB Docket No. 85-517-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 23, 1987

OPINION AND ORDER

Synopsis

A motion to dismiss objections and to compel discovery and/or for sanctions is granted where the information sought is relevant, reasonable, not beyond the scope of discovery and calculated to lead to the discovery of admissible evidence.

OPINION

This discovery dispute arises in connection with a November 26, 1985 appeal from a November 22, 1985 order by the Department of Environmental Resources (Department) revoking Solid Waste Permit No. 300662 which authorized the operation of a solid waste processing and recycling facility and incinerator at 400 River Road, in Upper Merion Township, Montgomery County, by Waste Techniques Corporation (Wastech). Globe Disposal Company (Globe) is a transporter of municipal waste with its principal place of business at the same address. The basis for the order was the existence of numerous violations regarding the handling and management of infectious hospital waste. Concurrent with the filing of the notice of appeal, Wastech and Globe

(hereinafter referred to jointly as GW) filed a petition for supersedeas, which the Board granted on December 4, 1985.

The parties then engaged in discovery and, after several extensions to conduct discovery, GW served its first set of interrogatories and request for production of documents on the Department on May 29, 1987. After receiving an extension for the filing of its answers to these requests, the Department, on July 29, 1987, filed its response, averring that the requests were not permitted under Pa.R.C.P. 4011 and that the subject matter of each and every interrogatory was privileged. It provided no responses or documents. The Department also variously alleged that the interrogatories were beyond the scope of discovery and would cause unreasonable annoyance, burden, and expense and require unreasonable investigation.

GW, on September 8, 1987, filed a motion to dismiss objections and to compel discovery and/or for sanctions, arguing that the Department's replies did not comply with 25 Pa.Code §21.111 and Pa.R.C.P. 4009(b)(2).[1] The Department filed a response in opposition to GW's motion on September 30, 1987, and at this time it included a list of privileged documents from the Norristown Bureau of Air Quality Control and Bureau of Waste Management.

The Department's objections may be grouped into three categories: 1) those protected by privilege, 2) those causing unreasonable annoyance, burden, expense and investigation, and 3) those beyond the scope of discovery seeking privileged attorney work product.

---

[1] GW also maintains that the Department's responses to these interrogatories and request for production of documents were due on or before June 30, 1987. However, the Board has granted several extensions of time to complete discovery in this matter upon motions of both parties and, as a result, the Department's responses were timely.

The Department made a blanket objection to each and every interrogatory as privileged, including but not limited to attorney-client communication, attorney work product, and/or confidential settlement discussions. Such a broad, undefined response is neither appropriate nor acceptable; the respondent must state with specificity his objection to each interrogatory.

Interrogatories 3 and 6(a) and Instructions A-2 and A-4 to the interrogatories and Instruction A-3 to the request for production of documents were objected to as causing unreasonable annoyance, burden, expense and investigation. Instruction A-2 states:

> 2. In answering, the Department is requested to identify separately and in a manner suitable for a request for production of documents for inspection and copying, pursuant to Rule 4009 of the Pennsylvania Rules of Civil Procedure, and for use in a subpoena, all sources of information, whether human, documentary or otherwise and all documents and records maintained by the Department or any other person or organization which relate to the information requested by the interrogatories. In lieu of identifying a particular document, when such identification is requested, the Department may, at its option, attach copies of such documents to the responses to the interrogatories.

This interrogatory instruction is not unresonably burdensome. Any information repeated in answers to other interrogatories or contained in the list of documents attached to the response in opposition to GW's motion to dismiss objections may be referred to in response to this question and hence, it is not unduly burdensome.

Instruction A-4 requires that the Department state, for each document it withholds on the grounds of privilege, the reason for withholding it, the

identity of all persons with information, the authors and addresses of each person to whom copies are furnished, the date and subject matter of the document and the present custodian and location of the document. Instruction A-3 to the request for production of documents requires this same information on any document withheld on the ground of privilege. Although the Commonwealth should have included this information along with its original objection to the interrogatories, it appears that Attachments A and B to the Commonwealth's response satisfied these instructions. However, we note that, in the future, we will look with extreme disfavor on such blanket responses.

Interrogatory 3 requires the Department to identify all persons working for the Department in any way responsible for inspecting the Wastech incinerator for compliance with the Solid Waste Management Act (SWMA), stating for each: his employment history, dates of inspections, identity of every individual consulted or who submitted a written report, the identity and location of every document or report submitted and the identity of every person who received a copy of the inspection report. Again, this is a reasonable request and if the information requested here has been set forth in another response, it may be referred to, thus avoiding unreasonable burden, expense and annoyance.

Interrogatory 6(a) requires the Department to identify all persons within the Department responsible for any work associated with §503(c) or (d) of the SWMA, including the date this employment began, the present employment of the individual and, if no longer employed with the Department, the date of termination and whether the termination was voluntary or involuntary. This interrogatory is relevant with the exception of the inquiry into whether the

termination of the employee was voluntary or involuntary. The request is reasonable if limited to non-clerical personnel in the offices of the Department in Harrisburg and Norristown.

Finally, interrogatories C-7(i), 8(i), 9(i), 14(i), 20(e), 21(e), 23(f), 24(f), 25, 27(d), and 28(c) are objected to as beyond the scope of discovery and as calling for privileged attorney work product, specifically case/trial strategy. Although the Department objected only to the subparts of these interrogatories as listed above, it failed to answer or object to any other subparts in violation of Pa.RCP 4006(a)(2), which provides, "the statement of an objection shall not excuse the answering party from answering all remaining interrogatories to which no objection is stated." Subparts C.7(i), 8(i), 9(i), 14(i), 20(e), 21(e), 22(e), 23(f) and 24(f) request that the Department identify all Department employees or any other individuals who witnessed, investigated or had personal knowledge of a particular incident that was cited in the Department's November 22, 1985 order. These interrogatories are both relevant to the appeal and reasonably calculated to lead to the discovery of admissible evidence pursuant to Pa.R.C.P. 4003.1. Interrogatory 25 lists 15 witnesses identified by the Department in its pre-hearing memorandum and requests that the Department describe all facts about which each of these individuals will testify. Interrogatory 27(d) requests the Department to identify all documents to be relied upon by each individual in his or her testimony and Interrogatory 28(d) requires the identification of all documents to be reviewed by the individual in preparing for such testimony. This information is relevant and within the scope of discovery. There is no merit to the Department's contention that depositions of these witnesses are all the discovery on the subject matter of witness related interrogatories to which GW is reasonably entitled.

O R D E R

AND NOW, this 23rd day of November, 1987, upon consideration of the Globe Disposal/Waste Techniques' Motion to Dismiss Objections and to Compel Discovery and/or for Sanctions, it is ordered that the motion is granted. The Department is to provide complete and full answers for all parts of these interrogatories by December 14, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: November 23, 1987

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M. DIANE SMITH
SECRETARY TO THE BOARD

BETHENERGY MINES, INC.	:	
	:	
v.	:	**EHB Docket No. 86-624-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued November 24, 1987

OPINION AND ORDER
SUR
MOTION TO AMEND ORDER TO
PERMIT INTERLOCUTORY APPEAL

Synopsis

A request for an interlocutory appeal is denied in part and granted in part. Where the question involves a controlling issue of law upon which there is substantial disagreement, and where immediate review would expedite the proceedings, the Board will amend its order to permit appellate review. Where an issue has previously been decided, and the Board believes it to be not critical to the outcome of the appeal, the Board will not certify its order for appellate review. Interlocutory appeals are generally disfavored in Pennsylvania, but in an appeal where there appears to be no additional, unrelated issues to be decided, the appeal from an interlocutory appeal may be granted.

O P I N I O N

This appeal was initiated by BethEnergy Mines Inc.'s (BethEnergy) November 10, 1986 filing of a notice of appeal from a November 6, 1986 Department of Environmental Resources (DER) letter directing BethEnergy to

conduct pre-shift examinations of areas where energized electrical equipment is present but which are not normally entered by miners. The order pertained to BethEnergy's "84 complex", an underground mine located in Washington County. DER took its action pursuant to the Bituminous Coal Mine Act, the Act of July 17, 1961, P.L. 654, as amended, 52 P.S. §701.101 et seq. (the Act).

Concurrent with its appeal, BethEnergy filed a petition for supersedeas. After a hearing, the Board denied the supersedeas petition in an opinion and order dated July 10, 1987, ruling that BethEnergy was unlikely to prevail on the merits since Section 228(a) of the Act could not be narrowly read to confine pre-shift examinations to only those areas where miners were about to enter for a work shift in light of the statute's overall concern for the safety of miners.

BethEnergy also appealed a March 6, 1987 DER letter, by which DER purported to clarify its November, 1986 order. This second appeal, which was docketed at 87-081-R, was accompanied by a petition for supersedeas. By order dated July 14, 1987, the Board denied the petition for supersedeas for the same reasons articulated in its July 10, 1987 opinion and order and consolidated Docket No. 87-081-R with Docket No. 86-624-R.

On July 23, 1987, BethEnergy filed a motion to amend the Board's orders of July 10 and 14, 1987 to permit an interlocutory appeal, by including the statement required in §702(b) of the Judicial Code, the Act of

July 9, 1976, P.L. 586, 42 Pa. C.S.A §101, et seq.[1] BethEnergy argues that the Board's interpretation of §228(a) of the Act involves a controlling question of law as to which there is a substantial ground for a difference of opinion, and cites the Board's acknowledgment in its opinion that there is no case law on the subject. BethEnergy also argues that the issue of whether DER's inspector had the authority to issue the November, 1986 and March, 1987 order is also an appropriate question for appellate review. Finally, BethEnergy asserts that interlocutory review of these two issues by the Commonwealth Court would expedite resolution of this appeal, especially in light of the Board's hearing calendar and the alleged importance of this issue to the entire bituminous deep mine industry.

DER, in its response to the motion, disputes that an appeal of these interlocutory orders would materially expedite the proceedings, since BethEnergy has indicated its intent to present evidence relating to discriminatory enforcement by DER with respect to Section 228(a) of the Act. DER also contends that the question of a mine inspector's authority to issue orders under Sections 121 and 123 of the Act is well settled and thus is not in need of immediate review.

Appeals from an interlocutory orders are looked upon with disfavor, particularly where there exists danger of piecemeal determinations and the consequent protraction of litigation. Weiss v. Philadelphia, 65 Pa.Cmwlth.

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[1] §702(b) of the Judicial Code, reads as follows:

Interlocutory appeals by permission. - When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

260, 442 A.2d 378 (1982). However, where there is a matter which might ultimately be reviewed by an appellate court, and the lower court believes its interlocutory order involves a controlling question of law over which there is a substantial difference of opinion and further believes that an immediate appeal from its order might materially advance the ultimate termination of the matter, the lower court may amend its order pursuant to §702(b) of the Judicial Code. The order may then be appealed by permission of both courts. Gellar v. Chambers, 292 Super.Ct. 324, 437 A.2d 406 (1981); 16 Std. Pa. Practice §86:17.

With respect to §228(a) of the Act, the Board believes, first, that its construction involves a controlling question of law and, second, that there is substantial ground for a difference of opinion over the Board's ruling that §228(a) requires a pre-shift examination of areas because energized electrical equipment is present. In reviewing BethEnergy's motion, the key question is whether the immediate appellate review of the interlocutory order would materially advance the ultimate termination of the matter. The Board believes the answer to be affirmative. The construction of §228(a) is the central issue in this matter. Even though BethEnergy has indicated it may raise the issue of discriminatory enforcement of §228(a) by DER, whether this issue is ever addressed in this appeal is problematic. The Board sees immediate appellate review as an aid to the disposition of this case. Accordingly, the Board will amend its orders to permit immediate interlocutory review of this issue.

The Board, however, will not amend its orders to permit review of BethEnergy's other issue, that being the inspector's authority to issue the order which was the subject of the appeal. The issue of an inspector's authority, under §§121 and 123 of the Act, to issue the appealed from order

has been established. The Board ruled in Bethlehem Mines Corporation v. DER, 1983 EHB 296, that §§121 and 123 of the Act, taken together, give the inspector the authority, in the exercise of his sound discretion, to decide matters of safety. Because the Board considers this question to have been resolved, it will not amend its order to permit interlocutory appellate review of this issue.

O R D E R

AND NOW, this 24th day of November, 1987, it is ordered that BethEnergy Mines Inc.'s motion to amend order to permit interlocutory appeal is granted in part and denied in part. The Board's orders of July 10, 1987 and July 14, 1987 are amended to include the following statement:

> The Board is of the opinion that its interpretation of the §228(a) pre-shift requirements of the Act involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter.

BethEnergy's motion is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 24, 1987
cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Office of Chief Counsel
Michael D. Bedrin, Esq./ Western Region
For Appellant:
R. Henry Moore, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA
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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

ALLEGHENY LUDLUM STEEL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 85-468-R**
	:	**85-469-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued November 25, 1987

OPINION AND ORDER

Synopsis

A motion to dismiss an amended appeal is denied. Failure to include a specific objection to a Department of Environmental Resources action in a notice of appeal does not preclude an appellant from raising the issue before the time of hearing.

OPINION

The two above-captioned matters involve Allegheny Ludlum Steel Corporation's (Ludlum) appeals from the Department of Environmental Resources's (DER) issuance of NPDES permits for Ludlum's West Leechburg (85-468-R) and Brackenridge (85-469-R) facilities. In each notice of appeal, Ludlum listed specific objections to DER's actions. In its pre-hearing memoranda, Ludlum amplified its objections and concluded with the statement "Allegheny Ludlum reserves the right to supplement this Pre-Hearing Memorandum at any time prior to the hearing."

On July 26, 1987, Ludlum filed amended appeals and included an

objection regarding the zinc limit in Outfall 008 at West Leechburg and Outfall 006 at Brackenridge. DER moved to dismiss the amended appeal, arguing that its filing as to the zinc limits was untimely and, therefore, the Board lacks jurisdiction.

Section 21.51(e) of the Board's rules of practice and procedure, 25 Pa.Code §21.51(e), states, in relevant part, as follows:

> The appeal shall set forth in separate numbered paragraphs the specific objections of the action of the Department [DER]. Such objections may be factual or legal. Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. . .

