Environmental Hearing Board

Adjudications and Opinions

2000
Volume III

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2000

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2000.

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

ADJUDICATIONS

OPINIONS

2000 DECISIONS

UNITED STATES CONSTITUTION

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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SECRETARY TO THE BOAR

MARY LEE ONG and JOHN ONG, INDIAN CREEK LAND & CATTLE COMPANY and MOUNTAIN WATERSHED ASSOCIATION	:	
v.	:	**EHB Docket No. 2000-016-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE AND LIME CO., INC., Permittee	:	**Issued: July 5, 2000**

OPINION AND ORDER ON MOTION FOR REMAND AND TO TERMINATE APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where proposed discharges from a noncoal mine are not reviewed under the current anti-degradation regulations the permit will be remanded to the Department so that the proper review can be performed.

OPINION

Appellants, Mary Lee Ong, John Ong, the Indian Creek Land & Cattle Company, and the Mountain Watershed Association, Inc., appealed a Noncoal Surface Mining Permit issued by the Pennsylvania Department of Environmental Protection (Department) to New Enterprise Stone & Lime Company (New Enterprise or Permittee). (Notice of Appeal) The permit, Noncoal Surface Mining Permit (SMP) Number 65980401, authorizes New Enterprise to conduct noncoal mining activities in Donegal Township, Westmoreland County, Pennsylvania. The operation of the noncoal surface mine includes the mining of Loyalhanna limestone, a mineral processing plant,

and the discharge of treated waste water into two tributaries of Indian Creek. The operation is commonly known as the Henderson Quarry.

The Notice of Appeal was filed on January 24, 2000. On April 28, 2000 we denied the Appellants' Motion for Summary Judgment which had requested that we void the permit because of a clerical error on the cover sheet of the seventeen page permit. Presently before the Board is the Department's Motion for Remand and to Terminate Appeal (Motion for Remand) filed on May 8, 2000. The Motion for Remand indicates that shortly after the appeal was filed but before the commencement of discovery, the Department realized that it had not applied recently promulgated anti-degradation regulations during the review of the permit application. "Accordingly, the Department is now taking the rather unusual step of admitting this oversight and asking the Board to terminate the present litigation and to remand the permit to the Department for further review." (Department's Memorandum in Support of Motion for Remand, page 1) Neither the Appellants nor the Permittee filed written responses to the Department's Motion for Remand.

The Department's Motion for Remand indicates that it had completed review of New Enterprise's proposed discharges in March, 1999, under the then existing anti-degradation regulations. (¶3) However, New Enterprise requested the Department delay the issuance of the permit while it attempted to resolve the objections voiced by the Appellants during the permit review. (¶4) On October 27, 1999, New Enterprise informed the Department that its settlement discussions were unsuccessful. (¶6) New Enterprise requested the issuance of the permit. On December 9, 1999, the Department issued the Henderson Quarry Permit to New Enterprise.

In July 1999, the Department adopted new anti-degradation regulations. *See* 25 Pa Code § 93.4. According to the Department, these new regulations superseded the anti-degradation

regulations under which the Department had reviewed New Enterprise's permit application in March, 1999. Prior to issuing the Henderson Quarry permit, the Department did not reevaluate the application in light of the revised anti-degradation regulations. The Department believes "it would be a wasteful and unproductive use of the parties' resources to continue this litigation in light of the need to review the Henderson Quarry application under the revised anti-degradation regulations." (¶13)

We agree. A remand will protect the interests of all parties, expeditiously allow the permit application to be reevaluated in accordance with the new anti-degradation regulations, and preserve both the rights of Appellants and the mining company to appeal any objectionable provisions of a reissued permit to the Environmental Hearing Board. A remand also serves the interests of justice and judicial economy. Therefore, we will grant the Department's Motion and issue an appropriate Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARY LEE ONG and JOHN ONG, INDIAN CREEK LAND & CATTLE COMPANY and MOUNTAIN WATERSHED ASSOCIATION	:	
v.	:	**EHB Docket No. 2000-016-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 5, 2000**

ORDER

And Now, this 5th day of July, 2000, the Department's Motion for Remand and to Terminate Appeal is **granted**. It is ordered as follows:

1) The Henderson Quarry Permit is suspended.

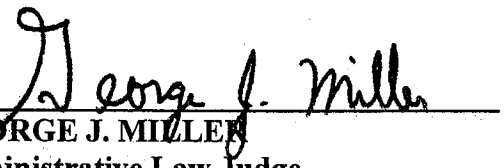
2) The Henderson Quarry Permit is remanded to the Department for reevaluation in accordance with this Opinion;

3) The issues raised by Appellants in this Appeal are dismissed without prejudice to Appellants' right to raise them again in an appeal, if any, of a reissued permit; and

4) Jurisdiction is relinquished.

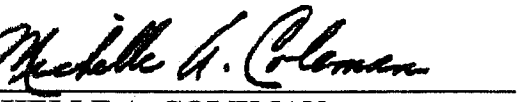
EHB Docket No. 2000-016-R

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: July 5, 2000

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JUDITH ANNE WAYNE	:	
	:	
v.	:	**EHB Docket No. 98-175-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	**Issued: July 11, 2000**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

In this appeal of Stage II and III bond release, the appellant has met her burden of proof on the issue of maintenance of the haul road. Where the regulations require that the Department must approve a maintenance plan for a haul road which is to remain in place after the completion of mining, and Department personnel testified that no such plan was required, the Department erred in granting Stage III bond release for the site on which the haul road is located. As to all remaining allegations, the appellant has not met her burden of proof. The evidence is insufficient to conclude that the permittee's mining caused the appellant's water quality problems or that the haul road contains toxic materials.

BACKGROUND

This is an appeal by Judith Anne Wayne (Ms. Wayne) of the Department of Environmental Protection's (Department) approval of bond release for two surface mines

operated by Robinson Coal Company (Robinson). The mine sites, designated as the McWreath I and II sites, are adjacent and are located in Robinson Township, Washington County and North Fayette Township, Allegheny County. The Department approved Stage II and III bond release for the McWreath I site and Stage III bond release for the McWreath II site.

Ms. Wayne is the owner of approximately 20 acres of land which overlap a portion of both the McWreath I and II sites. In addition to residing on the property, Ms. Wayne also raises sheep and goats. The prior owner, Joseph McWreath, had held approximately 150 acres of land on which he had operated a farm. Ms. Wayne purchased the property as part of a bankruptcy sale. She began to occupy the property in October 1992 but did not actually acquire a deed to it until June 1993. At the time Ms. Wayne moved into the property, Robinson had completed surface mining at both the McWreath I and II mines and was in the process of reclaiming the sites. Ms. Wayne contends that Robinson's mining has contaminated her water supply, that the haul road constructed by Robinson on her property contains toxic material and, finally, that remediations ordered by the Department with regard to problems on the Wayne property were insufficient.

On April 2, 1999, the Department moved for summary judgment in this matter. The motion was denied in an Opinion and Order issued on June 10, 1999. *Wayne v. DEP*, 1999 EHB 395.

A four-day hearing was held before the Honorable Thomas W. Renwand. Ms. Wayne's post-hearing brief was filed on March 20, 2000. Robinson and the Department filed post-hearing briefs on April 10 and 12, 2000, respectively. The record consists of four volumes of transcript and 55 exhibits. After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The Appellant is Judith Anne Wayne, an individual residing at 3103 Donaldson Road, McDonald, Pennsylvania. (Notice of Appeal)

2. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001; and the rules and regulations promulgated thereunder.

3. The permittee is Robinson Coal Company, with a business address of 200 Neville Road, Neville Island, Pa. (Notice of Appeal)

4. Ms. Wayne entered into a sales agreement for property located at 3103 Donaldson Road, McDonald, Pennsylvania (the property) in September of 1992. (Ex. A-1; T. 35-37) The agreement stated she purchased the property in "as is" condition. (Ex. A-1)

5. Ms. Wayne began to occupy the property in October of 1992. However she did not formally acquire the property until the sale was approved by the United States Bankruptcy Court in June of 1993, at which time she received the deed to the property. (Exs. A-2, A-3; T. 33-34, 37-39, 44)

6. The prior owner of the property was Joseph McWreath who held approximately 150 acres of land at the site. (T. 32-33)

7. Ms. Wayne purchased approximately 20 acres of the McWreath property upon which was situated, among other things, a residence, a barn and two ponds. (Exs. A-1, A-2 , A-3)

8. Mr. McWreath had entered into an agreement with Robinson on April 15, 1985 which allowed Robinson to conduct mining operations on the McWreath property. (Ex. P-1)

9. Ms. Wayne purchased her property subject to the terms of Mr. McWreath's agreement with Robinson. The agreement stated, among other things, that Mr. McWreath waived any claims that he might have against Robinson for affecting the groundwater on the property. (T. 123-125; Ex. P-1)

10. Dating back to the 1800's, the area surrounding the Wayne residence had been extensively mined for coal by both deep mining and surface mining methods prior to the time Robinson commenced mining in the area. (T. 196, 349-351)

11. The Department issued two mining permits to Robinson for mine sites known as McWreath I and McWreath II. (T. 326-327)

12. The McWreath I and McWreath II mine sites are contiguous to each other. The 20 acres purchased by Ms. Wayne overlap the two mine sites. (Ex. C-1)

13. Robinson commenced mining operations on the McWreath I site in approximately October 1987. Coal removal on the McWreath II site began in early July 1990. Mining was completed on both sites by the summer of 1991. (Ex. A-9; T. 190)

14. Mr. McWreath, prior to Ms. Wayne's purchase, had operated a farm on the property. As part of his farming operation, Mr. McWreath utilized over 80 head of dairy cattle and operated a milking business. (T. 150)

15. Department hydrogeologist Scott Jones was not aware of any complaints filed by Mr. McWreath regarding the quality of the water on his property or its effect upon himself, his family or his livestock. (Ex. A-18; T. 239)

16. The well which provided the water supply to the Wayne household served the McWreath family and farm. (T. 41-43)

17. Mr. McWreath had signed a notarized statement requesting that two sedimentation ponds

be allowed to remain on the property for the use of watering livestock. (Ex. A-6) These are referred to as the "upper pond" and the "lower pond." The "lower pond" is also referred to as the "livestock pond." (T. 116)

18. The livestock pond is located on the McWreath II site, while the other smaller pond is located on the McWreath I site. (T. 544; Ex. C-1)

19. Ms. Wayne was aware of the ponds when she purchased the property, had no objection to the ponds remaining on the property, and acquired the ponds as part of her purchase of the property. (Exs. A-1, A-6; T. 140)

20. Ms. Wayne uses the property not only as a residence, but also to raise goats and sheep. She first purchased four ewes in 1993 and purchased goats in 1994. She subsequently purchased additional sheep and goats. (T. 45-46, 113)

21. The water supply for the sheep is the "livestock pond," the lower of the two sedimentation ponds. (T. 116) Ms. Wayne is not aware of any problem with this source of water. (T. 118)

22. The discharges from the two sedimentation ponds on the Wayne property meet the Department's effluent limits, including limits for iron and manganese. (T. 562)

23. More than 30% of the time, sedimentation ponds remain as part of final reclamation of surface mine sites. In such cases, the Department requires a notarized letter from the landowner stating what structures may remain on the property. (T. 538)

24. Ms. Wayne is not concerned about the quality of the livestock pond as a water supply for her sheep. (T.118)

25. The reason Ms. Wayne does not allow her goats to drink from the livestock pond is because of the expense of building a fence that will contain the goats and give them access to the

pond. (T. 118)

26. Ms. Wayne wants the upper pond removed so she can have more pasture land for her animals. She could graze sheep there now by putting a fence around the pond, but has elected not to do so. (T. 148, 152-153)

27. As long as the upper pond is not drained, fish can live in it. (T. 131)

28. The fish die in the upper pond when the water is drained due to the drain pipe valve breaking. (T. 129-130)

29. The water supply for the goats, prior to 1998, was a spring on Ms. Wayne's property. (T. 114-115)

30. Ms. Wayne did not have any problems with the health of her sheep and goats when she first acquired them. (T. 62)

31. Marcia Read was recognized by the Board as an expert on goats. Ms. Read has considerable experience in raising goats and showing them in competition; she is also a licensed goat judge. (T. 260-262)

32. Ms. Wayne began to experience deaths of some of her goats in 1997 or 1998. (T. 99, 114) Ms. Wayne did not have any pathological tests performed on the goats that died. (T. 132-133)

33. In early 1998, Ms. Wayne stopped using the spring as a source of water for her goats. She now gives the goats public water which is supplied by a friend of Ms. Wayne. (T. 114-115)

34. The condition of Ms. Wayne's goats is described as "recovering" since she stopped using the water supply on her property. (T. 155) However, she continues to experience some problems with the goats, including the death of two baby goats and inability to produce sufficient milk. (T. 71)

35. Ms. Wayne did not experience any deaths of her sheep. (T. 113-114)

36. As part of its mining operations, Robinson constructed a haul road that runs over the property purchased by Ms. Wayne. (Exs. A-4, A-5, C-1; T. 320-331)

37. The haul road lies on the McWreath II permit. (T. 329, 413) However, it was constructed in 1986 or 1987 and was also used in connection with the McWreath I permit, as well as for other mines in the area operated by Robinson. (T. 413 –416)

38. The haul road was used until the early 1990's for reclamation at both the McWreath I and II sites. (T. 415 – 416)

39. After contacting both Robinson and the Department and being informed that Robinson was no longer using the haul road, Ms. Wayne constructed a fence across the haul road to contain her sheep and goats. (T. 48)

40. Early the following morning, without notification to Ms. Wayne, Robinson cut down the fence Ms. Wayne had constructed and used the haul road to remove their equipment. (T. 48-49)

41. Ms. Wayne sought relief in the Bankruptcy Court after Robinson removed the fence. This resulted in a settlement agreement entered into between Robinson and Ms. Wayne on April 16, 1993. Pursuant to the settlement agreement, Robinson was required to replace the fence Ms. Wayne had installed. (T. 52-53; Ex. A-4)

42. The settlement agreement also contained a provision stating as follows: "Wayne shall, on or before April 30, 1993, irrevocably agree, in writing and on the form required by the Department, that Robinson need not reclaim that portion of the haul road which runs over and upon Wayne's property." (Ex. A-4)

43. Pursuant to the aforesaid settlement agreement, Ms. Wayne signed a notarized statement dated April 23, 1993 which stated that the haul road on her property would "remain as a

permanent structure and will remain as presently constructed." (Ex. A-5; T.52-53)

44. Runoff from the haul road created pools of black water in the sheep pasture and the goat pen, flooded the milkhouse, and created gullies on the property. (T. 54-55)

45. After drinking water from the pools of runoff, Ms. Wayne's livestock experienced black tongues, diarrhea and weight loss. (T. 54-55)

46. Ms. Wayne complained to the Department about the pools of water forming on her property from the haul road runoff. In a November 24, 1993 memorandum from Reclamation Coordinator John Meehan to the Chief of the Division of Monitoring and Compliance, Evan Shuster, the Department stated: "If the haul road material is toxic, Robinson Coal will be directed to rectify the problem. If the road material is non-toxic, then the road will stay." (Ex. A-13)

47. Department Inspector Supervisor C.R. Greene testified that if the haul road material were found to be toxic, Wayne's release would not prevent the Department from taking action regarding the road. (T. 557)

48. The Department sampled the physical material from the haul road and the water on the haul road. The purpose was to see if the haul road contained any toxic materials. (T. 518)

49. The Department's review determined that metals are not leaching from the haul road, and the haul road contains no materials classified as hazardous waste. (T. 464-465)

50. Following complaints by Ms. Wayne, the Department required Robinson to regrade the haul road. (T. 436; Ex. C-9) Since then, the problem of flooding and runoff forming gullies on the property has not recurred. (T. 55, 436-437)

51. The flooding of Ms. Wayne's milk house has not occurred since 1998. (T. 125)

52. There have been no pools in the sheep pasture since 1998. (T. 125)

53. There is no maintenance plan in place regarding the haul road on Ms. Wayne's property. (T. 502-503, 518)

54. Ms. Wayne experienced problems with the well water on her property, including poor odor and taste. (T. 61, 168; Ex. A-9)

55. Approximately one week after moving onto the property, Ms. Wayne's son, Justin, who was six years old at the time, drank approximately eight or more glasses of water from the well during the course of a day. (T. 155-157)

56. He experienced loss of appetite and, later that evening, and into the day, he experienced stomach problems. An x-ray revealed a gas bubble in his stomach. (T. 155-157)

57. During that week, Justin had also been drinking soda pop. (T. 155-157)

58. Justin did not recall if the day he got sick was the first day he drank water from the well on the property. (T. 158)

59. Ms. Wayne no longer utilizes the water supply on the property for her family. Instead, she uses public water transported in containers by a friend. (T. 61-62, 115-116)

60. Secondary drinking water standards are aesthetic standards; ingesting large quantities of a parameter that is listed as a secondary drinking water standard will not produce hazardous effects. (T. 378) The secondary drinking water standard for sulfates for humans is 250 milligrams per liter. At that level the water may or may not have a poor odor. (T. 387-388)

61. The standards for acceptable sulfate levels for livestock that Department Mining Specialist Larry Jadyk obtained in his research ran from 500 to 2000 milligrams per liter. (T. 526) Based on Mr. Jadyk's research, there is no specific standard of water quality for sheep and goats (T. 523)

62. Mining does not cause bacteria contamination. (T. 228)

63. Department hydrogeologist Scott Jones conducted an investigation of the Wayne property's water supply. (T. 168-172)

64. Mr. Jones has been a hydrogeologist with the Department since August 1978 and holds a Bachelor of Arts degree in geology from Susquehanna University and a Master of Science degree in geology from West Virginia University. (Ex. C2; T. 162, 163, 333-334)

65. Mr. Jones was responsible for all water supply and mine drainage investigations in the Hawk Run District for six years. (T. 162)

66. Mr. Jones has performed several hundred water supply investigations during his employment with the Department. (T. 242)

67. Mr. Jones is an instructor for basic and advanced hydrogeology courses offered by the United States Office of Surface Mining. ("OSM") (T. 335)

68. The Board recognized Mr. Jones as an expert in hydrogeology. (T. 340)

69. Mr. Jones visited the Wayne property at least a dozen to several dozen times from 1994 to 1999. (T. 165)

70. Mr. Jones prepared a 1994 hydrology report which examined the history of mining activities on or around the Wayne property and the effect of said mining on the Wayne property's water supply. (Ex. A-9)

71. The report included samples taken from springs, streams, adjacent water supplies and the Wayne well. (Ex. A-9)

72. The 1994 hydrology report concluded that the Wayne water supply contained contaminants in excess of standards but there was no clear-cut evidence that directly linked mining activities by Robinson to the water supply problems on Wayne's property. (Ex. A-9)

73. The earliest data available to Scott Jones was from 1984. (Ex. A-9; T. 213-216)

74. It is not common for water quality data to be available prior to the 1980's. (T.242-244)

75. The 1994 hydrology report noted gaps in the sampling data. However, sufficient data was available for Mr. Jones to reach a valid conclusion regarding the effect of Robinson's mining on the water quality. (Ex. A-9; T. 220-222)

76. The report further noted that sampling points were misidentified or mislabeled, sampling point locations were shifted and spring discharges would appear on permits that were not previously identified on earlier applications. (Ex. A-9; T. 240-241) However, in preparing his report, Mr. Jones was able to sort through the data and accurately identify the sampling locations. (T. 244)

77. Mr. Jones prepared a supplemental report in 1997, in which he considered water quality data collected by the Department in connection with Robinson's request for bond release. (Ex. A-9; T. 172-173)

78. In 1999, Mr. Jones prepared an addendum to his earlier reports, which considered all previous water quality data as well as that collected since 1997. (Ex. C-3; 173, 355)

79. It is Mr. Jones' opinion, which he holds with a reasonable degree of scientific certainty, that there is insufficient information to hold Robinson responsible for the water quality problems of the Wayne well. (T. 379)

80. The data that Mr. Jones reviewed did not show any significant change in the water quality of the Wayne well from 1984 to 1999. (T. 398-399)

81. If Robinson's mining had affected the Wayne well, one would expect to see significant increases in sulfates, alkalinity and specific conductance, which did not occur. (T. 371-372)

82. The specific conductance, (which is a measure of the amount of mineralization) the alkalinity and the concentration of metals in the Wayne well were relatively consistent from

1984 to the present. (T. 180-181, 363-364)

83. Sulfate levels for the Wayne well showed wide fluctuations from 1984 to 1999. (T. 181, 365-369)

84. However, there is no correlation between peaks in sulfate levels in 1988 and 1989 to Robinson's mining or decreases in sulfate levels in 1995 to 1996 to cessation of mining. (T. 365-367, 369-371)

85. While sulfate levels fluctuated between 1984 to 1999, there was no trend over time. (T. 370)

86. Some of the fluctuation in sulfate levels may be attributed to seasonal changes. (T. 369)

87. Mining by Robinson at the Putt mine would not have affected the Wayne well because the Putt mine is too far away from the well, the structure at the Putt mine dips to the southeast away from the Wayne well, and because there is a tributary channel between the Putt mine and the Wayne well which would intercept groundwater flow. (T. 206)

88. On the McWreath I mine site, groundwater flows to the southeast. The Wayne property is located to the southwest of the McWreath I site. (Ex. C-1; T. 374)

89. In addition, there is an antiform or upthrust structure which lies between much of the McWreath I site and Wayne's well, which would tend to retard any major flow to the west. (T. 375)

90. Groundwater and surface water from the McWreath II mine site, after its reclamation, tends to flow into stream channels in the area, rather than into groundwater. (T. 375)

91. Mr. Jones found no clear-cut hydrologic link between the Wayne well and Robinson's mining activities. (T.229-230)

92. Mr. Jones had enough sampling data for him to reach a valid conclusion regarding

whether Robinson's mining adversely impacted the Wayne property well. (T.221-222)

93. The Department required Robinson to perform remediation work to eliminate general problems of flooding and erosion on Ms. Wayne's property. The remediations failed shortly after they were performed and had to be re-done. (Ex. A-7; T. 73-75, 87-87, 494-503, 560-561)

94. In or about 1993, Robinson, at the Department's direction, regraded the area near Ms. Wayne's milk house, which eliminated the problem of flooding of the milk house. (T. 427-429)

95. There were no puddles along the haul road when the Department's forester, Larry Jadyk, performed his bond release inspections in 1998. (T. 493)

96. Mr. Jadyk prepared a Reclamation Status Report identifying the corrective actions to be taken by Robinson in order for the Department to release the State II and Stage III bonds for the McWreath I mine. The Department conducted final bond release inspection of the site in November and December 1997. (Ex. A-14; T.477-478)

97. Before the Stage II and Stage III bond release could be granted for the McWreath I site, the Department required Robinson to repair a decant valve for the sediment pond located on the site, to place riprap along the discharge area of the pond in order to control erosion, and to stabilize the area and place riprap in any area below the pond that had been eroded. (Ex. A-14; T. 479)

98. Mr. Jadyk inspected the site in order to determine if Robinson had made the repairs identified in the Reclamation Status Report, and he determined that Robinson had taken the required corrective actions. Mr. Jadyk recommended that the Stage II and Stage III bonds be released for the McWreath I site based on his determination that the corrective actions had been taken and the site met the bond release criteria. (T. 483-484, 503)

99. Robinson's repair of the decant valve for the sedimentation pond on the McWreath I site

failed. This failure was discovered by a Department mine inspector during a visit to the McWreath I site in February 1999, after release of the bonds. (T. 544-545; Ex. C-17)

100. As of May 7, 1999, Robinson still had not repaired the decant valve. (Ex. C-18) As a result, the Department issued a compliance order to Robinson to repair the broken valve by May 21, 1999 at 10:00 a.m. (Ex. C-18; T. 546) The repair was completed as of May 12, 1999. (T. 547; Ex. C-19)

101. Mr. Jadyk prepared a Reclamation Status Report for Stage III bond release for the McWreath II mine and conducted final bond release inspections in November and December 1997. The report identified the corrective actions required to be taken by Robinson in order to obtain Stage III bond release. (Ex. C-14; T. 484-485)

102. Before the Stage III bond release could be granted, the Department required Robinson to stabilize the area below the primary spillway of the sediment pond located on the McWreath II site, at the southern end of the pond and to repair and stabilize a washout on adjacent property above the sediment pond. (Ex. C-14, Ex C-15B; T. 485-486)

103. Robinson made the repairs required by the Department and Mr. Jadyk recommended that the Stage III bond be released based on his determination that the corrective actions had been taken and the site met the bond release criteria. (T. 489-490, 504)

104. Repairs which Robinson made to an erosion area on the McWreath II site initially failed, and the Department directed Robinson to make them a second time before the bond could be released. (T. 537-538)

105. Department Inspector Supervisor C.R. Greene visited and walked the McWreath sites through August 1998 to insure that all corrective work had been completed by Robinson. (T-535-536)

106. Robinson made all the repairs the Department required to qualify for the bond release requests for the McWreath I and McWreath II mine sites. (T. 535)

DISCUSSION

As the party appealing the Department's approval of bond release, Ms. Wayne has the burden of proof. 25 Pa. Code § 1021.101(c)(2). Ms. Wayne must demonstrate by a preponderance of the evidence that Robinson did not meet the criteria for bond release set forth in Sections 4(g)(2) and (3) of the Surface Mining Act, 52 P.S. § 1396.4(g)(2) and (3), and the surface mining regulations at 25 Pa. Code §§ 86.172 and 86.174. *Lucchino v. DEP*, EHB Docket No. 98-166-R (Adjudication issued May 9, 2000).

Ms. Wayne's complaints can be summarized as follows: 1) the haul road contains toxic materials which produce toxic runoff; 2) the Department failed to approve a maintenance plan for the haul road; 3) the Department should have ordered removal of the upper sedimentation pond; 4) Robinson's mining has contaminated her water supply; and finally 5) the remediation ordered by the Department was inadequate. Based on the evidence before us, we find that Ms. Wayne has met her burden in part with regard to the issue of a maintenance plan for the haul road, but has not met her burden with regard to the remaining issues.

Criteria for Bond Release

Ms. Wayne challenges the Department's approval of Stage II bond release for the McWreath I site and Stage III bond release for both the McWreath I and II sites. The criteria for bond release are set forth in Section 4(g) of the Surface Mining Act and at 25 Pa. Code § 86.172 and 86.174 of the regulations.

Stage II bond release may occur when the following standards have been achieved:

> (1) Topsoil has been replaced and revegetation has been successfully established in accordance with the approved

reclamation plan.

(2) The reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the acts, regulations thereunder or the permit.

(3) If prime farmlands are present, the soil productivity has been returned to the required level when compared with nonmined prime farmland in the surrounding area, to be determined from the soil survey performed under the reclamation plan approved in Chapters 87 – 90.

(4) If a permanent impoundment has been approved as an alternative postmining land use, the plan for management of the permitted impoundment has been implemented to the satisfaction of the Department.

25 Pa. Code § 86.174(b).

Stage III bond release may occur when the following have been achieved:

(1) The permittee has successfully completed mining and reclamation operations in accordance with the approved reclamation plan so that the land is capable of supporting postmining land use approved under §§ 87.159 (relating to postmining land use), 88.133, 89.88 and 90.166.

(2) The permittee has achieved compliance with the requirements of the acts, regulations thereunder, the conditions of the permit and the applicable liability period under § 86.151 (relating to period of liability) has expired.

25 Pa. Code § 86.174(c).

Toxicity of Haul Road

The haul road used by Robinson in connection with its surface mining activities is located on the Wayne property. The haul road sits on the area covered by the McWreath II permit but was also used in connection with the McWreath I permit as well as other mines operated by Robinson in the vicinity of the Wayne property. (F.F. 39, 40) Robinson used the haul road at least until the early 1990's in connection with its reclamation of the McWreath I and II sites.