The Board has liberally construed this language. Matters not raised in a notice of appeal need not be waived if they are raised in the appellant's pre-hearing memorandum. See John F. Culp v. DER, 1984 EHB 505; Township of Indiana v. DER, 1982 EHB 469. An appellant may present arguments and testimony on objections not stated in its notice of appeal provided it gives proper notice of such arguments and testimony through its pre-hearing memorandum. Indiana, Id.

In light of the case history, the Board is not persuaded by DER's jurisdiction argument. Indeed, Ludlum timely appealed DER's permit issuances. Accordingly, we will accept Ludlum's amended appeal. However, Ludlum is required supplement its pre-hearing memorandum, consistent with the Board's ruling in Indiana, supra.

ORDER

AND NOW, this 25th day of November , 1987, it is ordered that the Department of Environmental Resources's motions to dismiss the amended appeals of Allegheny Ludlum Steel Corporation in the above-captioned matters are denied. It is also ordered that Ludlum shall file supplemental pre-hearing memoranda on or before December 21, 1987.

ENVIRONMENTAL HEARING BOARD

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 25, 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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KIRKPATRICK & LOCKHART
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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

DENNIS L. PYPER AND PENN STATE WELL SERVICE AND PRODUCTION CO., INC.	:	
v.	:	**EHB Docket No. 87-415-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 27, 1987

OPINION AND ORDER
SUR
REQUEST FOR APPEAL NUNC PRO TUNC

Synopsis

An appeal nunc pro tunc is denied where Appellant fails to show fraud or breakdown of the Board's operation.

O P I N I O N

On September 24, 1987, Dennis L. Pyper and Penn State Well Service and Production Co., Inc. (hereinafter Pyper-Penn) filed a request for an appeal nunc pro tunc from a Department of Environmental Resources (DER) gas well plugging order. On the notice of appeal form, Pyper-Penn states that the order was received June 26, 1987.

The Board's jurisdiction does not attach unless an appeal is filed with the Board within 30 days after the appellant has received notice of the appealable action. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). However, the Board may allow an appeal nunc pro tunc where fraud or a breakdown in the Board's procedures were the cause of the untimely

filing of the appeal. See Appalachian Industries, Inc. v. DER, EHB Docket No. 86-521-W (Opinion and order issued May 11, 1987).

In this case, Pyper-Penn has not shown that the untimely filing was due to fraud or a breakdown of Board procedures. The only bases advanced were that the issue is complex, that Pyper-Penn was unable to contact principal parties regarding the facts and that Pyper-Penn was unable to compel DER to hold a conference to determine facts. These reasons are hardly grounds to allow an appeal nunc pro tunc. Accordingly, we deny Pyper-Penn's request.

O R D E R

AND NOW, this 27th day of November , 1987, it is ordered that the request for an appeal nunc pro tunc by Dennis L. Pyper and Penn State Well Service and Production Company, Inc. is denied and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: November 27, 1987
cc: **Bureau of Litigation**
Harrisburg
For the Commonwealth, DER:
Western Region
For Appellant:
Dennis L. Pyper

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

KENT COAL MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 86-433-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued December 3, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment on the propriety of a civil penalty assessment is granted where, because of a stipulation of the parties, there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. The civil penalty assessment is reduced in accordance with the stipulation.

O P I N I O N

On September 2, 1986, Kent Coal Mining Company (Kent) filed this appeal from a $420 civil penalty assessment by the Department of Environmental Resources (DER). DER imposed the assessment pursuant to Section 18.4 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.

By order dated September 3, 1987, the Board granted a DER motion to limit issues. The Board held that, under the doctrine of administrative

finality, because Kent failed to appeal a prior compliance order which was the underlying basis for this assessment, it was precluded from challenging the factual or legal basis of the compliance order which formed the underlying basis for the assessment and limited to challenging the propriety of the amount of the assessment.

On October 7, 1987, Kent filed a motion for summary judgment on the amount of the assessment. The basis for its contention that it was entitled to summary judgment was a stipulation by Kent and DER that, under the circumstances, a civil penalty of $210 would be appropriate. Kent requested that a final order reducing the civil penalty from $420 to $210 be entered in its favor.

The Board is empowered to grant summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Marlin L. Snyder, 1985 EHB 671. Because Kent is precluded from challenging the underlying compliance order and the parties have stipulated that DER abused its discretion under 25 Pa.Code §86.194 in assessing a civil penalty of $420 where a $210 penalty was appropriate, there are no issues of material fact and Kent is entitled to judgement as a matter of law.

O R D E R

AND NOW, this 3rd day of December, 1987, it is ordered that Kent Coal Mining Company's motion for summary judgment is granted and the Department of Environmental Resources' civil penalty assessment of $420 is reduced to $210.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: December 3, 1987

cc: **Bureau of Litigation**
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SECRETARY TO THE BOARD

McGAL COAL COMPANY	:	
	:	
v.	:	EHB Docket No. 87-199-R
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued December 3, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The 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). Appellant's insolvency is no defense to its failure to prepay.

O P I N I O N

On May 26, 1987, McGal Coal Company filed an appeal with this Board from an April 21, 1987 assessment of a $55,400 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. §1396.22 ("Surface Mining Act"), and Section 605(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S.

amended, 35 P.S. §691.605(b). The assessment pertained to alleged violations at McGal's surface mining operation in Salem Township, Westmoreland County.

The notice of assessment informed McGal that it was required to pay the assessed penalty within thirty days of receipt of the assessment, or if it wished to appeal the assessment, to forward the 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 assessment. The notice of assessment also warned McGal that its right to appeal the assessment would be waived unless it followed the procedures for appealing civil penalty assessments 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).

On June 15, 1987, DER filed a motion to dismiss McGal's appeal, contending that the Board was without jurisdiction to hear McGal's appeal because it had not perfected its 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). In its June 29, 1987 response, McGal argues that the filing of the full amount of the penalty within thirty days of receipt is not required and that pre-paying civil penalty assessments is unconstitutional. McGal also claims that it is insolvent and financially incapable of securing an appeal bond. Additionally, McGal contends that the statutory scheme for contesting civil penalty assessments is unconstitutional.

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

> 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. Raymond Westrick v. DER, EHB Docket No. 86-417-R (Opinion and order issued March 6, 1987); Thomas Fitzsimmons v. DER, 1986 EHB 1190. Further, the constitutionality of this prepayment procedure has already been settled by the Commonwealth Court in Boyle Land and Fuel Company v. Com., Environmental Hearing Board, 82 Pa. Cmwlth. 452, 475 A.2d 928 (1984), aff'd 507 Pa. 135, 488 A. 2d 1109 (1985). The Board has taken notice in previous cases that the caselaw upholding the constitutionality of the prepayment requirement did not address the question of a litigant's inability to pay. Ray Martin v. DER, 1984 EHB 821 at 822-23, but held that since it has no power to determine the constitutionality of a statute, it must dismiss the appeal of an insolvent operator contending that prepayment was unconstitutional. Anthracite Processing Co., Inc. v. DER, 1986 EHB 1173. Accordingly, under the circumstances herein, we have no choice but to dismiss this appeal for lack of jurisdiction.

O R D E R

AND NOW, this 3rd day of December, 1987, it is ordered that the Department of Environmental Resources' motion to dismiss the appeal of McGal Coal Company at Docket No. 87-199-R is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: December 3, 1987

cc: **Bureau of Litigation**
Harrisburg
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For Appellant:
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Plowman and Spiegel

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SECRETARY TO THE BOARD

T.R.A.S.H., LTD. and PLYMOUTH TOWNSHIP	:	
v.	:	EHB Docket No. 87-352-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES DRAVO ENERGY RESOURCES, Permittee and COUNTY OF MONTGOMERY, Intervenor	:	December 4, 1987

OPINION AND ORDER SUR MOTION OF DRAVO ENERGY RESOURCES OF MONTGOMERY COUNTY, INC. FOR PROTECTIVE ORDER FROM SECOND REQUEST FOR PRODUCTION OF DOCUMENTS OF APPELLANT, T.R.A.S.H., LTD.

OPINION

T.R.A.S.H., Ltd. has served a second request for production of documents on Dravo Energy Resources, Inc. (Dravo), asking that Dravo and its related companies produce various documents for T.R.A.S.H.'s inspection at the offices of T.R.A.S.H.'s counsel in Philadelphia. These documents include:

(a) Any permit issued to a Dravo Related Company by any governmental agency in the United States or a foreign country authorizing the building or construction of a municipal solid waste resource recovery combustor or incinerator;

(b) Any condition imposed by any governmental agency with respect to alleged air contaminants emitted from any municipal solid waste resource recovery project for which a Dravo Related Company has been issued a construc-

tion permit;

(c) Any amendment to a construction permit which has been issued to a Dravo Related Company for a municipal solid waste resource recovery project;

(d) Any permit which has been issued to a Dravo Related Company by any governmental agency in the United States or any foreign country authorizing the operation of a municipal solid waste resource recovery combustor or incinerator;

(e) Any conditions imposed by any governmental agencies with respect to the alleged emission of air contaminants from a municipal waste resource recovery project for which a Dravo Related Company has been issued an operating permit;

(f) Any amendments to any operating permits which have been issued to a Dravo Related Company for a municipal solid waste recovery project or incinerator;

(g) All stack emission test reports from municipal solid waste resource recovery projects or incinerators with which any Dravo Related Companies have been involved since January 1, 1984; and

(h) All reports of alleged toxic contaminants in fly ash, bottom ash and combined fly ash and bottom ash from municipal solid waste resource recovery projects or incinerators with which any Dravo Related Companies have been involved since January 1, 1984.

Dravo responded to T.R.A.S.H.'s request by filing a motion for protective order on November 30, 1987. Dravo has variously asserted that the documents are not relevant or reasonably calculated to lead to the discovery of admissible evidence; that the scope of the request is overbroad, vague and ambiguous; and that production of these documents from offices all over the country at counsel for T.R.A.S.H.'s Philadelphia office causes Dravo unreasonable annoyance, embarrassment, oppression, burden, and expense.

We agree with Dravo that requiring it to assemble and produce these documents for T.R.A.S.H. at its counsel's offices in Philadelphia is unreasonable, annoying, oppressive, burdensome, and expensive. To the extent that the remainder of this opinion and order compels production of the documents described above, Dravo may produce them at its various offices throughout the country.

We agree also with Dravo that requests (a), (c), (d), and (f) are vague and overbroad. In particular, they refer to "any permit" or "any amendment" issued by "any governmental agency in the United States or a foreign country." We are not concerned with "any" permit; we are concerned here with air quality and solid waste permits. We fail to see also how even air quality and solid waste permits issued by foreign countries are relevant to this proceeding, and we have some difficulty with the relevance of permits or permit amendments issued by the United States or other states. However, with the latter, we will permit some inquiry, although this should not be construed as a ruling on the ultimate admissibility of such documents or testimony relating to them.

Accordingly, we will enter the following order.

O R D E R

AND NOW, this 4th day of December, 1987, it is ordered that Dravo Energy Resources' Motion for Protective Order from Second Request for Production of Documents of Appellant T.R.A.S.H. Ltd. is granted subject to the following conditions:

1) T.R.A.S.H. shall be permitted to examine any air quality or solid waste permit, or amendment, or condition issued by the U. S. Environmental Protection Agency or state environmental control agency.

2) The documents described in the above paragraph, as well as

paragraphs (g) and (h), supra, shall be made available at the appropriate Dravo offices throughout the country. T.R.A.S.H. and Dravo shall arrange for mutually convenient dates and times for inspection of the documents prior to December 31, 1987.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: December 4, 1987

cc: **For the Commonwealth, DER:**
Winifred M. Prendergast, Esq.
Eastern Region
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Arthur Lefkoe, Esq./Plymouth Township
Anthony J. Mazullo, Jr., Esq./Plymouth Township
For Permittee:
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

TIMOTHY E. WEAVER	:	
	:	
v.	:	**EHB Docket No. 87-056-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 8, 1987
and STEPHEN FISHER, SR., Permittee	:	

OPINION AND ORDER
SUR
MOTION TO LIMIT ISSUES

Synopsis

The Board grants a motion to limit issues in an appeal of a solid waste permit modification. Testimony on the underlying solid waste management permit, which was issued four years ago and never appealed, is precluded, since Section 21.52(a) of the Board's rules of practice and procedure provides that an appeal from a solid waste permit must be filed within 30 days of a third party appellant's receiving actual notice of the permit issuance or publication of notice of issuance in the Pennsylvania Bulletin, whichever is earlier.

OPINION

This matter was initiated by Timothy Weaver with his filing of a Notice of Appeal with this Board on February 12, 1987. The Notice of Appeal challenged the Department of Environmental Resources' (Department) January 8, 1987, modification of Solid Waste Permit No. 300971 which permitted S. S. Fisher Landfill (Fisher), a residual waste landfill in Pequea Township,

Lancaster County, to accept spent foundry core from the Eastern Foundry Company, Boyertown, Pennsylvania. The solid waste permit authorizing Fisher to operate a residual waste landfill was originally issued on November 21, 1983, 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).

On August 27, 1987, the Department filed a motion to limit issues requesting that the Board limit the issues in this proceeding to those involving the propriety of the Department's issuance of the permit modification and preclude any testimony regarding the issuance of the underlying permit. Mr. Weaver responded to this motion on September 21, 1987, arguing that it would be impossible for the Board to adjudicate this appeal without knowing all the facts relating to this permit.

The Board will grant this motion because it is without jurisdiction to hear evidence relating to the issuance of the underlying permit.

An analagous case is Pittsburgh Coal and Coke, Inc. v. DER, 1986 EHB 704, wherein the Board held that a challenge to the Department's correction of a mining permit to bring it into conformity with the conditions of the underlying mine drainage permit was, in essence, a prohibited collateral attack on the underlying mine drainage permit. Similarly, Mr. Weaver cannot, in the course of his challenge to the modification of Fisher's solid waste permit, attack the 1983 permit issuance of the underlying permit, since he failed to timely appeal it.

ORDER

AND NOW, this 8th day of December, 1987, it is ordered that the Department of Environmental Resources' motion to limit issues is granted and testimony in this matter will be limited to the modification to Solid Waste Permit No. 300971 authorizing S. S. Fisher Landfill to dispose of spent foundry core from Eastern Foundry Company.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

DATED: December 8, 1987

cc: **Bureau of Litigation**
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For Permittee:
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mjf

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

LOUIS J. NOVAK, SR., HILDA NOVAK and NOVAK SANITARY LANDFILL, INC.	:	
v.	:	**EHB Docket No. 84-425-M**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 10, 1987

OPINION AND ORDER
SUR
PETITION FOR STAY POST PARTIAL ADJUDICATION

Synopsis

Pa.R.A.P. 1781, rather than Pa.R.A.P. 1736, is applicable to requests for stays of the determinations of governmental units pending appeal in the Commonwealth Court. The Department of Environmental Resources' petition for a stay of a partial adjudication pending its appeal of that adjudication to the Commonwealth Court is denied where the Department failed to meet the criteria for a stay enunciated in Pennsylvania Public Utility Com. v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983).

OPINION

On August 13, 1987, the Board issued a partial adjudication sustaining Louis J. Novak, Sr. and Hilda Novak's appeals of a December 13, 1984 order and civil penalty assessment issued by the Department of Environmental Resources (Department) and sustaining in part and denying in part the appeal of that same order by the Novak Sanitary Landfill. The

Department timely filed a petition for review of the Board's partial adjudication at No. 2156 C.D. 1987, and the Novaks and Novak Sanitary Landfill (collectively, Novaks) filed a petition for review at No. 2230 C.D. 1987. On October 30, 1987, the Department filed a Petition for Stay Post Partial Adjudication to which the Novaks responded on November 5, 1987. By order dated November 27, 1987, the Board denied the Department's petition, and this opinion explains and confirms that order.

The Department has filed this petition for stay pursuant to Pa.R.A.P. 1781(a) as a protective measure, as it contends that Pa.R.A.P. 1736 operates to automatically stay the Board's partial adjudication. We believe that Pa. R.A.P. 1781, and not Pa. R.A.P. 1736, applies to stays of determinations of governmental units pending review in the Commonwealth Court. While it may be arguable that there is some ambiguity regarding the scope of Pa.R.A.P. 1736, it was eliminated, as the Novaks pointed out, by Judge Blatt in Commonwealth, Dept. of Education, Clarion State College v. Postlewait, 84 Pa.Cmwlth 568, 482 A.2d 57 (1979) wherein she expressly held that Pa.R.A.P. 1736 did not apply to petitions for review of the determinations of governmental units, such as Commonwealth agencies.

Having disposed of the threshold issue of whether a petition for a stay is even necessary, we turn now to the stay request and the criteria by which the Board must evaluate it. The Pennsylvania Supreme Court, in Pennsylvania Public Utility Com. v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983) (Process Gas), adopted four standards for judging requests for stays pending appeal: a strong showing that the petitioner is likely to succeed on the merits of the appeal; a demonstration that petitioner will suffer irreparable harm if not granted the stay; the effect of the stay on other interested parties; and the public interest.

The Department urges us that it is entitled to a stay pending appellate review because it "has raised substantial issues on the merits in its Commonwealth Court appeal...". These issues relate to what bonding scheme is applicable to the Novak Sanitary Landfill, and whether off-site waste may be brought to the site for disposal in light of the Board's finding of overfill. It is also argued by the Department that the public will suffer irreparable harm because the disposal of additional waste at the site will violate the terms and conditions of the Novaks' permit and, therefore, constitute irreparable harm under PUC v. Israel, 356 Pa. 400, 52 A.2d 317 (1948). The Department contends that issuance of the stay would be in the public interest because "the public will be better protected by having the full $300,000 bond posted rather than the partial amount suggested by the EHB Order" and that the Novaks will not be substantially harmed because "should they prevail, they will be free to conduct their business as before." The Novaks, on the other hand, oppose any stay of the Board's partial adjudication, arguing vigorously that the Department has not met the Process Gas criteria and that the Department is attempting to raise issues it abandoned or never articulated on the merits before the Board. For the reasons which follow, we find that the Department's petition falls far short of the Process Gas standards.

The Department has wrongfully equated raising "substantial" issues on appeal with a strong showing of likelihood of prevailing on the merits of its appeal. Obviously, every litigant believes it is raising substantial issues before an appellate court. But, if we were to adopt the Department's definition of a strong showing of likely success on the merits, the mere

filing of an appeal would be sufficient grounds for a stay, a result the Department urges anyhow with its contention that Pa.R.A.P. 1736 is applicable here.

Notwithstanding this strained interpretation of the Department's, we do not believe there is strong likelihood that the Department will prevail on the merits of the bonding and vertical fill issues. The one page justification for imposing a collateral bond on the Novaks pursuant to §505(a) of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.505(a) (SWMA), which is set forth in the Department's post-hearing brief, is utterly devoid of any legal analysis and, as a result, ignores the critical issue of the effect of the savings clause in §1001 of the SWMA. It is true that this is the first time the Board has construed the applicability of §505(a) of the SWMA to sites permitted under the prior law, but this, again, does not equate to a strong showing of likely success on the merits of the Department's appeal.

As to the issue of overfill in the area fill section, we have specifically determined that the Novaks and the Department resolved this issue in 1982 with the Department's approval of the Novak's plan to shift the area overfill to the trenches (Findings of Fact 10-14). The Department's December, 1984 order didn't mandate removal of the area overfill and, furthermore, the Department conceded at page 27 of its post-hearing brief that this violation had been corrected. As a result, we cannot grant a stay where one of the primary reasons advanced for the request was removed from our consideration by the party requesting the stay.

The Department also argues that enforcement of the provisions of its December, 1984 order as modified by our order, relating to surface water

management is impractical because the Department cannot find plans for surface water management in its files and the Board neglected to identify it for the Department. We direct the Department's attention to Paragraph L of its 1984 order, which alleged improper surface water management at the Novak Sanitary Landfill, and the remedial action prescribed in the order, which did not mandate any specific action relating to surface water management. The Board, which sustained the Department's determination in Findings of Fact 75 and 76, was not reviewing whether the Novaks had a surface water management plan or the adequacy of it; the Board was reviewing the Department's finding that the Novaks had not properly implemented surface water controls, which finding was predicated on the terms and conditions of the permit issued by the Department. In any event, we cannot stay our adjudication because the Department is now raising an issue never before us.

Process Gas requires us to determine that the Department will be irreparably injured if the requested stay is not granted by the Board. The irreparable harm alleged by the Department is that allowing the Novaks to bring additional waste "to an already overfull site will violate the volumetric limits for the site" in violation of the SWMA and, therefore, by virtue of PUC v. Israel, there is irreparable harm per se. Since we have determined that the overfill violations in the area fill were corrected long before the order was issued, we cannot understand the Department's logic in urging us that we committed error because we did not direct disposal of the area overfill. As we noted above, the Department conceded that this problem was corrected. If, after disposal of the overfill from Trench 4 in Trench 5, overfilling occurs in the remainder of Trench 5, the Department has remedies available to it under the SWMA.

The Department glibly urges us that the Novaks will not be harmed by a stay, because, if they prevail before the Commonwealth Court, they may resume their business. This is admittedly so, but the Novaks have not been able to conduct their business for three years. Moreover, the Department was unable to establish any of the more serious allegations in its order, especially its claim of pollution of the waters of the Commonwealth.

The Department also offers us little in the way of explanation as to how the stay will serve the public interest, other than a bond of $300,000 is better because it's more than the amount mandated by the Board's order and a claim that the public interest will be protected by preservation of the SWMA's scheme, unarticulated by the Department, for volumetric controls. These fall short of the required demonstration of public interest in a stay, especially in light of the weaknesses in the Department's other arguments.

O R D E R

AND NOW, this 10th day of December, 1987, it is ordered that the Department's Petition for Stay Post Partial Adjudication is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: December 10, 1987

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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

BOROUGH OF LILLY	:	
	:	
v.	:	**EHB Docket No. 87-187-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued December 15, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

The Board has no jurisdiction over an untimely filed appeal. Jurisdiction is a question which may be raised at any time during the course of the appeal. An appeal nunc pro tunc is appropriate only where fraud or breakdown in the Board's procedures is the cause of the late filing.

O P I N I O N

This matter was initiated by the May 15, 1987 filing by the Borough of Lilly (Lilly) of a skeletal appeal from an April 9, 1987 Department of Environmental Resources (DER) compliance order (CO) which directed Lilly to lower the lead levels and correct the pH in its water supply. DER took this action pursuant to the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, as amended, 35 P.S. §721.1 et seq., the rules and regulations promulgated thereunder, and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17. Lilly's skeletal

appeal was filed, and later perfected by the filing of a completed notice of appeal form by Secretary E. Beverly Mandichak.

On July 13, 1987, DER filed a motion to dismiss. DER contended that since Lilly was served with the CO on April 10, 1987, and its appeal was not filed with the Board until May 15, 1987, the Board lacked jurisdiction to hear the appeal because it was filed more than 30 days after Lilly had received the order.

In its answer to DER's motion, Lilly argued that its appeal was not untimely filed because the CO was served on an individual not authorized to receive service on behalf of Lilly. Lilly also alleged that until June 2, 1987, Lilly was without a solicitor capable of understanding the significance of DER's CO, that DER's motion to dismiss for lack of jurisdiction was untimely filed, and that Lilly should be permitted to appeal nunc pro tunc if the Board granted DER's motion.

On its notice appeal form, Lilly clearly states that it received DER's CO[1] on April 10, 1987. Regardless of who at Lilly may have first received the CO, the Board must be guided, and Lilly must be bound, by the plain language in Lilly's notice of appeal as to the date of receipt of the DER action. Charles A. Kayal v. DER, EHB Docket No. 87-233-W (Opinion and order issued October 21, 1987). Accordingly, the Board finds that Lilly's appeal was filed more than thirty days from the date it received the appealed-from action. Therefore, the appeal is untimely and the Board lacks jurisdiction to hear it. 25 Pa.Code §21.52; Rostosky v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Further, questions of jurisdiction may be raised at

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[1] Lilly's answer to paragraph 2(a) states,"... Appeal was received by Lilly Borough on April 10, 1987 ". The Board interprets the word "appeal" here to be a reference to DER's CO, as it follows a description of the CO which forms the subject of this appeal.

any time during the life of an appeal. Thomas Fitzsimmons v. DER, 1986 EHB 1190. DER's timing in filing its motion was, therefore, entirely proper.

The Board must also refuse Lilly's request for an appeal nunc pro tunc. The Board may allow an appeal nunc pro tunc where fraud or a breakdown in the Board's procedures were the cause of the untimely filing of the appeal. Appalachian Industries, Inc. v. DER, EHB Docket No. 86-521-W (Opinion and order issued May 11, 1987). No such circumstances exist in this appeal.

O R D E R

AND NOW, this 15th day of December, 1987, it is ordered that the Department of Environmental Resources motion to dismiss is granted and the appeal of the Borough of Lilly at Docket No. 87-187-R is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: December 15, 1987
cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

McGAL COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 86-116-R**
	:	**(consolidated appeals)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued December 16, 1987**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT OR TO LIMIT ISSUES

Synopsis

The Board grants partial summary judgment in connection with the issue of an operator's liability for the abatement of discharges emanating from its mine site. The operator's failure to appeal an earlier Department of Environmental Resources compliance order relating to discharges from the same sediment pond precludes it from challenging its liability for discharges from the pond in a later appeal. Summary judgment in the appeal is denied where appellant raises an issue of material fact relating to whether or not the discharges at issue exceeded effluent limitations on the date sampled.

OPINION

This matter was initiated by the filing of appeals on February 27, 1986 (originally docketed at 86-116-R) and on June 2, 1986 (originally docketed at 86-283-R) by McGal Coal Company (McGal) from two Department of Environmental Resources (DER) compliance orders (COs), dated January 27, 1986 and May 29, 1986 respectively. These DER COs alleged that the discharges from

a sedimentation pond on McGal's operation (the "Hapchuck Mine") in Salem Township, Westmoreland County, exceeded the applicable effluent limitations in 25 Pa. Code §87.102.

On April 29, 1987, DER filed motions for summary judgment, or, in the alternative, to limit issues at both docket numbers. DER states that it had issued previous COs, on June 17, 1985, pertaining to discharges from the same sediment pond which were allegedly violative of 25 Pa. Code §87.102 and which directed McGal to treat these discharges. DER, therefore, argues that because McGal failed to appeal the 1985 COs which directed abatement of discharges from the same source, it is barred under principles of administrative finality from appealing the 1986 COs. DER also argues that since McGal's sole basis for contesting these COs was its claim that the discharges pre-existed its mining operations and were not aggravated by its mining activities, DER is entitled to summary judgment as a matter of law because McGal constructed the sediment pond in accordance with the terms and conditions of its permit and, therefore, McGal is responsible for any sediment pond discharge emanating from its mine site. Alternatively, DER contends the issues in this appeal should be limited to whether the January and March, 1986 discharges met the applicable effluent limitations on the days they were sampled by DER, and that McGal should be precluded from contesting its underlying liability to treat its sediment pond discharges.

McGal's contends that the Hapchuck mine was operated by two other individuals who constructed the sediment pond, and, therefore that it is not responsible for the treatment of these discharges. McGal does not dispute, however, that the sediment pond was, in fact located on its permit area. McGal also admits the issuance of the 1985 CO, but contends that there were no discharges during the time of the subject COs, that it had no

responsibility to treat any discharges from or on the mining site because it did not cause these discharges, that abatement of the discharges would not be feasible or in the public interest and, finally, that the discharges did not exceed the limitations in 25 Pa. Code §87.102.

On October 8, 1987, due to the common issues of law and fact, the Board sua sponte consolidated McGal's two appeals at Docket No. 86-116-R.