(F.F. 41)

In 1993, Ms. Wayne and Robinson entered into a dispute concerning the haul road. After conversations with the Department and Robinson personnel that led her to believe that Robinson was no longer using the haul road, Ms. Wayne constructed a fence across the road in order to contain her livestock. Early the next morning, personnel from Robinson entered the property and cut the fence. Following the incident, Ms. Wayne sought relief in the Bankruptcy Court, which was overseeing the sale of the property to Ms. Wayne. This led to a settlement agreement between Ms. Wayne and Robinson in which Robinson agreed to restore the fence and Ms. Wayne agreed to allow the haul road to remain on her property as a permanent structure. (F.F. 45, 46)

Beginning in 1993, Ms. Wayne filed complaints with the Department regarding surface runoff from the haul road causing puddles of black water near the road and flowing into one of the buildings on her property. Ms. Wayne had concerns that the runoff was toxic and was causing illness and death of her animals when they drank it. Responding to Ms. Wayne's concerns, the Department tested the composition of the haul road. According to an internal Department memorandum from Reclamation Coordinator John Meehan to the Chief of the Division of Monitoring and Compliance, Evan Shuster, if the haul road material were found to be toxic, the Department would order Robinson to rectify the problem. (F.F. 49)

The test results were reviewed by soil scientist Edward Bates of the Department's Greensburg District field office. Based on his review, Mr. Bates concluded that no metals were leaching from the road material and that the haul road contained no material which would be classified as hazardous waste. Mr. Bates testified that the metals found in the haul road were "comparable to what would be expected to be found in a rural setting...." (T. 465)

Ms. Wayne argues that the Department erred in not relying on the conclusions set forth in a letter written by Mary Sue Shick, an extension agent at Pennsylvania State University's College of Agricultural Sciences. Ms. Wayne's counsel sought to introduce the Shick letter into evidence during the cross-examination of Department witness William Shuss. The letter was written in response to a request from Ms. Wayne to evaluate a water sample taken by the Department on the Wayne property.

In the letter, Ms. Shick states her conclusion that run-off water on the Wayne property "is not safe for livestock consumption" and that the levels of sulfates, iron and manganese in the water sample are "of major concern." The letter further sets forth what are deemed to be toxicity levels for sulfates, iron and manganese, which Ms. Shick obtained from a third party, Dr. Larry Hutchinson, a Penn State Extension Veterinarian. A copy of the letter was sent to the Department at the time it was provided to Ms. Wayne.

In response to Ms. Wayne's assertion regarding the conclusions of Mary Sue Shick, we note, first, that the Department did, in fact, respond to the findings of Ms. Shick. After receiving the Shick letter, the Department conducted its own independent research and was unable to confirm the findings contained in Ms. Shick's letter. Second, for the reasons set forth below, we find that the Shick letter is not competent evidence.

At the hearing, the Department objected to the letter's admission on the basis that it constituted hearsay since Ms. Shick did not testify. Robinson objected to its admission on the basis of lack of foundation. Judge Renwand ruled that the letter's admissibility would be determined following the filing of post-hearing briefs.

We hereby hold that the Shick letter is not admissible on the grounds that it constitutes inadmissible hearsay. "Hearsay" is defined as "a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c). Pursuant to Pa.R.E. 802, hearsay is not admissible unless it falls into one of the exceptions set forth in the Rules of Evidence. We find that none of the exceptions are applicable in this case.

The rule against hearsay is designed to insure that certain safeguards apply to a witness' testimony, including testimony under oath, presence at trial, and an opportunity for the other parties to cross-examine the witness. 2 McCormick on Evidence § 245 (5th ed. 1999). Here, the Shick letter was introduced as evidence of toxicity levels for sulfates, manganese and iron; for the conclusion reached therein that the levels of these parameters in the runoff from the haul road were unsafe; and, finally, as evidence that the Department erred in failing to take action when faced with Ms. Shick's conclusions that the haul road runoff was toxic.

Though Ms. Shick was listed as an expert witness in Ms. Wayne's pre-hearing memorandum and was expected to testify, she did not appear at the hearing. Thus, her letter constitutes an out-of-court statement offered for the truth of the matter asserted. Without Ms. Shick's testimony at the hearing, the Department and Robinson were deprived of the opportunity to cross-examine her with regard to her knowledge in this particular area and the basis for her conclusions, and the Board was further deprived of the opportunity to assess Ms. Shick's credibility on this subject.

Moreover, in her letter Ms. Shick sets forth what she refers to as "guidelines" for toxicity levels for sulfates, manganese and iron which were provided to her by yet another individual, Dr. Hutchinson, who also did not testify at the hearing. Again, the Department and Robinson had no opportunity to cross-examine Dr. Hutchinson on the source of these threshold levels. This is particularly important here where the evidence indicates that the Department conducted further

investigation after receiving the Shick letter but reached contrary conclusions. Department personnel testified, under oath and subject to cross examination, that their research was unable to confirm the toxicity threshold levels set forth in Ms. Shick's letter and that at least one resource indicated that sulfate levels much higher than that set forth in the letter were suitable for livestock. (F.F. 64)

Based on the record before us, we cannot conclude that the haul road contains toxic materials. The only evidence properly admitted on this subject is the testimony of the Department personnel who tested and examined the toxicity of the haul road material and runoff and found it not to be hazardous.

Moreover, the record indicates that the problem of water pooling along the haul road was corrected prior to bond release. In its pre-bond release inspections of the site, the Department determined that water was pooling along the edges of the haul road, causing at least some erosion. The Department required Robinson to regrade the area along the haul road where the pooling and runoff were occurring. It is the testimony of both the Department and Ms. Wayne that regrading the area along the haul road eliminated the pools of black water and that this problem has not recurred. (F.F. 53-55)

Maintenance of Haul Road

Ms. Wayne raises a second issue regarding the haul road. She asserts that the Department erred in approving bond release without requiring that a maintenance plan be in place for the haul road. Based on the requirements of the regulations, we agree.

Section 87.160(a) of the surface mining regulations states in relevant part as follows:

> Upon completion of the associated surface mining activities, the area disturbed by the road shall be restored in accordance with § 87.166 (relating to haul roads and access roads: restoration) unless retention of the road *and its maintenance plan* is approved as part

of the postmining land use.

25 Pa. Code § 87.160(a).

Robinson argues that Ms. Wayne waived this objection because it was not raised in the notice of appeal. While Ms. Wayne did not specifically cite to this regulation in her notice of appeal, she raised objections regarding runoff and erosion caused by the haul road and further asserted that the Department required only superficial remediation and failed to order Robinson to correct the violations listed therein. (Notice of Appeal, para. 3, 6, 8, 9) Under *Croner v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991), we find that Ms. Wayne's notice of appeal sufficiently raises the issue of whether the Department ordered all necessary remediation of the haul road, including a maintenance plan, in order to qualify for bond release.

The Department argues that 25 Pa. Code § 87.160(a) is not applicable since the requirement of a maintenance plan was not in effect at the time Ms. Wayne signed the notarized statement allowing the haul road to remain on her property. The Department is incorrect in its assertion since the requirement of a maintenance plan has been in place since the regulation was first adopted in 1980, 10 Pa.B. 4789, at 4847, and went into effect in 1982, 12 Pa.B. 2382.[1]

One of the requirements of Stage III bond release is that the permittee has achieved compliance with the requirements of the regulations. 25 Pa. Code § 86.174(c)(2). At the time the Department granted bond release, the regulations required that upon completion of surface mining activities, any existing haul road must be restored unless both retention of the road *and a maintenance plan* are approved by the Department. The Department's witnesses acknowledged that there was no maintenance plan in effect for the haul road at the time of bond release. They

[1] The Department cites to subsection (i) of § 87.160 in its post-hearing brief; however, the

further testified that they did not require a maintenance plan.

In a footnote in its post-hearing brief, the Department argues that even if a maintenance plan were required, the person responsible for the plan would be Ms. Wayne not Robinson. (Department Post-Hearing Brief, p. 42, n. 4) This is based on the testimony of Inspector Supervisor C.R. Greene, who stated that once bonds are released, the property owner assumes responsibility for the site. (T. 547-549) However, Mr. Greene's testimony pertains to who is responsible for the site *after* bonds have been released. Section 87.160(a) is a requirement which must be met *prior* to bond release.

Earlier in these proceedings, the Department also argued that its hands were tied with regard to the haul road. The Department's position was that it could require no further action by Robinson with regard to the haul road due to Ms. Wayne's signed statement allowing the haul road to remain as a permanent structure on her property. It is true that the Department often has the authority and, in many cases, a duty to evaluate property-related issues and contracts for the purpose of determining compliance with regulations and statutes. *Coolspring Stone Supply, Inc. v. DEP*, 1998 EHB 208, 212. However, as Ms. Wayne correctly notes in her post-hearing brief, the Department also has the authority and duty to administer and enforce Pennsylvania's environmental statutes and regulations. Were the haul road found to pose an environmental hazard, the Department could not simply defer to the agreement between Ms. Wayne and Robinson as relieving it of its duty to insure compliance with the law. This was further evidenced by the Department's own records which indicated that if the haul road were found to be toxic, it would require Robinson to rectify the problem. (F.F. 49)

Pursuant to the regulations, Stage III bond release may not be granted where a haul road

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requirement of a maintenance plan is contained in subsection (a).

is to remain in place unless the Department has approved both the road's retention *and* its maintenance plan. The testimony is clear that the Department did not require or approve a maintenance plan for the haul road in question. Thus, it did not follow its own regulations.

We, therefore, conclude that bond release for the McWreath II site, on which the haul road is located, was inappropriate without the Department having approved a maintenance plan for the road in accordance with 25 Pa. Code § 87.160(a).[2] This portion of the appeal is remanded to the Department for further action consistent with this Adjudication.

Sedimentation Ponds

When Ms. Wayne purchased the property, two sedimentation ponds, designated as the lower pond and the upper pond, were located on the property. Robinson used the ponds in connection with its mining operation. The prior owner of the property, Joseph McWreath, signed a notarized statement requesting that the two ponds be allowed to remain on the property after the completion of mining for the purpose of watering livestock. When Ms. Wayne purchased the property, she was aware of the existence of the ponds and had no objection to the ponds remaining on the property. (F.F. 19) Ms. Wayne uses the lower of the ponds, or the "livestock pond" as it is sometimes called, as a water supply for her sheep and has no concerns about the quality of the water in the pond. (F.F. 21, 24)

Ms. Wayne does, however, have concerns about the upper pond. She testified that fish in the upper pond have died, and it is her contention that the Department has failed to require sufficient remediation with regard to the pond, up to and including removal of the pond.

Pursuant to Section 87.111 of the surface mining regulations, a permanent impoundment may be authorized by the Department if the following criteria are met:

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[2] Ms. Wayne also cites to 25 Pa. Code § 89.26. However, this regulation is not applicable since

(1) The quality of the impounded water shall be suitable on a permanent basis for its intended use, and discharge of water from the impoundment will not degrade the quality of receiving waters to less than the water quality standards established under § 87.102 (relating to hydrologic balance: effluence standards).

(2) The level of water shall be sufficiently stable to support the intended use.

(3) Adequate safety and access to the impounded water shall be provided for proposed water users.

(4) Water impoundments shall not result in diminution of the quality or quantity of water used by adjacent or surrounding landowners for agricultural, industrial, recreational or domestic uses.

(5) The size of the impoundment is adequate for its intended purposes.

(6) The impoundment will be suitable for the approved postmining land use.

25 Pa.Code § 87.111.

It is not uncommon for sedimentation ponds to remain in place as part of the final reclamation of a surface mine site. According to Department personnel, sedimentation ponds are left in place in more than 30% of surface mining reclamations. (F.F. 23) In such cases, the Department requires a notarized letter from the landowner stating that the structures may remain on the property. (F.F. 23)

Here, the prior landowner signed a notarized statement requesting that the ponds remain in place on the property. Ms. Wayne was aware of the ponds' existence when she purchased the property and they were included in the agreement of sale. (F.F. 7, 19) The agreement of sale further stated that Ms. Wayne accepted the property in an "as is" condition. (F.F. 4)

Ms. Wayne argues that Mr. McWreath's notarized statement does not strip the Department of its authority, duty and constitutional mandate to administer and enforce the

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it deals only with underground mining operations.

requirements of the Clean Streams Law and the Surface Mining Act. We agree that the Department cannot be relieved of its responsibility for insuring compliance with Pennsylvania's environmental statutes and regulations by virtue of a contract between two private parties. However, in the instant case, there is no basis for finding that the Department has done so. Ms. Wayne presented no evidence that the upper sedimentation pond presented an environmental or health hazard or that it did not comply with the requirements of 25 Pa. Code § 87.111 set forth above.

Although Ms. Wayne stated she had concerns about the safety and water quality of the upper pond, the evidence did not demonstrate this at hearing. While Ms. Wayne stated she was concerned about the water quality of the upper pond due to fish dying, she admitted that the fish died only after the pond was drained due to breakage of the drain pipe valve. (F.F. 28) She further admitted that as long as the upper pond is not drained, fish can live in the pond. (F.F. 27) In addition, on cross examination, she stated that she wanted the upper pond removed, not because of water quality concerns, but because she wanted more pasture land for her livestock. (F.F. 26) She admitted that she could graze sheep in the area of the pond by putting a fence around the pond, but has elected not to do so. (F.F. 26)

Further, with regard to breakage of the drain pipe valve, the Department ordered Robinson to repair the valve. When the first repair failed, the Department ordered a second repair. The record indicates that the valve has not failed since that time.

Based on the evidence, we find that the Department acted properly with regard to the repair work it ordered for the upper sedimentation pond. Ms. Wayne has provided no basis for removal of the pond.

Contamination of Water Supply

Approximately one week after moving into the property, Ms. Wayne's son, Justin, who was six years old at the time, experienced loss of appetite and stomach problems. An x-ray later revealed a gas bubble in his stomach. On the day he became ill, Justin had drunk eight or more glasses of water from the well located on the property. It is Ms. Wayne's contention that Robinson's mining contaminated the water supply for her property. As a result, she no longer uses the water from her well, but uses public water transported in containers by a friend.

Ms. Wayne offered no medical evidence that Justin's episode of stomach problems related to the water supply. In fact, Justin testified that during the week in which he developed the gas bubble, he had also been drinking soda. (F.F. 60) Moreover, there is no evidence in the record establishing that sulfates or other elements of mine drainage cause the type of problem experienced by Justin.

Ms. Wayne argues that the water supply on her property has also caused illness to her goats. From the time of their purchase in 1994 until 1998, she provided water to the goats from a spring located on the property. In 1997 or 1998 Ms. Wayne began to experience deaths of some of the goats. In early 1998, she stopped using the spring as a water supply and now gives the goats some of the same public water she uses for her family. Since the goats stopped drinking from the spring, their condition is described as "recovering." However, Ms. Wayne continues to experience some problems with the goats, including the death of two baby goats and the goats' inability to produce sufficient milk. (F.F. 33)

At the hearing, Ms. Wayne presented the testimony of Marcia Read, who was recognized by the Board as an expert on goats. Ms. Read has considerable experience in raising goats and showing them in competition and is licensed as a goat judge. (F.F. 35) Ms. Wayne consulted

Ms. Read after she began to experience problems with her goats. Ms. Read examined the goats and suggested various courses of action in an attempt to improve their condition. Ms. Wayne implemented these measures but the goats' condition failed to improve. By eliminating every other potential source of the problem, Ms. Read concluded that the problem had to be the water supply. As Ms. Read testified, "[T]he only thing it could be would be the water because they had normal pasture. They had hay in the winter time. They had grain. [The water supply] was the only thing that was different between my place and her place." (T. 283)

No pathological tests were performed on the goats that died to determine the cause of death. Nor did Ms. Read test the water that the goats drank. There is no direct evidence linking the goats' illness and deaths to the water supply. However, Ms. Wayne argues that we should apply the doctrine of *res ipsa loquitur* to allow the inference that Robinson's mining contaminated the water supply, which in turn caused illness and death to her goats.

Res ipsa loquitur is a rule of circumstantial evidence. *D'Ardenne v. Strawbridge & Clothier, Inc.*, 712 A.2d 318, 320 (Pa. Super. 1998). In its purest form, the doctrine applies when there is no direct evidence to show cause of injury, and the circumstantial evidence indicates that the negligence of the defendant is the most plausible explanation for the injury. *Id.* at 321 (quoting W. Page Keaton, Prosser & Keaton on the Law of Torts § 40 at 257).

According to the Restatement (Second) of Torts § 328D:

> It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
>
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
>
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

D'Ardenne, 712 A.2d at 321.

In *W.P. Stahlman Coal Co. v. DER*, 1985 EHB 149, the Board noted that "*res ipsa loquitor* is applicable only in negligence actions." *Id.* at 163. In *Stahlman*, the Department advocated a theory analogous to *res ipsa loquitur* to establish that the appellant had caused water loss in a nearby spring. The Department argues that because no theory based on negligence is involved in this case, Ms. Wayne may not rely on *res ipsa loquitur* to prove her case.

Regardless of whether *res ipsa loquitur* is applied in this case, the evidence is insufficient to establish that Robinson's mining has contaminated the Wayne water supply. Equally applicable here is the language the Board noted in *Stahlman*, "*Res ipsa loquitur* is used to establish a particular causation when all alternatives seem unreasonable. In the present appeal there are reasonable alternatives to DER's thesis...." *Id.*

In the present case, the evidence suggests that there are problems with the Wayne water supply. Water from the well has poor odor and taste. Sulfate levels are high. And Marcia Read provided credible testimony that the water supply may have certainly caused, or at least contributed to, the goats' ill health. However, even if we accept Ms. Read's testimony that the *water supply* caused the goats' health problems, Ms. Wayne still must demonstrate that *Robinson's mining* contaminated the Wayne water supply. To carry one's burden of proof, "the evidence of facts and circumstances on which [the party] relies and the inferences logically deducible therefrom must so preponderate in favor of the basic proposition he is seeking to establish as to exclude any equally well-supported belief in any inconsistent proposition." *McDonald Land & Mining Co. v. DER*, 1991 EHB 1956, 1980 (quoting *Henderson v. National Drug Co.*, 23 A.2d 743, 748 (Pa. 1942)). There are too many inconsistencies to find, by a

preponderance of the evidence, that Robinson's mining has contaminated the Wayne water supply.

Ms. Wayne experienced no health problems with her goats between 1994, when she first acquired them, to 1997 or 1998, during which time Robinson was reclaiming the site. Thus, the goats drank the water from the spring for many years during Robinson's reclamation of the site without experiencing any problems. In early 1998, after experiencing deaths and health problems with the goats, Ms. Wayne changed the goats' water supply to public water. Although she described the goats' condition as "recovering" after changing the water supply, she continued to experience some problems, including the death of two baby goats and inability of the goats to produce sufficient milk. (F.F. 33)

Further, the hydrologic investigation conducted by Department hydrogeologist Scott Jones does not support the conclusion that Robinson's mining contaminated the Wayne water supply. As part of his investigation, Mr. Jones collected and reviewed samples from springs, streams, adjacent water supplies and the Wayne well. (F.F. 74) The results of the investigation showed that while the Wayne water supply did in fact contain contaminants in excess of the regulatory standards, there was no clear-cut evidence linking Robinson's mining to the water supply problems. (F.F. 75)

From 1984 (the earliest water quality data available) to 1999, there was no significant change in the water quality of the Wayne well. If the Wayne well had been impacted by Robinson's mining, one would expect to find significant increases in sulfates, alkalinity and specific conductance. This did not occur. Rather, specific conductance, alkalinity and metal concentrations remained relatively consistent from 1984 to 1999. And while sulfate levels did fluctuate widely, there was no correlation between peaks in sulfate levels with Robinson's

mining or decreases in sulfate levels with the cessation of mining. Nor was there any upward or downward trend in sulfate levels over time. Finally, some of the sampling points showed excessive sulfate levels prior to Robinson's mining. Based on his investigation, Mr. Jones determined that there was insufficient evidence to hold Robinson responsible for the excessive sulfate levels in Ms. Wayne's water supply or to link Robinson's mining activities to any water-quality changes in the Wayne water supply. We find Mr. Jones' conclusions to be well-supported and credible.

Ms. Wayne correctly points out that the sampling data relied upon by Mr. Jones contained some flaws. In particular, there are gaps in the data and no sampling is available prior to 1984. However, we find that the data which was available was sufficient to allow Mr. Jones to reach a valid conclusion as to Robinson's impact on the Wayne water supply. In addition, although Ms. Wayne noted that certain sampling points had earlier been misidentified, Mr. Jones sorted through the data and accurately identified sampling locations when preparing his report.

Based on the evidence, we cannot find that Robinson's mining caused the problems with Ms. Wayne's water supply. As in *Stahlman, supra,* there are reasonable alternatives as to the cause of the water supply problems. Ms. Wayne's home is surrounded by areas which have been both deep mined and surfaced mined, including pre-Act and abandoned mines. From the water quality data available, it appears that the quality of Ms. Wayne's water was less than ideal when she moved into the property due to decades of prior mining. In addition, Ms. Wayne has had problems with bacteria in her water supply, which required her to install an ultra-violet light. Bacteria contamination is unrelated to mining. (F.F. 65)

The situation here is much like that in the case of *Alice Water Protection Assn. v. DEP*, 1997 EHB 108. There, the appellants were able to demonstrate that the water supply of the area

suffered from a number of water quality problems; however, the evidence was insufficient to demonstrate that the water quality problems were due to mining. Here, Ms. Wayne, through her counsel, has presented a strong case demonstrating that there are problems with the Wayne water supply. However, as in *Alice Water*, we cannot find that the evidence preponderates in favor of the proposition that the water quality problems are the result of mining by Robinson.[3]

Remediation Work Performed by Robinson

Ms. Wayne asserts that the remediation work ordered by the Department and performed by Robinson was inadequate and, in some cases, is likely to fail. The Department ordered several remediations prior to releasing the bonds for the McWreath I and II sites. On the McWreath I site, this included repairing a decant valve on the sedimentation pond, as set forth above, placing riprap along the discharge area of the pond in order to control erosion, and stabilizing the area. (F.F. 100) On the McWreath II site, this included stabilizing the area below the primary spillway of the sedimentation pond and repairing and stabilizing a washout on adjacent property. (F.F. 105) In addition, Robinson was required to regrade and stabilize areas where flooding or erosion was occurring. (F.F. 96-98)

It is true that in some cases remediation work performed by Robinson did fail. (F.F. 96, 102, 107) In each of these instances, the Department ordered Robinson to re-do the work, and the work was completed as requested. (F.F. 96, 103, 107) The record indicates that the repairs have not failed since they were re-done.

Ms. Wayne is concerned that because the repairs failed once, they may fail again. While

[3] We note that Ms. Wayne's case was made more difficult due to financial hardship and inability to retain expert witnesses. Unfortunately, in a case involving issues such as water quality, toxicity and hydrogeology, expert testimony may be critical in meeting one's burden of proof. Despite this obstacle, however, Ms. Wayne's counsel presented a very strong and well-prepared case. We commend all of the parties and their counsel for their efforts and conduct throughout

we can appreciate Ms. Wayne's concerns, we note that as of the hearing, the repairs which were ordered by the Department had not failed. Nor does the evidence indicate that the subsequent repairs ordered by the Department were inadequate. We cannot find that the Department erred in granting bond release on the speculation that remediation work might fail in the future. Moreover, should any of the remediations fail, the Department has the power and duty to take appropriate enforcement action to insure that any such condition is corrected.

CONCLUSIONS OF LAW

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

2. Ms. Wayne has the burden of proving by a preponderance of the evidence that the Department erred in granting Stage II and III bond release to Robinson. 25 Pa. Code § 1021.101(c)(2).

3. Appellant's Exhibit 19 (the Mary Sue Shick letter) constitutes inadmissible hearsay under Pa.R.E. 801 and 802.

4. The Department failed to follow its own regulations at 25 Pa. Code § 87.160(a) by approving the retention of the haul road without a maintenance plan.

5. Robinson meets the criteria for Stage II bond release set forth in 25 Pa. Code § 87.174(b).

6. Robinson meets the criteria for Stage III bond release set forth in 25 Pa. Code § 87.174(c) for the McWreath I site.

7. Robinson does not meet the criteria for Stage III bond release for the Mc Wreath II site due to the lack of a maintenance plan for the haul road.

8. Ms. Wayne has met her burden of proof regarding maintenance of the haul road.

9. Ms. Wayne has not met her burden of proof with regard to all remaining issues.

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the proceeding.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH ANNE WAYNE	:	
	:	
v.	:	**EHB Docket No. 98-175-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 11th day of July, 2000, the appeal of Judith Anne Wayne is sustained with regard to the issue of a maintenance plan for the haul road. The Department's approval of bond release for the McWreath II site is overturned until such time as the Department has approved a maintenance plan for the haul road located on Ms. Wayne's property in accordance with this Adjudication. The appeal is dismissed with regard to all remaining issues.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: July 11, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southwest Region

For Appellant:
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Pittsburgh, PA 15222

For Permittee:
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mw

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 97-099-L (Consolidated with 98-169-L and 98-078-L)**
WHITEMARSH DISPOSAL CORPORATION, INC. and DAVID S. MILLER	:	
		Issued: July 12, 2000

OPINION AND ORDER
ON AN APPLICATION FOR STAY OF DECISION PENDING APPEAL

By Michelle A. Coleman, Administrative Law Judge[1]

Synopsis:

An application for stay pending an appeal to the Commonwealth Court is denied. The Petitioners have not established that they will succeed on the merits of their appeal. Furthermore, the Board's statutory and regulatory proscription against granting a supersedeas where pollution is threatened supports the denial of the application for stay.

OPINION

This Board issued an adjudication and order on March 20, 2000 which upheld the Department of Environmental Protection's (the "Department's") order directing Whitemarsh Disposal Corporation ("Whitemarsh") to cease discharging from its sewage treatment facility

[1] Judge Coleman has been temporarily assigned responsibility of this case because Judge Bernard A. Lebuskes, Jr. is on vacation and the matter needs to be promptly disposed. Judge Labuskes will resume primary handling of this matter upon his return.

(the "facility"). The Board modified the Department's order, requiring Whitemarsh to cease discharging from the facility within 180 days, instead of the 90 days requested by the Department. The Board's order also dismissed an appeal from the Department's denial of a National Pollutant Discharge Elimination System permit and assessed a civil penalty against Whitemarsh in the amount of $250,000 and David S. Miller ("Miller"), general manager of the facility, in the amount of $17,000. The civil penalties were to be paid within 30 days of the order.

Whitemarsh and Miller filed a petition for review of the Board's March 20, 2000 order with the Commonwealth Court (the "Court") on or about April 19, 2000. By order dated June 27, 2000, the Court determined that the petition had been filed in its appellate jurisdiction. Whitemarsh and Miller have filed an application for stay with the Board requesting that the implementation of the Board's order be stayed pending a final decision of the Court. We deny the application.

When ruling upon an application for stay pending appeal, the Board is guided by the criteria that it uses in ruling upon petitions for supersedeas. *Heston S. Swartley v. DEP*, 1999 EHB 160, 163. *See also Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983). Thus, we consider the irreparable harm to the petitioner, the likelihood of the petitioner prevailing of the merits, and the likelihood of injury to the public or other parties. *Id.*; *see also* 35 P.S. §7514(d) and 25 Pa. Code §1021.78.

With regard to the merits, our March 20, 2000 Adjudication and Order established that Whitemarsh could not be counted on to provide reliable sewage treatment in the future (Finding of Fact #108), had demonstrated an inability or lack of intention to comply with the law (Finding of Fact #109; Conclusion of Law #15), and, most importantly, caused and is likely to continue causing actual pollution and a danger of pollution to the waters of the Commonwealth (Finding of Fact #110; Conclusion of Law #16). Moreover, Whitemarsh has been discharging from the facility without a permit since August 13, 1996, which constitutes a continuing violation of Sections 201 and 202 of the Clean Streams Law, 35 P.S. §§691.201 and 691.202,

and the Department's regulations at 25 Pa. Code §92.3. Finding of Fact #9; Conclusion of Law #25.