The Board is empowered to grant summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Bell v. DER, 1986 EHB 273. The only issues of fact are whether the sediment ponds are on McGal's permitted area, and whether McGal appealed the June, 1985 COs. Since McGal has admitted the ponds are within its permitted area and has admitted it did not appeal the 1985 COs, we must determine whether DER is entitled to judgment as a matter of law. We believe that application of the doctrine of administrative finality compels that summary judgment be entered in DER's favor on the issue of McGal's liability for the discharges from the sediment ponds. However, the Board cannot grant summary judgment in favor of DER on the issue of whether McGal's discharges met the effluent limitations on the dates of DER sampling. McGal contests these facts, they are material, and the motion must be viewed in the light most favorable to the non-moving party.

Because McGal failed to appeal the June 17, 1985 COs, which pertain to the same discharge point cited in the instant orders, it is now estopped from challenging its liability as set forth in those DER orders.[1] To allow McGal to proceed otherwise would be to condone an impermissible collateral attack on

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[1]In any event, McGal is responsible for discharges emanating from its permitted area. Benjamin Coal Company v. DER, EHB Docket No. 84-266-M (Opinion and order issued June 8, 1987)

a final DER order. See Dithridge House Association v. DER, EHB Docket No. 86-550-R (Opinion and order issued June 17, 1987). Having failed to contest the COs in a timely fashion, McGal cannot now revive this opportunity. See James E. Martin v. DER, EHB Docket No. 85-567-R (Opinion and order issued April 28, 1987). Consequently, we will enter summary judgment in DER's favor on the issue of liability.

ORDER

AND NOW, this 16th day of December, 1987, it is ordered that the Department of Environmental Resources' motion for summary judgment is granted with regard to McGal's liability for the discharges emanating from its sediment pond.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

DATED: December 16, 1987

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WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF READING	:	
	:	
v.	:	**EHB Docket No. 86-615-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued December 16, 1987**

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

A permittee-appellant's actual receipt of its NPDES is the determinative date for computing its 30 day appeal period. The provision in 25 Pa.Code §21.52(a) that the date of publication of notice of permit issuance in the Pennsylvania Bulletin may mark the beginning of the 30 day appeal period applies only to third parties; where a permittee-appellant admits to receiving actual notice, the publication date in the Pennsylvania Bulletin is inapplicable. The Board lacks jurisdiction to hear appeals filed beyond the 30 day appeal period.

O P I N I O N

This action was commenced by the November 3, 1986 filing of a Notice of Appeal by the City of Reading (Reading) from the September 11, 1986 Department of Environmental Resources (DER) issuance of its NPDES permit.

On May 5, 1988, DER filed a motion to dismiss, alleging that Reading received notice of DER's issuance of the NPDES permit on September 15, 1986.

DER asserts that Reading included, with its pre-hearing memorandum, a copy of the permit's cover letter on which was stamped "Received September 15, 1986, Bureau of Engineering." DER contends that since Reading's appeal was filed more than thirty days after receiving written notice of the NPDES permit issuance, a final DER action, the Board's jurisdiction does not attach.

Reading, in its response, admits that it received written notice of the permit issuance on September 15, 1986. Reading nonetheless contends that its appeal was filed in a timely fashion in accordance with 25 Pa.Code §21.52(a),[1] since the appeal was filed within 30 days of the publication of notice of permit issuance in the Saturday, October 4, 1986 issue of the Pennsylvania Bulletin, Volume 16, No. 40. Reading further argues that it had filed its pre-hearing memorandum and that DER had twice moved for continuances in order to file its pre-hearing memorandum. Reading concurred with both extension requests, but states that DER never filed its pre-hearing memorandum and that now DER was taking the "untoward" step of moving to dismiss this appeal due to an "alleged technicality". DER filed a response to Reading's objections, disputing both Reading's construction of 25 Pa.Code §21.52(a) and DER's ability to raise jurisdiction at this time.

Jurisdiction is not a technicality, as Reading suggests, but rather a fundamental prerequisite. As DER correctly argues, the Board does not have

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[1] 25 Pa.Code §21.52(a), in relevant part, states:

> "(a)... jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute..."

jurisdiction over appeals not filed within 30 days from the date of receipt of written notice of a final DER action. Joseph Rostosky Co. v. DER, 26 Pa.Cmwlth. 478, 364 A.2d 761. Additionally, jurisdiction is an issue which may be raised by any party at any time during the action. Thomas A. Fitzsimmons v. DER, 1986 EHB 1190.

Reading's argument that 25 Pa.Code §21.52(a) allows it an alternative means of computing the 30 day appeal period also fails. The Board has only employed the Pennsylvania Bulletin notice in 25 Pa.Code §21.52(a) when the matter involved third party appeals. Third parties may, in fact, only receive constructive notice, i.e. by publication in the Pennsylvania Bulletin, and not actual notice, i.e. via written notice from DER. 25 Pa.Code §21.52(a) was not designed to give permittee-appellants, all of whom receive actual written notice of the issuance of their permits, an opportunity to delay the filing of their notices of appeal. In this case, Reading is the permittee-appellant and its 30 day appeal period began upon its actual receipt of notice of the issuance of its NPDES permit on September 15, 1986.[2] In order for Reading's appeal to have been timely, it should have been filed with the Board on or before October 15, 1986. Because this appeal was not filed with the Board until November 3, 1986, we have no jurisdiction and the DER's motion to dismiss must be granted.

Because of the issues raised in this appeal, Board Chairman Maxine Woelfling has recused herself from this matter. Because the Board presently has only two members, the sole remaining member, William A. Roth would have

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[2] Even if the date of notification through publication in the Pennsylvania Bulletin applied in this situation, Reading's appeal would still be untimely. In cases where 25 Pa.Code §21.52(a) is dispositive of the jurisdictional issue, it is the earlier event that governs the tolling of the 30 day appeal period. See Lower Allen Citizens Action Group, Inc. v. DER, 1986 EHB 765.

to solely handle this matter, including, if warranted, final disposition. The parties were informed of this situation and requested to submit any objections to Board Member Roth's sole disposition. None have been received. Under the circumstances, the requirements of 25 Pa.Code §21.86 are deemed met. Del-AWARE Unlimited, Inc. v. DER, 1984 EHB 178.

O R D E R

AND NOW this 16th day of December, 1987, it is ordered that the Department of Environmental Resources motion to dismiss is granted and that the City of Reading's appeal at Docket No. 86-615-R is dismissed.

ENVIRONMENTAL HEARING BOARD

WILLIAM A. ROTH, MEMBER

DATED: December 16, 1987

cc: **Bureau of Litigation**
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

GLEN IRVAN CORPORATION	:	
	:	
v.	:	**EHB Docket No. 87-155-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 28, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is granted where the sole basis for the appeal of a bond release denial is financial inability to remedy existing violations at the mining site. Financial impossibility is not a defense to a bond release denial.

OPINION

This matter was initiated on April 17, 1987, with the filing of a notice of appeal by the Glen Irvan Corporation (Glen Irvan), the operator of a surface coal mine in Benezette Township, Fayette County authorized by Mine Permit 671-24800102-02-0. Glen Irvan was challenging the Department of Environmental Resources' (Department) March 19, 1987 denial of an application for bond release based on Completion Report No. 2-87-025 which was filed on February 13, 1987. The Department's stated reasons for denying the bond release application were that Glen Irvan failed to submit quarterly monitoring reports for the site and that it failed to abate the violations cited in Compliance Order No. 86-K-223S.

The Department filed a motion for summary judgment on June 29, 1987, to which Glen Irvan has not responded. The Department alleged that the only contention raised by Glen Irvan in its notice of appeal was that, as a debtor in possession under Chapter 11 of the Bankruptcy Code, it "is presently without funds to remedy the deficiencies alleged as reasons for denial of the applications for bond releases." The Department avers that because Glen Irvan has failed to state a valid defense for its non-compliance or to contest the factual basis for the Department's denial of its bond release application, it is entitled to summary judgment as a matter of law.

The Board may render summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and order issued March 19, 1987). However, in this case we must deem the facts in the Department's motion to be admitted because of Glen Irvan's failure to respond to the motion. 25 Pa.Code §21.64(d).

Financial insolvency is not a valid defense to a Department order. Mt. Thor Minerals v. DER, 1986 EHB 128. Furthermore, the Board has held that "lack of funds is...no defense to a bond forfeiture action for defaulted performance." Orville Richter, d/b/a Richter Trucking Co. v. DER, 1984 EHB 43 and James E. Martin v. DER, Docket No. 85-120-R and 85-156-R (Opinion and order issued June 12, 1987). We believe the same reasoning applies to appeals of the Department's denial of bond releases.

Because Glen Irvan has failed to contest the factual basis of the Department's bond release denial letter, there are no issues of material fact.

And, because Glen Irvan has not stated any valid legal defense to the Department's bond release denial, the Department is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 28th day of December, 1987, it is ordered that the Department of Environmental Resources' Motion for Summary Judgment is granted and the appeal of the Glen Irvan Corporation is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 28, 1987

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MAXINE WOELFLING, CHAIRMAN
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M. DIANE SMITH
SECRETARY TO THE BOARD

GLEN IRVAN CORPORATION	:	
	:	
v.	:	**EHB Docket No. 87-156-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 28, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is granted where the sole basis for the appeal of a bond release denial is financial inability to remedy existing violations at the mining site. Financial impossibility is not a defense to a bond release denial.

OPINION

This matter was initiated on April 17, 1987, with the filing of a notice of appeal by the Glen Irvan Corporation (Glen Irvan), the operator of a surface coal mine in Benezette Township, Fayette County authorized by Mine Permit 671-24800102-01-0. Glen Irvan was challenging the Department of Environmental Resources' (Department) March 19, 1987 denial of an application for bond release based on Completion Report No. 2-87-026, which was filed February 13, 1987. The Department's stated reasons for denying the bond release application were that Glen Irvan failed to submit quarterly monitoring reports for the site, and that it failed to abate the violations cited in Compliance Order No. 86-K-178S.

The Department filed a motion for summary judgment on June 29, 1987, to which Glen Irvan has not responded. The Department alleged that the only contention raised by Glen Irvan in its notice of appeal was that, as a debtor in possession under Chapter 11 of the Bankruptcy Code, it is presently without funds to remedy the deficiencies alleged as reasons for denial of the applications for bond releases." The Department avers that because Glen Irvan has failed to state a valid defense for its non-compliance or to contest the factual basis for the Department's denial of its bond release application, it is entitled to summary judgment as a matter of law.

The Board may render summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and order issued March 19, 1987). However, in this case, we must deem the facts in the Department's motion to be admitted because of Glen Irvan's failure to respond to the motion. 25 Pa.Code §21.64(d).

Financial insolvency is not a valid defense to a Department order. Mt. Thor Minerals v. DER, 1986 EHB 128. Furthermore, the Board has held that "lack of funds is...no defense to a bond forfeiture action for defaulted performance." Orville Richter, d/b/a Richter Trucking Co. v. DER, 1984 EHB 43 and James E. Martin v. DER, Docket No. 85-120-R and 85-156-R (Opinion and order issued June 12, 1987). We believe the same reasoning applies to appeals of the Department's denial of bond releases.

Because Glen Irvan has failed to contest the factual basis of the Department's bond release denial letter, there are no issues of material fact.

And, because Glen Irvan has not stated any valid legal defense to the Department's bond release denial, the Department is entitled to judgment as a matter of law.

O R D E R

AND NOW, this 28th day of December, 1987, it is ordered that the Department of Environmental Resources' Motion for Summary Judgment is granted and the appeal of the Glen Irvan Corporation is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 28, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
Timothy J. Bergere, Esq.
Western Region
For Appellant:
James A. Prostko, Esq.
ROTHMAN GORDON FOREMAN & GROUDINE
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

GLEN IRVAN CORPORATION	:	
	:	
v.	:	**EHB Docket No. 87-157-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 28, 1987

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

A motion for summary judgment is granted where the sole basis for the appeal of a bond release denial is financial inability to remedy existing violations at the mining site. Financial impossibility is not a defense to a bond release denial.

OPINION

This matter was initiated on April 17, 1987, with the filing of a notice of appeal by the Glen Irvan Corporation (Glen Irvan), the operator of a surface coal mine in Benezette Township, Fayette County authorized by Mine Permit 671-4678SM1-06 and 06-2. Glen Irvan was challenging the Department of Environmental Resources' (Department) denial of Completion Report No. 2-87-012, which was filed February 23, 1987. The Department's stated reasons for denying the bond release were that Glen Irvan failed to submit quarterly monitoring reports for the site and failed to treat discharge from Sediment Basin 1Aa to meet effluent criterion.

The Department filed a motion for summary judgment on June 29, 1987, to which Glen Irvan has not responded. The Department alleged that the only contention raised by Glen Irvan in its notice of appeal was that, as a debtor in possession under Chapter 11 of the Bankruptcy Code, it "is presently without funds to remedy the deficiencies alleged as reasons for denial of the applications for bond releases." The Department avers that because Glen Irvan has failed to state a valid defense for its non-compliance or to contest the factual basis for the Department's denial of the completion report, it is entitled to summary judgment as a matter of law.

The Board may render summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the summary judgment motion in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, EHB Docket No. 82-303-M (Opinion and order issued March 19, 1987). However, in this case, we must deem the facts in the Department's motion to be admitted because of Glen Irvan's failure to respond to the motion. 25 Pa.Code §21.64(d).

Financial insolvency is not a valid defense to a Department order. Mt. Thor Minerals v. DER, 1986 EHB 128. Furthermore, the Board has held that "lack of funds is...no defense to a bond forfeiture action for defaulted performance." Orville Richter, d/b/a Richter Trucking Co. v. DER, 1984 EHB 43 and James E. Martin v. DER, Docket No. 85-120-R and 85-156-R (Opinion and order issued June 12, 1987). We believe the same reasoning applies to appeals of the Department's denial of bond releases.

Because Glen Irvan has failed to contest the factual basis of the Department's bond release denial, there are no issues of material fact. And,

because Glen Irvan has not stated any valid legal defense to the Department's bond release denial, the Department is entitled to judgement as a matter of law.

O R D E R

AND NOW, this 28th day of December, 1987, it is ordered that the Department of Environmental Resources' Motion for Summary Judgment is granted and the appeal of the Glen Irvan Corporation is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 28, 1987

cc: **Bureau of Litigation**
Harrisburg, PA
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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOAR

HARRY ANDERSON, t/a HAP'S FAMILY RESTAURANT	:	
v.	:	**EHB Docket No. 87-356-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	DATED: December 29, 1987

OPINION AND ORDER

Synopsis

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

O P I N I O N

Harry Anderson, t/a Hap's Family Restaurant (Anderson), initiated this matter on August 21, 1987 when he filed a notice of appeal from the Department of Environmental Resources' (DER) order directing him to cease operating his restaurant until certain alleged sewage problems are corrected and until a valid eating or drinking place license is obtained. In his notice of appeal, Anderson stated that he received the order on July 20, 1987. For an appeal to be timely, it must be received by the Board within 30 days of the appellant's receipt of notice of the DER action. The Board has no jurisdiction to hear appeals filed after the 30 day period. 25 Pa.Code §21.52(a); Commonwealth v. Joseph Rostosky, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Thus,

Anderson would have had to file his appeal no later than August 19, 1987 in order for it to have been timely. The appeal, however, was filed on August 21, 1987, 32 days after Anderson, by his own admission, received notice of DER's action.

The Board entered a rule upon Anderson to show cause why his appeal should not be dismissed for lack of jurisdiction. Anderson responded by alleging that he mailed his appeal, via first class mail, postage pre-paid, on August 18, 1987, which was within the 30 day appeal period. Anderson argues that any delay was beyond his control. Regardless, it is the date of receipt of an appeal by the Board--not the date of mailing--that is determinative of jurisdiction. Jake C. Snyder v. DER, EHB Docket No. 86-610-R (Opinion and Order issued May 27, 1987). The Board notes that Anderson filed an amended notice of appeal in which he stated that he received the appealed from order on July 21, 1987. Even so, the appeal was untimely filed since with this new date, it would have had to have been filed on or before August 20, 1987. An appeal filed even 1 day late deprives this Board of jurisdiction. Accordingly, the Board lacks jurisdiction and, therefore, we must dismiss this appeal.

Anderson, in the alternative, requests that he be permitted to appeal nunc pro tunc. The Board may allow an appeal nunc pro tunc where fraud or a breakdown in the Board's procedures were the cause of the untimely filing of the appeal. Appalachian Industries, Inc. v. DER, EHB Docket No. 86-521-W (Opinion and order issued May 11, 1987). No such circumstances exist in this appeal.

O R D E R

AND NOW, this 29th day of December, 1987 it is ordered that the appeal of Harry Anderson, t/a Hap's Family Restaurant, is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 29, 1987

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

THE ARCADIA COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 87-467-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**DATED:** December 29, 1987

OPINION AND ORDER

Synopsis

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

O P I N I O N

The Arcadia Company, Inc. (Arcadia) initiated this matter on November 5, 1987 when it filed a notice of appeal from the Department of Environmental Resources' (DER) denial of a Stage 1 bond release for Arcadia's mine site in Montgomery and Grant Townships, Indiana County. In its notice of appeal, Arcadia stated that it received the denial on October 5, 1987. For an appeal to be timely, it must be received by the Board within 30 days of the appellant's receipt of notice of the DER action. The Board has no jurisdiction to hear appeals filed after the 30 day period. 25 Pa.Code §21.52(a); Commonwealth v. Joseph Rostosky, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976). Thus, Arcadia would have had to file its appeal no later than November 4, 1987 in

order for it to be timely. The appeal, however, was filed on November 5, 1987, 31 days after Arcadia, by its own admission, received notice of DER's action.

The Board entered a rule upon Arcadia to show cause why its appeal should not be dismissed for lack of jurisdiction. Arcadia responded by alleging that it mailed its appeal, via certified mail, on November 2, 1987, which was within the 30 day appeal period. Arcadia argued that it had no control over the postal system or the Board's receipt of its appeal. Regardless, it is the date of receipt of an appeal by the Board--not the date of mailing--that is determinative of jurisdiction. Jake C. Snyder v. DER, EHB Docket No. 86-610-R (Opinion and Order issued May 27, 1987). Accordingly, the Board lacks jurisdiction and, therefore, we must dismiss this appeal.

O R D E R

AND NOW, this 29th day of December, 1987 it is ordered that the appeal of The Arcadia Company, Inc. is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 29, 1987
cc: **Bureau of Litigation**
Harrisburg, PA
For the Commonwealth, DER:
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Western Region
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The Arcadia Company, Inc.
Indiana, PA
rm

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JERRY HANEY AND POCONO ENVIRONMENTAL CLUB	:	
v.	:	EHB Docket No. 87-189-W
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MONROE COUNTY GENERAL AUTHORITY, Intervenor	:	Issued: December 30, 1987

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

This appeal from a Department of Environmental Resources' approval of a Solid Waste Management Plan is dismissed for lack of standing. Appellants have made no showing of any interest which may be substantially, directly and immediately affected by the Plan's approval.

OPINION

This appeal was filed on May 18, 1987, by Jerry Haney and the Pocono Environmental Club (collectively, the Club). The Club is challenging the Department of Environmental Resources' (Department) approval on April 1, 1987, of the Monroe County Solid Waste Management Plan (Plan). The Monroe County General Authority (Authority), which developed the Plan, filed a petition to intervene in this matter, which the Board granted on August 18, 1987.

The Authority has moved to dismiss this appeal for lack of

standing.[1] The Department joined in the Authority's motion. The Club answered the Authority's motion, averring generally that it does have a substantial, direct, and immediate interest in the subject matter of the appeal.

To have standing in an appeal such as this, the Club must demonstrate that it, or some of its members, have an interest which may be substantially, immediately, and directly affected by the action it seeks to challenge. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). Merely stating that it has such an interest is not sufficient to meet this test. The Club must state with some particularity how it or its members are affected.

Here, the Club has not indicated in any way its relation to the subject matter of this appeal, where its members reside, who its members are, or how any member will be directly affected by the Plan's approval. Other than a mere general statement of the Club's interest, there is nothing in the record to substantiate the Club's standing. The Club's appeal is directly on point with Allegheny River Coalition v. DER and Davison Sand & Gravel Co., 1984 EHB 906, where the Board dismissed a non-profit corporation's appeal of a consent order and agreement and permit for lack of standing. The Board held that the appellant's sole allegation relating to standing was a statement regarding its non-profit status, and that this was an insufficient demonstration of interest as articulated in the William Penn decision.

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[1] Ordinarily, an intervenor's claim must be in recognition of the propriety of an action. 3 Standard Pennsylvania Practice 2d §14:243. However, in this case, the Authority is a party appellee, as it is the recipient of the Department's solid waste plan approval, and intervention on its part was unnecessary. See 25 Pa.Code §21.51(g).

As with Allegheny River Coalition, we must also dismiss this appeal for lack of standing.[2]

O R D E R

AND NOW, this 30th day of December, 1987, the Monroe County General Authority's Motion to Dismiss for Lack of Standing is granted and the appeal of Jerry Haney and the Pocono Environmental Club is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING, CHAIRMAN

William A. Roth

WILLIAM A. ROTH, MEMBER

Robert D. Myers

ROBERT D. MYERS, MEMBER

DATED: December 30, 1987

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For Intervenor:
Edmund G. Flynn, Esq.
BENSINGER, FLYNN & WEEKES
Stroudsburg, PA

bl

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[2] The Authority also filed a motion to dismiss the Club's appeal as untimely filed which is unnecessary for us to address in light of our disposition of the motion to dismiss for lack of standing.

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MAXINE WOELFLING, CHAIRMAN
WILLIAM A. ROTH, MEMBER
Robert D. Myers, Member

M. DIANE SMITH
SECRETARY TO THE BOARD

W. C. LEASURE	:	
	:	
v.	:	**EHB Docket No. 82-007-G**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 31, 1987

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

By the Board

This adjudication is based on a draft adjudication prepared by former Board Member Edward Gerjuoy, acting as a hearing examiner, as modified by the Board.

Syllabus

DER issued an Order directing Old Home Manor, Inc. ("OHM") and the Appellant to perform various reclamation activities on some 16 surface mining sites that OHM had operated. The Appellant has been president and a corporate director of OHM since its incorporation. A previous adjudication has dismissed OHM's appeal of many portions of the aforesaid Order. OHM v. DER, Docket No. 82-006-G, 1986 EHB 1248. This appeal is concerned solely with the question whether the Appellant can be required to expend his own funds to perform those required reclamation activities which, as to OHM, were found to be within DER's discretion in our previous adjudication at 82-006-G. The Board held: (1) DER and the Board had personal jurisdiction over the Appellant, a Texas resident; (2) corporate officers and directors are not

excluded from the definition, in 35 P.S. §691.1, of persons to whom DER may issue orders under the Clean Streams Law, 35 P.S. §691.1 et seq., or under the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq.; (3) DER had the authority to issue its Order to the Appellant under a theory of liability stemming from the Appellant's status as an OHM officer; (4) said authority does not necessarily imply that, on the merits, the Order was within DER's discretion; and (5) on the merits, DER did not sustain its burden of showing the Order to Leasure was within DER's discretion. Therefore, the above-captioned appeal was sustained, as to all portions of the Order which were still in dispute and not found moot as to OHM in our previous adjudication at 86-006-G. The Board carefully discussed the "participation" theories which might make the Appellant liable for OHM's reclamation failures, and--in view of the holding in Wicks v. Milzoco Builders, Inc., 503 Pa. 614, 470 A.2d 86 (1983)--has retreated somewhat from the statutory duty theory of participatory liability expounded in U.S. v. Park, 421 U.S. 658 (1975) and cited as applicable in two recent Board adjudications. John E. Kaites, et al v. DER, Docket No. 84-104-G, 1986 EHB 234; DER v. Lucky Strike Coal Company and Louis J. Beltrami, Docket No. 80-211-CP-W (April 22, 1987). In particular, the Board concluded that Wicks, by which the Board is bound, forbids finding the Appellant personally liable for OHM's reclamation failures solely from the fact that he was president and a director of OHM during the period these reclamation failures were established; under Wicks, the Appellant's mere nonfeasance in his corporate post is insufficient to establish personal liability for OHM's reclamation violations.

INTRODUCTION

This matter has had the following procedural history. On December 23, 1981, DER issued an administrative order (the "Order") addressed to

William C. Leasure ("Leasure") and Old Home Manor, Inc. ("OHM") ordering Leasure and OHM to remedy various alleged violations at a number of surface mining sites which had been operated by OHM under some 16 mining permits. The Order was appealed by Leasure at this docket number, and by OHM at Docket No. 82-006-G. OHM and Leasure each also filed petitions for supersedeas of the Order. The hearings on these petitions were consolidated, although the appeals were not; these consolidated hearings included ten days of testimony during the period April 13 - June 3, 1982.

On April 11, 1983, the Board granted Leasure's petition, except for a limited number of the sites referred to in the Order; OHM's petition was denied, except for a single clause in the Order. Old Home Manor and W. C. Leasure v. DER, 1983 EHB 396 (hereinafter "Leasure II"). Thereafter, the parties commenced extensive settlement discussions, which resolved many, but not all, of the disputed issues; the parties' agreements on various issues, and on various undisputed facts, have been embodied in stipulations which have been made part of the record (see infra). Eventually a single day of hearing on the merits of the OHM and Leasure appeals was held,[1] on February 7, 1985. At this consolidated hearing on the merits the parties stipulated (Bd.Ex.1)[2] that the record for the hearing on the merits included all evidence introduced during the hearings on their petitions for supersedeas ("supersedeas hearings").[3] The consolidated hearing on the merits also

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[1] The transcript for this single day of hearings will be denoted as Tr II.

[2] Exhibits ("Ex.") will be identified as follows: Bd. denotes Board Exhibits; DER Exhibits have the prefix "C", i.e., Ex.C1 is DER's first exhibit; Leasure Exhibits have the prefix "P" (for "petitioner"), i.e., Ex.P2 is Leasure's second exhibit.

[3] The transcripts for these ten days of supersedeas hearings were consecutively paginated, and will be denoted simply as Tr.

involved OHM's appeal at Docket No. 84-121-G, which, on November 29, 1984, was consolidated with the original OHM appeal at 82-006-G, under the 82-006-G docket number; the 84-121-G appeal was from a DER compliance order ("Order II") dated March 5, 1984, addressed to OHM only, alleging OHM's failure to comply with certain paragraphs of the Order.