The application for stay filed by Whitemarsh and Miller does not demonstrate a basis for the Commonwealth Court to conclude that the aforementioned factual findings are not supported by substantial evidence or that legal conclusions are incorrect. In fact, the application is bereft of any factual or legal challenge to the merits of these seminal aspects of our adjudication. Thus, there is no justification for issuing a stay. Furthermore, we are instructed by Section 4(d)(2) of the Environmental Hearing Board Act, 35 P.S. §7514(d)(2), and Section 1021.78(b) of the Board's Rule of Process and Procedure which preclude the issuance of a supersedeas "where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect." Here, the undisputed factual record establishes that Whitemarsh is likely to cause pollution to the waters of the Commonwealth.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 97-099-L**
	:	**(Consolidated with 98-169-L and**
WHITEMARSH DISPOSAL CORPORATION, INC. and DAVID S. MILLER	:	**98-078-L)**

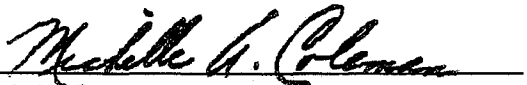
ORDER

AND NOW, this 12th day of July, 2000, the application for stay filed by Whitemarsh Disposal Corporation and David S. Miller is DENIED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **July 12, 2000**

c: **For DEP Litigation:**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Southeastern Regional Counsel

For Petitioners, Whitemarsh Disposal Corporation, Inc. and David S. Miller:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SEDAT, INC. and SEVEN SISTERS MINING CO., INC.	:	
v.	:	**EHB Docket No. 99-171-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 18, 2000**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

Following a transfer order from a court of common pleas, the Board grants the Department's motion for summary judgment because the stipulated record demonstrates that there was no extraordinary delay in reviewing a party's permit application, and, therefore, there was not a temporary taking of the party's property for which the party is entitled to compensation.

OPINION

The Department of Environmental Protection (the "Department") has filed a motion for summary judgment, which Sedat, Inc. ("Sedat") and Seven Sisters Mining Co., Inc. ("Seven Sisters") (Sedat and Seven Sisters shall occasionally be referred to collectively as "Sedat") have opposed. The parties have filed a stipulation of 86 facts ("Stip. 1-86") and an extensive stipulation of documents numbered 1 through 15 ("Stip. Doc. 01-15"). We have relied exclusively upon the parties' stipulations and the stipulated documents in ruling upon the Department's motion.

FACTS

This matter relates to the Clever Mine, a surface coal mine located in Wayne Township, Armstrong County, covered by Surface Mine Permit No. 03940110. (Stip. 7.) Sedat owns coal leases and coal mineral estates for the site. (Stip. 4, 9.) Seven Sisters is the permittee, and it leases the coal from Sedat. (Stip. 8.) Seven Sisters has never commenced operation of the mine. (Stip. 11.)

Prior to Seven Sisters' submission of its permit application to the Department, it tried to obtain the signature of the owners of the surface estate, Kenneth and Ann Fisher, on the Department's landowner consent form. (Stip. 13.) The landowner consent form is commonly referred to as a "Supplemental C." (Stip. 14.) The Supplemental C is provided for under Section 4(a)(2)(F) of the Surface Mining Act , 52 P.S. § 1396.4(a)(2)(F), and 25 Pa. Code § 86.64(d). (Stip. 15.)

When the Fishers refused to sign a Supplemental C, Sedat filed an action against them in the Armstrong County Court of Common Pleas in 1990 seeking a court order compelling them to sign the Supplemental C. (Stip. 16, 17.) The Department was not a party to that case. The court dismissed the complaint and Sedat appealed. (Stip. 18-20.) In 1992, the Superior Court held that there was no need to compel the Fishers to sign the form because the Supplemental C was not required in order for the Department to accept Seven Sisters' permit application for review. (Stip. 21.) The Superior Court did not rule on the issue of whether the Department could issue the permit. (Stip. 21.) In its appeal to Superior Court, Sedat acknowledged that it had not submitted a permit application to the Department. (Stip. 22.)

In March 1990, March 1993, and September 1993, Seven Sisters submitted notices of intent

to explore under 25 Pa. Code § 86.133, which proposed boreholes to collect geological information and determine the extent of coal reserves at the site. (Stip. 25-27.)

On or about March 30, 1993, Seven Sisters submitted an application for funding under the Small Operators Assistance Program ("SOAP"). (Stip. 28.) The SOAP program provides funding for qualified mining companies to assist them in obtaining the hydrologic and geologic information needed in order to submit a permit application to the Department. (Stip. 29.) The Department's approval of a SOAP application does not authorize the applicant to conduct surface mining activities, and is not a permit. (Stip. 30.) On or about June 8, 1993, the Department informed Seven Sisters it would not begin its review of the SOAP application because it did not include a Supplemental C. (Stip. 34.) On or about July 9, 1993, Seven Sisters filed an appeal of the Department's June 8, 1993 letter to this Board. (Stip. 35.) By agreement between Seven Sisters and the Department, however, Seven Sisters withdrew the appeal "without prejudice," reserving the right to raise the issue of whether a Supplemental C was required in future appeals. (Stip. 36, 37.)

On or about September 10, 1993, Seven Sisters submitted a surface mining permit application for the Clever Mine to the Department. The permit application included a copy of the mineral deeds for the site and the 1992 Superior Court decision. The technical components of the permit application were incomplete. (Stip. 38.) On or about September 22, 1993, the Department returned the permit application to Seven Sisters because the permit application did not include a Supplemental C and did not include an overburden analysis. (Stip. 39.) The overburden analysis was required because the area proposed for the Clever Mine drained to the North Branch of the South Fork of Pine Creek, a high quality stream. (Stip. 40.) Seven Sisters filed an appeal with this Board from the letter returning the permit. (Stip. 43.) By letter dated September 20, 1993, Seven

Sisters' consultant, Kenneth L. King, advised the Department that Seven Sisters would submit an overburden analysis. The overburden analysis required by the Department was subsequently submitted on or about July 24, 1994. (Stip. 41.)

At the same time as the second appeal to this Board (on or about October 18, 1993), Sedat and Seven Sisters filed a "Petition for Review in the Nature of a Petition for Writ of Mandamus and Equitable Relief" before the Commonwealth Court. (Stip. 44.) In their petition, Sedat and Seven Sisters asked the Commonwealth Court to require the Department to accept and review Seven Sisters' permit application without the Supplemental C. (Stip. 45.) In the meantime, on or about November 22, 1993, the Department and Sedat filed a joint motion to stay the proceedings in the second appeal with this Board. The Board granted the motion on or about November 30, 1993. (Stip. 47.) The appeal to this Board was withdrawn "without prejudice" on or about May 3, 1994. (Stip. 50.)

On November 19, 1993, the Department filed preliminary objections in the Commonwealth Court matter. (Stip. 48.) Following briefing, the Court overruled the objections by order dated June 28, 1994. (Stip. 51.) The Court held that Seven Sisters was not required to submit a Supplemental C as part of its permit application. *Sedat, Inc. v. Department of Environmental Resources*, 645 A.2d 407 (Pa. Cmwlth. 1994). All of the Department's subsequent attempts to have this holding overturned were unsuccessful. (Stip. 52, 53, 60, 79-82.)

Following the Court's order of June 28, 1994, Seven Sisters resubmitted its permit application without a Supplemental C on or about July 26, 1994. (Stip. 54.) The Department returned the application on or about August 11, 1994, asserting that the issue of a need for a Supplemental C was still the subject of active litigation. (Stip. 55, 56.)

On September 14, 1994, finding that no material issues of fact remained following its ruling on the preliminary objections, the Commonwealth Court granted Sedat's motion for judgment on the pleadings and ordered the Department to substantively review the permit application without requiring a Supplemental C. (Stip. Doc. 14.) Seven Sisters resubmitted its application on September 29, 1994 and the Department proceeded with its technical review of the application at the same time that it unsuccessfully pursued an appeal to the Supreme Court. (Stip. 62, 63, 79-82.)

Specifically, the Department, by letter dated December 22, 1994, identified 47 revisions and additions to the permit application which the Department contended required correction by Seven Sisters in order for the Department to proceed with its review. (Stip. 64.) Seven Sisters responded to the Department's December 22, 1994 correction letter on or about February 9, 1995. (Stip. 65.) The Department held a predenial meeting on February 25, 1995. At that meeting, the Department identified deficiencies in the permit application for the Clever Mine which needed to be corrected in order for the permit to be issued. (Stip. 66.) Seven Sisters requested and the Department granted Seven Sisters additional time in which to submit the information requested by the Department. (Stip. 67.) Seven Sisters requested approval to withdraw the permit application for the Clever Mine on or about March 29, 1995. (Stip. 68.) The Department, by letter dated April 11, 1995, granted Seven Sisters' request to withdraw the permit application. The Department requested that Seven Sisters resubmit the permit application within 60 days. (Stip. 69.) Seven Sisters resubmitted the permit application and submitted the information requested by the Department on or about April 12, 1995, April 19, 1995, and May 30, 1995. (Stip. 70.) The Department issued the permit on June 27, 1995. (Stip. 71.)

In the Commonwealth Court's September 14, 1994 order, it deferred ruling upon Sedat's

request for damages and attorneys' fees until after the Department's final decision on the mining permit. (Stip. Doc. 14.) Thereafter, Sedat filed a petition for an award of costs and attorneys' fees. On September 5, 1996, the Court awarded Sedat approximately $18,000 in fees and costs. (Stip. Doc. 15.) The Court found that the Department's conduct, at least as of June 28, 1994, "caused an unnecessary delay in processing the application and a needless extension of the litigation." *Sedat, Inc. v. Department of Environmental Resources,* 449 M.D. 1993 (September 5, 1996), slip op. at 6 (Stip. Doc. 15 at B-6.) The Court held that the Department's actions after June 28, 1994 constituted arbitrary, vexatious, or bad faith behavior, which entitled Seven Sisters to an award of attorneys' fees. *Id.* The Court's further findings were as follows:

> We limited liability for attorney's fees and costs to the period between June 28, 1994 and June 27, 1995. We chose June 28, 1994 as the start date because that is when Judge Craig determined that Seven Sisters need not submit a Supplement C form signed by the Fishers as part of its permit application. We chose June 27, 1995 as the end date because that is when the Department ultimately issued the mining permit.
>
> We chose that one-year period in which to impose liability because, during that year, the Department refused to consider the permit without the Supplement C form thereby unduly and fruitlessly protracting the litigation. It is clear that, subsequent to Judge Craig's June 28, 1994 opinion and order, the Department was failing to comply with a clear mandate of this Court.
>
> > I do find as a fact that the delays were unnecessary after the date of Judge Craig's order. Up to that time the issue of what the Department was to do or not to do with reference to its rights to inspecting the land after the mining commenced was a legitimate interest on the part of the Commonwealth to inquire about as to what the law was there. So up to the time that Judge Craig spoke otherwise,

> I believe it was appropriate for them to litigate the issue.
>
> (N.T. 133.)

Id., slip op. at 6-7 (Stip. Doc. 15 at B-6 - B-7) (footnotes omitted).

In responding to the Department's argument that subsequent technical issues contributed to the permit review time, the Court stated:

> The Department argued that the one-year time period should have been shortened because much of the delay during that year was due to requests by the engineers for additional time. We declined to shorten the one-year period "because had the application been accepted earlier, these issues concerning the engineering questions that were still open could have been addressed much earlier." (N.T. 131.)

Id., slip op. at 7 n. 6 (Stip. Doc. 15 at B-7 n.6).

Three years after the permit was issued, on November 30, 1998, Sedat commenced an entirely separate action by filing a "Petition for the Appointment of a Board of Viewers" in the Court of Common Pleas of Armstrong County. (Stip. 83.) On January 14, 1999, the Department filed preliminary objections and a supporting brief. (Stip. 84.) By order dated July 20, 1999, the Court sustained the Department's preliminary objections as to jurisdiction of the Court of Common Pleas, and by order dated August 24, 1999, transferred the matter to this Board. (Stip. 85.) The Armstrong County Court transferred the case to this Board because it found, pursuant to *Domiano v. Department of Environmental Protection*, 713 A.2d 713 (Pa. Cmwlth. 1998), that it is this Board's responsibility to determine in the first instance whether a Departmental action has resulted in an unconstitutional taking. We received this matter from the Court on or about September 2, 1999. (Stip. 86.) Sedat filed a statement of claim/notice of appeal following a conference call between the parties and the undersigned Administrative Law Judge, and we docketed the matter at Docket No.

DISCUSSION

A. General Principles

Sedat is pursuing a temporary takings claim. It argues that it irretrievably lost the return that it could have made on high coal prices that prevailed for a short period of time while the Department improperly refused to review and/or delayed the review of Seven Sisters' permit application. The Department eventually issued the permit, so there is no claim of a permanent taking.[1]

In a takings case, before we can do anything else, we must define exactly what property right has allegedly been taken. *Domiano v. DEP*, 1999 EHB 408, 413. A party may not pursue a takings claim unless the government by its actions has affected a legally cognizable property right. *Id.* To be accurate, the Department only deprived Seven Sisters of a permit to mine Sedat's coal; the Department did not actually take the coal itself. In *Tri-State Transfer Company, Inc. v. Department of Environmental Protection*, 722 A.2d 1129, 1132 n.3, the Commonwealth Court held that a solid waste permit does not rise to the level of a property interest that can support a regulatory takings claim. Such a permit is a privilege, not a right, and therefore, it cannot be taken in the constitutional sense. *Id.*

We do not believe that this *Tri-State* language applies to a permit to mine coal. Under Pennsylvania law, *in situ* coal constitutes an entirely separate estate in land. *Machipongo Land &*

[1] Sedat notes that it may never again recoup the losses it suffered in 1993 because the coal prices may never return to the 1993 levels that obtained during a UMW strike. Even if true, that fact does not mean that there was a permanent taking. Sedat's claim is premised upon a temporary deprivation of property rights. The fact that the alleged temporary deprivation resulted in a "permanent" loss does not mean that the ability to mine the coal was permanently taken or that the claim is converted into one for a permanent taking. In the absence of a permanently unrecoverable loss, it is unlikely that there would be a taking of any kind.

Coal Company, Inc. v. Department of Environmental Resources, 719 A.2d 19, 28 (Pa. Cmwlth. 1998). "The right to coal consists in the right to mine it." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (quoting *Commonwealth v. Clearview Coal Co.*, 100 A. 820 (Pa. 1917)). Without the ability to mine the coal, which is to say the ability to obtain a permit, the coal is truly worthless. Accordingly, the permit and the coal itself are intertwined into a single, inextricable property right. A party who is deprived of its ability to use the land surface to operate a solid waste facility may have many other uses of the land, but a party who is deprived of a permit to mine its coal has no other use for its estate in land, i.e., the coal. Therefore, we will not apply the *Tri-State* language in this case.

Having concluded that Sedat and Seven Sisters have property rights that are capable of being taken pursuant to the Department's permitting activity, we turn to the question of whether there has been such a taking here. "[A] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-27 (1985).[2] "[M]ere fluctuations in value during the process of governmental decision making, **absent extraordinary delay**, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" *Agins v. City of Tiburon*, 447 U.S. 255, 263 n. 9 (1980) (quoting *Danforth v. United States*, 308 U.S. 271, 285 (1939)). (emphasis added).

---

[2] Sedat's claim is based upon both the Pennsylvania and the United States Constitutions. Neither the parties' briefs nor our independent research has uncovered any Pennsylvania case law directly on point. Due to the similarity of the federal and state constitutional takings clauses, however, Pennsylvania courts can and frequently do rely upon federal case law as an aid to interpreting the Pennsylvania constitutional provision regarding takings. *See Machipongo Land and Coal Company. Inc. v. Department of Environmental Resources*, 719 A.2d 19 (Pa. Cmwlth. 1998). We will do the same.

In a temporary takings case involving an allegedly extraordinary delay in the permitting process, we must initially determine whether the government's actions have temporarily deprived the property owner of all or substantially all economically viable use of its property. *See Anaheim Gardens v. United States*, 33 Fed. Cl. 24, 36 (1995) ("In order to prevail on a temporary taking claim, a plaintiff must show that substantially all economic use of its property was denied during the period in question."); *Tabb Lakes, Inc. v. United States*, 26 Cl. Ct. 1334, 1352-54 (1992), *aff'd*, 10 F.3d 796 (Fed. Cir. 1993) (rejecting temporary takings claim where landowner had "substantial economically beneficial use" of property during period of alleged temporary taking); *1902 Atlantic Limited v. United States*, 26 Cl. Ct. 575, 579 (1992) (plaintiff must show that substantially all economic use of its property was denied during the time in question); *Dufau v. United States*, 22 Cl. Ct. 156, 163 (1990), *aff'd*, 940 F.2d 677 (Fed. Cir. 1991) (property owners asserting temporary takings claim "correctly recognize that they must prove substantially all economically viable use of their property has been denied."). *See generally First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (temporary taking that denies landowner all use of his property clearly requires compensation). As already noted, any delay attendant to the mining permit review clearly deprived Sedat of all use of the coal. Without the permit, the coal could not be mined or used in any other way.

The second key question in any case where the permit application review is alleged to have resulted in a temporary taking is whether the government is responsible for "extraordinary delay" in the permit review process. *Agins,* 447 U.S. at 263 n.9; *Walcek v. United States*, 44 Fed. Cl. 462, 467 (1999); *Norman v. United States*, 38 Fed. Cl. 417, 427 (1997) (summarizing cases); *Tabb Lakes, Inc.,* 26 Cl. Ct. at 1352-54; *Dufau*, 22 Cl. Ct. at 163. *See also First English Evangelical Lutheran*

Church, 482 U.S. at 321 ("normal delay" in obtaining building permits does not give rise to a taking).

The phrase "extraordinary delay" incorporates a value judgment. As in all takings cases, it is our duty to decide whether the government's actions have forced a particular party to alone "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 83 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1980)). At the risk of stating the obvious, the resolution of this question of fairness and justice properly turns upon the particular circumstances of each case. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)).

While a property owner should be expected to bear the costs and losses associated with a normal permit review, once that review goes on too long, the delay can no longer be considered an "incident of ownership." We are sensitive to the government's need to conduct careful, deliberative reviews of permit applications for projects that could have significant, often irreversible, impacts upon the environment, but we also cannot ignore the right of property owners to receive timely decisions on their permit applications.

Both the terms "extraordinary" and "delay" denote a comparison to some norm. But comparing the actual to the average permit review time is only the beginning of the analysis. A simple measurement of the time taken to review the permit at issue compared to an average time does not take into account the particular circumstances of each case. Even where similar permits are involved, each case is invariably unique. We would be skirting our responsibility to apply an important, constitutionally driven analysis if we unthinkingly applied a simple mathematical

comparison. Nevertheless, the analysis must start somewhere, and it is helpful to define whether the review time at issue was, objectively speaking, materially above average. We suspect it would be very difficult to prove that there was a "delay" for any review that was completed faster than the average time for similar permit reviews.

In order to prevail on a takings claim, a party must not only show that there was a delay in processing the application, it must show that the delay was "extraordinary" in the sense that the government wrongfully caused the delay. This is another manifestation of the seminal principle in regulatory takings jurisprudence that there is no regulatory taking requiring compensation unless the government has "gone too far." *Pennsylvania Coal Co.*, 260 U.S. at 393. The government must not only have caused the delay, *Tabb Lakes*, 26 Cl. Ct. 1334, it must have done so wrongfully. Unfortunately, the courts have not been particularly precise in defining what constitutes wrongful conduct that can result in an extraordinary delay. The courts appear to have been particularly sensitive to neglect or inactivity; a key factor in assessing whether a delay has been extraordinary is whether the government "actively pursued" its review. *Walcek*, 44 Fed. Cl. at 467-68 (citing *Dufau*, 22 Cl. Ct. at 163-164, and *Anaheim Gardens v. United States*, 33 Fed. Cl. at 37). Beyond that, it appears that either objectively improper conduct, *Norman v. United States*, 38 Fed. Cl. 417 (1997) (court must decide whether government's actions were "reasonable"), subjectively improper conduct, *Dufau*, 22 Cl. Ct. 156 (no taking because government did not act in bad faith), or both, *Walcek*, 44 Fed. Ct. 462 (no taking where government did not act negligently or in bad faith); *Tabb Lakes*, 26 Cl. Ct. 1334 (no taking because no bad faith or unreasonable conduct), will suffice. Thus, in order to assess whether there has been an extraordinary delay in completing a permit review, we must address the following questions:

1. Did the review time materially exceed the norm for similar permit reviews such that there was a "delay"?

2. Did the government actively pursue its review?

3. Did the government act unreasonably and/or in bad faith?

4. Did the government's wrongful conduct cause or materially add to the delay?[3]

Although these questions help guide our thinking, we must not lose sight of the fact that our responsibility at its most basic level is to make a value judgment of whether fairness and justice require the public to reimburse an individual for the consequential costs and losses resulting from an inordinately long permit review.

B. Collateral Estoppel

Before turning to the facts of this case, we must address Sedat's assertion that our flexibility to conduct our own analysis is constrained by previous court rulings. As discussed above, the Commonwealth Court found that the Department's conduct before June 28, 1994, the date of Judge Craig's order, was reasonable, but that its conduct thereafter was arbitrary, vexatious, and in bad faith and "caused an unnecessary delay in processing the application and a needless extension of the litigation." *Sedat,* (September 5, 1996) slip op. at 6.

We believe that it would be disingenuous to conclude that there is a meaningful distinction between the finding of an "extraordinary delay" and what the Commonwealth Court meant when it found that there had been an "unnecessary delay in processing the application." In order for collateral estoppel to apply, however, the issue in both proceedings must not only be identical and

[3] The parties' debate about whether the Department's review of Seven Sisters' application was a "regulatory" or "ministerial" act is, at best, semantical. The courts have established certain principles that guide the analysis of whether a delay in a permit review resulted in a taking (e.g., was the delay "extraordinary"). Whether the review is characterized as "ministerial" or "regulatory" has no legal significance.

have been vigorously litigated by the same parties, the finding in the previous proceeding must have been an essential finding necessary to support the final judgment. *In re Private Road in Union Township*, 611 A.2d 1362, 1365 (Pa. Cmwlth. 1992) (finding in earlier action that was unnecessary and, therefore, not essential to decision had no collateral estoppel effect). *See generally Temple University v. Workers' Compensation Appeal Board (Parson),* Docket No. 124 C.D. 1999, slip op. at 5 (Pa. Cmwlth. May 5, 2000) (issue preclusion bars relitigation of issue of law or fact in a later case, despite fact that later action is based on a cause of action different from the one previously litigated, where the issue is identical, it was actually litigated, it was essential and material to the earlier judgment, and the party against whom the estoppel claim is asserted was a party in the earlier case); *Pucci v. Workers' Compensation Appeal Board (Woodville State Hospital)*, 707 A.2d 646 (Pa. Cmwlth 1998)(same).

Unless a finding was essential to an earlier ruling, one cannot be sure that the issue was truly put to the test. Dicta in one case should not be transformed into a dispositive ruling in another case merely by operation of an estoppel rule. A finding that was of no consequence in the first case should not be given immutable weight in another case where it could have determinative consequences.

Such is the case here. Although there is no denying that the Commonwealth Court found that there was unnecessary delay in the Department's processing of the permit application, that finding was immaterial to the Court's award of attorneys' fees. No such finding was necessary for an award of fees under the Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 1396.4(b) and 1396.18c. *See Sedat*, slip op. at p. 5-6 *(citing Big B Mining Co. v. Department of Environmental Resources*, 624 A.2d 713 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 633

A.2d 153 (Pa. 1993) (criteria for award of fees are issuance of final order, applicant prevailing party, applicant made a substantial contribution, applicant achieved some degree of success)).[4] The finding was also of no legal relevance to the award of fees under the operative provision of the Judicial Code, 42 Pa.C.S. § 2503(9), because that statute only allows an award of fees for improper conduct in the litigation itself. *Department of Transportation v. Smith*, 602 A.2d 499, 503 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 613 A.2d 561 (Pa. 1992) (improper or bad faith agency conduct outside of the court action cannot support an award of attorneys' fees). Therefore, the parties are not collaterally estopped by the Commonwealth Court's nonessential finding from arguing in this proceeding whether there was an extraordinary delay in the processing of the permit application.

In addition, the task before the Commonwealth Court was dramatically different than the task that we face. The Court needed to decide whether what is essentially a sanction---an award of fees of a few thousand dollars---was appropriate. Here, the Appellants are pursuing a takings claim for roughly a million dollars. When the stakes and the underlying purposes of the inquiries are so starkly different, we are admittedly extremely reluctant to conclude based upon an estoppel doctrine alone that the public should bear the consequential costs of a delay. *See Rue v. K-Mart Corporation*, 713 A.2d 82, 86 (Pa. 1998) (quoting Restatement (Second) of Judgments, Section 28, Comments (d) and (j)) (finding in unemployment compensation proceeding not binding in subsequent civil lawsuit because the amount in controversy in the first action was "so small in relation to the amount in controversy in the second that preclusion would plainly be unfair.")

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[4] Our holding in *Lucchino v. DEP*, 1998 EHB 556, 557-558 (reiterated in the same case at 1998 EHB 1070, 1073-74, *aff'd*, 744 A.2d 352 (Pa. Cmwlth. 2000)), that a permittee may not recover attorneys' fees from a **third-party appellant** unless the appeal was brought in bad faith does not apply in an action such as this one where the permittee sued the Department directly.

Although the parties are not precluded from contesting whether there was an extraordinary delay in issuing the permit, they are precluded from disputing the more limited issue of the extent to which the litigation regarding the permit was conducted in bad faith or was needlessly extended. The Court's findings in that regard were essential to its award of attorneys' fees. In addition, to the extent that that more narrow issue is implicated here, the issue is identical, the parties are identical, and the question was fully litigated. All of the criteria for the application of collateral estoppel are satisfied and we will not re-examine to what extent the litigation as one component of the entire process was reasonable.

Thus, as a matter of law in this appeal, it is established that the Department's litigation activities prior to June 28, 1994, the date of Judge Craig's order, were reasonable and in good faith. The Court found that the Department was entitled to litigate the Supplemental C issue up to that point. On the other hand, after June 28, 1994, the Department acted unreasonably by unnecessarily protracting **the litigation**. These findings must be factored into the broader question before us, which is whether the entire review process – legal and technical – resulted in an extraordinary delay.

C. Was There A Taking Here?

Turning at last to the facts of this case, the parties have stipulated that "[t]he Department can usually approve a technically complete application within 180 days of receipt." (Stip. 73.) Seven Sisters first applied for its permit on September 10, 1993. In measuring the period of review, it is not appropriate to include the time that passed during the developments that preceded the application submittal itself. Sedat's notices of intent to explore and SOAP application were related activities, but they did not constitute part of the mining permit review process. Sedat's litigation with the Fishers also cannot fairly be counted against the Department's review time. The most appropriate

trigger here is the first submittal of the actual permit application for the Department's review. We do not accept Sedat's argument that its SOAP application was designed to test the Department's position. If a party desires a permit, it needs to do more than float trial balloons; it must actually apply for the permit. Otherwise, there has been no delay in the **permit review process**, which is the operative determination.

We understand why Seven Sisters wanted to avoid submitting a complete permit application: It is expensive. But Seven Sisters eventually realized that it would need to make a proper application and have it rejected if it was to obtain a resolution of the legal issue. (See App. Memorandum, p.6) ("Because the legal authority and requirements under the SOAP program were not clear, Seven Sisters filed a 'full' mining permit application....") It was only after Seven Sisters had submitted and had rejected a permit application that it commenced its Commonwealth Court litigation. Before the rejection, it is unlikely that the Court would have considered the matter ripe. For similar reasons, and as a matter of simple logic, it would be inappropriate for us to begin measuring a period of delay in a permit application review until the application is actually submitted. An unfortunate, but necessary, consequence of that holding is that an applicant must bear the expense of preparing an application.

Seven Sisters applied for the permit on September 10, 1993 and the Department issued the permit on June 27, 1995. This nearly 21-month period was about three times what has been stipulated to be the ordinary review time for a permit of this nature. If the permit had been issued in roughly six months, we doubt that our analysis would have needed to proceed any further. The extended review period that occurred here, however, may certainly be characterized as a delay and we are, therefore, compelled to move forward.

With respect to the second question in our analysis, we conclude that the Department "actively pursued" the review of Seven Sisters' permit application for the 21-month period. When we consider whether the Department was actively engaged, we consider both the litigation and the technical review. While the Commonwealth Court found that the Department's energies may have been improperly focused on the litigation instead of the technical review for part of the time, there is no question that the Department was actively engaged in pursuing resolution of the legal issue, conducting its technical review, or both for the entire period. Viewing all of the facts in the light most favorable to the Appellants, there is simply no indication that the Department was guilty of neglect or inactivity, purposeful or otherwise.

There may be cases where regulators are understandably reluctant to actually deny permit applications when they understand the rather substantial economic impact such a decision could have. They, therefore, ask for countless studies, project adjustments, and the like to avoid making an adverse decision. *See Eastern Mineral International, Inc. v. United States*, 36 Fed. Cl. 541 (1996) (10-year delay in denying permit involving numerous requests for studies by OSM and during which period the coal leases expired). In such cases, it may fairly be said that the government has, in truth, denied the permit and compensation might be warranted. The facts in this case do not fit that description. There also might be cases where the government, intentionally or otherwise, buries an application and takes no action at all. The public might fairly be asked to compensate the victim of such inexcusable neglect. Again, however, this is simply not such a case.

It is established by the Commonwealth Court opinion that it was reasonable for the Department to litigate the Supplemental C issue up to the date of Judge Craig's June 28, 1994 ruling. In other words, there was a reasonable, good faith dispute up to that point regarding Sedat's need to

obtain an executed Supplemental C. Because that difficult and central issue was potentially dispositive, it would have been potentially very wasteful to have simultaneously pursued a technical review of the application. Even Seven Sisters acknowledged the need to perform an overburden analysis (a study of the pollution producing potential of the site) very early in the process (Stip. 40), but did not submit the analysis until July 1994 (Stip. 41). Seven Sisters acknowledges that preparing the overburden analysis would only have taken about two weeks, but it, quite reasonably, decided to attempt to await resolution of the legal issue before incurring that expense. Just as it was reasonable for Seven Sisters to wait to prepare a complete permit application, it was reasonable for the Department to wait to expend the considerable resources necessary to perform a complete technical review pending a resolution of the legal issue.

Sedat suggests that the Department could have performed its technical review and issued a permit with a special condition requiring a Supplemental C pending resolution of the litigation. Even if we assume that such a course would have been a reasonable use of the Department's resources, given the reasonable, good faith legal dispute, it does not follow that choosing to defer that review was unreasonable. At least up to the point of Judge Craig's order, it made perfect sense to refrain from performing a technical review pending resolution of the Supplemental C issue.

We do not believe that the Commonwealth Court's opinion can be interpreted as holding that the Department should have commenced a technical review prior to Judge Craig's ruling, but even if it did, as previously noted, that finding regarding the Department's technical review activities (as distinguished from its litigation activities) was not essential to the award of fees and is not binding in this takings case. In any event, the better interpretation of the Commonwealth Court's ruling is that the Department should have commenced its review immediately after, not before, Judge Craig's

ruling.

Sedat points to the Superior Court's decision and argues repeatedly that the Department should have proceeded with its technical review based on that decision. The Commonwealth Court found, however, that the Department was justified in litigating the issue in Commonwealth Court (albeit not for as long as it did), and we are collaterally estopped from revisiting that issue. But we cannot resist adding that the Department was not a party to the Superior Court action and the decision in that case was neither binding on the Commonwealth Court nor the Department in the subsequent litigation. *Sedat*, 645 A.2d at 411. In short, the Department acted neither wrongfully nor in bad faith for the first nine months of the 21-month period by focusing exclusively upon the litigation.

Jumping ahead to the end of the 21-month period, from the date that Sedat resubmitted its application (September 29, 1994) and the date the Department issued the permit about nine months later (June 27, 1995), the record shows that the Department proceeded deliberately with a technical review. The parties' stipulations as discussed above reveal a fairly typical technical review process that involved review letters, meetings, and other discussions regarding technical issues. The stipulations (including stipulated documents) show that, as with many coal surface mining permit reviews, the review of Seven Sisters' permit application was a complicated affair involving numerous technical issues. (*See, e.g.*, Stip. 41 (an overburden analysis was required), Stip. 78 (a social and economic impact statement for a possible impact upon high quality water was required), Stip. Doc. 01 (the technical review letter listing 47 technical deficiencies).) Indeed, as previously noted, Seven Sisters agreed at one point to voluntarily withdraw the application, and did not submit all of the needed, missing technical information until several weeks later. (Stip. 68-70.)

It is interesting to note that the Commonwealth Court never found that the Department proceeded too slowly once it actually started its technical review. Rather, it believed that the technical permit review should have started earlier. *Sedat*, slip op. at 7 n. 6 (September 5, 1996). Importantly, Sedat has not contended that the execution of the Department's technical review **once it commenced** was improper or dilatory. While it is established by virtue of collateral estoppel that the Department acted wrongfully in pursuing the litigation after June 28, 1994, the record viewed most favorably toward Sedat in no way supports a finding that the Department's bad faith litigation after that date slowed down the technical review once it started. The Commonwealth Court did not so find, Sedat has not so argued, and there is no basis for concluding otherwise. We conclude that the Department did not act wrongfully in processing the permit application during the final 9 months of the 21-month period, and the Department's bad faith continuation of the litigation during that time did not result in any delay in the permit review.

Thus, the only portion of the 21-month period that appears to be analytically problematic is the period between Judge Craig's order of June 28, 1994 and September 29, 1994, the date when Seven Sisters resubmitted its application and the Department commenced a technical review. In fact, Seven Sisters did not have an application pending as of June 28. It did not resubmit its application until July 26.

Perhaps the action of the Department that comes closest to being wrongful was its refusal to begin a technical review as of July 26 and its return of Seven Sisters' application because the Supplemental C issue was still "in litigation." Even if we assume for purposes of resolving the Department's motion that the Department acted in bad faith, we conclude that its actions were not objectively unreasonable. Judge Craig's interlocutory ruling of June 28 simply overruled the

Department's preliminary objections. The Court did not enter judgment and direct the Department to commence its technical review until September 14. The Department need not have proceeded immediately as if the mandamus had already been issued by virtue of the interlocutory order. We believe that it was reasonable to await a final order. We would be very wary of imposing an obligation on parties to proceed to action based upon interlocutory court orders. Once a final order is issued, the availability of appeals does not justify disregarding the order absent a stay, but we would not expect the Department or any other party to comport itself as if judgment has been entered until judgment is entered. Once the Court issued its **final** order on September 14, Seven Sisters resubmitted its application on September 29, and as previously discussed, technical review proceeded apace from that point forward, notwithstanding the Department's litigation activities.

The Department unsuccessfully attempted to file an immediate appeal from Judge Craig's interlocutory ruling. The Court later cited this as an example of the Department's improper litigation activity. If we again assume that the Department acted in bad faith, and we take it as a given that this appeal was dilatory, the appeal in itself did not cause any additional delay in the technical review. In other words, the appeal did not add materially to the delay in the technical review that would have occurred in any event while the Department awaited a final order in the Commonwealth Court action. In other words, this unreasonable activity did not add to the period of delay.

We do not believe that the Department wrongfully caused a delay during the summer of 1994, but even if we assume for current purposes that it did, we would still not conclude that the delay was so extraordinary as to result in a taking. We are not willing to microanalyze every step in the permit review process with the benefit of hindsight to assess whether each and every action of the

regulators was justified in a takings case. Such an exercise would stretch the concept of a constitutional taking far beyond the notion the property owners should be reimbursed when they are forced to sacrifice their property for the public good. Instead, we need to look at the big picture: Based upon the totality of the regulatory review, was the applicant treated so unfairly that the public should reimburse him? Even if the Department made a bad call in rejecting Seven Sisters' July 26 application, its mistake resulted in no more than a two to three month delay. Viewed either separately or in the context of the total review time of 21 months, this two to three month error was not enough to give rise to an extraordinary delay that amounted to a temporary taking. In other words, we will not find that a taking occurred here where 90 percent of the total review time was justified and appropriate.

In opposing the Department's motion for summary judgment, Sedat lists seven factual issues that it believes are in dispute, thereby precluding entry of summary judgment. The first four of those issues, however, are based on the assertion that Seven Sisters would have submitted and obtained a permit in 1993 "had DEP agreed" that no Supplemental C was necessary. As discussed above, we have concluded as a matter of law that the period of delay that must be measured to determine if it was extraordinary does not begin until a party actually applies for the permit. No court that has ever addressed a temporary takings claim for a permit delay has ever treated anything other than the permit application submittal as the triggering event. To conclude otherwise would be too slippery a slope on which to stand. Would a conversation where a Department employee expresses a certain view be enough? A letter? A general policy statement not directed at any one applicant? A decision in another case? We choose not to view anything other than the submittal of the application itself as the triggering event. Therefore, disputed facts concerning what might or

could have happened in 1993 long before Seven Sisters actually applied for a permit have no relevance and do not preclude entry of summary judgment.

The remaining three disputed issues cited by Sedat relate to the amount of damages that it allegedly suffered. Even if we had found that there was a taking, these issues would have been beyond the scope of the court of common pleas' transfer order. They are entirely irrelevant.

Sedat also argues that we "must hear testimony and make findings" regarding four questions: Did the Department deprive Sedat of all use of its property? (we have held for purposes of this motion that it did); When did the period of delay begin? (as discussed above, September 10, 1993); When did the period of "compensable" delay occur? (this simply restates the ultimate issue in the case); and, Has the Department "gone too far"? (again, this is the ultimate question.) Sedat, however, does not identify any disputed factual issues that stand in the way of resolving these four questions. Nor do we independently perceive any.

Quite to the contrary, the parties are to be commended for putting together a comprehensive set of stipulated facts and documents. Perhaps after ten years of almost continuous litigation, it would have been surprising if the parties were not able to stipulate to all of the essential facts. The stipulated record paints a complete record of the material facts, and no purpose would be served by taking further testimony in this matter. Sedat did not unequivocally admit every allegation in the Department's motion, but we have carefully reviewed its responses and found its limited denials either to be along the lines discussed above (relating to irrelevant issues or issues that have been decided in Sedat's favor), or in the nature of qualification or argument that do not raise any material disputed facts. In short, there are no genuine issues of disputed fact, and viewing the record in the light most favorable to Sedat, we are nevertheless able to conclude as a matter of law that no taking

has occurred here.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

SEDAT, INC. and SEVEN SISTERS MINING CO., INC.	:	
v.	:	**EHB Docket No. 99-171-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of July, 2000, the Department's motion for summary judgment is GRANTED. The Department's actions did NOT result in a taking. The Secretary of the Board is directed to return this matter to the Armstrong County Court of Common Pleas. Our jurisdiction is relinquished.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **July 18, 2000**

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 98-235-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 21, 2000

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss an appeal of a compliance order as moot is denied, despite the lifting of the compliance order. The recipient of a compliance order based on alleged violations under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.3a(d) (Surface Mining Act) continues to have a stake in an appeal of the order—even after the order has been lifted—as a result of the penalty escalation provisions in 25 Pa. Code § 86.194.

OPINION

This appeal concerns a compliance order that the Department of Environmental Protection (DEP) issued to Harriman Coal Corporation (Appellant) of Valley View, Pennsylvania. The November 25, 1998, order related to Appellant's Good Spring South mining operation, in Porter Township, Schuylkill County. It cited Appellant for exceeding the 1500-foot

limit on the length of an open pit; directed Appellant to backfill and regrade the site December 28, 1998, so that the open pit fell within the limit; and directed Appellant to cease all other mining activities at the site.

On December 17, 1998, Appellant filed a notice of appeal challenging the compliance order. The appeal asserts, among other things, that the Department abused its discretion by issuing the compliance order because the order was not necessary for the Department to enforce the provisions of the Surface Mining Act.

The Department filed a motion to dismiss and supporting memorandum on law on May 5, 2000, and Appellant filed an answer and memorandum opposing the motion on June 19, 2000. The Department did not file a reply.

In its motion and memorandum, the Department maintains that Appellant's appeal is moot because (1) Appellant agreed in a March 15, 1999, consent order and agreement to pay a $100,000 civil penalty for—among other things—the violations alleged in the compliance order; and (2) the Department lifted the compliance order in a June 7, 1999, inspection report. Appellant responds that the mootness doctrine does not apply here because, during license and permit application reviews, the Department may consider orders that are lifted after compliance but not those that are vacated, rescinded, or withdrawn before compliance. Appellant also argues that, even assuming the Board could grant no meaningful relief in this instance, the appeals falls within exceptions to the mootness doctrine because the issue is one of great public importance and is capable of repetition yet evading review.

The Board will grant a motion to dismiss only where there are no material factual disputes and the moving party is entitled to judgment as a matter of law. *See Smedley v. DEP,*

1998 EHB 1281, 1282. We deny the Department's motion to dismiss here because the Department has failed to establish that it is entitled to judgment as a matter of law.

"In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of the necessary stake in the outcome, or whether the court (or agency) will be able to grant effective relief." *Al Hamilton Contracting Co. v. Department of Environmental Resources,* 496 A.2d 516, 518 (Pa. Cmwlth. 1985) (citations omitted). Generally, tribunals may not decide moot issues. *See, e.g., Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117, 119 (Pa. Cmwlth. 2000). However, exceptions to the mootness doctrine exist "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest, or where a party will suffer some detriment without the court's decision." *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa.Cmwlth.1997), *aff'd*, 731 A.2d 1133, 1134 (Pa. 1999).

Both parties agree that the Department lifted the compliance order at issue here by virtue of the Department's June 7, 1999, inspection report. (Motion, paragraph 20; answer, paragraph 20.) Because the Department's lifting of the order removed any duties that might have otherwise remained under the order, the Board could give Appellant no additional relief from the order once the Department lifted it. Thus, Appellant's appeal of the compliance order technically became moot when the Department issued the inspection report lifting the order. However, Appellant's appeal falls within an exception to the mootness doctrine because, as explained below, Appellant could suffer some detriment were the Board not to proceed with its appeal.

Although both Appellant and the Department treat the issue as one of first impression in their filings, and neither of them mention the Commonwealth Court's decision in *Al Hamilton Contracting Co. v. Department of Environmental Resources,* 496 A.2d 516 (Pa. Cmwlth. 1985),

that case is controlling here. *Al Hamilton* involved an order the Department issued to a coal company (Hamilton), directing it to clean up a diversion ditch, catch basin, and underdrain within 11 days. 496 A.2d at 517. Hamilton first complied with the order but later filed a notice of appeal. *Id.* The Board dismissed the appeal as moot on the basis that Hamilton had already complied with the order. *Id.* at 517-518.

The Commonwealth Court reversed the Board on appeal and remanded the case back to the Board. The Court held that, despite Hamilton's compliance with the order, Hamilton continued to have a stake in its appeal before the Board because of a penalty escalation provision in the Department's regulations. The Court explained:

> Hamilton maintains that in assessing future civil penalties one factor which is considered by DER is prior violations and that by precluding Hamilton from litigating the propriety of the abatement order the result is to subject Hamilton to the penalty escalation provision in DER regulation 86.194, 25 Pa. Code § 86.194.... This regulation ... requires consideration of prior violations in assessing future civil penalties. At oral argument DER maintained that should the prior violation be utilized in such a manner against Hamilton, DER would *then* be required to prove the existence of the ... violation. While DER did not explain how it would do so, in all likelihood it would introduce the abatement order and attest to Hamilton's compliance with that order. Thus, Hamilton's timely action would be used against it. Hamilton would then be forced to rebut this evidence and clearly it would be at a disadvantage to prove the negative ... that may have occurred two years earlier. This result is absurd and unfair. The matter should be litigated now while the witnesses are fresh and the data available....
>
> This Court realizes that had Hamilton obtained a stay ... the instant problem would not have arisen. We note in particular that the DER regulations contain no indication that requesting or obtaining a stay is a mandatory step to preserve appeal rights. 25 Pa. Code § 21.76 provides, "[a]petition for supersedeas ... *may* be filed at any time during the proceeding." (Emphasis added.) Moreover, a civil penalty can be reduced by swift compliance with a DER order..., and thus Hamilton may well have had legitimate reasons for prompt compliance.

494 A.2d at 518-519 (footnote omitted).

There are some differences between *Al Hamilton* and the instant appeal. For instance, in *Al Hamilton*, the Department appears never to have lifted the order, and the Department issued a civil penalty based on the violations alleged in it. Nevertheless, the same reasoning that the Commonwealth Court outlined in *Al Hamilton* applies here. As in *Al Hamilton*, Appellant seeks to challenge an order that alleges violations under the Surface Mining Act, and Appellant complied with the order while it retained the force of law. The relevant portions of § 86.194 of the Department's regulations remain unchanged since the Court issued its decision in *Al Hamilton.* And, the penalty escalation provision in § 86.194 does not distinguish between violations alleged in orders that remain valid and those alleged in orders that have been lifted. Thus, *Al Hamilton* controls here.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 98-235-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 21st day of July, 2000, it is ordered that the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 21, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-218-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 21, 2000

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board denies a motion for partial summary judgment in an appeal of an anthracite mining permit that requires that the Department consent to the removal of any mining equipment from the site. The fact that the Department's regulations only require permission to remove backfilling equipment does not necessarily mean that the Department abused its discretion by issuing a permit requiring permission for the removal of other equipment as well. Furthermore, even assuming the Department had abused its discretion by requiring permission to remove the other equipment, material issues of fact remain concerning whether some of the equipment listed in the permit would be used for backfilling.

OPINION

This appeal concerns special conditions in an anthracite surface mining permit that the Department of Environmental Protection (DEP) reissued to Harriman Coal Corporation

(Appellant). The Department issued the permit on September 20, 1999, for Appellant's Good Spring South mining operation, in Porter Township, Schuylkill County.

On October 20, 1999, Appellant filed a notice of appeal challenging special conditions 1, 2, 4, 5, 7, 8, 10, and 11 of the permit. Among other things, Appellant argues that the Department abused its discretion because the requirements in the special conditions go beyond what is required in Chapter 88 of the Department's regulations, 25 Pa. Code Chapter 88.

On May 23, 2000, Appellant filed a motion for partial summary judgment and supporting memorandum of law. In the motion, Appellant moves for summary judgment on special condition 1 in the permit. The Department filed an answer and memorandum in opposition on June 19, 2000. Appellant filed a reply on July 10, 2000.

In its motion, Appellant argues that it is entitled to judgment as a matter of law on special condition number 1 because the condition requires that Appellant obtain written permission from the Department before it can remove *any* mining equipment from the Good Spring South operation, while section 88.115(d) of the Department's regulations, 25 Pa. Code § 88.115(d), requires only that a mine operator obtain written permission before it removes *backfilling* equipment from a site. According to Appellant, the Department abused its discretion by imposing a requirement in the permit that went beyond what was required in the regulations, and preventing Appellant from removing other mining equipment from the site would hamstring Appellant's ability to compete with other coal producers. Therefore, Appellant requests that we substitute our discretion for that of the Department,[1] and that we modify special condition 1 so that it comports with section 88.115(d).

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[1] Appellant argues that the Department abuses its discretion where there is "manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the

The Department disagrees. It argues (1) that 25 Pa. Code §§ 88.44 and 88.115 require that operators obtain written permission to remove any equipment involved in mining a site (even equipment not used in reclamation), and (2) that, even assuming that the Department's regulations only required Appellant to obtain permission to remove reclamation equipment, the Department did not err by requiring permission for Appellant to remove the equipment listed in special condition 1 because Appellant's permit application failed to specify which of the equipment would be used for reclamation and which would not.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record—and affidavits, if any—show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party and will enter summary judgment only where the right is clear and free from doubt. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

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law, or similarly egregious transgressions on the part of [the Department]." (Motion, paragraph 27, p. 7.) In support of that proposition, Appellant cites *Sussex, Inc. v. DER,* 1984 EHB 355 (*Sussex I*).

However, the standard for abuse of discretion set forth in *Sussex I* is no longer good law. The Board reconsidered that decision and renounced the standard for abuse of discretion it used there, writing, "[T]he language ... defining 'abuse of discretion' does not accurately enunciate this Board's scope of review of actions of [the Department]." *Sussex, Inc. v. DER,* 1986 EHB 350, 352 (*Sussex II*). The Board explained that when it formulated the abuse of discretion standard in *Sussex I,* the Board looked to cases articulating the standard of review of courts sitting in their appellate jurisdiction. However, when reviewing Department actions, the Board is conducting a *de novo* review—not an appellate review—and, thus, we accord less deference to determinations made by the Department than an appellate court extends to determinations made by lower tribunals.

The Board itself has erroneously cited the abuse of discretion standard in *Sussex I* in several decisions—even after *Sussex II* was decided. Those decisions should not be read as resurrecting the standard set forth in *Sussex I.*

The Department is wrong when it argues that 25 Pa. Code §§ 88.44 and 88.115(d) require that operators obtain written permission to remove any equipment involved in mining a site—even equipment that is not necessary for restoration of the site (other equipment). Section 88.44 does not even address equipment; it simply contains the requirements for operation maps and plans. Section 88.115(d), meanwhile, only requires permission to remove *backfilling* equipment; it does not apply to other equipment.[2]

Nevertheless, Appellant has failed to show that it is entitled to judgment as a matter of law on special condition 1 for two reasons. First, Appellant has failed to show that the Department would have abused its discretion by requiring that Appellant had its permission before removing other equipment from the site. Second, even assuming that Appellant did show that the Department would have abused its discretion by requiring its permission for Appellant to remove other equipment, it is unclear which of the equipment listed in special condition number 1 would be used for reclamation and which would not.

I. APPELLANT HAS FAILED TO SHOW THAT THE DEPARTMENT ERRED BY REQUIRING THAT APPELLANT HAVE ITS PERMISSION BEFORE REMOVING OTHER EQUIPMENT FROM THE SITE

Appellant assumes that, because neither section 88.44 nor section 88.115(d) require that operators obtain the Department's permission before removing other equipment, the Department necessarily abused its discretion by imposing that requirement in special condition 1. However, this assumption is incorrect. Even assuming that none of the Department's anthracite mining

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[2] Section 88.115(d) provides:

> *Backfilling* equipment needed to complete the restoration may not be removed from the operation until backfilling and leveling has been completed and approved in writing by the Department....

regulations requires that operators obtain the Department's permission before removing other equipment, it would not necessarily follow that the Department abused its discretion by imposing that requirement in Appellant's permit.

The Department can impose requirements in a permit even if those requirements do not appear in the Department's regulations.[3] As the United States Supreme Court explained in *Security and Exchange Commission v. Chenery Corp, et al.*, 332 U.S. 194 (1946):

> Not every principle essential to the effective administration of a statute can or should be case immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations....
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have sufficient experience with a particularly problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding in a general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

332 U.S. at 202-203. This principle of administrative law applies with equal force in the Commonwealth. *See Department of Environmental Resources v. Butler County Mushroom*

(Emphasis added.)

[3] An agency must go through the rulemaking process to give a standard of conduct *the force of law*—binding upon both the agency and the regulated community—as opposed to being prepared to support the application of the standard in every instance it is applied. *See, e.g., Pennsylvania Human Relations Commission v. Norristown Area School*, 374 A.2d 671, 679 (1977); *Department of Environmental Resources v. Rushton Mining Company,* 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991). However, Appellant does not argue that the Department treats the provisions in special condition 1 as having the force of law or that they are part of a comprehensive regulatory system such that the provisions might constitute invalid regulations under the "binding norm" test, akin to the standard mining permit conditions the Commonwealth Court held to be invalid regulations in *Rushton Mining,* 591 A.2d at 1173.

Farm, 454 A.2d 1, 3 n.2, 8 (Pa. 1982); *Inmates of Cumberland County Prison v. Department of Justice of Pennsylvania,* 462 A.2d 937, 940-41 (Pa. Cmwlth. 1983).

The Department's authority to attach terms and conditions to a permit is ordinarily discretionary. *See Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); and *Pequea Township v. Herr,* 716 A.2d 678, 686 (Pa. Cmwlth. 1998). Therefore, whether the Department erred by including a particular requirement in a permit turns on whether the Department abused its discretion by imposing the requirement under the particular circumstances involved in that permit—not simply whether the requirement in the permit goes beyond what is required in the regulations.

Appellant never addressed the question of whether the Department abused its discretion by including special condition 1 under the particular circumstances involved in Appellant's anthracite mining permit. Instead, it simply argued that the Department abused its discretion because the requirement in the permit was more stringent that the requirements in § 88.144(d).

II. EVEN ASSUMING THAT APPELLANT DID SHOW THAT THE DEPARTMENT ABUSED ITS DISCRETION BY REQUIRING ITS PERMISSION FOR APPELLANT TO REMOVE OTHER EQUIPMENT, IT IS UNCLEAR WHICH OF THE EQUIPMENT LISTED IN SPECIAL CONDITION NUMBER 1 WOULD BE USED FOR RECLAMATION

"[W]here the board finds ... that the department has abused its discretion then the board may properly substitute its discretion for that of the department and order the relief requested. This includes the power to modify the Department's action and to direct the department in what is the proper action to be taken." *Pequea Township v. Herr,* 716 A.2d 678, 686 (Pa. Cmwlth. 1998). However, even assuming that Appellant showed that the Department abused its discretion by requiring the Department's permission for Appellant to remove other equipment, we would not substitute our discretion for that of the Department here because issues of fact

remain concerning which of the Appellant's equipment would be used in reclamation and which would not.

Special condition 1 of the permit provides, in pertinent part:

> The minimum equipment to be utilized for mining and reclamation on this [surface mining permit] shall consist of the following:
>
> Excavators: 2 – 4600 Manitowac dragline...
> 1 – EX 1100 Hitachi...
> 1-245 Caterpillar...
>
> Loaders: 1 – 988B Caterpillar Loader...
> 1 – 72-81 Terex...
> 1 – 980 B Caterpillar Loader...
>
> Trucks: 2 - 773B Caterpillar...
> 3 – D400D Caterpillar...
>
> Dozer: 1 – D8N Caterpillar
>
> No equipment listed above may be removed from the site until backfilling, grading and leveling of the site has been completed and approved in writing by the Department.... However, the operator may request to remove or replace equipment if he can demonstrate to the Department's satisfaction that each piece of equipment to be removed or replaced is not required to complete the mining or reclamation of all affected areas....

It is unclear from the permit which of the equipment listed in special condition number 1 will be used for reclamation. Although Appellant's motion for summary judgment asserts that "[n]ot all of the equipment listed in the mining plan of the permit is necessary to reclaim the Good Spring South operation," (Motion, paragraph 39, p. 10), the Appellant's motion does not make clear precisely which equipment will be used for reclamation.

In support of the averment in its motion that "[n]ot all of the equipment listed in the mining plan of the permit is necessary to reclaim the Good Spring South operation," Appellant

cites the deposition of David Williams, an engineering and surveying consultant Appellant retained. Williams testified:

> I don't believe that you need two drag lines on the site to accomplish what the backfilling requirements are. I don't believe you need all of the trucks that are listed there. There are five of them listed. And, certainly, you may only need one loader as far as the reclamation goes. And a 245 Caterpillar wouldn't put too much of a dent in the reclamation obligation on that site either.

(Motion, Ex. 7, p. 12.)

The problem with Williams' testimony is that it is unclear precisely how it relates to the equipment listed in special condition number 1. It is clear from his testimony that Williams thinks that the 245 Caterpillar excavator and one of the 4600 Manitowac draglines are not necessary for reclamation. But Williams' testimony concerning the trucks and loaders is more problematic. For instance, although Williams testifies that not all five trucks are needed, he does not say whether Appellant can do without one or more of the 773 B Caterpillars, or one or more of the D400D Caterpillars, or whether the Appellant can do without one or more of either one. Similarly, although Williams testifies that Appellant may only need one loader, he does not say whether the Appellant could do without the 988B Caterpillar Loader, or the 72-81 Terex loader, or whether the Appellant could do without either one. Consequently, material issues of fact remain concerning precisely which of the trucks and which of the loaders are necessary for backfilling.

Since Appellant failed to show that the special condition 1 constituted an abuse of the Department's discretion by requiring permission for appellant to remove other equipment, and factual issues remain concerning whether some of the equipment listed in the condition will be used for reclamation, we shall deny Appellant's motion for partial summary judgment and proceed to a hearing on the merits. At hearing, one of the crucial issues concerning condition 1

will be precisely which equipment listed in the condition is necessary for reclamation. The Department need not establish that special condition 1 is reasonable with regard to equipment necessary for reclamation. (As noted above, this requirement appears at section 88.115(d) of the Department's regulations; therefore, it has the force of law.) For other equipment, however, the Department must prove that the requirements are unreasonable to the extent that they go beyond what is in the regulations.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-218-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of July, 2000, it is ordered that Appellant's motion for partial summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 21, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VALLEY CREEK COALITION	:	
	:	
v.	:	**EHB Docket No. 2000-068-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and VANGUARD GROUP	:	**Issued: July 26, 2000**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to compel answers to interrogatories because they are relevant to the subject matter of the objections raised in a notice of appeal which is not clearly without merit and involve matters which were considered by the Department during the permit review process.