Both parties have filed post-hearing briefs, although only after many mutually agreed-upon requests for extensions of time; in fact, OHM's post-hearing brief was not filed until July 14, 1986. Thus this matter assuredly is ripe for adjudication. Our task is greatly simplified, however, by the fact that Leasure's contentions in the instant appeal fall into two categories. In the first category are a number of Leasure claims to the effect that DER has no jurisdiction over Leasure, did not have any legal authority for addressing the Order to Leasure, and had no basis for requiring Leasure personally to reclaim areas OHM had mined. Leasure's contentions in the second category register Leasure's objections to: (i) DER's allegations that there have been violations of the surface mining statutes and regulations at the various sites, and (ii) the specific remedies (for those alleged violations) that DER ordered. This second category of contentions is identical with the contentions raised by OHM in its appeal of the Order at 82-006-G. Therefore, our recent adjudication of the 82-006-G appeal--Old Home Manor v. DER, 1986 EHB 1248 (hereinafter "OHM v. DER")--also serves as an adjudication of the instant appeal's second category of contentions.[4] This

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[4] The Board granted the Department's request for reconsideration of that portion of its adjudication holding that the Department committed an abuse of discretion in issuing a cessation order when mining had already ceased; the Board has not issued its opinion on reconsideration, but that is not critical to the result here.

assertion--which was foreshadowed in OHM v. DER (at 1253)--herewith is embodied into the following explicit rulings:

> 1. Except for those portions of OHM v. DER which are concerned solely with Order II (which was not addressed to Leasure), all Findings of Fact, Conclusions of Law and rulings in OHM v. DER are incorporated into and made part of the instant adjudication of the above-captioned appeal.
>
> 2. Any portion of OHM v. DER which is concerned solely with Order II is irrelevant to--and therefore is not incorporated into--the instant adjudication.
>
> 3. This adjudication sustains Leasure's appeal of any portion of the Order whose appeal by OHM was sustained in OHM v. DER.
>
> 4. Any portion of the Order whose appeal by OHM was dismissed in OHM v. DER also will be dismissed in the instant appeal, unless that portion of the instant appeal can be sustained on the basis of Leasure's first category contentions.
>
> 5. Any portions of the Order which were not at issue in OHM v. DER--because the parties had stipulated that they had reached agreement on those portions of the Order--also no longer are at issue between DER and Leasure; Leasure's appeals from such portions of the Order are not examined in this adjudication.[5]

It follows that this adjudication can be and will be limited to examination of those first category Leasure contentions which might convince us to sustain Leasure's appeal from some portions of the Order whose appeal by OHM was dismissed in OHM v. DER. We add for the record that this adjudication indeed does respond to all first category Leasure contentions--and to DER contentions in opposition to those Leasure contentions--which the Board deemed to have some merit. Contentions pertinent to this 82-007-G

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[5] Portions of the Order which no longer are at issue are listed in, e.g., OHM v. DER Findings of Fact (hereinafter "Findings") 6, 7 and 46. Numbered Findings which do not receive the OHM v. DER designation refer to the listed Findings in this adjudication, infra.

appeal (as now limited) which are not discussed herein were deemed wholly without merit, and herewith are rejected. Also, in general, any arguments not pursued by the parties in their post-hearing briefs have been deemed waived. OHM v. DER; Robert Kwalwasser v. DER, 1986 EHB 45; Equipment France, Inc. v. Toth, 328 Pa.Super 351, 476 A.2d 1366 (1984); Schneider v. Albert Einstein Medical Center, 257 Pa.Super 348, 390 A.2d 1271 (1978).

FINDINGS OF FACT

The following Findings are in addition to those Findings which have been incorporated into this adjudication in accordance with our ruling No. 1, supra.[6]

1. The Appellant is William C. Leasure, an individual whose permanent residence is Houston, Texas (Tr. 13).

2. The Order which is the subject of this appeal and was the subject of OHM v. DER was directed equally to OHM and to Leasure, typically via the phrase "Old Home Manor and Leasure"; for example, paragraph 1 of the Order reads:

> 1. Old Home Manor and Leasure shall commence reclamation and correction of all illegal conditions on the above-referenced surface mining sites within seven (7) days of this Order, and in accordance with the following schedule.

[6] It has been convenient to permit a few of the following Findings to overlap some of the Findings listed in OHM v. DER. Cf., e.g., Finding 3 herein and OHM v. DER Finding 14.

3. During the period of the hearings, W. C. Leasure was the president of OHM and a member of its Board of Directors (Tr. 13, 351-2).[7]

4. Leasure has been president of OHM since its incorporation (Tr. 348).

5. OHM was incorporated by A. G. Services, Inc., on January 6, 1971 (Tr. 347-8).

6. Prior to July 27, 1981, OHM was wholly owned by A. G. Services (Tr. 346).

7. On July 27, 1981, OHM became the wholly owned subsidiary of Global Energy, Inc., a Texas corporation (Tr. 345-6).

8. Global Energy is owned in equal parts by A. G. Services and by the Sleipner Mining Co., N.B., which is incorporated in the Netherlands Antilles (Tr. 345-6).

9. Leasure owns 30% of the shares of A. G. Services (Tr. 346).

10. The remaining 70% of A. G. Services is owned by members of Leasure's family, including his wife, children and grandchildren (Tr. 347).

11. OHM has an office in Houston, Texas, where some corporation business is conducted with the help of a single employee (Tr. 348-9).

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[7] Because our Findings necessarily are based on the record made in the hearings, none of which record is less than 28 months old, and most of which now is over five years old, many of our Findings may be out of date by now; for instance, there is no information on the record concerning Leasure's present relationship to OHM. For the purposes of this adjudication, however, facts established by the evidence on the record generally can be regarded as still valid. Unless there is reason to do otherwise, therefore, our Findings will be stated in the present tense, without repetitious resort to the awkward phrase "during the period of the hearings." The approximate period to which any Finding refers can be inferred from the pages of the transcript referenced. As stated earlier, the first set of hearings took place during the period April 13 to June 3, 1982; the final day of hearings, on February 7, 1985, is referenced by Tr.II.

12. OHM conducts its mining operations in Pennsylvania only (Tr. 348-9).

13. OHM has an office in Pennsylvania, at R. D. #2, Homer City, PA 15748 (Tr. 349; OHM v. DER Finding 1).

14. Prior to July 27, 1981, the Board of Directors of OHM was composed of Leasure and other members of his family (Tr. 352).

15. Since July 27, 1981, the Board of Directors of OHM has been composed of Leasure and two other individuals not related to Leasure (Tr. 351).

16. Global Energy has the same Board of Directors as OHM (Tr. 351).

17. The officers of OHM are Leasure, his wife and his daughter (Tr. 350).

18. When Leasure comes to Pennsylvania, he stays at a farm house, whose address is R. D. #2, Homer City (Tr. 356).

19. The farm house is owned by A. G. Services (Tr. 356).

20. Leasure is the president of A. G. Services (Tr. 358).

21. OHM has not shipped any coal since about December, 1979 (Tr. 313).

22. OHM has no source of income other than revenues from the mining and sale of coal (Tr. 314).

23. OHM has had no income since about December, 1979 (Tr. 314, 510).

24. At the close of the fiscal year ending September 30, 1981, OHM had a negative net worth, in excess of $1,000,000 (Tr. 510).

25. Anthony Ercole, Director of DER's Bureau of Mining and Reclamation, met Leasure for the first time in December, 1979, during a discussion of the status of the mining sites which were the subject of the Order (Tr. 16-19, 890-3).

26. The Order was issued under the authority of the Clean Streams Law ("CSL"), 35 P.S. §§691.1 et seq., and the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §§1396.1 et seq.

27. The Order alleged that on the date the Order was issued (December 23, 1981) Leasure was the owner of a number of properties which were the subject of the Order.

28. Specifically, the Order alleged that on December 23, 1981, Leasure was the owner of the properties subject to OHM's Mining Permits Nos. 615-4 and 615-4(A), 615-6 and 6(A), 615-12, 12(A) and 12(A2), and Special Reclamation Projects Nos. 47 and 445 (see OHM v. DER Finding 6 and other Findings therein for the locations and descriptions of these properties).

29. On March 29, 1982, Leasure filed a "Supplemental Affidavit" in support of his motion to dismiss the Order with respect to Leasure.

30. This "Supplemental Affidavit" has been made part of the record in this appeal (Tr. 360).

31. This Supplemental Affidavit denies that Leasure ever owned the property encompassed by Special Reclamation Project No. 445.

32. The Supplemental Affidavit agrees that at one time Leasure was the owner of all properties (other than Special Reclamation Project No. 445) mentioned in Finding 28.

33. According to the Supplemental Affidavit, all the properties mentioned in Finding 28 which Leasure did own at one time were deeded to A. G. Services on February 15, 1977.

34. A. G. Services purchased the property encompassed by Special Reclamation Project No. 445 from the Appalachian Coal Company on April 20, 1976; Appalachian Coal Company had owned the property ever since February 8, 1923 (Supplemental Affidavit).

35. DER has not challenged the accuracy of the assertions in the Supplemental Affidavit.

36. For the properties listed in Finding of Fact 28 which Leasure actually had owned at one time, DER offered no evidence that might tend to show that the violations the Order was intended to remedy had occurred while Leasure still was the landowner.

37. For those same properties, DER offered no evidence that Leasure, while a landowner, had resided on those properties, or had visited frequently, or otherwise had associated himself with reclamation violations that might have occurred during Leasure's ownership.

38. For these same properties, DER offered no evidence as to the rent or mining royalties Leasure had received as the landowner of record.

39. During his testimony, Leasure frequently referred to OHM as "I" or "we" (Cf., e.g., Tr. 41, 75, 93).

40. There was no evidence that OHM was undercapitalized when formed.

41. There was no evidence that OHM did not observe corporate formalities, such as maintaining separate (from Leasure's) books and records; Leasure testified that corporate formalities had been observed (Tr. 317).

42. There was no evidence that Leasure had siphoned OHM funds for his personal use, or otherwise used OHM for his personal benefit.

43. There was no evidence that OHM's directors were non-functional.

44. There was no evidence that Leasure had used OHM to perpetrate a fraud or similar illegality.

45. Under OHM v. DER, OHM remains responsible for completing some additional reclamation on each of the following permit areas, which are

identified and described in OHM v. DER Finding 6 and other OHM v. DER Findings: 615-4 and 4(A); 615-6 and 6(A); 615-12 and Amendments; 615-10 and 10(A); 615-22; 615-35; 615-17 and Amendments; 615-42; 615-44 and 44(A); Special Reclamation Project 445.

46. On the 615-4 and 4(A) permit area, OHM completed its coal removal activities prior to December, 1979, and completed its backfilling activities in 1975-76 (OHM v. DER Findings 17 and 20).

47. On the 615-6 and 6(A) permit area, OHM completed its coal removal activities well before December, 1979 (OHM v. DER Finding 48).

48. On the 615-12 and Amendments permit area, OHM completed its coal removal activities prior to December, 1979 (OHM v. DER Finding 66).

49. On the 615-10 and 10(A) permit area, OHM completed its coal removal activities prior to 1976, and had completed its backfilling work (to OHM's satisfaction) before June, 1979 (OHM v. DER Findings 100-102).

50. On the 615-22 permit area, coal removal activities ended about 1978, and conditions on the site have been unchanged since at least October 20, 1980 (OHM v. DER Findings 108 and 109).

51. Where reclamation still is needed on the 615-35 permit area, mining was completed before November, 1979 (OHM v. DER Findings 127 and 128).

52. On the 615-17 and Amendments permit area, OHM completed its coal removal activities in November, 1979, and conditions on the site have not changed significantly since November, 1980 (OHM v. DER Findings 135 and 136).

53. On the 615-42 permit area, coal removal was completed in November, 1979 (OHM v. DER Finding 174).

54. On the 615-44 and 44(A) permit area, coal removal was completed in November, 1979; the site has not been backfilled or revegetated (OHM v. DER Findings 187 and 191).

55. On the Special Reclamation Project 445 permit area, coal removal was completed prior to December, 1979 (OHM v. DER Finding 210).

56. DER offered no evidence tending to show that Leasure had been actively involved in OHM management prior to 1979, when he began to meet with DER staff to review the reclamation status of OHM's permits (Tr. 16).

57. Ex. P10 consists of two letters, dated December 29 and 30, 1976, on OHM stationery, written to DER by George Jones, Chief Engineer, concerning OHM reclamation activities; Leasure did not sign these documents, nor does his name appear on them.

58. Exs. P31-P36 are deeds, recording the sale to OHM of various properties owned by various individuals on various dates between May 22, 1974 and April 4, 1975.

59. Exs. P31-P36 each was signed for OHM by Robert Cochran, an employee of OHM, who testified during the hearings (OHM v. DER Findings 86-88 and other OHM v. DER Findings); Leasure did not sign these deeds, and his name is not mentioned on any of them.

60. Exs. C7, C12, C15-A through C15-D, C17, C19, C19-A, C22-A, C26-A, C28-A, C28-B and C33 are OHM mining permits and/or permit applications, for a variety of mining sites, dated variously between June 16, 1975 and April 20, 1978.

61. Each of the exhibits listed in Finding 60 is addressed to and/or signed by R. L. Leasure, usually identified as Vice-President, OHM, at the OHM Homer City, PA address (see Finding 13); Leasure did not sign any of these documents, nor does his name appear on any of them.

62. Exs. C22, C26, C28, C31 and C31-A are OHM mining permits for a variety of mining sites, dated variously between June 20, 1973 and October 22, 1975.

63. Each of the exhibits listed in Finding 62 is addressed to John G. Auld, Vice-President, OHM, at the Homer City address; Leasure did not sign any of these documents, nor does his name appear on any of them.

64. Exs. C14 through C14-B, C21 through C21-C and C30 are OHM mining permits, for a variety of mining sites, dated variously between June 28, 1972 and November 10, 1977.

65. Each of the exhibits listed in Finding 64 is addressed directly to OHM at the Homer City address, without specific mention of any OHM officer or employee; Leasure did not sign any of these documents, nor does his name appear on any of them.

66. Ex. C3 is a letter from DER to OHM at its Homer City address, dated June 9, 1977, granting OHM approval for Special Project No. 445; Leasure's name nowhere appears on this document.

67. Ex. C2 is an Order to OHM from DER, dated sometime in 1977, concerning alleged violations by OHM of the Water Obstructions Act on the site covered by MP 615-22 (Tr. 125-6, OHM v. DER Finding 124); Leasure did not sign this document, nor does his name appear on it.

68. Ex. P23 is an undated document on OHM, Homer City, PA stationery, listing photographs taken by OHM January 18, 1973 at the "Crichton Tract," which is the area covered by Special Reclamation Project 47 (Tr. 214, 732-3); the document was prepared by George R. Jones, an engineer employed by OHM, and is unsigned; Leasure's name does not appear on it. (Tr. 881).

69. Ex. P50 is an inspection report on OHM's MP 615-10 and 10(A) permit area, dated June 12, 1979, listing some reclamation violations; Leasure did not sign this document and his name is not mentioned on it.

70. When Leasure first met with Ercole in December, 1979, he brought with him a list of OHM's active mining sites, showing the status of reclamation on each of those sites (Tr. 16; Ex. P1).

71. With the exception of Ex. P1 and the Supplemental Affidavit (Finding 29), the exhibits mentioned in Findings 57-69 include all documents put into evidence which are dated before 1980 or directly relate to OHM's mining operations before 1980.

72. Ercole testified that it was his understanding that Leasure's "more or less running the company (OHM) on his own" only began in 1979 (Tr. 908).

73. Prior to 1979, according to Ercole, Leasure's cousin was in charge (Tr. 908).

74. Ercole testified that he had commented to Leasure that Leasure "had the sins of five years to catch up on" (Tr. 908).

75. According to George R. Jones, in 1973, when Mr. Jones prepared Ex. P23, John G. Auld was "manager" of OHM (Tr. 875-6; Findings 63 and 68).

76. Leasure testified that he never had ordered OHM not to carry out reclamation that Leasure felt was necessary (Tr. 318).

77. Leasure testified, without contradiction by DER, that the extensive reclamation conducted by OHM during the years 1979-81 had been performed with funds Leasure had secured from OHM creditors (Tr. 510).

78. There was no evidence that Leasure had failed to commit available resources of OHM to OHM's reclamation obligations.

79. Leasure was the principal witness for OHM during the hearing on this matter and presented testimony on each aspect of OHM's defense; he testified as to the physical conditions of each of the sixteen mining sites, as to why OHM chose to mine several of the sites, as to OHM's future

intentions to mine several of the sites, as to OHM's property acquisitions relative to several of the mining sites, and as to various oral and written commitments by OHM to perform corrective work (Tr. 13-400, 506-561).

80. During the hearings on this matter, Leasure displayed an extraordinarily complete knowledge of OHM's mining operations on the sites in issue, of the physical conditions of each site, and of the work remaining to be performed on each site.

81. Cochran testified that when Leasure is not in the Homer City OHM office, he and Leasure maintain almost daily telephone contact about OHM operations (Tr. 809-12).

82. In 1980 Cochran, who originally was employed by OHM as an engineer, was put in charge of OHM's reclamation activities (Tr. 804-6).

83. Cochran is a full-time employee of OHM's, who spends almost every working day at the OHM Homer City office (Tr. 809).

84. Cochran testified that Leasure "often" is at the Homer City office (Tr. 809-10).

85. Leasure testified that he sees any letters notifying OHM of reclamation violations (Tr. 88).

86. Leasure claims that he responds immediately to violation notices (Tr. 102).

87. Cochran makes Leasure aware of all mine site inspection reports received by OHM (Tr. 813).

88. Harry Hamill, Joseph Smith, Alene Claycomb and William Hartman, whose various properties OHM had mined, testified for DER (Tr. 405-501).

89. These witnesses testified at length about the conditions of their properties after mining, and about their agreements with OHM; however,

none of these witnesses gave any evidence that would connect Leasure to reclamation violations established prior to 1979.

90. Joseph Smith was the landowner of the property which is the subject of the deed dated October 8, 1974 and introduced into evidence as Ex. P32.

91. Mr. Smith testified that about the time he signed the deed he had a conversation with "Bob Leasure" who, Mr. Smith believed, was the "superintendent" of OHM (Tr. 471).

92. Cochran was not specifically asked, and did not say, whether his frequent contacts with Leasure (Findings 81 and 84) and his practice of making Leasure aware of all mine site inspection reports (Finding 87) date from before 1980, when Cochran was put in charge of OHM's reclamation activities (Finding 82).

93. Cochran did not testify to any direct contacts with Leasure prior to 1979.

94. Cochran first was employed by OHM in 1973 (Tr. 567).

95. Cochran is supervised by Leasure and only by Leasure (Tr. 809, 816).

96. Ercole testified, in connection with a letter purporting to be from Robert Leasure, that he had engaged in many discussions with Robert Leasure (Tr. 923).

97. Bd. Ex. 1, a stipulation between the parties dated February 7, 1985, lists a considerable number of mining sites that, though originally subjects of the Order, no longer are at issue in this appeal because they have been satisfactorily reclaimed.

98. Paragraph 4 of Bd. Ex. 1 makes reference to an earlier stipulation between the parties, which was filed with the Board on November 8, 1982.

99. DER presented no direct evidence that before 1979 Leasure had authorized or directed any OHM failures to properly reclaim, or had knowledge of and consented to such violations.

DISCUSSION

Findings 21-24, which were uncontradicted by DER, establish that since about December 1979 OHM had no income, and that by September 30, 1981 OHM was over one million dollars in debt. Thus, the underlying issue in this appeal can be stated very simply: Recognizing that OHM may not have the resources to perform those reclamation activities which were specified in the Order upheld in OHM v. DER, should Leasure be required to perform them with his personal funds? The resolution of this issue depends primarily on application--to the instant facts--of various theories concerning Leasure's potential liability for OHM's failure to properly reclaim. For the purposes of this appeal, these theories are of two sorts:

> (i) Leasure's liability stems from Leasure's status as an officer, director and principal stockholder of OHM.
> (ii) Leasure's liability stems from his former status as landowner of some sites OHM mined.

Before we reach these theories of Leasure's potential liability, however, we must deal with Leasure's objections to DER's and the Board's assertions of jurisdiction over him.

Leasure's post-hearing brief (at 2) reserves all jurisdictional arguments made originally by him in his Brief in Support of Supersedeas, filed October 12, 1982. These jurisdictional arguments were summarized by Leasure as follows (supersedeas brief, Table of Contents):

THE DEPARTMENT LACKS JURISDICTION TO ENFORCE ITS ORDER AGAINST LEASURE AS AN INDIVIDUAL

A. The Department Lacks The Statutory Authority To Direct Its Order to Appellant Leasure

B. The Department Cannot Exercise Personal Jurisdiction Over Appellant, Because Appellant Is A Domiciliary of Texas, Is Not The Owner Of Any Of The Mining Sites Identified In The Order, And Is Not The Holder Of Any Of The Mining Permits With Which The Order Is Concerned

C. The Irregularities In The Service Of The Order Prevented Jurisdiction From Attaching

These contentions B and C were dealt with at length in W. C. Leasure v. DER, 1982 EHB 355 (hereinafter "Leasure I"), in Leasure II, supra, and in Old Home Manor and W. C. Leasure v. DER, 1983 EHB 463 (hereinafter "Leasure III"). Beyond the reservation of these contentions, Leasure's post-hearing brief does not discuss contentions B and C. We have reviewed our analyses of contentions B and C in Leasure I, Leasure II, and Leasure III, and we now reaffirm them. DER and the Board have personal jurisdiction over Leasure in this matter.

Authority To Issue Order To Leasure as OHM Officer

As we noted in Leasure I (at 367), contention A supra is analogous to a claim that--insofar as the Order to Leasure is concerned--DER lacks jurisdiction over the subject matter, in contradistinction to contentions B and C, which challenge DER's personal jurisdiction over Leasure. Contention A also has been fully discussed and rejected in Leasure I, with affirmation of the rejection in Leasure II and Leasure III. Leasure's post-hearing brief does discuss contention A, however, phrasing those arguments somewhat differently than heretofore. Therefore, we will re-examine Leasure's contention A in this adjudication.

The Order was issued under the authority of the CSL and the SMCRA. Authority to issue orders under the CSL stems from Section 610 of that Act, 35

P.S. §691.610, which reads:

> § 691.610. Enforcement orders
>
> The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits and orders requiring persons or municipalities to cease operations of an establishment which, in the course of its operation, has a discharge which is in violation of any provision of this act. Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth, or if it finds that the permittee, or any person or municipality is in violation of any relevant provision of this act, or of any relevant rule, regulation or order of the board or relevant order of the department.

The CSL, 35 P.S. §691.1, defines "person" as follows:

> "Person" shall be construed to include any natural person, partnership, association or corporation or any agency, instrumentality or entity of Federal or State Government. Whenever used in any clause prescribing and imposing a penalty, or imposing a fine or imprisonment, or both, the term "person" shall not exclude the members of an association and the directors, officers or agents of a corporation.

The corresponding sections of the SMCRA are 52 P.S. §1396.4c and 52 P.S. §1396.3 respectively. Section 1396.4c reads:

> The department shall have the right to enter upon and inspect all surface mining operations for the purpose of determining conditions of health or safety and for compliance with the provisions of this act, and all rules and regulations promulgated pursuant thereto. The department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending or revoking permits, licenses and orders requiring persons to cease operations immediately.

The definitions of "person" in 52 P.S. §1396.3 and 35 P.S. §691.1 are identical.

Leasure I dealt with Leasure's argument that the second sentence in the CSL and SMCRA definitions of "person" signifies the Legislature's intention to exclude corporate officers and directors from the meaning of "persons" as used in 35 P.S. §691.610 or 52 P.S. §1396.4c, because these sections are concerned with "orders," not with penalties; penalty sections include, e.g., CSL §691.602 and SMCRA §1396.23. Hence, according to Leasure, DER had no authority to issue the Order to Leasure, inasmuch as that Order was based on Leasure's status as a director or officer of OHM.

The main new feature of Leasure's post-hearing brief is a series of citations to cases which allegedly have construed other Pennsylvania statutes in the same fashion as Leasure would have us construe the CSL and SMCRA definitions of "person"; neither party has called our attention to any cases which actually have construed this definition of "person." According to Leasure, his cited cases illustrate the applicability of the statutory construction maxim expressio unius est exclusio alterius, or "the expression of one thing is the exclusion of another." Black's Law Dictionary, Fifth Edition at 521. Leasure points out that this maxim has been adopted by many Pennsylvania courts, e.g., Comm. v. Charles, 270 Pa.Super.280, 411 A.2d 527 (1979), which states:

> The maxim is one of long-standing application, and it is essentially an application of common sense and logic.

Leasure claims that, under the maxim, the Legislature's explicit inclusion of corporate directors and officers into the class of "persons" who can receive penalties necessarily implies that corporate directors and officers are excluded from the class of persons who can receive orders under the first sentence of the definition.

Section 1921(a) of the Statutory Construction Act, 1 Pa. C.S.A. §1921(a), instructs us that "Every statute should be construed, if possible, to give effect to all its provisions." Adoption of Leasure's construction of the definition of person would greatly modify the effect of the first sentence of that definition, by excluding--in application to sections of the CSL like 35 P.S. §691.610--corporate directors and officers from the class of natural persons. Moreover, the numerous Pennsylvania applications of the maxim expressio unius est exclusio alterius cited by Leasure all have used the maxim as justification for refusing to go beyond the explicit language of the statute, not--as Leasure would have us do--to justify modifying the explicit language. For example, Charles, supra, did not allow any additional sanctions for a driver's refusal to submit to a breathalyzer test beyond those sanctions explicitly listed in the statute.

In short, Leasure's new arguments in his post-hearing brief do not warrant overturn of our previous rejection of his interpretation of the definition of "person." Correspondingly, we herewith re-affirm our Leasure I ruling that the CSL and the SMCRA did give DER the authority to direct its Order to Leasure under this theory of liability. We stress that in so ruling we have not ruled on the merits of DER's order to Leasure under this theory. Whether the facts really do establish Leasure's liability in this regard goes to the merits of DER's order, as disussed infra.

Authority To Issue Order To Leasure As Landowner

DER's December 23, 1981 order was based on the allegation that on that date Leasure was the owner of a number of the mining sites which were the subject of the order (Finding 28). Findings 29-35 establish, however, that this allegation was false. In particular, though Leasure at one time had been the owner of all properties mentioned in Finding 28, except Special

Reclamation Project No. 445, after Febuary 15, 1977, all properties mentioned in Finding 28 were owned by A.G. Services, one of the corporations in Leasure's corporate pyramid (recall Findings 5-10 and 16-20). In Leasure II, though aware that after February 15, 1977, Leasure had not owned any of the properties mentioned in Finding 28, we nevertheless refused to supersede the Order with respect to those properties Leasure once had owned, because we were not convinced that as a matter of law DER's authority to issue its Order to Leasure under an ownership theory required that Leasure be a property owner at the time the Order was issued.

We still are not convinced that DER could not establish its authority to issue its Order to Leasure as a former landowner, under, e.g., the theory of Ryan v. DER, 373 A.2d 475 (1977); one could argue that Leasure--as a landowner accepting rent from OHM during the period OHM mined and failed to properly reclaim--had sufficiently associated himself with OHM's mining activities to be personally responsible for the reclamation failures. When we wrote Leasure II, however, it was Leasure's burden to convince us that he was likely to win on the merits. 25 Pa. Code §21.78 (in the form which was operative at the time we ruled on Leasure's petition for supersedeas, see Leasure II at 406); William Fiore v. DER, Docket No. 83-160-G, 1983 EHB 528; Armond Wazelle v. DER, Docket No. 83-160-G, 1984 EHB 865. At the present stage of these proceedings, the burden falls on DER, to convince us that its Order to Leasure was not an abuse of discretion or an arbitrary exercise of DER's duties and functions; the fact that we judged Leasure had not met his burden of justifying a supersedeas for properties he once had owned now is irrelevant. 25 Pa.Code §21.101(b)(3); Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975); Ohio Farmer's Insurance Co. v.

DER, 73 Pa.Cmwlth 18, 457 A.2d 1004 (1983).[8]

We rule that DER has not met its burden of alleging, much less showing, facts which could establish DER's authority to issue the Order to Leasure for those properties Leasure formerly had owned under the ownership theory of Leasure's liability. DER has made no attempt to show that the violations the Order sought to remedy on Leasure's former properties occurred when Leasure still owned those properties (Finding 36). Nor, even assuming the violations did occur when Leasure was a landowner, has DER introduced any evidence tending to show that--in his capacity of landowner--Leasure sufficiently associated himself with the violation to warrant issuance of the Order to Leasure as well as to OHM (Findings 37 and 38). Indeed, neither DER's supersedeas brief nor its post-hearing brief present any arguments in support of its authority to issue the Order to Leasure as a former landowner. Insofar as the instant appeal is concerned, therefore, Leasure's liability for OHM's failure to reclaim must be based on the corporate officer/director/stockholder theory, and from this point on, our adjudication of the merit of Leasure's appeal will be concerned solely with deciding whether DER has shown that the order was not an abuse of discretion under this theory.

Piercing The Corporate Veil

Personal liability of corporate officers may be established under two theories--piercing the corporate veil or participation in the action by the officer. Louis J. Novak, Sr., Hilda Novak and Novak Sanitary Landfill, Inc. v. DER, EHB Docket No. 84-425-M (Adjudication issued August 13, 1987).