OPINION

Before the Board is the motion of the Valley Creek Coalition (Appellant) to compel the Vanguard Group (Permittee) to answer interrogatories concerning the Appellant's third party appeal of an NPDES permit issued by the Department. The permit was issued for the Permittee's expansion of its corporate campus in Tredyffrin Township, Chester County and authorizes the discharge of stormwater from its construction activities to the Little Valley Creek. The Appellant objected to the permit because, among other things, it alleges that the Department failed to

properly consider and require management of post-construction discharges into the Valley Creek Watershed from permanently installed control facilities authorized as part of the permit.

During the course of discovery, the Appellant sent its first set of interrogatories to the Permittee on May 4, 2000. The Permittee objected, and declined to answer interrogatories 15 to 21 because it did not believe that these questions were relevant to the appeal inasmuch as they related to discharges which would occur after the Permittee's construction was complete and the term of the permit expired. During the month of June, counsel attempted to reach an agreement concerning the relevance of the subject matter of interrogatories. Failing to persuade the Permittee's counsel to his point of view, the Appellant has filed a motion to compel answers to the interrogatories on July 3, 2000. The Permittee filed its response on July 17, 2000. Both parties included extensive briefing in support of their respective positions.

The Appellant argues that it is entitled to inquire into the consideration of post-construction discharges in the permitting process because the issue was clearly raised in its notice of appeal and the matter was given some consideration by the Department and by the Permittee during the permit review process. The Permittee argues that its permit is explicitly limited to discharges which occur during construction, and therefore, as a matter of law, post-construction discharges are irrelevant to the question of whether the NPDES permit was properly issued by the Department. For the reasons that follow, we believe that the Permittee must answer the interrogatories propounded by the Appellant.

The Board's discovery procedure is, for the most part, governed by the Rules of Civil Procedure. 25 Pa. Code § 1021.111(a). Those rules provide that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." Pa. R.C.P. No. 4003.1(a). "Relevancy" for the purposes of discovery is to be broadly construed. *T.W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608; *Starr v. DEP*, 1996 EHB 313; *Harbison-Walker Refractories v. DER*, 1992 EHB 943. This is distinct from the

concept of relevancy for the purposes of hearing, which is a much narrower inquiry: For the purposes of discovery, it is not a ground for objection that the information sought would be inadmissible at hearing, so long as it is reasonably likely that the information will lead to admissible evidence. Pa. R.C.P. No. 4003.1(b); *City of Harrisburg v. DER*, 1992 EHB 1007; *City of Harrisburg v. DER*, 1992 EHB 170. The burden is on the party objecting to a discovery request to demonstrate its right to refuse to produce the information. *Estate of Charles Peters v. DER*, 1991 EHB 653.

With these principles in mind, we grant the Appellant's motion to compel. First, the subject of post-construction discharges was at least touched upon by both the Department and the Permittee during the permit review process. (*See e.g.*, Appellant's Motion to Compel Ex. 2 (Department's Answers to the Appellant's First Set of Interrogatories)) The Permittee concedes as much in it memorandum of law opposing the motion to compel. Since it was considered a relevant subject during the permit review process, it could certainly be relevant to whether the permit was properly issued by the Department.

Second, there is no dispute that the Department's consideration of post-construction discharges was raised as a basis of objection in the Appellant's notice of appeal. However, the Permittee argues that simply raising an issue in a notice of appeal does not make it a legitimate subject for appeal. Specifically, the Permittee contends that it should not have to answer these interrogatories because as a matter of law, neither the Permittee nor the Department is required to consider post-construction discharges.

This issue goes to the heart of the Appellant's appeal and is not clearly without merit. It may very well be that the argument that the Department is required to consider post-construction discharges when it issues an NPDES permit which calls for permanent control facilities is without legal support. We recently considered a series of motions for summary judgment which raised a similar contention. In *Valley Creek Coalition v. DEP*, 1999 EHB 935, we first held that

we had the authority to consider whether the Department abused its discretion in issuing a permit which provided for permanent facilities affecting storm water flow to a watershed even though on the face of the permit only construction activities were authorized. Second, although we denied summary judgment because of disputed issues of material fact, we found that there was some legal support for the proposition that the Department may be required to consider post-construction discharges pursuant to its duty to preserve the water resources of the Commonwealth under the Clean Streams Law.[1] Yet, for the purposes of this motion, we are not required to make this determination, and leave the question for another day. *Cf. T. W. Phillips Oil & Gas Co. v. DEP*, 1997 EHB 608 (although the Board was unable to determine the relevancy of certain data to the ultimate disposition of the appeal, in view of the broad definition of relevance for the purposes of discovery it denied a motion for protective order).[2]

In sum, we believe that the subject of post-construction discharges was properly raised as an objection in a notice of appeal and is not completely baseless; it is therefore a proper subject of inquiry for discovery purposes. The interrogatories are relevant to the subject-matter of those objections. *See Starr v. DEP*, 1996 EHB 313; *City of Harrisburg v. DER*, 1992 EHB 170 (matters raised in the notice of appeal are relevant subjects of inquiry for the purposes of discovery).

Accordingly, we enter:

---

[1] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001.

[2] Of course, the Permittee may test the legal adequacy of the Appellant's claim in dispositive motions.

COMMONWEALTH OF PENNSYVANIA
ENVIRONMENTAL HEARING BOARD

VALLEY CREEK COALITION	:	
	:	
v.	:	**EHB Docket No. 2000-068-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and VANGUARD GROUP	:	

ORDER

AND NOW, this 26th day of July, 2000, the motion to compel answers to interrogatory numbers 15-21 of the Valley Creek Coalition's First Set of Interrogatories to the Vanguard Group is hereby **GRANTED**. The Vanguard Group shall answer these interrogatories within 20 days of entry of this order.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 26, 2000

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EDWARD A. DELLINGER	:	
	:	
v.	:	**EHB Docket No. 2000-106-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 27, 2000

OPINION AND ORDER ON RULE TO SHOW CAUSE

By Michael L. Krancer, Administrative Law Judge

Synopsis:

An appeal is dismissed on a Rule to Show Cause why the Board should not dismiss for lack of jurisdiction as the appeal was not timely filed and there are no grounds for application of the concept of appeal *nunc pro tunc*. There is not good cause for failure to file the appeal within the 30 day mandatory period. There is no non-negligent failure to file the appeal on time, fraud, or breakdown in the Board's process. There is no legitimate reason that Appellant could not have filed the appeal within 30 days of the action he claims is appealable to the Board.

I. PROCEDURAL BACKGROUND

Edward A. Dellinger (Dellinger) initiated this matter on May 16, 2000, by filing a Notice of Appeal with the Board. The appeal purported to be from the action of the Hellam Township Sewage Enforcement Officer's (SEO's) denial of Dellinger's application for a permit to construct and operate an on-lot sewage system which denial

was issued on July 8, 1995 and then again on July 9, 1998. On May 30, 2000, the Board issued a Rule To Show Cause why the appeal should not be dismissed as untimely. Dellinger filed a Response on June 7, 2000.[1] The Department of Environmental Protection (DEP) filed a Response on June 16, 2000.[2]

II. FACTUAL BACKGROUND

On May 25, 1995, Dellinger submitted a permit application to Hellam Township for an on-lot sewage system. (NOA).[3] William Deal (Deal), the Hellam Township SEO, reviewed Dellinger's application. Deal tested Dellinger's soil twice in June 1995 to determine if the percolation rate (perc rate) was suitable for an on-lot sewage disposal

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[1] Dellinger filed his appeal *pro se*. He has continued to represent himself throughout the Rule to Show Cause process. By letter dated July 6, 2000 to Mr. Dellinger, the Board admonished Mr. Dellinger that the Board is a legal forum which follows legal procedure and precedent, that the Board is governed by legal doctrines and proscriptions which can be difficult for persons not trained in the law, and that competent and experienced legal counsel is highly recommended.

[2] DEP's response to the Board's May 30, 2000 Rule to Show Cause asserted that the Board had no subject matter jurisdiction not only because the appeal was not filed within the required 30 days but also for another reason, i.e., because the action Dellinger was attempting to appeal was that of a local township officer and, thus, no DEP action was involved. The Board allowed Dellinger to respond to that additional theory by issuance of a second Rule to Show Cause dated June 20, 2000. While DEP's argument on that point may be well taken, *Klay v. DER*, EHB 163, 168 (observing that the Legislature has specifically placed jurisdiction over appeals from SEO permit issuance decisions with the local agency, not the Board), that matter is not before us as this is a disposition of the May 30, 2000 Rule to Show Cause regarding timeliness and DEP has not filed a Motion to Dismiss on that ground.

[3] The factual background is taken from Dellinger's Notice of Appeal. Dellinger's Notice of Appeal is cited as "NOA". Exhibits to the Notice of Appeal are cited as "NOA Ex.-__." Dellinger's Response to the Board's May 30th Rule to Show Cause is cited as "D-R." DEP's Response to the Board's May 30th Rule to Show Cause is cited as "DEP-R."

system.[4] (NOA). The test revealed that Dellinger's lot was unsuitable for an on-lot sewage disposal system because it had a perc rate in excess of 90 min/inch. (NOA). On July 10, 1995, Dellinger received Deal's July 8, 1995 letter denying his on-lot permit application. (NOA, Ex-BB).

For the next three years, Dellinger actively investigated his application denial; he sought a second opinion on Deal's soil test, researched the law on on-lot sewage facilities systems, and in 1998 he attempted to appeal Deal's July 8, 1995 permit application denial letter to the Hellam Township Board of Supervisors. (NOA). According to Dellinger's papers, in 1998 when he attempted to appeal Deal's July 8, 1995 letter, Frank Countess, (Countess) Solicitor for Hellam Township, informed him and then Township Manager, Nancy Halliwell, that the July 9, 1995 permit denial letter was "unofficial" and therefore unappealable to the Township Board of Supervisors.[5] (NOA, D-R). Countess advised the Township Manager to officially deny Dellinger's permit application. The Township mailed the official denial on July 9, 1998. (NOA Ex.-Q, D-R).

Dellinger appealed the July, 1998 "official" denial to the Hellam Township Board of Supervisors. (NOA unlabeled exhibit) On August 20, 1998, he presented his case to the Hellam Township Board of Supervisors. (NOA, D-R). By "Notice of Decision" dated

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[4] *See generally* 25 Pa. Code §§ 73.15, 73.16 (explaining percolation rate).

[5] The circumstances surrounding Dellinger's interaction with Solicitor Countess are unclear from Dellinger's Notice of Appeal and filings in response to both Rules to Show Cause. Nonetheless, viewing the facts asserted in the light most favorable to Dellinger we take it that the July 1995 denial of the Township Sewage Enforcement Officer was in some way or form "unofficial" thus making it not in a format which was then appealable to the Township's Board of Supervisors. Therefore, the Township, at Mr. Dellinger's behest, issued an "official" denial in July of 1998 which was in a form that was appealable to the Township Board of Supervisors.

September 4, 1998, the Hellam Township Board of Supervisors, through Countess, notified Dellinger that the Board had denied his appeal and upheld the decision of SEO Deal. (NOA Ex.-RR, D-R). The Notice of Decision outlined 12 itemized "findings of fact" in support of its decision. (NOA Ex.-RR, D-R). Additionally, the Notice of Decision concluded by advising Mr. Dellinger that:

> You are further advised that you may have the right to file and appeal from the above decision to the York County Court of Common Pleas within thirty (30) days from the date of mailing of this Notice of Decision, however, you should consult your own attorney in order to make certain of your right to file this appeal and the procedure in order to accomplish such an appeal.

(NOA Ex.-RR, D-R).

However, rather than appealing to the York County Court of Common Pleas, Dellinger filed the instant Notice of Appeal with the Board on May 16, 2000.

III. DISCUSSION

A. The Parties' Arguments

Dellinger's Response to the Board's first Rule argues that "unique and compelling factual circumstances establish . . . a non-negligent failure on the part of the appellant to appeal within a timely manner" and therefore he "seeks allowance of his appeal *Nunc Pro Tunc*." (D-R). The "unique and compelling factual circumstances" alleged by Dellinger are: (1) Deal's July 1995 denial letter failed to contain a paragraph advising Dellinger of his right to appeal the permit application denial to the Hellam Township Board of Supervisors; (2) Dellinger was not aware until July 9, 1998 that he could appeal Deal's decision; (3) Deal failed to submit to the Township or DEP the cover sheet to his July 1995 denial letter and soil test results he performed in June 1995; (4) the Township did

not officially deny his permit until July 1998; and (5) "Dellinger believes he could not obtain relief in an environmental matter, via any other government agency or party, [sic] than by the . . . Environmental Hearing Board." (D-R).

DEP's Response asserts that Dellinger failed to establish any good cause why the Board should grant an appeal *nunc pro tunc*. (DEP-R). DEP asserts that, "Appellant admits that he received what he considers to be 'proper' notice on September 4, 1998 . . .[and that] Appellant proffered no explanation as to why he waited over a year and a half to appeal to this Board even after he received what he considered 'proper' notice." (DEP-R).

B. Jurisdiction

The Board's jurisdiction can only attach to timely filed appeals or appeals *nunc pro tunc*. *See Pennsylvania Game Commission v. DER*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986) *aff'd*, 555 A.2d 812 (Pa. 1989) ("[T]he failure to file specific grounds for appeal within the thirty-day period is a defect going to jurisdiction, and the time period cannot be extended *nunc pro tunc* in the absence of fraud or breakdown in the court's operation." (citations omitted); *Rostosky v. Department of Environmental Resources,* 364 A.2d 761, 763 (Pa. Cmwlth. 1976) ("The untimeliness of the filing deprives the Board of jurisdiction.").

It is clear that the appeal was untimely and Dellinger has not met the standard for application of the doctrine of appeal *nunc pro tunc*. As the appeal is not timely, it must be dismissed for lack of jurisdiction.

Board Rule 1021.52 governs timeliness of appeals, it provides:

§ 1021.52. Timeliness of appeal

> (a) Except as specifically provided in § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board in a timely manner, as follows, unless a different time is provided by statute:
>
> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> (i) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin*;
>
> (ii) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin.*

25 Pa. Code §1021.52. Three dates are important for purposes of determining whether Dellinger filed a timely appeal: (1) July 8, 1995, the "unofficial" permit denial letter, (2) July 9, 1998, the "official" permit denial letter, and (3) September 4, 1998, the Hellam Township Board of Supervisors' decision to uphold SEO Deal's denial of Dellinger's permit application for an on-lot sewage system. The Board docketed Dellinger's appeal on May 16, 2000, which is well beyond the 30-day appeal period prescribed by Board Rule 1021.52(a)(1) for any of the dates of decisions just mentioned. May 16, 2000 is *4 years and 10 months* after the July, 1995 unofficial notice; *1 year and 10 months* after the "official" notice of July, 1998; and *1 year and 8 months* after the Board of Supervisors' decision upholding SEO Deal's denial. Accordingly, we lack jurisdiction over this appeal unless Dellinger meets the Board's standards for an appeal *nunc pro tunc* set out

in 25 Pa. Code § 1021.53. *See Pennsylvania Game Commission,* 509 A.2d at 886; *Rostosky*, 364 A.2d at 763.

Board Rule 1021.53(f) governs appeals *nunc pro tunc* to the Board, it provides: "The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." 25 Pa. Code § 1021.53(f). In *Bass v. Commonwealth*, 401 A.2d 1133, (Pa. 1979), the Pennsylvania Supreme Court explained that an appeal *nunc pro tunc* is appropriate only in "cases where 'there is fraud or some breakdown in the court's operation'"[6] or when there is "a non-negligent failure to file a timely appeal." *Id.* at 1135.

Bass, exemplifies a case where the court granted an appeal *nunc pro tunc* based on appellant's non-negligent failure to file a timely appeal. In *Bass*, appellant's counsel prepared the appeal papers six days in advance of the appeal deadline. However, the papers were not filed until four days after the deadline expired because the secretary responsible for this task became suddenly ill and no other employee was aware that the appeal papers needed to be filed. *Compare id.* at 1134-35, *with Borough of Bellefonte v. DER*, 570 A.2d 129, 130 (Pa. Cmwlth. 1990) ("It is clear that Petitioners have not presented a unique and compelling factual circumstance for which an appeal *nunc pro tunc* may be granted. Although the secretary mailed the appeal papers to all other parties, she just forgot to mail them to the EHB. Petitioners' argument is not that the secretary

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[6] Quoting *West Penn Power Co. v. Goddard*, 333 A.2d 909, 912 (Pa. 1975).

was unable to mail the notice, but that emotional distress is an excuse for negligent performance of her duties. The EHB did not err in rejecting this argument.").

JEK Construction Company and *Washington Township* are two instances where the Board granted an appeal *nunc pro tunc* based on a breakdown in the Board's operations. In *JEK Construction Company*, the Board failed to docket JEK Construction Company's (JEK) letter as a skeleton appeal even though given the letter's contents it was the Board's normal practice to have done so.[7] *JEK Construction Company v. DER*, 1987 EHB 643, 646. JEK ultimately filed an untimely appeal with the Board. *Id.* at 643-44. The Board granted JEK's Motion to Allow Appeal *Nunc Pro Tunc* holding that a breakdown in its operations occurred with its failure to docket the JEK's letter as a skeleton appeal. *Id.* at 645.

In *Washington Township*, the Board prematurely discharged a Rule to Show Cause issued to the Appellants that lead the Appellants to believe that their appeal was perfected even though the appeal remained unperfected. *Washington Township v. DER*, 1995 EHB 403, 404-406. DEP motioned to dismiss Washington Township's appeal as unperfected. *Id.* at 405. The Board granted Washington Township leave to file an appeal *nunc pro tunc* holding that the Board's premature discharge of the Rule to Show Cause resulted in the breakdown of the Board's process. *Id.* at 407.

Dellinger has not established any cause let alone good cause for the Board to grant leave to file an appeal *nunc pro tunc*. 25 Pa. Code § 1021.53(f). Even if, as Dellinger asserts, there was a "breakdown" involved in the July 8, 1995 "unofficial" denial, the

---

[7] The Board's Rules no longer provided for skeleton appeals.

July, 1998 denial was "official". Indeed, Dellinger appealed the July, 1998 denial to the Township Board of Supervisors. That appeal was, in turn, denied and Dellinger was notified in that denial that he could appeal to the Common Pleas Court within 30 days. Moreover, Dellinger has not asserted, nor could he, that there has been a breakdown of the Board's operations. He does not assert that the July 9, 1998 notice or the September 4, 1998 Notice of Decision led to the untimely filing of his appeal with the Board. In fact, Dellinger asserts no reason whatsoever that he did not file an appeal with this Board *in 1998* within 30 days of either the issuance of the "official" notice of the denial of his permit application on July 9, 1998 or the issuance of the Notice of Decision by the Board of Supervisors on September 4, 1998. Thus, application of the concept appeal *nunc pro tunc* has no place in this case.[8]

Accordingly, we enter the following order:

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[8] Obviously, the fact that Dellinger "believes he could not obtain relief in an environmental matter, via any other government agency or party, [sic] than by the ... Environmental Hearing Board" is not a factor which allows application of the concept of appeal *nunc pro tunc*.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD A. DELLINGER	:	
	:	
v.	:	**EHB Docket No. 2000-106-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of July, 2000, the Notice of Appeal of Edward A. Dellinger is **dismissed** for lack of subject matter jurisdiction.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: July 27, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Alexandra C. Kauper, Esquire
Southcentral Region

Appellant:
Edward A. Dellinger
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York, PA 17406

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, and DEFENSE SUPPLY CENTER PHILADELPHIA	:	**EHB Docket No. 2000-004-MG**
v.	:	**Issued: July 28, 2000**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER ON APPELLANT'S SECOND MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to compel answers to interrogatories that may lead to admissible evidence with respect to the basis of the Department's Order directing the appellant to conduct specified remediation activities. The Board denies the motion to compel further answers to other interrogatories where the Department has produced extensive information and the appellant claims only that there must be more information available.

OPINION

Background

This appeal is from the December 10, 1999 Order of the Department of Environmental Protection (Order) directing the Appellant[1] to undertake specified steps to remediate conditions

[1] The Appellant appears to be three separate entities: the Defense Logistics Agency, Department of the Army, and Defense Supply Center of Philadelphia. The Notice of Appeal and subsequent filings refer to them as a singular appellant.

arising from petroleum contamination in a portion of South Philadelphia, including odor arising from petroleum vapors. The Order was issued primarily under the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001, and the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 - 6021.2104. The Appellant and its predecessor, Defense Personnel Support Center (DSCP), and Sun Company, Inc. (Sun) have been involved with the Department for some time in working toward the remediation of this contamination plume pursuant to a Consent Order and Agreement dated October 16, 1998. Portions of this plume underlie or adjoin facilities owned and operated by DSCP and Sun. Prior to the issuance of the Order the Department attempted to require DSCP to perform some of the work required by the Order by a regulatory decision under the Consent Order and Agreement. However, the Board sustained DSCP's appeal of this decision in an adjudication based on a stipulated record. The Board held that the tasks required under this decision were not required of DSCP by the remediation agreement in the absence of evidence that this was necessary to prevent an unacceptable health or environmental risk as required by the Consent Order and Agreement. *Defense Personnel Support Center v. DEP*, 1998 EHB 512.

The Order directs the Appellant, among other things, to maintain and operate the petroleum non-aqueous phase liquids (NAPL) removal system currently in place on the Passyunk Homes property and the DSCP facility and to design, construct, maintain and operate any additional remedial systems necessary to remove as much of the petroleum NAPL from the affected areas as is practicable. It also requires the Appellant to assume responsibility for the operation of that portion of the sewer air collection and filtration system installed by Sun on the Packer Avenue Sewer in South Philadelphia in 1997.

The Appellant's motion seeks an order from the Board compelling answers to interrogatories propounded to the Department. For the reasons that follow we deny in part and grant in part this motion.

The Appellant's Discovery Requests

Interrogatory 19 requests the Department to identify all parties responsible for releases to the "affected area" described in the Order that were not made subject to the Department's Order and to produce all documents relied upon related to that statement. The Department objects on the ground that this interrogatory seeks to inquire into the Department's exercise of prosecutorial discretion.

We will require the Department to respond to this interrogatory even though ordinarily the decision to proceed against one party rather than another is strictly within the Department's discretion and is not subject to review by this Board. *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220. *See also, Penn Argyl Borough v. DEP*, 1999 EHB 701. However, this is only discovery, and the information sought may lead to the discovery of admissible evidence. In this case, the Department seeks to have Appellant alone undertake particular steps in the remediation. The reasonableness of such a requirement may be open to question under the circumstances of this case.

Interrogatory 23 and its subparts seek information as to the identity and conduct of outside parties who may have participated in the decision-making, preparation, drafting and/or issuance of the Order, including, but not limited to, participation at discussions preliminary or otherwise. The Appellant appears to believe that this may have been done by representatives of Sun or by representatives of Sunoco, Inc. or ARCO, Inc. The Department objected to this

interrogatory and its subparts on the ground that these requests seek to inquire into the Department's exercise of prosecutorial discretion.

The Appellant responds that this discovery is necessary to demonstrate that the Order was an abuse of discretion because it was issued out of partiality, bias or ill will. The Appellant points to the Board's opinion in *Sussex, Inc. v. DER*, 1984 EHB 353, in which the Board quoted with approval a statement that an abuse of discretion may be shown by partiality, prejudice, bias, or ill will.[2] The Department's response refers to Board decisions that state that so long as the Department's action is in accordance with law, the Department's motives for taking the action are irrelevant. *See, e.g., American Autowash v. DEP*, 1997 EHB 568.

We grant Appellant's motion with respect to this interrogatory without reaching the substance of the contentions by the parties with respect to partiality, bias or ill will. The information sought may lead to the discovery of admissible evidence. Information as to who participated in the drafting of the Order may well lead to information as to the historical basis for issuance of the Order which may indicate whether the Department's issuance of the Order was proper. It is not ground for objection to discovery that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P., No. 4003.1(b).

In reaching this result, we do not reach the question of whether the issuance of an order influenced in part by partiality to other parties or prejudice, bias or ill will toward the Appellant would be improper conduct where the order is otherwise reasonable under the circumstances.

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[2] This opinion also expressed a formulation of a limited scope of review applicable to judicial review of administrative action. Such a limited scope of review is not applicable to appeal proceedings before the Board because of the Board's authority to conduct a *de novo* review based on the evidence presented to it. *See Pequa Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Sussex, Inc. (Sussex II) v. DER,* 1986 EHB 350.

We hold only that the Department's broad claim of prosecutorial privilege does not protect it from providing answers to Interrogatory 23.

Interrogatory 24 seeks information as to whether more than one order was discussed, drafted or prepared by the Department prior to the issuance of the Order and requests the production of any alternative draft orders and all documents which the Department relied upon to choose among any alternative draft orders. The Department objected to this interrogatory on the ground that this interrogatory seeks to inquire into the Department's exercise of its prosecutorial discretion.

We will require the Department to answer this interrogatory and its subparts. Information as to what employees of the Department considered in the drafting stage of the Order may be most relevant to determine the basis for the issuance of the Order. The availability of drafts of the order may be important in reconstructing the Department's thinking as the Department's employees developed their recommendations for issuance of the Order. We recognize that other privileges may apply as these circumstances are developed in discovery. We hold only that these documents are not protected from discovery from Interrogatory No. 24 by the Department's broad claim of a privilege based on prosecutorial discretion.

The Appellant claims that the Department provided insufficient responses to Interrogatories 8, 10, 28, 29, 30, 31 and 31a. The Department responded to many of these interrogatories without a specific answer and relied upon their production of documents in accordance with the provisions of Rule 4006(b) of the Pennsylvania Rules of Civil Procedure. That rule permits the response to interrogatories by the production of documents under the circumstances described in that rule, which appear to apply here. Pa. R.C.P. No. 4006(b).

The Department states that it has made its entire technical file on the NAPL plume, which forms the subject of the Department's Order, including confidential materials not part of the "Right To Know Act", public file, available to the Appellant in response to these interrogatories. This file consists of technical reports from Sun or its predecessor, Sunoco, and its consultants, from the Appellant and its consultants, as well as some documents from other sources. The Department says it also made available its entire technical file on groundwater contamination at the Point Breeze Processing Area of the Sunoco Philadelphia Refinery. This consists of material leading up to and produced pursuant to a 1993 Consent Order and Agreement with Sunoco. The Department also produced the Base Closure and Realignment files, consisting of reports submitted by DSCP and its consultants, plus the Department and EPA review materials. Finally, the Department says it also produced its internal notes and correspondence concerning the NAPL plume, withholding only that material which is maintained only in its attorney's file.

The Appellant's motion does not give any indication as to why it thinks that this production of documents was not responsive to their interrogatories and requests. It is therefore difficult for the Board to determine whether or not this production is sufficient to respond to the discovery sought by the Appellant.

Interrogatory 8 sought information relating to the basis of Paragraph O of the Department's Order. The Department finding of fact stated:

> The NAPL plume is located on the DSCP facility and properties contiguous to the DSCP facility. The Affected Area is a "site" as that term is defined by 35 P.S. § 6026.101 (Definitions). The Affected Area includes properties, which are at risk for exposure to petroleum vapors as a consequence of vapor transport from the NAPL through the Packer Avenue Sewer and its tributary sewer system, as well as properties underlain by NAPL and by dissolved phase petroleum derived from the NAPL.

The Appellant's motion does not state why they believe that the documents produced by the Department are an insufficient response to this interrogatory. Without some indication as to what documents may not have been produced, the Board cannot determine that the Department's response is inadequate.

The Department does claim in its response to this interrogatory that the facts set forth in this paragraph of the Order were admitted in part by the Appellant in the prior Consent Order and Agreement. The Appellant disputes this contention. We think that it is the Department's duty to produce documents in response to this interrogatory and requests whether or not it believes the Appellant may have admitted the truth of this paragraph of the Order. Whether the Appellant has made such a binding admission must be reserved for the hearing on the merits and the final adjudication. Accordingly, if any documentation has been withheld simply because the Department believes the Appellant has already admitted the facts in this paragraph of the Order, the documents should be produced.

Interrogatory 10 seeks information as to the basis for paragraph T of the Department's Order relating to the prospective closure of the Appellant's facility. The Department answered the interrogatory by stating that this statement in the order was primarily based upon representations made by the Appellant to the Department. In addition, the Department responds that it has produced the entire Department file, including the entire BRAC file addressing the closure of the facility.

The Department will not be required to give a further response to this discovery request. The Appellant provides no information as to what other information the Department may have failed to disclose. In addition, the facts of the status of the closure of the Appellant's facility is peculiarly within the knowledge of the Appellant.

Interrogatories 28-31 request the factual basis for paragraphs 1-4 of the Order which direct the Appellant to accomplish the following:

1. DLA shall immediately maintain and operation the NAPL removal system currently in place on the Passyunk Homes property and the DSCP facility, and shall design, construct, maintain and operate any additional remedial systems necessary to remove as much of the petroleum NAPL contamination from the Affected Area as is practicable.

2. DLA shall immediately take all steps necessary to demonstrate that the Affected Area is brought into compliance with the substantive, procedural and notice requirements and shall meet one or a combination of the remedial standards set forth in the Land Recycling Act and the regulations found in 25 Pa. Code Chapter 250.

3. DLA shall immediately undertake all measures necessary to ensure that the health and safety of workers, residents and visitors within the Affected Area is protected from any unacceptable risks associated with or contributed to by the petroleum contamination described in Paragraphs G through O and BB through DD.

4. DLA shall immediately assume responsibility for the operation of that portion of the sewer air collection and filtration system described in Paragraph L, which collects and treats petroleum vapors that enter the sewer system from within the Affected Area.

The Department's answer to these interrogatories refers to the documents produced by it and also directs attention to previous answers to interrogatories. In response to the motion to compel further answers, the Department states that that these provisions are grounded on the facts and law set forth in the Order. In addition, the Department says that these steps represent what DEP believes to be necessary to address the situation documented in the Department's technical file. The Appellant complains that it cannot locate a response in any previous interrogatory answer and that responsive documents were not provided. The Appellants do not describe any document types that might exist that would answer these interrogatories.

We will not require further answer to these interrogatories at this time unless the basis for the assignment of these tasks to the Appellant is contained in descriptive, non-privileged documents in the Department's possession or control. It is obvious that the decision to assign

these tasks to the Appellant is a judgment made by Department personnel that may or may not have been documented in any way other than privileged communications with the Department's counsel. As for answers to previous interrogatories, the answers to interrogatories 1-6 provide significant information as to the Appellant's operations and releases, the location of the plume of contamination as it is relevant to odor abatement, the level of malodors and the history of odor abatement performed by Sun in the relevant area to date. In the event the basis for the decision to assign the required tasks to the Appellant is recorded in any non-privileged documentation, the Department will be directed to produce those documents.

The Appellant also claims that the Department's answer to interrogatory 31a is insufficient. Interrogatory 31a asks:

> Whether Appellee analyzed the health risks, if any, of odors/vapors that enters the sewer system within the Affected Area and produces any related documents.

The Department's response referred to the production of documents and directed attention to previous answers to interrogatories. It also disclosed the existence of relevant calculations made by the Department's consultant, which the Department states was in the public file, which was produced for the Appellant's inspection. The answers to previous interrogatories provide information as to odor complaints, related instrument readings, and the location of the odor complaints. The Department states that this evidence of malodors is evidence of a violation of law since infiltration of petroleum odors into a water of the Commonwealth is a violation of the Pennsylvania Clean Streams Law.

We will not require further answer to this interrogatory. The Appellant is well aware that a previous risk assessment study developed by a consultant to the Appellant and Sun and referred to in the Board's previous adjudication, made negative conclusions with respect to the existence

of a health risk. We think that under these circumstances the Appellant has been given or has all the information in response to this interrogatory to which it is entitled.

Interrogatory 33 seeks information as to amounts paid by the Appellant's predecessor pursuant to the Defense and Commonwealth Memorandum of Agreement and provide documentation related to the types and amounts of such reimbursement and/or funding. The relevancy of this information appears to flow from the requirement of the Order that the Appellant reimburse the Department for all expenses incurred in overseeing compliance with the Order. In any event, the Department's response to the motion to compel is that it thinks it has produced documentary material in response to this interrogatory, but in any event the Appellant should have records of any payments it has made.

We will require the Department to provide a complete answer to this interrogatory. If the amount of past payments is in dispute, both parties should disclose whatever information they may have as to the amount of payments made or received.

The Appellant finally complains that the verification of David Burke is an inadequate verification of the answers to interrogatories. The Department responds that he is the person in the Department most qualified to verify the answers. The fact that others may also have provided information contained in the answers in the Department does not make Mr. Burke's verification inadequate.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, and DEFENSE SUPPLY CENTER PHILADELPHIA	:	**EHB Docket No. 2000-004-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of July, 2000, in consideration of the Appellant's Second Motion to Compel Answers to Interrogatories and Requests for Production of Documents, IT IS HEREBY ORDERED as follows:

1. The Appellant's motion with respect to the information sought by Interrogatory 19 is **GRANTED**.

2. The Appellant's motion with respect to the information sought by Interrogatory 23 and its subparts is **GRANTED**.

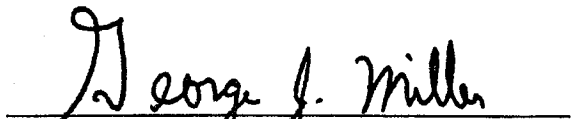
3. The Appellant's motion with respect to the information sought by Interrogatory 24 is **GRANTED**.

4. The Appellant's motion with respect to the information sought by Interrogatories 8, 10, 28, 29, 30, 31 and 31a is **DENIED**, except that the Department shall produce (1) any documents withheld in answer to these interrogatories on the sole basis of the Department's contention that the Appellant has admitted the allegations of the cited paragraphs of the Department's Order, and (2) any non-privileged documents that may describe the reasons for the Department's assignment of the tasks specified in the Order to the Appellant.

5. The Appellant's motion with respect to payments made by the Appellant or its predecessor under the Defense and Commonwealth Memorandum Agreement as sought by Interrogatory 33 is **GRANTED**.

6. The Appellant's motion with respect to the claimed inadequacy of the Department's verification of the answers to interrogatories is **DENIED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 28, 2000

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Attention Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAWN M. ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO, III	:	
v.	:	**EHB Docket No. 99-185-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	**Issued: July 31, 2000**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand Administrative Law Judge

Synopsis:

The Board denies two dispositive motions filed in an appeal from the approval of a nutrient management plan to develop and operate a hog farm. Third-party appellants have standing where they credibly aver that the permittees' conduct will potentially cause illness from misapplication of manure or incorrect nitrogen concentration estimates, create malodor and cause groundwater contamination and runoff onto property frequented by the appellants.

BACKGROUND

On June 30, 1999, the State Conservation Commission (Commission) approved a Nutrient Management Plan submitted by Ting-Kwang Chiou and Chiou Hog Farm, LLC (collectively, Chiou) for a proposed hog farm to be built and operated on approximately 137

acres located in Clearville, Monroe Township, Bedford County.[1] The proposed facility qualifies as a concentrated animal operation under the provisions of the Nutrient Management Act[2] (Act) which requires the development and approval of a nutrient management plan. The Commission is the administrative agency with the duty and authority to administer and enforce the Act. The Commission has entered into a delegation agreement with the Bedford County Conservation District to administer the nutrient management program. The Act confers jurisdiction on the Board as follows:

> "Any person aggrieved by an order or other administrative action of the Commission issued pursuant to this act shall have the right within 30 days from actual or constructive notice of the action, to appeal the action to the Environmental Hearing Board."

3 P.S. §1715.

Notice of the Commission's approval of the Nutrient Management Plan was published in the Pennsylvania Bulletin on August 7, 1999. 29 Pa. Bull. 4327 (1999). On September 7, 1999, Dawn Ziviello, Angela J. Ziviello and Archimede Ziviello, III (the Ziviellos or Appellants) filed an appeal of the Commission's approval of the Nutrient Management Plan with the Environmental Hearing Board.[3] The six objections raised by the Ziviellos to the Commission's approval can be summarized as follows:

1. The Commission's action was unlawful in that it failed to comply with the Administrative Agency Law[4];

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[1] The farmstead is commonly known as Bussard Farm.

[2] Act of May 20, 1993, P.L. 12, 3 P.S. §§ 1701-1718.

[3] This is actually the second nutrient management plan submitted by the Permittees, approved by the Commission, and appealed by the Appellants. The original nutrient management plan was withdrawn by the Permittees and the appeal was dismissed by the Board as moot. *See Ziviello v. Commonwealth of Pennsylvania*, 1999 EHB 889.

[4] Act of April 28, 1978, P.L. 202, *as amended*, 2 Pa. C.S. §§ 501-508 relate to the practice and procedure of Commonwealth agencies.

2. The Commission's action was unlawful in that it failed to comply with the Pennsylvania Public Records Law[5] (commonly referred to as the Right to Know Act);

3. The Commission's action was unlawful in that it failed to comply with the Sunshine Act[6];

4. The Commission's action was unlawful in that it failed to satisfy the requirements of the Nutrient Management Act;

5. The Commission's action was unlawful in that it failed to comply with the requirements of Section 361 of the Nutrient Management regulations, 25 Pa. Code § 83.361(c)[7]; and

6. The Commission's action was unlawful in that it failed to comply with the requirements of Section 292 of the Nutrient Management regulations, 25 Pa. Code § 83.292.

On May 5, 2000, the Commission filed a motion for summary judgment and supporting memorandum of law. The Commission avers that the appeal should be dismissed because the Ziviellos lack standing to maintain it. By letter dated May 24, 2000, the Permittees indicated that they concur in the motion for summary judgment. Also on May 5, 2000, the Permittees filed a motion to dismiss for lack of standing and supporting memorandum of law. Since the motion to dismiss was filed after the close of discovery and it was accompanied by depositions, answers to interrogatories and an expert report, the Board will treat the motion as a motion for summary judgment in accordance with Rule 1035.1 of the Pennsylvania Rules of Civil Procedure. By letter dated June 2, 2000, the Commission advised the Board that it concurs with and joins in the Permittees' motion. On June 6, 2000, the Appellants filed a response to the Commission's

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[5] Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §§ 66.1-66.4.

[6] Sub-paragraph 3.3 of the Notice of Appeal apparently cites to the version of the Sunshine Act that was repealed. The correct citation is Act of October 15, 1998, P.L. 729, 65 P.S. §§ 701-716.

[7] Sub-paragraphs 3.5 and 3.6 of the Notice of Appeal mis-cite the Nutrient Management Regulations as appearing in Title 52 of the Pennsylvania Code. Those regulations appear in Title

motion, a response to the Permittees' motion, and a memorandum of law in support of both responses.[8]

DISCUSSION

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to existence of material fact must be resolved against the moving party. *Washington v. Baxter*, 719 A.2d 733, 737 (Pa. 1998).

The motions before the Board allege that the appeal should be dismissed on the ground that the Appellants lack standing. In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Florence Township v. DEP*, 1996 EHB 282. Accordingly, where standing is not conferred by statute, a private party has standing to maintain an action so long as he has a direct, immediate, and substantial interest in an appeal. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *See also Sprague v. Casey*, 550 A.2d 184 (Pa. 1984)(generally, in order to have standing to contest a government action, one must have a substantial, direct, and immediate interest in the controversy that is distinguishable from the interest shared by other citizens). A party has a "substantial" interest within the meaning of the

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25.

[8] The Appellants' memorandum states that "[d]ue to the substantially similar motions and commonality of issues raised by the Commission and the Permittee, this memorandum of law is filed in support of both of the Ziviellos' [responses]." (Appellants' Memorandum at 1) Neither the Commission nor the Permittees filed a reply to the Appellants' response to the

William Penn standing test so long as he has an interest which surpasses the common interest of all citizens in seeking compliance with the law. A party has a "direct" interest so long as the party was harmed by the challenged action or order caused the harm. A party has an "immediate" interest so long as there is a causal connection between the action or order complained of and the injury suffered by the party asserting standing. *Empire Coal Mining & Development, Inc. v. DER*, 623 A.2d 897, 899 (Pa. Cmwlth. 1993), *appeal denied* 629 A.2d 1384 (Pa. 1993).

Both the Commission and the Permittees argue that the appeal should be dismissed for lack of standing because the Appellants did not plead any facts in their Notice of Appeal that alleged substantial, direct, and immediate interests. (Commission's Motion, ¶ 16; Permittees' Motion, ¶ 7) This argument lacks merit. There is no requirement in the Board's rules requiring an appellant to aver facts sufficient to show that it has standing in its notice of appeal. *Valley Creek Coalition v. DEP*, 1999 EHB 935, 941. A notice of appeal need only contain the appellant's objections to the actions of the Department. 25 Pa. Code § 1021.51(e); *City of Scranton v. DER*, 1995 EHB 104. Accordingly, the fact that the notice of appeal does not demonstrate that the Appellants have standing does not warrant the dismissal of the appeal.

The Commission and the Permittees next argue, based on responses to interrogatories, deposition testimony, and the expert report filed on the Appellants' behalf, that the Ziviellos have not adduced any evidence demonstrating the substantial, direct and immediate interest necessary to give them standing to challenge the Commission's approval of the Nutrient Management Plan. We disagree. In response to motions, the Appellants proffered evidence from the record in the form of depositions, answers to interrogatories and an expert report filed

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motions.

on their behalf which indicate that they have a substantial, direct and immediate interest in the subject matter of the present appeal. *See* Appellants' Exhibits 1-6.

Angela J. Ziviello (Appellant) resides with her parents on the family homestead where she and her brother Archimede Ziviello, III (Appellant) grew up. The homestead is approximately 1/4 mile (approximately 300 yards) from the proposed hog farm site. Archimede Ziviello, III and his wife Dawn M. Ziviello (Appellant), frequent the family homestead four or five times per week and leave their daughter there for childcare at least twice per week. The family homestead is located adjacent to a manure importer listed on the plan and adjacent to two tracts slated to receive manure from the proposed hog farm site. The evidence generally describes how the Ziviellos spend their time on the family homestead, recreating there and around the local creeks proximate to the proposed hog farm site, tending the family garden, growing crops, and consuming those foods and well water located on the family homestead.[9] Evidence was also offered in support of the Appellants' allegations that they have been denied due process rights guaranteed by the Administrative Agency Law, Right to Know Act and Sunshine Act.

The motions challenge that the Appellants have suffered or will suffer any harm as a result of the Commission's action. Both the Commission and the Permittees argue that there is the absence of proof of a causal connection between the Commission's action and any potential harm identified by the Appellants. At such a preliminary stage in the appeal process, a party should be required to prove that there is an objectively reasonable threat that adverse effects will

[9] The Board has recognized that an aesthetic appreciation for, or recreational enjoyment of, an environmental resource can confer standing. *See, e.g., Valley Creek Coalition v. DEP*, 1999 EHB 935; *Blose v. DEP*, 1998 EHB 635, *rev'd on other grounds*, No. 287 C.D. 1999 (Pa. Cmwlth. filed July 1, 1999); *Belitskus v. DEP*, 1997 EHB 939; *Barshinger v. DEP*, 1996 EHB 949.

occur as a result of the challenged action rather than being required to show that adverse effects will in fact occur. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 120 S.Ct. 693 (2000); *O'Reilly v. DEP*, EHB Docket No. 99-166-L (Opinion issued May 24, 2000); *Wurth v. DEP*, EHB Docket No. 98-179-MG (Opinion issued February 29, 2000)(Labuskes, Jr., B., concurring). The evidence currently in the record demonstrates that the Appellants in this case risk illness from misapplication of manure or incorrect nitrogen concentration estimates, malodors, groundwater contamination, and runoff onto the family property. The Appellants have shown that at the present time, the likelihood of the alleged adverse effects is more than merely speculative. The determination that the adverse effects will in fact occur as a result of the Commission's approval of the Nutrient Management Plan is a genuine issue of material fact which must be made after the hearing on the merits.

We will not dismiss the Appellants' appeal for lack of standing at this time. The purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department. *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944. In viewing the record in the light most favorable to the nonmoving party, the Board finds that the Appellants in the present matter are proper parties to appeal the Commission's approval of the Permittees' Nutrient Management Plan.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAWN M. ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO, III	:	
v.	:	**EHB Docket No. 99-185-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	

ORDER

AND NOW, this 31st day of July, 2000, the Motions for Summary Judgment are **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: July 31, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Mary Martha Truschel, Esq.
Southcentral Regional Counsel

For Appellant:
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For Permittee:
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Mark Stanley, Esq.
Stacey L. Morgan, Esq.
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221 East Chestnut Street
Lancaster, PA 17602-7254

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-072-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** August 22, 2000

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for partial summary judgment in an appeal of an anthracite mining permit is granted in part and denied in part. The Department lacks the authority to impose a special condition providing for automatic revocation under section 3.1(d) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.3a(d) (Surface Mining Act); section 5(b)(5) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.5(b)(5) (Clean Streams Law); 25 Pa. Code § 86.37, or a previous consent order and agreement. However, Appellant failed to show that the Department erred by requiring that (1) permittees identify the location of blasts with more specificity than that set forth in 25 Pa. Code §88.137(2); (2) permittees' blasting signals be audible to residents of nearby villages; (3) permittees cease blasting if the Department determines that the blasting procedures are inadequate to protect the public, their property or waters of the Commonwealth; and (4) blasting conducted within a scaled distance of 70 be

recorded on a seismograph. Whether the Department erred by imposing these requirements under the particular circumstances here turns on disputes of material fact.

OPINION

This matter was initiated with the April 19, 1999, filing of a notice of appeal challenging a March 19, 1999, surface mining permit (permit), the Department issued to Harriman Coal Corporation, (Appellant), under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a (Surface Mining Act); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law); and the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001- 4106 (Air Pollution Control Act). The permit authorized Appellant to conduct anthracite surface mining activities at the Lincoln No. 6 site (site) in Tremont Township, Schuylkill County. The notice of appeal asserts that the Department abused its discretion, acted outside the scope of its authority, and otherwise acted contrary to law by:

1. classifying the mine as a modified box cut contour mine, as opposed to an open box cut mine, in special condition 1, part B of the permit (amended notice of appeal, ¶ 25);

2. requiring that all blasting conducted under a scaled distance of 70 be recorded with an approved seismograph, in special condition 13 of the permit (notice of appeal, ¶ 4); and

3. imposing the requirements in special conditions No. 14-18 in the permit when the Department's regulations at 25 Pa. Code Chapter 87 did not authorize it to impose those requirements (notice of appeal, ¶¶ 14-18).

Appellant filed a motion for partial summary judgment and supporting memorandum of law on April 7, 2000. The Department filed a response and memorandum in opposition on May 5, 2000. Appellant filed a reply on May 31, 2000.

In its motion for partial summary judgment, Appellant argues that it is entitled to judgment as a matter of law because the Department erred by including certain terms in special conditions 13, 16, 17, 18, and 21. Accordingly, Appellant asks us to strike the conditions from its permit. The Department argues that Appellant is not entitled to judgment as a matter of law on any of these special conditions.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record—and affidavits, if any—show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party and will enter summary judgment only where the right is clear and free from doubt. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). We shall examine the parties' arguments concerning each of the special conditions addressed in the motion separately below.

SPECIAL CONDITION 16

Special condition 16 provides, in pertinent part:

> All blasts shall be geographically located to include bench elevation in MSL [mean sea level], with a horizontal tolerance of less than 25 feet..., and a vertical tolerance of less than 10 feet.... This data is to be plotted on a[n] Exhibit 9: Operations Map and ... submitted on a quarterly basis....

(Motion, ¶ 34; Answer, ¶ 34.) Appellant argues that it is entitled to summary judgment concerning this condition because the Department identified 25 Pa. Code § 88.137(2) as its authority for the condition, yet the condition requires that Appellant provide greater detail concerning the blast location than required by 25 Pa. Code § 88.137(2). The Department argues

that it has the authority to include the condition pursuant to 25 Pa. Code §§ 88.135(m) and 88.137.

Section 88.135(m) of the regulations did not provide the Department with the authority to impose special condition 16. Section 88.135(m) provides, "The Department may require a seismograph record of any or all blasts and may specify the location at which the measurements are taken." Since section 88.135(m) relates only to the Department specifying the location where seismographic records are taken, and special condition 16 does not relate to seismographic records, section 88.135(m) cannot have authorized special condition 16.

However, the situation is different concerning section 88.137 of the regulations. Section 88.137 expressly provides that information concerning the location of the blast must be included in the blasting record:

> A record of each blast shall be retained for at least three years and shall be available for inspection by the Department and the public on request.... The record shall contain...:
>
> (2) The location, date and time of the blast.

While section 88.137 does not spell out precisely what information a permittee must provide concerning the location of blasting, Appellant is incorrect when it assumes that the regulation had to spell out the level of detail required for the Department to require that level of detail in special condition 16.

It is a cardinal principle of administrative law that administrative agencies have only those powers that are expressly conferred or necessarily implied *by statute. See, e.g., Department of Environmental Resources v. Butler County Mushroom Farm,* 454 A.2d 1 (Pa. 1982). However, as we explained in our recent opinion in *Harriman Coal Corporation v. DEP,* EHB Docket No. 99-218-C (opinion issued July 21, 2000), an agency need not reduce every

principle essential to the administration of its statutory duties to a regulation.[1] Slip op. at 4-5.[2] Furthermore, even in areas already subject to agency regulations, agencies can expand on a rule through adjudication.[3] Thus, notwithstanding the fact that the Department's regulations require that permittees identify the location of blasting, the Department was not required to spell out in its regulations precisely what details permittee must provide concerning the location of the blasting. Instead, it could decide what details it would require in the permits on a case by case basis.

Accordingly, the Department did not act contrary to law by spelling out in the permit precisely what details Appellant must provide concerning the location of blasting, even where section 88.137(2) of the regulations did not spell out those details. Since Appellant never even alleges that the location details required in the permit are unreasonable under the circumstances here, Appellant is not entitled to summary judgment on this issue.

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[1] An agency must go through the rulemaking process to give a standard of conduct *the force of law*—binding upon both the agency and the regulated community—as opposed to being prepared to support the application of the standard in every instance it is applied. *See, e.g., Pennsylvania Human Relations Commission v. Norristown Area School*, 374 A.2d 671, 679 (1977); *Department of Environmental Resources v. Rushton Mining Company,* 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991). Duly promulgated regulations, of course, are not only binding upon the regulated community but also on the Department itself. *See, e.g., Al Hamilton Contracting v. Department of Environmental Protection,* 680 A.2d 1209, 1212-1213 (Pa. Cmwlth. 1996).

Appellant does not argue that the Department treats the provisions in special condition 16 as having the force of law or that they are part of a comprehensive regulatory system such that the provisions might constitute invalid regulations under the "binding norm" test, akin to the standard mining permit conditions the Commonwealth Court held to be invalid regulations in *Rushton Mining,* 591 A.2d at 1173.

[2] *See also Inmates of Cumberland County Prison v. Department of Justice,* 462 A.2d 937, 940-941 (Pa. Cmwlth. 1983), *affirmed* 468 A.2d 747 (Pa. 1983) ("the choice made between proceeding in a general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency") (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

SPECIAL CONDITION 17

Special condition 17 provides, in pertinent part:

> Warning and all clear signals shall be different in pattern, audible within a range of ½ mile ... from the point of the blast, and sounded before and after each blast within the permit area. For purpose[s] of determining compliance with this condition the warning and all clear signals for blasts shall be clearly audible to residents of Lincoln and Jolliet Villages.

(Motion, ¶ 36; answer, ¶ 36.)

In its motion and memorandum in support, Appellant maintains that the Department erred by requiring that the signals be clearly audible to residents of Lincoln and Jolliet Villages because this requirement goes beyond what is required in section 88.135(c) of the Department's regulations, 25 Pa. Code § 88.135(c).[4] According to Appellant, some residents of the villages are more than half a mile away from the blasting locations, and special condition 17 imposes a more onerous requirement than section 88.135(c) because the special condition requires that the signals be audible even to those residents of the villages who are more than half a mile away from the blasting. Accordingly, Appellant argues that it is entitled to judgment as a matter of law on this issue, and the Board should strike the second sentence of special condition 17.

In its answer and memorandum in opposition, the Department denies that any of the residents of the villages are more than a half mile from the blasting sites and argues that Appellant is misinterpreting special condition 17. According to the Department, special condition 17 does not require that all signals be audible to all members of Lincoln and Jolliet

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[3] *See Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 96 (1995) ("The APA [Federal Administrative Procedure Act, 5 U.S.C. §§ 500-596] does not require that all specific applications of a rule evolve by further, more precise rules rather than by adjudication.")

[4] Section 88.135(c) provides, in pertinent part: "Warning and all-clear signals shall be ... audible within a range of ½ mile from the point of the blast, sounded before and after each blast."

Villages; it just requires that signals be audible to persons within a half mile of the blast—even those who happen to be residents of one of the villages. (Answer, ¶ 72; memorandum in opposition, pp. 7-8.) The Department also argues that the Board must defer to its interpretation of the condition unless the interpretation is clearly erroneous. (Memorandum in opposition, p. 6.)

In its reply, Appellant argues that the Department's interpretation of special condition 17 is "clearly erroneous," and that—contrary to 25 Pa. Code § 88.135(g)—the plain language of the condition requires that the signal be audible to villagers more than a half mile from the blast location.[5] (Reply, p. 7.) Appellant, therefore, persists in requesting that we strike the condition.[6]

We reject the Department's position that, when construing the terms of the permit, the Board must defer to the Department's interpretation of those terms. None of the cases that the Department cites in support of its position—*Department of Environmental Resources v. Washington County,* 629 A.2d 172 (Pa. Cmwlth. 1993), appeal denied 631 A.2d 1011 (Pa. 1993); *Starr v. Department of Environmental Resources,* 607 A.2d 321 (Pa. Cmwlth. 1992); and *T.R.A.S.H. v. DER,* 1990 EHB 1707—hold that the Department's interpretation of permit conditions is entitled to any deference.[7] Nor are we aware of any such cases ourselves.

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[5] Since we conclude here that Special Condition 17 does not require that signals be audible for more than half a mile, we need not address Appellant's argument that 25 Pa. Code § 88.135(g) precluded the Department from requiring that signals be audible over a greater distance.

[6] The posture of the parties on the interpretation of special condition 17 here is unconventional: ordinarily, permittees take a narrower view of what a permit requires than does the Department.

[7] *Washington County* and *Starr* held that the Department's interpretation of *statutes that it administers* is entitled to deference. *See* 629 A.2d at 175, and 607 A.2d at 321, respectively. *T.R.A.S.H.*, meanwhile, held that the Department's interpretation of *its regulations* is entitled to deference. *See* 1990 EHB at 1715.

Yet, while we do not defer in any way to the Department's interpretation of the special condition, we do agree with it. Special condition 17 provides, "Warning and all clear signals shall be ... audible within a range of ½ mile ... from the point of the blast.... *For purpose[s] of determining compliance with this condition* the ... signals shall be clearly audible to residents of Lincoln and Jolliet Villages." The phrase "for purposes of determining compliance with this condition," at the beginning of the second sentence, makes it clear that the second sentence is not *increasing* the half mile distance requirement set forth in the first sentence, but is merely *clarifying* it. The second sentence makes it clear that a signal within half a mile of the villages need not only be audible within a half mile *in any direction*; it must be audible to those villagers who reside within a half mile. As we noted above with respect to condition 16, an agency can expand on a rule through adjudication. *See Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 96 (1995). Thus, the Department properly added the second sentence, clarifying that the signals must be audible to villagers within a half mile—despite the fact that section 88.135(c) of the Department's regulations provides only that "signals shall be ... audible within a range of ½ mile...."

SPECIAL CONDITION 18

Special condition 18 provides:

> If ... the Department deems the established blasting practices are insufficient to insure adequate protection to: (a) public health and safety, (b) existing structures and property surrounding the mining operation..., or (c) surface water and groundwater resources, blasting shall cease until a corrective blast plan is approved....

(Motion, ¶ 37; answer, ¶ 37.)