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[8] In the context of the present appeal an arbitrary exercise by DER of its duties or functions would be an abuse of its discretion as well, so that--as in OHM v. DER at 1280--we can and will focus on the "abuse of discretion" clause in the Warren standard.

In order to pierce the corporate veil, the Department must establish that "The corporation was an artifice and a sham designed to execute illegitimate purposes in abuse of the corporate fiction and the immunity it carries." Zubik v. Zubik, 384 F.2d 267, note 2 (3d Cir.1967), cert.denied, 390 U.S. 988 (1968). To do so, the Department must present evidence of the sort summarized in U. S. v. Pisani, 646 F.2d 83 (3d Cir.1981), as:

> Whether the corporation is grossly undercapitalized for its purpose...failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.

The Superior Court has recently stated in Burton v. Boland, ___ Pa.Super.___, 489 A.2d 243 (1985) that

> Even when a corporation is owned by one person or family, the corporate form shields the individual members of the corporation from personal liability and will be disregarded only when it is abused to permit perpetration of a fraud or other illegality.

Other than proposing a conclusion of law that the corporate veil of OHM should be pierced, DER's post-hearing brief does not directly address the issue of whether the evidence justifies finding Leasure liable under a piercing of the corporate veil theory. DER's post-hearing brief incorporates its supersedeas brief, however, where justification for piercing the corporate veil was strongly argued. The essence of the argument in DER's supersedeas brief is as follows (quoting from pp. 8-9 of the supersedeas brief):

> The testimony of Mr. Leasure demonstrates that there was an intermingling of his personal interests with the corporate interests of OHM. Sometime prior to 1977, Mr. Leasure personally purchased certain farms in Indiana County upon

> which are located various homes. In 1977 he sold three farms and the attendant homes to A.G. Services, Inc., at that time the parent corporation of OHM and now a fifty percent (50%) shareholder in Global Energies which in turn is the one hundred percent (100%) shareholder of OHM. Mr. Leasure no longer maintains a residence in Pennsylvania; however, when he is in Pennsylvania on business, he uses one particular home on the farms as his personal residence (T. 337-346, 356). In testifying about the mining site authorized by Special Reclamation Project 47, Mr. Leasure could not testify as to whether he or OHM originally purchased the property prior to its subsequent sale to A. G. Services (T. 213).
>
> The testimony further demonstrates a frequent disregard of the corporate form. Mr. Leasure frequently referred to OHM as "I" or "we" and to corporate activites as his own. While testifying about the independent activities of gas well drillers on one of the mining sites, Mr. Leasure stated, "I did not give permission... They don't ask me. They go in, drill wells on my land, on land that I have, bonded." (T. 139). In discussing OHM's intention to conduct mining activities on the land that was eventually permitted under Special Reclamation Project 47, Mr Leasure testified, "...we got permission, or general permission, I should say, at least that's what was given to me by my people from the state, that they would allow us to--if I could purchase it, if I purchased it, they would allow me to clean it up." (T.215). In testifying about the proposed limestone mining on certain mining sites in Westmoreland County, Mr. Leasure stated, "I believe it's the only limestone around in that area that will be good for power plant SO_2 scrubbing, and that's the reason why I bought it." (T. 269). There are numerous other such references which are located at pages 41, 51, 75, 79, 88-90, 94, 102, 110, 111, 216-217, 320 and 323 of the transcript of the hearing.
>
> In both his language and in his personal use of corporate assets, Mr. Leasure has disregarded the corporate existence of OHM and its affiliated companies. Such conduct justifies the piercing of the corporate veil.

This argument for piercing OHM's corporate veil is pitifully weak. We cannot agree that Leasure's references to OHM as "I" or "we" when testifying is evidence that OHM is merely a facade for Leasure, or that

Leasure's use of a farmhouse belonging to A.G. Services when he visits Pennsylvania (Finding 18) presumably for business reasons (DER has not shown the contrary) is evidence that OHM's funds are being siphoned by Leasure. Although OHM presently is heavily indebted, there was no evidence that OHM was grossly undercapitalized when formed, or that corporate formalities such as maintaining separate (from Leasure's) books and records were not observed, or that Leasure really had siphoned OHM funds, or that OHM's directors [though members of Leasure's own family before July 27, 1981 (Finding 14)] were non-functional. Moreover, our formulation of the specific burden DER bears to justify piercing the corporate veil, taken from Zubik, supra, is considerably lighter than other formulations in the case law. For example, the Superior Court has stated:

> Even when a corporation is owned by one family, the corporate form shields the individual members of the corporation from personal liability and will be disregarded only when it is abused to permit perpetration of a fraud or other illegality.

Burton v. Boland, 489 A.2d 243 (Pa. Super. 1985). There was no evidence that Leasure used OHM for his personal benefit, to perpetrate a fraud or some similar illegality.

We hold that DER has not met its burden of showing that the corporate veil justifiably can be pierced to impose personal liability on Leasure for OHM's failures to properly reclaim.

Participation Theory of Leasure's Liability, Common Law

As we pointed out in Leasure I, originally DER appeared to believe that Leasure could be liable for OHM's failure to properly reclaim solely

because Leasure was an officer[9] of OHM, without any need for DER to prove Leasure's "participation" in OHM's malfeasances. DER's post-hearing brief has accepted the need for Leasure's "participation," however, as expressed by us in DER v. Lucky Strike Coal Company and Louis J. Beltrami, EHB Docket No. 80-211-CP-W (Adjudication issued April 22, 1987).

Our interpretation of the participation theory was set forth in John E. Kaites, et al. v. DER, 1986 EHB 234, where we analyzed liability of corporate officers under the "participation" theory. Analogizing to tort law, we stated that an officer is personally liable if his actions actually further the alleged violations. We held that although an officer cannot be held liable for mere nonfeasance, a conscious decision to pursue a certain course of conduct, accompanied by an order implementing that decision, can be sufficient "participation" to establish personal liability. The Board also in Kaites recognized corporate officer liability under the "participation" theory on the basis of a violation of a statutorily created duty, following the reasoning enunciated in U.S. v. Park, 421 U.S. 658 (1975). As we pointed out in Novak, the Commonwealth Court has recently overturned this expansive view of corporate officer liability in John E. Kaites, et al. v. DER, No. 1061 C.D. 1986 (Pa.Cmwlth., filed August 6, 1987) wherein it held that evidence of misconduct or intentional neglect is necessary before individual liability will be imposed on a corporate officer under the participation theory.

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[9] Leasure is an officer, director and--through Global Energy and A.G.Services--a principal stockholder of OHM (Findings 3, 7-10). Officers, directors and shareholders have differing rights and responsibilities vis-a-vis a corporation. For the purposes of this appeal, however, it is sufficent to focus on Leasure's rights and responsibilities as president of OHM. If Leasure is not liable for OHM's failure to reclaim in his capacity as president, he will not be liable as director or shareholder under a participation theory. If he is liable as president, there is no need to analyze further.

Although the evidence on OHM's mining and reclamation schedules on the permit areas which are the subject of this adjudication (namely the permit areas listed in Finding 45) could have been much more complete, it does appear from Findings 45-55 that on all those sites extraction of coal ceased before December, 1979, often years before that time; it also appears from these same Findings that for the most part OHM's reclamation violations had been established by December, 1979. On the other hand, the evidence indicates that Leasure did not become actively involved in management of OHM until some time in 1979 (Findings 25, 56-75, 88-91 and 96). Before Leasure did become so involved, OHM's coal mining and reclamation activities apparently (the evidence could be sharper) were supervised and conducted not by Leasure, but by Pennsylvania residents, notably Robert L. Leasure and John G. Auld (Findings 60-63, 73, 75 and 91). DER points to Findings like 79-81, 84-87 and 95 in arguing that Leasure actively has participated in the OHM management decisions that caused OHM to violate its reclamation requirements. Careful reading of the testimony shows, however, that such Findings merely establish Leasure's detailed personal involvement in management of OHM's mining activities after some time in 1979, when he first sought out Ercole for the purpose of coming to an understanding about the status of the mining sites which were the subject of the Order (Findings 25 and 70). Perhaps evidence that Leasure was involved in managing OHM's mining activities before 1979 exists, but such evidence was not put on the record; for example, Robert Cochran, who has been an employee of OHM since 1973, and who since 1980 has been in charge of OHM's reclamation activities under Leasure's close supervision, never was asked whether and/or how Leasure had supervised him prior to 1980 (Findings 81-87 and 92-93).

We conclude that DER has not met its burden of demonstrating that Leasure--under the common law theory of "partication"--can be said to have participated in OHM's mining activities before 1979, when OHM's reclamation violations seemingly were largely established. The Order was issued December 23, 1981, however, more than two full years after Leasure assumed his active role in managing OHM's mining activities; in principle, these two years are more than enough time for Leasure to have become a "participant" in the reclamation violations. But Leasure testified, without contradiction by DER, that OHM has had no income since about December, 1979, and by September 30, 1981 was more than one million dollars in debt (Findings 23 and 24). Furthermore, DER itself has stipulated that considerable reclamation was performed between the time the Order was issued and February 7, 1985, when the stipulation was signed (Bd. Ex. 1; OHM v. DER Finding 7); much of this reclamation actually was performed before November 8, 1982, when the parties filed a "Stipulation Of The Parties And Status Report", whose contents are summarized in paragraph 4 of Bd. Ex. 1 (Findings 97 and 98). These reclamations assuredly were far from being in full satisfaction of those portions of the Order's requirements which--as to OHM--were within DER's discretion (see OHM v. DER); nonetheless these reclamations must be counted to Leasure's credit, as having occurred during his period of active management. In addition, this reclamation was performed even though OHM was out of funds; Leasure has testified that the reclamation conducted by OHM (up to the time he testified, in April 1982) was paid for with funds Leasure had secured from OHM's creditors (Finding 77).

Under these circumstances we do not see how--on any common law participation theory--Leasure can be required to expend his own funds for

reclamation OHM has not performed, whether before or after 1979. Because Leasure was not a participant before 1979 (as we already have concluded), and because OHM was heavily in debt when Leasure did become a participant, it is unreasonable to hold Leasure personally responsible for OHM's incomplete reclamation when the evidence indicates that under Leasure's post-1979 management considerable reclamation has been performed and when DER has not shown that OHM resources were available for even more reclamation (Finding 78). Admittedly, there are mining sites mentioned in the Order which Leasure deliberately refused to reclaim after 1979, because, e.g., on 5 acres of the mining site covered by MP 615-6 and 6(A) he hoped to receive a permit for a deep mine and felt any backfilling OHM performed on these 5 acres just would have to be torn up later (see OHM v. DER Findings 62 and 63). If OHM had the resources to perform all reclamation within DER's discretion the Order required, such a refusal by Leasure to order OHM to do this reclamation on the MP 615-6 and 6(A) site would be more than enough to constitute "participation" in unlawful actions under the standard enunciated by the Commonwealth Court in Kaites. But if OHM really did not have the resources to perform all reclamations (within DER's discretion) the Order required, so that OHM had to omit some such reclamation, Leasure's decision to reclaim other areas than the aforesaid 5 acres on the MP 615-6 and 6(A) site could be quite understandable. Therefore we rule that DER has not met its burden of showing that its Order to Leasure (more accurately, those portions of the Order which still are at issue in this appeal, recall rulings 1-5 in the Introduction) can be justified on a common law theory of participation--by Leasure, as OHM's president--in OHM's failures to properly reclaim.

CONCLUSIONS OF LAW

1. Our recent adjudication of OHM v. DER, 1986 EHR 1248, also serves as an adjudication, as to Leasure, of all contentions previously raised by OHM and raised also here by Leasure, concerning: (i) DER's allegations that there have been violations of the surface mining statutes and regulations, and (ii) the specific remedies (for those alleged violations) that DER ordered.

2. However, any portion of OHM v. DER which is concerned solely with DER's March 5, 1984 Order addressed to OHM (Order II) is irrelevant to--and is not incorporated into--this adjudication.

3. This adjudication is limited to examination of those Leasure contentions--made here but not in the OHM appeal adjudicated in OHM v. DER--which might convince us to sustain Leasure's appeal from some portions of the Order whose appeal by OHM was dismissed in OHM v. DER.

4. Contentions pertinent to this appeal which are not discussed herein were deemed wholly without merit and have been rejected.

5. Arguments not pursued by the parties in their post-hearing briefs are deemed waived.

6. DER and the Board have personal jurisdiction over Leasure in this matter.

7. Corporate officers and directors are not excluded from the definition--in 35 P.S. §691.1--of persons to whom DER may issue Orders under the CSL or the SMCRA.

8. DER had the authority to issue the Order to Leasure on a theory of liability stemming from Leasure's status as an OHM officer, but our approving this authority does not necessarily imply that, on the merits, the Order was within DER's discretion.

9. DER did not meet its burden of showing it had the authority to issue the Order to Leasure under an "ownership theory" of Leasure's liability for reclamation of OHM mining sites of which Leasure formerly had been the landowner.

10. DER has not met its burden of showing that the corporate veil justifiably can be pierced to impose personal liability on Leasure for OHM's failure to properly reclaim.

11. DER has not met its burden of showing that Leasure can be said to have participated in OHM's mining activities before 1979, under the common law theory of "participation" by establishing misconduct or intentional neglect by Leasure.

12. Although Leasure did participate in OHM's reclamation activities after 1979, the circumstances--especially the facts that OHM was heavily in debt and that Leasure nevertheless has managed to get much reclamation performed--do not warrant requiring Leasure to expend his own funds for reclamation OHM has not performed.

ORDER

WHEREFORE, this 31st day of Dec. 1987, it is ordered that:

1. W. C. Leasure's appeal is sustained for all portions of the Order which were still in dispute when we rendered our companion adjudication at Docket No. 82-006-G (Old Home Manor v. DER, December 24, 1986), excepting those portions which were dismissed as moot in our companion adjudications.

2. W. C. Leasure's appeal is dismissed, as also moot, for those portions of the appeal which were dismissed as moot in our companion adjudication.

ENVIRONMENTAL HEARING BOARD

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ROBERT D. MYERS, MEMBER

DATED: December 31, 1987

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