Appellant insists that it is entitled to summary judgment on this condition because "there is no authority expressly recognizing a right of [the Department] to cease blasting unilaterally"

and because Appellant "would incur great cost if mining operations were stopped with no prior notice or opportunity to cure any problem." (Memorandum in support, pp. 13, 14.) Therefore, Appellant requests that we grant it summary judgment on this issue and strike the condition.

The Department disagrees. It contends that it had the authority to issue special condition 18 by virtue of section 88.135(g) of its regulations, which provides:

> Blasting shall be conducted in a manner to prevent injury to persons, damage to public or private property outside the permit area, ... or availability of groundwaters or surface waters and shall be prohibited in all cases where the effect of the blasting is liable to change the course or channel of any stream.

We agree with the Department that summary judgment is inappropriate here. All that special condition 18 requires is that, if the Department determines that the blasting procedures set forth in the permit are inadequate to ensure compliance with section 88.135(g) of the regulations, Appellant must cease blasting until the Department approves a corrective blast plan. Under the circumstances, this condition is reasonable.

The Department's authority to limit blasting pending the approval of a corrective plan flows directly from the language in section 88.135(c) authorizing the Department to ensure that blasting is conducted in a manner which protects the public, their property, and waters of the Commonwealth. Blasting is an inherently dangerous activity. Where blasting procedures set forth in the permit are not adequate to protect the public, their property, or waters of the Commonwealth, it would be irresponsible to allow a permittee to continue blasting so long as the activity had not yet harmed these entities. Even one errant blast can have drastic consequences.

Nor are we troubled by Appellant's assertion that it would be expensive for it to stop blasting without notice beforehand. If the Department should subsequently determine that the blasting procedure outlined in Appellant's permit is inadequate—and that, therefore, Appellant

must cease blasting pending the approval of a revised blasting plan—Appellant can appeal that determination to the Board. While the appeal itself would not act as an automatic supersedeas, *see* 35 P.S. § 7514(d)(1), Appellant could file a petition for temporary supersedeas and a petition for supersedeas. The Board would then weigh whether Appellant would be irreparably injured pending the resolution of its appeal and petition for supersedeas, his likelihood of prevailing on the merits, and the likelihood of injury to the public or other parties. *See* 25 Pa. Code §§ 1021.78, 1021.79.

SPECIAL CONDITION 21

Special condition 21 provides:

> This permit is being conditionally issued. [It] is valid only as long as Harriman Coal Company complies, fully and completely, with the requirements of the Consent Order and Agreement, dated March 15, 1999.... Any violation of any term of that Consent Order and Agreement, or of any of the terms of the mining plans contemplated and described in that Consent Order and Agreement, shall automatically make this permit null and void. Similarly, within 90 days of the issuance date, the permit will become null and void without prior notice if Harriman fails to submit cross-sections and revised mapping for the Good Spring site addressing excess spoil calculations and spoil to be used for backfilling purposes at that site or if Harriman fails to respond, fully and completely within seven days, to deficiency letters from the Department pertaining to Harriman's submission of those materials or any other Module 10 (mining and reclamation plan) submittals.

(Motion, ¶ 38; answer, ¶ 38.)

Appellant contends that it is entitled to summary judgment on this issue because neither the Surface Mining Act nor the Department's regulations authorize the Department to declare a permit "automatically null and void." Appellant also argues that, even assuming "automatic nullification" were a proper enforcement tool, the Board "has specifically held that [the Department] is only authorized under 25 Pa. Code § 86.37(a)(8) to condition permits upon compliance, or satisfactory progress towards compliance, of [Department] orders," and that,

therefore, the Department could not condition the permit upon Appellant complying with the other mining plans, or submitting cross sections and revised mapping for other permit applications, or responding to deficiency letters within 7 days. (Memorandum in support, p. 16.)

The Department argues that it had the authority to include the "automatic nullification" provision by virtue of section 3.1(d) of the Surface Mining Act, 52 P.S. § 1396.3a(d); section 5(b)(5) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.5(b)(5) (Clean Streams Law); 25 Pa. Code § 86.37(a)(8); and because Appellant agreed to submit the materials required in special condition 21 when it agreed to the March 15, 1999, consent order and agreement.[8]

None of the authority that the Department cites authorized it to include the automatic revocation provision in the permit. Section 3.1(d) of the Surface Mining Act simply provides that the Department must deny permits to applicants who are either violating the Act or whose compliance history shows that they will likely violate the Act in the future. Section 3.1(d) does not authorize the Department to automatically revoke a permit for any violation of the Act that may occur after the permit is issued. As for section 5(b)(5) of the Clean Streams Law, it simply authorizes the Department to "[r]eview and take appropriate action on all permit applications ... and to issue ... or revoke permits pursuant to this act...." It does not independently grant the Department the authority to automatically revoke a permit for any prospective violation of the Clean Streams Law.

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[8] The Department also argued that it had the authority to include the "automatic nullification" provision because the December 8, 1998, consent order and agreement required Appellant to submit the materials required in special condition 21. However, the Department failed to include the December 8, 1998, consent order and agreement as an exhibit with its answer to the motion, nor was the consent order otherwise made a part of the record in this

Nor does the Department have the authority to include the automatic revocation provision under 25 Pa. Code § 86.37(a)(8). Section 86.37(a)(8) provides that, where "a violation is in the process of being corrected or pending the outcome of an appeal," the permit "will be issued conditionally." As the language in section 86.37(a)(8) makes clear, the regulation applies only where the applicant has violations in the process of being corrected or appealed.[9] Furthermore, the power to condition a permit is only the power to take action to terminate the permit for violation of the conditions.

That brings us to the March 15, 1999, consent order and agreement. Even assuming that the Department is correct when it argues that special condition 21 merely requires that Appellant submit information that was already required by the consent order, that does not authorize the Department to include the automatic revocation provision. Before we could conclude that the Department had the authority to include the automatic revocation provision based on the consent order, we would have to not only conclude that the Department had the authority to require the information required by the consent order; we would also have to conclude that the consent order

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appeal. Therefore, we did not consider the Department's arguments concerning the December 8, 1998, consent order.

[9] While the Department correctly notes in its memorandum of law that *Al Hamilton Contracting Co. v. DEP,* 1996 EHB 444, and *Bradford Coal Co. v. DEP,* 1996 EHB 888, hold that the Department may condition a permit upon compliance with outstanding Department orders, both of those cases are distinguishable from the situation we confront in this appeal. The conditions involved in *Al Hamilton* and *Bradford Coal* differ from Condition 21 in that neither the *Al Hamilton* nor the *Bradford Coal* conditions appear to have provided for the *automatic* revocation of the permit. The opinion in *Al Hamilton* says merely that "some of the permits contain the provision that failure to comply with the orders will result in a suspension of the permits." 1996 EHB at 447. The opinion in *Bradford Coal* does not contain any details about the operation of the compliance conditions, apart from stating that the permit were "condition[ed] on compliance" with various orders. 1996 EHB at 896. There is no indication in either opinion that the conditions at issue provided that the permits would be revoked automatically, by operation of law. As we explain in the text above, the automatic nature of the revocation in Condition 21 is the condition's most troublesome feature.

gave the Department the authority to provide for automatic revocation of the permit if—at some point in the future—Appellant fails to submit all of the information required. The Department points to no authority that stands for the latter proposition.

As noted previously in this opinion, administrative agencies have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., Department of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. Department of Environmental Protection*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). While neither the Surface Mining Act nor the Clean Streams Law authorize the Department to include a provision automatically revoking a permit for violations occurring after the permit is issued, both acts expressly provide that the Department has the authority to issue orders modifying, revoking, or suspending permits where necessary to aid in the enforcement of the acts.[10]

The automatic revocation provision is also problematic for reasons similar to those the Board has identified when striking down automatic civil penalty provisions. For instance, in *202 Island Car Wash v. DEP,* 1998 EHB 1325, an appellant moved for summary judgment on a provision in a compliance order the Department issued to it which called for an automatic civil penalty of $1,500 per day if the appellant failed to comply with any provision of the order. We granted the appellant's motion, holding that the administrative penalty was "arbitrary as a matter of law and therefore an abuse of the Department's discretion." 1998 EHB at 1334. The Board explained, "[T]o calculate a reasonable penalty for a particular violation, the Department must

[10] The relevant portions of the acts are identical. They provide: "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...." *See* 35 P.S. § 691.610 and 52 P.S. § 1396.4c.

consider the facts surrounding the violation itself, not just the facts underlying the order which gives rise to a violation." 1998 EHB at 1335.

The same reasoning that controlled in *202 Island Car Wash* applies to the automatic revocation provision in special condition 21. Whether the Department is justified in revoking a permit for Appellant's failing to comply with other mining plans, or submit cross sections and revised mapping for other permit applications, or respond to deficiency letters within 7 days, turns on the type of violation and the circumstances surrounding it. The Department simply cannot reasonably determine that revocation is the appropriate sanction for a violation without knowing what the violation is or the surrounding circumstances. Therefore, the Department cannot include a permit condition that provides that any future violation will automatically revoke the permit.

SPECIAL CONDITION 13

Special condition 13 provides:

> If blasting is conducted with a scaled distance[11] greater than 70, seismograph readings are not necessary. Scaled distance must be shown on all blasting logs. Any blasting being conducted under a scaled distance of 70 must be recorded on an approved seismograph.

(Motion, ¶ 34; answer, ¶ 34.)

Appellant argues that it is entitled to summary judgment on special condition 13 because (1) 25 Pa. Code § 88.135(e) provides that seismographic recordings (recordings) are necessary

[11] The "scaled distance" is the "actual distance" of a blast divided by the square root of the "maximum explosive weight." 25 Pa. Code § 211.1. The "actual distance" is "[t]he distance in feet from the blast location to the nearest dwelling house, public building, school, church, commercial or institutional building neither owned not leased by the person conducting the blast." *Id.* The "maximum explosive weight," meanwhile, is the "weight ... in pounds that is detonated per delay period for delay intervals of 8 milliseconds or greater; or the total weight of explosive in pounds that is detonated within an interval [of] less than 8 milliseconds." *Id.*

only where the scaled distance is less than 50; (2) the Department could not extend the recording requirement beyond the scaled distance listed in § 88.135(e); and, (3) even if the Department could extend the scaled distance beyond that required at § 88.135(e), the Department erred by choosing 70 as the scaled distance in special condition 13.

The Department disagrees. It argues that it has the authority under 25 Pa. Code §§ 88.135(e) and (m) to require recordings for scaled distances of 50 or above, and that the Department's selection of 70 as the scaled distance requirement for the recordings was reasonable given Appellant's previous blasting violations.

Appellant is not entitled to summary judgment on this issue. First, it is not clear from the Department's regulations that recordings are necessary only where the scaled distance is less than 50. Section 88.135(e) of the Department's regulations provides, "In all blasting operations, a scaled distance of 50 or numerically greater may be used to determine the maximum charge weight per delay interval of eight milliseconds or greater without the use of seismic instrumentation." The Department insists that the phrase "50 *or numerically greater*" shows that the Department can require recordings for scaled distances greater than 50 under section 88.135(e). This is a plausible—if not the only plausible—interpretation of section 88.135(e). Furthermore, section 88.135(m) provides, "The Department may require a seismograph record of any or all blasts and may specify the location at which the measurements are taken." Thus, the Department has the discretion under section 88.135(m) to require a recording even where the scaled distance exceeds 50.

Nor can Appellant prevail on its assertion that the Department erred by choosing 70 as the scaled distance for the recording requirement. Appellant argues that the Department erred in the methodology that it used to select the scaled distance. (For instance, Appellant argues that

the Department's selection of the figure was arbitrary, and that it wrongly considered Appellant's compliance history at other sites and unsubstantiated complaints concerning Appellant's operations.) Yet, even assuming that Appellant established that the Department erred in how it derived the scaled distance in the permit, Appellant had to do more than that to establish that it was entitled to summary judgment on this issue: Appellant had to persuade the Board that the scaled distance the Department chose was incorrect.

Even assuming that Appellant showed that the Department erred in the methodology it used to derive the scaled distance, the record is insufficiently developed at this point in the proceedings for us to conclude that the scaled distance that the Department selected was incorrect. Appellant's motion points to virtually no particulars concerning the nature of the explosives to be used, the material in which the charges will be set, the buildings and topography in the area, the details surrounding seismographic recording, etc. Without this evidence, and perhaps other technical evidence concerning the potential effects of the blasts on structures, we cannot conclude that the scaled distance that the Department selected is wrong—even if, as Appellant alleges—the procedure the Department used to derive the scaled distance was wrong. Therefore, we will not grant Appellant summary judgment on this issue.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-072-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd of August, 2000, it is ordered that Appellant's motion for summary judgment is granted regarding special condition 21 and is denied regarding special conditions 13, 16, 17, and 18.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
CHAIRMAN

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: August 22, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BEAVER FALLS MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2000-098-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMBRIDGE WATER AUTHORITY	:	**Issued: August 25, 2000**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The permittee's motion to dismiss for lack of standing is denied. An appellant need not make allegations of standing in its notice of appeal. Standing in most cases is a factually intensive issue. Where, as here, the permittee makes general conclusory statements in a motion to dismiss the Board can not find as a matter of law at this early stage of the proceedings that Appellant has no standing. In reaching this conclusion the Board did not consider the late response to the motion to dismiss filed by the Appellant.

OPINION

On March 30, 2000, the Department of Environmental Protection (Department) issued a water allocation permit to the Ambridge Water Authority (Ambridge) of Ambridge Borough, Beaver County, authorizing it to withdraw 4.8 million gallons per day of water, with a one-day

maximum of 6.6 million gallons of water from the Service Creek Reservoir in Raccoon Township, Beaver County. On April 27, 2000, the Beaver Falls Municipal Authority (Beaver Falls) filed the present appeal, seeking that the permit be rescinded. Beaver Falls objected, *inter alia,* that the Department erred in: 1) requiring Ambridge to obtain an additional source of water supply of 600,000 gallons per day as a condition subsequent to the issuance of the permit rather than as a condition precedent; 2) its calculations regarding "safe yields;" and 3) finding that Ambridge could properly meet and fulfill the needs of the customers which it proposes to serve.

Presently before the Board is a motion to dismiss filed by Ambridge on July 10, 2000, alleging that Beaver Falls lacks standing to file this appeal. By letter dated August 8, 2000, the Department notified the Board that, because this is a third-party appeal, it is not taking an active role in the litigation of this matter; nevertheless, it supports Ambridge's motion to dismiss. Beaver Falls filed no response to the motion to dismiss until August 14, 2000.

Due to its untimely filing, we will not consider Beaver Falls' response for the purpose of ruling on the motion to dismiss. Under Board rule 1021.73(d), a response to a dispositive motion is to be filed within 25 days of the date of service of the motion. 25 Pa. Code § 1021.73(d). The date of service is the date the motion is mailed or delivered in person. *Id.* at § 1021.33(a). When service is by mail, an additional three days is added to the time for responding to the motion. *Id.* Since the date of service of Ambridge's motion is July 6, 2000, Beaver Falls had until August 3, 2000 to file a response. It did not file a response until 11 days later, August 14, 2000. Nor was the response accompanied by a request for extension or any explanation for its late filing. Where a response is untimely, it may be considered a failure to respond. *Berwick Township v. DEP*, 1998 EHB 487, 489; *Duquesne Light Co. v. DEP*, 1998 EHB 381, 384.

There are occasions when it may not be appropriate to reject a late-filed response. Where

a response to a dispositive motion is only one day late and no prejudice is alleged, striking the response may be too harsh a sanction. *People United to Save Homes v. DEP*, 1998 EHB 194. Likewise, upon motion for good cause, the Board may extend the time for filing a response to a motion. 25 Pa. Code § 1021.17(a).

Neither of these situations is present here. Beaver Falls' response was, not one day, but 11 days past due and is accompanied by neither a motion for an extension nor any explanation for its late filing. Moreover, to accept Beaver Falls' response at this date would send a message that it is acceptable to ignore the Board's rules and that the timeframes set by the Board's rules for the filing of documents are merely advisory.

We now turn to Ambridge's motion to dismiss for lack of standing. A party has standing to challenge a Department action when it possesses a substantial, direct and immediate interest in the action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Ziviello v. DEP*, EHB Docket No. 99-185-R (Opinion and Order issued July 31, 2000).

In its motion, Ambridge asserts that Beaver Falls fails to aver any facts in its notice of appeal that establish it is aggrieved by the Department's action. This by itself is an insufficient basis on which to dismiss the appeal, since there is no requirement in the Board's rules that an appellant must aver facts demonstrating standing in its notice of appeal. *Ziviello, slip op.* at 4; *Valley Creek Coalition v. DEP,* 1999 EHB 940, 941. A notice of appeal need only contain the appellant's objections to the Department's action. *Id.*

As noted earlier, we consider Beaver Falls' untimely response to the motion as a failure to respond. Therefore, we shall not consider the arguments set forth in its response as supporting a claim of standing. According to the notice of appeal, Beaver Falls serves customers in central and northern Beaver County, while Ambridge is located in southern Beaver County

and will draw its water from a source in the southwestern portion of the county. The notice of appeal further states that Beaver Falls draws its water from the Beaver River at the Eastvale Dam and a location in the Borough of New Brighton, while Ambridge will draw water from the Service Creek Reservoir in Raccoon Township. Beaver Falls expresses a general concern that Ambridge will be unable to meet the needs of its customers during low-flow yields and that the permit ignores the state policy of promoting conservation and will result in the unnecessary expenditure of public funds. Finally, Beaver Falls alleges in paragraph 7.D of the notice of appeal, that

> "Because [Beaver Falls] currently has an interconnection by way of bulk sales to an existing bulk sale customer...[Beaver Falls] can supply the 600,000 gallons of water per day required by Ambridge to meet the condition of the DEP's permit and this requirement of obtaining the 600,000 gallons of water per day should have been a condition precedent and not a condition subsequent so as to insure adequate supplies of water to all those customers which Ambridge Water proposed to serve by the increased draw on its Service Creek Reservoir."

Ambridge's motion to dismiss asserts bald conclusions that Beaver Falls lacks standing. Issues of standing are intensely factual. On the record before us at this time and at this early juncture in the appeal, we can not rule as a matter of law that Beaver Falls lacks standing. Therefore, we will deny the motion to dismiss at this time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BEAVER FALLS MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2000-098-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMBRIDGE WATER AUTHORITY	:	

ORDER

AND NOW, this 25th day of August, 2000, the Ambridge Water Authority's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: August 25, 2000

See the following page for service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THOMAS F. WAGNER, INC., d/b/a BLUE BELL GULF; and BLUE BELL GULF	:	**EHB Docket No. 98-184-MG (consolidated with 98-133-MG, 98-164-MG, 98-213-MG and 99-016-MG)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, the DEPARTMENT OF ENVIRONMENTAL PROTECTION and SETH GRANT, Intervenor	:	**Issued: August 29, 2000**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Department of Environmental Protection properly suspended the underground storage tank permits for a retail gasoline station as necessary to aid in the enforcement of the Storage Tank Act after a release of over 10,000 gallons of gasoline resulted in significant groundwater contamination and required two residents to evacuate their homes as a result, in part, of the operator's failure to properly monitor his gasoline inventory and take prompt corrective action after the need for that prompt action was directed by Department personnel. The suspension was reasonable, appropriate and necessary to aid in the enforcement of the Storage Tank Act due to the operator's failure to act promptly to prevent injury to his neighbors and to the environment from his business operations and his failure to continue corrective action. In

addition, the Department, which took over remediation after the exhaustion of the appellant's resources, has invested over $1 million in remediation costs and its staff has dedicated a significant number of hours for over a year to the release, in derogation of other projects in the region.

Additionally, the Department properly may hold the appellant legally responsible for the clean-up of the release while at the same time performing those activities itself. Similarly, there is insufficient evidence to conclude that the deadlines for the submission of the site characterization and remedial action plan were unreasonable, even though the Department's contractor and not the appellant completed these tasks.

BACKGROUND

These are appeals by Thomas F. Wagner, Inc. d/b/a Blue Bell Gulf and Blue Bell Gulf (collectively, the Appellant) from a series of enforcement orders of the Department of Environmental Protection. These orders arise from the Department's efforts to seek remediation of a release event at the Appellant's retail gasoline facility which resulted in the contamination of not only the Appellant's property but nearby residential properties as well. The orders set a schedule for remediation activities by the Appellant and also ordered a cessation of the Appellant's operation, pending performance of remediation and leak detection activities. The final order, issued on January 19, 1999, suspends the Appellant's permits for the operation of its underground storage tanks.

The Board held two supersedeas hearings in this matter, the most recent superseding the Department's suspension of the Appellant's permits.[1] By order dated June 29, 1999, Seth Grant, a

[1] *See Wagner v. DEP*, 1998 EHB 1056; 1999 EHB 52. Additionally, the Board granted partial summary judgment in favor of the Appellant relating to the automatic civil penalty

neighboring landowner, was permitted to intervene. A hearing on the merits was held before Administrative Law Judge George J. Miller on April 11, 12 and 19, 2000. The parties filed extensive stipulations of fact which were entered into evidence as Exhibits B-2 and B-3. The record additionally consists of a transcript of 429 pages and 43 exhibits.[2] All the parties have filed post-hearing memoranda, the last of which was received by the Board on August 15, 2000. After full consideration of the record, we make the following:

FINDINGS OF FACT

1. The Department is an agency of the Commonwealth with authority to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. No. 169, No. 32, *as amended*, 35 P.S. §§ 6021.101-6021.2104 ("Storage Tank Act"); and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law").

2. Thomas F. Wagner is an individual doing business as Blue Bell Gulf. (Ex. B-2, ¶ 5)

3. Thomas F. Wagner, Inc.[3] was issued a Certificate of Incorporation by the Commonwealth of Pennsylvania, Department of State in 1998, but the Department of State currently considers this corporation to be out of existence. (Ex. B-2, ¶ 6)

4. Blue Bell Gulf (also referred to as the "Facility" in the Department's orders) is a retail gasoline station business located at 599 Skippack Pike, Blue Bell, Whitpain Township, Montgomery County. (Ex. B-2, ¶ 7)

5. The Appellant has operated a gasoline and/or automotive service station at 599

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provision of the July 2, 1998 order. 1999 EHB 681.

[2] The exhibits of the Department are designated as "Ex. C-__; the Appellant's as "Ex. A-__"; and the Intervenor's as "Ex. I-__." The notes of testimony are designated as "N.T. __."

[3] Thomas F. Wagner the individual and Thomas F. Wagner, Inc. are collectively

Skippack Pike since the 1970s. (Ex. B-2, ¶ 172)

6. In January of 1995, Bayard Pump & Tank Company (Bayard) commenced work on an upgrade project at Blue Bell Gulf. (Ex. B-2, ¶ 32)

7. The upgrades performed by Bayard in 1995 included: (i) installation and initial startup of gasoline dispensers and the dispenser console; (ii) installation of new Bravo dispenser pans; (iii) installation of new double-wall fiberglass pipe; (iv) installation of new Red Jacket submersible pumps with mechanical line leak detectors; (v) installation of new Environ containment sumps for the submersible pumps; (vi) installation of Stage I and Stage II vapor recovery; and (vii) installation of overfill protection. (Ex. B-2, ¶ 33)

8. Additionally, Bayard installed a Veeder Root TLS 350 automatic tank gauging system (the "ATG System") with interstitial sensors and connected the sensors and existing probes to the Veeder Root TLS 350 console. (Ex. B-2, ¶¶ 33;76)

9. While the Appellant attempted to use this system, he failed to detect a leak from the Appellant's super-grade line which resulted in a 10,000-13,000 gallon release of gasoline. (Ex. B-2 ¶ 49)

The Spill and Enforcement Actions of the Department

10. On May 8, 1998, the local fire Department responded to two incidents, later described as gasoline vapor explosions, at Weichert Realty, located across the street from Blue Bell Gulf. The Department was called to investigate, and learned that the pump shed contained explosive levels of gasoline vapors. (Ex B-2, ¶ 54; *see also* Exs. A-96, 97)

11. The Department's Emergency Response identified Blue Bell Gulf station and the Appellant as the potentially responsible party, and that the groundwater had been contaminated

---

referenced as "the Appellant."

by gasoline released from a storage tank in unknown amounts. (Ex. B-2, ¶ 55; Ex. C-3)

12. The incident was referred for Emergency Response to Leonard Forte of the Department's Environmental Cleanup Program on May 11, 1998. (Ex. B-2, ¶ 55; Ex. C-3)

13. The Appellant reported a release at about 11:00 a.m. on May 9, 1998. (Ex. B-2, ¶ 56)

14. On Monday, May 11, 1998, Leonard Forte and Stephan Brown, Water Quality Specialists with the Storage Tank Section of the Department's Environmental Cleanup Program, and George Fritz, also employed by the Department, visited Blue Bell Gulf and met with the Appellant. (Ex. B-2, ¶ 58; Forte, N.T. 25)

15. The Appellant told Mr. Forte that he did not know exactly how many gallons were lost, but he thought the loss of gasoline was limited to 1 or 2 gallons. Representatives from Bayard told Mr. Forte that the source of the release had been repaired. (Forte, N.T. 28; 46)

16. Mr. Forte told the Appellant to immediately employ an environmental contractor to investigate and remedy the release. (Forte, N.T. 34)

17. Before leaving Blue Bell Gulf on May 11, 1998, Mr. Forte prepared and signed a written report, which was also signed by the Appellant. (Ex. B-2, ¶ 59)

18. In the May 11, 1998 report, Mr. Forte states, among other things, that :

a. the Appellant noticed a problem with his inventory on 05/08/98 and suspected a release, then notified Bayard Pump and Tank and asked Bayard to investigate;

b. Bayard contacted Crompco, and Crompco performed a test that discovered a leak at the supreme dispenser;

c. Bayard evacuated around the dispenser and a leak was discovered at a

flexible connector where it meets the rubber sealed boot;

d. the Appellant was unaware of how much product was released;

e. power to the supreme gasoline pump was shut off on 5/08/98 at 11:00 to contain the release;

f. organic vapors were detected with a Microtip HL 200 photoionization detector in the office building;

g. the Appellant was informed to call the Underground Storage Tank Indemnification Fund, hire an environmental consultant to perform site characterization, and make sure the power to the pump remains off;

h. interim remedial measures should continue as necessary to minimize environmental impact; and

i. Weichert Realtors' pump was investigated and vapors were noticed.

(Ex. B-2, ¶ 6; Ex. C-7)

19. At this point, the Department did not consider a release of a few gallons to be a high priority matter because such small releases do not generally result in serious remediation problems. (Forte, N.T. 45; Nagle, 111)

20. In the Department's experience, most releases at gasoline stations are fairly limited in scope and often the area of contamination is only a short distance around the tanks in the soil. (Sinding, N.T. 335)

21. It was not until June 25, 1998, that the Department learned for the first time that the release at Blue Bell Gulf was much larger than originally thought. In a telephone call between Mr. Forte and Mr. Sakacs of the Underground Storage Tank Indemnification Fund (USTIF), Mr. Forte learned that the Appellant had reported a release of about 13,000 to USTIF. (Forte, N.T.

28, 30-31; Exs. C-8; C-9)

22. Mr. Forte telephoned the Appellant on June 30, to inquire about the progress of his remediation contractor. The Appellant told him that he had not yet hired a contractor. (Forte, N.T. 34; Ex. C-11)

23. Also, on June 30, 1998, Mr. Forte was advised by Mr. James Fenerty, the Fire Marshal of Whitpain Township, that a complaint had been received by a neighbor of Blue Bell Gulf, Mrs. Celeste Behr, that there were gasoline vapors in her home. (Forte, N.T. 33; Ex. C-10)

24. On June 30, 1998 and July 1, 1998, two homes, one belonging to Celeste Behr and one belonging to Mr. and Mrs. Seth Grant, were evacuated following reports of gasoline odors at these two residences and inspections by township officials. These homes remained unoccupied as of the time of the hearing. (Ex. B-2, ¶ 69)

25. On July 1, 1998, Mr. Forte and Tom Canigiani of the Department visited Blue Bell Gulf and met with the Appellant. (Ex. B-2, ¶ 70)

26. At that time the Appellant told the Department that he lost an undetermined amount in excess of 10,000 gallons. (Ex. C-12)

27. The Appellant hired Leak D-Tech Services on June 30, or July 1, 1998, seven weeks after the release, to investigate the scope of the release and to conduct interim remedial actions. (Ex. B-2, ¶ 66)

28. In response to the gasoline release at Blue Bell Gulf, the Department, on July 2, 1998, issued an administrative order (the "July 2, 1998 Order") to Thomas F. Wagner, Inc. d/b/a Blue Bell Gulf. (Ex. B-2, ¶ 8)

29. The July 2, 1998 Order required the Appellant to perform corrective action, including interim remedial action, a full site characterization and remediation to an applicable standard.

The order also required the facility to cease operations until the Appellant explained the cause of the release, submitted an acceptable protocol for performing leak detection and conducted a third party inspection. Once the facility reopened, the order required the monthly submission of leak detection records. (Ex. B-2, ¶ 10)

30. Blue Bell Gulf was allowed to reopen on or about July 10, 1998. (Ex. B-2, ¶ 12)

31. On August 18, 1998 the July, 1998 Order was amended (the "August 18, 1998 Amended Order"). Among other things, the August, 18, 1998 Amended Order imposed additional and more detailed requirements, named Thomas F. Wagner individually, and made most of the requirements of the July 2, 1998 Order applicable to both Mr. Wagner individually and Thomas F. Wagner, Inc. Additionally, it required the Appellant to submit a complete site characterization report to the Department by October 2, 1998, and to submit a complete remedial action plan to the Department by November 27, 1998. (Ex. B-2, ¶¶ 13, 106)

32. Blue Bell Gulf was closed from August 20, 1998 through November 18, 1998, and the ATG System was upgraded by the installation of new mag probes and the Continuous Statistical Leak Detection ("CSLD") software (the system as upgraded in 1998 is hereinafter referred to as the "Upgraded ATG System"). (Ex. B-2, ¶ 79)

a. Since reopening in November of 1998, the Appellant has used the Upgraded ATG System as the leak detection method for the gasoline and diesel tanks at Blue Bell Gulf. (Ex. B-2, ¶ 80)

b. The Upgraded ATG System currently performs CSLD leak tests on a daily basis for each of the gasoline and diesel underground storage tanks at Blue Bell Gulf. (Ex. B-2, ¶ 81)

33. By opinion and order dated October 9, 1998, the Board issued a partial supersedeas

of the portion of the Department's order which required the Appellant to cease operations based upon a stipulation between the Appellant and the Department that the Appellant had complied with all the conditions for reopening imposed by the August order and that there was no evidence that the facility was currently leaking petroleum. Blue Bell Gulf resumed operations on November 18, 1998. (Ex. B-2, ¶ 16)

34. Shortly after the Department and Leak D-Tech investigation began, the magnitude of the impacts from the Blue Bell Gulf release became apparent, including significant contamination of water supplies, gasoline vapors in residences, and a contamination plume which was ultimately determined to be ½ mile long and 850 feet wide. (Ex. B-2, ¶ 100; Canigiani, 213-16; Silar, N.T. 295)

35. In or around the fall of 1998, the Department became concerned that the USTIF funds available to the Appellant were rapidly becoming exhausted, and the Department took anticipatory steps to ensure that the necessary site characterization and interim remedial work would continue without interruption. (Ex. B-2, ¶ 116)

36. The Department contacted Foster Wheeler Environmental Services, which is under contract with the Department to provide technical services, and advised Foster Wheeler that its services were likely to be needed in this case. (Ex. B-2, ¶ 117)

37. The Department advised the Appellant, both verbally and through correspondence, of its intention to perform corrective action in the event that Appellant could not commit to continuing corrective action following the exhaustion of USTIF funding. (Ex. B-2, ¶ 118)

38. The Department advised the Appellant that while the Department recognized the Appellant's financial inability to perform corrective action to the extent required to adequately address the release, the Department expected the Appellant to contribute financially to any

corrective action performed by the Department. (Ex. B-2, ¶ 119 ; Ex. C-23)

39. On September 11, 1998, Bruce Beitler of the Department's Environmental Cleanup Program signed a requisition for contract services for the purpose of providing uninterrupted services for the remediation of the gasoline release at Blue Bell Gulf. (Ex. B-2, ¶ 120; Ex. C-27)

40. By letter dated October 2, 1998, the Department acknowledged that the Appellant's consultants had performed extensive site characterization work, and that the work had been performed vigorously given the magnitude of the problem and the complex nature of the geology, and extended the dates for completing the site characterization report and remedial action plan as the Appellant had requested. (Ex. B-2, ¶ 128)

41. Foster Wheeler began to assume the lead role in corrective action in December 1998, gradually taking the work over from Leak D-Tech, the Appellant's environmental consultant, in accordance with the plans agreed upon by the Department and Wagner. (Ex. B-2, ¶ 133)

42. From October of 1998 through January of 1999, the Appellant and his consultants fully cooperated with the Department in order to assure a smooth and orderly transition of the site characterization and corrective action work from the Appellant's contractor and subcontractors to the Commonwealth's contractor and subcontractors. (Ex. B-2, ¶ 141)

43. On January 5, 1999, the Department instructed Foster Wheeler to take over and to perform all necessary corrective action through the completion of site characterization. (Ex. B-2, ¶ 138)

44. After January 5, 1999, Trimpi & Associates, a subcontractor to Leak D-Tech, remained involved in the activities associated with trouble shooting, operation and maintenance of the Blue Bell Gulf ground water treatment system and provided other technical assistance as a subcontractor to Foster Wheeler. (Ex. B-2, ¶ 142)

45. Since January of 1999, Foster Wheeler has operated and maintained the treatment system located on the Appellant's property at the Blue Bell Gulf site, and its employees and subcontractors have visited and occupied the Blue Bell Gulf site on a regular and routine basis for purposes of performing corrective action. (Ex. B-2, ¶ 146)

46. On January 19, 1999, the Department issued an administrative order in the matter of Thomas F. Wagner d/b/a Blue Bell Gulf (the "January 19, 1999 Order"). Among other things, the January 19, 1999 Order suspended the operating permits for the tanks at Blue Bell Gulf, required the Appellant to immediately cease operation of all regulated storage tanks and surrender the Facility registration certificate to the Department, and stated that the requirements of the July 2, 1998 Order as amended on August 18, 1998, remained in effect. (Ex. B-2, ¶ 20)

47. The January 19, 1999 Order suspended the facilities operating permit for the Appellant's failure to continue corrective action as of that date. (Ex. B-2, ¶ 21)

48. On February 11, 1999, the Board superseded the Department's January 19, 1999 Order because the Department failed to present sufficient evidence to persuade the Board that its order was necessary to the enforcement of the Storage Tank Act. (1999 EHB 52; Ex. B-2, ¶ 22)

49. The Board later partially denied the Appellant's motion for summary judgment as it related to the requirements of the Department's orders because of outstanding issues of material fact. (1999 EHB 681)

Details of the Release and Activities of the Appellant

50. Although there is uncertainty and dispute over the cause of and the allocation of responsibility for the release, for the purposes of this proceeding only, the parties have stipulated as follows:

a. The tank top upgrade performed at Blue Bell Gulf consisted of the

installation of new fiberglass double-walled fiberglass product piping and an automatic tank gauging ("ATG") system.

b. The ATG system installed at Blue Bell Gulf was a Veeder Root TLS 350, equipped with capacitance probes for detecting liquid levels in the tanks and sump sensors for detecting releases into the interstitial spaces of the double walled piping which connected the storage tanks to the product dispensers.

c. The product piping was also equipped with mechanical line leak detectors, which are designed to restrict the flow of gasoline in the event that a leak between the leak detector and the product dispenser causes a pressure drop in the product line.

d. The product lines were attached to the bottom of the fuel dispenser (generally known to the public as gas pumps, although pumps are often located elsewhere) with flexible hoses (also referred to as flex connectors), which in turn were surrounded by rubber accordion hoses (also referred to as containment boots). The containment boots were intended to capture leaks from the flex connectors and direct any leakage into the interstitial space between the inner and outer fiberglass product pipeline walls.

e. The Department believes and has advised Bayard that in order for the Veeder Root sump detector to properly detect leaks in the product piping, the product pipelines should slope from all points to the sump locations.

f. Based on its review of photographs taken during the 1995 upgrades at Blue Bell Gulf, the Department has determined that at least some of the flexible hoses and containment boots were installed with low points from which product

would not flow by gravity to the sump locations, and that these low points were adjacent to and underneath the product dispenser.

g. At some point in time, believed to be in February or March 1998, one of the product pipelines began to release gasoline into the subsurface environment. This release was not detected by the sump sensors of the Veeder Root ATG system at any time.

h. Based on the reports submitted to the Department, it appears at this time that the release was caused by a failure of a flexible hose under one of the dispensers and the failure of a containment boot to capture the release, that no gasoline reached the Veeder Root sump detector, and that the line leak detector failed to constrict the flow of gasoline along the product line.

i. During the months of March, April and early May of 1998, there was a discrepancy between the number of gallons of gasoline purchased by Blue Bell Gulf and the number of gallons of gasoline sold by Blue Bell Gulf. This information was collected by Blue Bell Gulf and provided to Appellant's accountant monthly for accounting purposes, but was not used for regulatory leak detection purposes.

(Ex. B-2, ¶ 49)

51. The ATG System in use at Blue Bell Gulf on May 8, 1998, did not indicate that there was a leak from any of the underground gasoline and diesel tank systems at Blue Bell Gulf at or around that time. (Ex. B-2, ¶ 77)

52. Prior to July 1998, the Appellant performed no analysis of his inventory to detect any possible leak other than the information provided to him by his accountant in his monthly

financial statements. (Wagner, N.T. 131, 142)

53. He was aware that there were problems with the ATG system and instead relied on "long-term averaging" based on accounting data provided monthly by his accountant. (Wagner, N.T. 142)

54. The Appellant's use of the ATG system, until July 1998, was not in conformance with the Department's regulations in part because the capacitance probes used for interstitial monitoring were not the proper monitoring system for use with the manifolded tanks in use at the facility, were inadequate for the configuration of the lines, and the product pipelines did not all drain from all points by gravity to the sump product sensors. (Nagle, N.T. 89-92)

55. The records prepared by the accountant could not provide adequate notice of a release because the accountant did not report his findings to the Appellant for more than a month after the close of the prior month's records. (See Rowley,[4] N.T. 381-82)

56. It usually takes from three to six months to determine if there is an actual loss of product using the method of reconciling company inventory records used by Mr. Rowley's office. (Rowley, N.T. 395-96)

57. In March 1998, the Appellant was concerned about a possible loss of gasoline, but was satisfied by his accountant's assurances that he had enough money in the bank to pay his taxes. (Wagner, N.T. 149-50; see also Rowley, N.T. 396-97)

58. Neither the Appellant nor his accountant made any attempt at that time to determine whether there was an actual leak of product from the tanks or lines at the facility. (Rowley, N.T. 396-97; Wagner, N.T. 149-50)

59. In late April, in a telephone conversation, the Appellant's accountant advised him

that there was an inventory discrepancy. (Rowley, N.T. 391)

60. The Appellant did not confirm his suspicions of a loss of product until May 8, 1998 when he recognized that there was a loss of money from gasoline sales. (Wagner, N.T. 172, 174; Ex. I-1)

61. Before or shortly after May 8, 1998, the Appellant's accountant, Michael Rowley, advised him that he had an inventory discrepancy of 10,000 to 13,000 gallons. (Rowley, N.T. 389-90)

62. The Department's analysis of the Appellant's inventory records indicate that there was a loss of approximately 3,900 gallons of product in March 1998, and a loss of 7,560 gallons in April. (Nagle, N.T. 97; Ex. C-40)

63. Kathy Nagle, a water quality specialist supervisor with the Department's Storage Tank program, has many years of experience with that program. She testified, based on her analysis of Appellant's accounting records, that the Appellant should have known of a problem based on the apparent loss of product as shown by the records from the end of March. (N.T. 98; Ex C-40)

Corrective Action

64. Leak D-Tech Services and its subcontractors initially conducted the site characterization work. (Ex. B-2, ¶ 97)

65. Leak D-Tech Services was reimbursed for its remedial expenses by USTIF, until the $1,000,000 in USTIF coverage available to the Appellant was exhausted in January of 1999. (Ex. B-2, ¶ 98)

66. Leak D-Tech Services and its subcontractors conducted extensive interim remedial

[4] Mr. Rowley's name was misspelled in the transcript as "Raleigh."

and site characterization work from July 2, 1998 until December of 1998. The tasks performed by Leak D-Tech are set forth in the interim site characterization reports dated October 2, 1998 and January 14, 1999. (Ex. B-2, ¶ 99)

67. The site characterization and corrective action work performed by Appellant's consultant and sub-consultants by October 2, 1998, included:

a. surveys of public and private wells;

b. completion of 40 geoprobe borings;

c. the installation of 41 wells for use as monitoring, soil vapor extraction and groundwater recovery wells;

d. aquifer testing;

e. sampling and analyses of monitoring wells, residential wells, surface water and indoor air;

f. measurements of groundwater levels and product thickness;

g. design, installation and pilot testing of a soil vapor extraction (SVE) system at Blue Bell Gulf;

h. free product recovery from installed wells;

i. design, installation and operation of basement soil vapor extraction systems at the Grant and Behr residences;

j. temporary relocation of the Grant and Behr residents;

k. installation of in-line carbon filtration systems in private water systems;

l. installation of public water lines to residential properties;

m. installation of a treatment system for a spring at the Nichols' residence; and

n. sub-surface investigations, such as boring logs.

(Ex. B-2, ¶ 105)

68. On or about December 8, 1999, the Department received a Final Site Characterization Report, dated December 7, 1999, prepared by Foster Wheeler, the Department's remediation contractor. (Ex. B-2, ¶ 148 ; Ex. C-39)

69. Foster Wheeler's site characterization of the Blue Bell Gulf Station Site was performed and completed in accordance with the Storage Tank Act and the corrective action process regulations promulgated thereunder. (Ex. B-2, ¶ 151)

70. Site characterization activities to complete the site characterization were conducted by Foster Wheeler from January 1999 to December 1999, and consisted of the following:

a. a focused, on-site investigation program to evaluate the nature and extent of any remaining soil contamination;

b. hydrogeologic investigations to characterize the geology and groundwater systems in the area, including the installation and sampling of an additional 49 monitoring wells, bedrock coring, several rounds of water level measurements to determine the horizontal and vertical flow components for groundwater, pumping tests to determine the hydraulic parameters for the multi-layered bedrock aquifer, and long term water level monitoring to evaluate potential impacts due to withdrawals from nearby golf courses and public supply wells;

c. several rounds of surface water sampling to evaluate potential site-related impacts to nearby surface water and associated receptors;

d. air sampling at the residence of Intervenor and one other residence to monitor the effectiveness of vapor extraction systems installed by the Appellant's consultants as part of the interim remedial actions;

e. evaluation of adjacent underground utilities;

f. surveys of site characterization sampling locations;

g. characterization and disposal of investigation-derived wastes; and

h. preparation of the Final Site Characterization Report.

(Ex. B-2, ¶ 153)

71. James T. Silar, a program manager for Foster Wheeler, is the project manager at the Blue Bell Gulf site. He is a Pennsylvania Registered Professional Engineer and an expert in hydrogeology. (N.T. 261-63; Ex. C-42)

72. Mr. Silar oversaw the site characterization work performed by Foster Wheeler and the preparation of the site characterization report submitted to the Department on December 7, 1999. (Silar, N.T. 262, 267-68, 280; *see also* Ex. C-39)

73. Mr. Silar concluded that the groundwater contamination delineated in the site characterization report was caused by a release from the Blue Bell Gulf site. (N.T. 289-91; Ex. C-39)

74. The contamination from the release spread radially, over a large area aided by the topography, fractured bedrock and high transmissivity of the subsurface. (Silar, N.T. 280-89; Ex. C-39)

75. Additionally, the migration of product was significant due to the gradient of the geography because the gas station is located at a topographical high point, and the presence of several pumping centers, such as a nearby golf course and the residences in the area. (Silar, N.T. 280, 286-87)

76. Using MTBE as a marker because it travels more quickly than other compounds in gasoline, Mr. Silar concluded that the contamination from the release has migrated to a depth of 175-200 feet. (Silar, N.T. 280, 284, Ex. C-39F)

77. Horizontally, the contamination plume is ½ mile long and 850 feet wide. (Silar, N.T. 295)

78. Due to the magnitude of the release and the nature of the subsurface environment, it is technologically impossible to clean up the contamination to state-wide health standards under

Act 2.[5] (Silar, N.T. 292, 296-97, 301)

79. However, a site specific standard could be achieved. (Silar, N.T. 301)

80. Foster Wheeler continues to perform all necessary remediation associated with the 1998 gasoline release. (Ex. B-2, ¶ 155)

81. The soil vapor extraction systems installed by the Appellant's consultants at the residence of Intervenor on Grouse Court and the residence of Ms. Celeste Behr on Village Circle have been operated continuously since the week of July 6, 1998, except for planned shut downs for testing purposes. (Ex. B-2, ¶ 156)

Corrective Action Expenses and the Appellant's Financial Status

82. Pursuant to regulations issued under the Storage Tank Act, a per gallon fee was and is assessed on each gallon of gasoline that Appellant purchases for delivery to the underground storage tanks at Blue Bell Gulf. The current fee for the year 2000 is $0.0005 per gallon. (Ex. B-2, ¶ 157)

83. On or about January 11, 1999, ICF Kaiser, on behalf of USTIF, advised the Appellant that the USTIF coverage for the Blue Bell Gulf release had been exhausted. (Ex. B-2, ¶ 158)

84. By letter dated January 12, 1999, the Department notified the Grants that the Department was prepared to make payment to him and his wife for reasonable increased living expenses associated with their relocation and the operation of the vapor remediation system at their property at 556 Grouse Court. (Ex. B-2, ¶ 159)

85. Since January 12, 1999, the Department has reimbursed the Grants for reasonable

[5] Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, *as amended*, 35 P.S. §§ 6026.101-6026.908.

increased living expenses associated with their relocation and the operation of the vapor remediation system at 556 Grouse Court. (Ex. B-2, ¶ 160)

86. The Department has incurred more than $1,000,000.00 in expenses for corrective action and cleanup activities as a result of the release from Blue Bell Gulf, and continues to incur additional costs. (Ex. B-2, ¶ 161)

87. Additionally, Stephan Sinding, chief of the Department's Storage Tank section, testified that the release at Blue Bell Gulf has impaired the Department's ability to enforce the Storage Tank Act and invest in other projects:

a. One fifth of the Department's $5 million annual statewide allowance from the USTIF has been invested in the remediation of the Blue Bell Gulf site;

b. He has requested that $3 million remaining of those funds be held over for the next fiscal year to continue the remediation;

c. Many of his staff members have devoted large portions of their time over the last year to the investigation, remediation planning and management of the concerns of the residents;

These factors have resulted in limited resources for other work in the region. (Sinding, N.T. 331-33)

88. Since January 5, 1999, the Appellant has made no financial or material contribution to corrective action, apart from the submission of an interim site characterization report, which summarized the work performed until the exhaustion of the USTIF funds. (Ex. B-2, ¶ 162)

89. The Appellant's accountant testified that as of the end of December 1999, the Appellant had a personal negative net worth of $153,675 and his business had a negative net worth of $89,675. These calculations assume that the facility's real estate has no value because of

the contamination. (Rowley, N.T. 387-88)

90. The commercial loan from the bank to the Appellant was in the original amount of $440,000, and is still secured by a mortgage and security agreement on the Blue Bell Gulf premises at 599 Skippack Pike, a mortgage and security agreement on the Appellant's home, and a security interest granted to the bank in certain furniture, fixtures, equipment and other tangible property owned by the Appellant and/or installed in, made a part of, or used at Blue Bell Gulf. (Ex. B-2, ¶ 164)

91. The Appellant was current on payment of the Bank's commercial loan until August 1, 1998, but owed the bank approximately $24,254 for five months of delinquent payments and $419,721 in principal on the loan, as of December 31, 1998. (Ex. B-2, ¶ 165)

92. In 1999, the Appellant's bank extended a home equity line of credit to the Appellant in the amount of $25,000, which he used to pay the delinquent mortgage payments. (Ex. B-2, ¶ 166)

93. As of December 31, 1999, the Appellant owed the bank approximately $21,851 in delinquent payments on the commercial loan, as well $413,532 in principal on the loan and approximately $24,609 on his home equity loan. (Ex. B-2, ¶ 167)

94. The Appellant signed a Promissory Note dated July 1, 1994 in the amount of $240,000, and this note is still secured by Gulf's subordinate security interest on the real estate at Blue Bell Gulf, the Appellant's home and certain fixtures, machinery and equipment. (Ex. B-2, ¶ 168)

95. As of December 31, 1999, the Appellant was indebted to Gulf Oil in the amount of about $130,847 under the 1994 agreements with Gulf. (Ex. B-2, ¶ 169)

96. On his U.S. Individual Income Tax Returns for 1996 and 1997, the Appellant's

adjusted gross annual income was reported as less than $25,000 per year. (Ex. B-2, ¶ 170)

97. On his U.S. Individual Income Tax Return for 1998, the Appellant's adjusted gross income was reported as less than $9,000. (Ex. B-2, ¶ 171)

DISCUSSION

Where the Department issues an order suspending a permit it bears the burden of proving by a preponderance of the evidence that its action was an appropriate use of its enforcement authority. 25 Pa. Code § 1021.101(b). Therefore it must show by a preponderance of the evidence that it had both the legal authority for this action and that the factual circumstances justified the suspension of the permit as being necessary to aid in the enforcement of the Storage Tank Act[6] or its regulations. *See CPM Energy Systems, Inc. v. DEP*, 1990 EHB 366.

The Storage Tank Act provides the Department with ample legal authority to suspend an operator's permits for storage tanks. Section 1309 authorizes the Department to suspend permits by order when necessary to aid in enforcement of the Act.[7] The underlying authority for such an action is provided in several other provisions of the Act. Section 1301(2) explicitly allows the Department to revoke a permit where there is a demonstrated "lack of ability or intention to comply with any law, rule, regulation, permit or order of the department issued pursuant to this act as indicated by past or continuing violations." 35 P.S. § 6021.1302(2). Additionally, Section 1304 provides that a violation of the Storage Tank Act constitutes a public nuisance, and the Department has the authority to order abatement of that nuisance. 35 P.S. § 6021.1304; *see also* 35 P.S. § 6021.1310 (failure to comply with an order of the Department or violate the Act is unlawful). The Department's implementing regulations at 25 Pa. Code § 245.212(b) give the

[6] Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Storage Tank Act).

Department the authority to suspend a permit for any violation of the Storage Tank Act, the regulations or the provisions of any permit. Similarly, the Appellant's duty to perform corrective action is equally clear. Both the Act and the regulations provide ample authority for the Department to require an operator of tanks to remediate a release from those tanks. *See, e.g.,* 35 P.S. §§ 6021.107(g), 6021.501(a); 25 Pa. Code § 245.303.

Even though the Department has authority to suspend a permit from several sources within the statutory scheme, a second step in the analysis of whether the Department's suspension of a permit by order is lawful is required because such orders of the Department must be necessary as an aid to the enforcement of the Storage Tank Act and must also be reasonable and appropriate given the circumstances of each case. *See Leeward Construction, Inc. v. DEP*, EHB Docket No. 98-048-L (consolidated)(Adjudication issued June 13, 2000).

The Department argues that the suspension of the Appellant's storage tank permits was proper because he has failed to perform corrective action to remediate the release from his facility as required by the Storage Tank Act and its regulations. The Appellant counters that he has made every effort to cooperate with the Department and that suspending his permits is excessive. For the reasons set forth below, based on the new evidence presented at the hearing on the merits by the Department, it has now borne its burden of showing that it was reasonable, appropriate and necessary to suspend the Appellant's permits.

We reject the Department's broad contention because the circumstance of financial inability to perform corrective action may not alone justify an order suspending the Appellant's permits unless it is otherwise reasonable, appropriate and necessary to aid in the enforcement of the Storage Tank Act. The issuance of a permit under the Storage Tank Act grants an opportunity

[7] 35 P.S. § 6021.1309.

to conduct a business without proof of financial ability to pay for a possible catastrophic loss. The Legislature in enacting the Storage Tank Act did not impose such a strict financial responsibility requirement. Instead, the Act permitted the Department to establish financial responsibility requirements, 35 P.S. § 6021.701(a), and the Department's regulations only require storage tank operators to participate in the Underground Storage Tank Indemnification Fund, by making contributions based on the number of tanks and volume of gasoline sales. 25 Pa. Code §§ 245.704-245.707. There are no further financial responsibility requirements.

Accordingly, while the operator may be responsible for conducting remediation action in the event of a release, the question still remains whether it is reasonable, appropriate and necessary to aid in enforcement of the Act to deprive him of his opportunity to conduct his business when the Appellant met the Department's financial responsibility requirements by making the required contributions to the Fund. Nevertheless, he is simply financially unable to pay for a multi-million dollar remediation after the one million dollar limit of the Fund has been expended. Although the Department has the legal authority to suspend the Appellant's permits for failure to continue corrective action caused by his financial inability to pay, we believe that an order suspending an operator's permit must also be reasonable, appropriate and "necessary to aid in the enforcement of the provisions of" the Storage Tank Act as required by Section 1309. 35 P.S. § 6021.1309.

Considering all of the evidence presented to the Board in this case, we find that the permit suspension in this case was reasonable, appropriate and necessary to aid in the enforcement of the Storage Tank Act, and therefore not an abuse of the Department's discretion. Specifically, there are a variety of factors in this case, which are based primarily on new evidence presented at the hearing on the merits, which support the Department's action.

First, the environmental damage caused by the release was significant and unprecedented. In the Department's experience, most releases from gasoline storage tanks do not migrate far from the tanks. (Finding of Fact No. 20) In contrast, the Blue Bell Gulf release resulted in significant groundwater contamination which can never be fully remediated. (Finding of Fact No. 78) Two residents had to be evacuated from their homes due to unsafe levels of gasoline vapors. These residents had been unable to return to their homes as of the date of the hearing. (Finding of Fact No. 24) The contamination plume from this release measures ½ mile long, 850 feet wide and 175-200 feet deep. (Finding of Fact No. 76, 77)

Second, the Appellant failed to properly monitor his gasoline inventory. It is very clear that the Appellant should have known that there was a potential release from his tanks long before he reported a release to the Department. He was aware that his leak detection system was not functioning properly, but relied instead on his accountant's monthly financial analysis. (Finding of Fact No. 53) Obviously, his financial records were not adequate to give him prompt notice of a release, because he only received the reports once a month, and did not receive the accountant's findings until more than a month after the close of the prior month's records. (Finding of Fact No. 55)

Further, the Appellant *did* notice a possible loss of gasoline as early as March 1998, yet did nothing to investigate it beyond confirming with the accountant that there was enough money in his account to pay his taxes. (Finding of Fact No. 57) Again in April there was an indication that there was a loss of inventory, yet the Appellant still did nothing. (Finding of Fact No. 59)[8] It was not until early May, near the time of the explosions across the street from the gasoline

[8] These losses were confirmed by Kathy Nagle's analysis of the accounting records for the facility. (Ex. C-40)

station, when his accountant told him that he had an inventory discrepancy of between 10,000 and 13,000 gallons of gasoline that he finally reported a release to the Department. (Finding of Fact Nos. 13, 61) Common sense dictates that had the Appellant taken the proper steps earlier, at least some of the serious effects of the release would have been avoided.

Third, upon confirming his suspicions that there had been a release, the Appellant failed to promptly secure an environmental contractor to assess the extent of the contamination and prevent further migration of product in the groundwater. Not only do the regulations require prompt corrective action, but Department personnel specifically told the Appellant to hire a contractor immediately. (Finding of Fact No. 16) Although he repaired the source of the release in the underground system, it was not until seven weeks later that he hired a consultant to assess the scope of the damage caused by the release. (Finding of Fact No. 27)

Finally, the Department's need to "preserve the integrity of the storage tank permit program, but also to provide an incentive for other operators to fulfill their legal responsibilities in the event of a spill" is a significant concern. (Department's Post-hearing Brief at 17) The Department has invested significant resources both financially and in man-hours to the remediation of this one release at the Appellant's facility, which meant that these resources could not be invested in other projects which would further the Department's mission to protect and improve the environment. (See Finding of Fact No. 87) Although nothing can be done about that now, allowing the Appellant to continue to operate, even though his lack of attention to detail and unwillingness to respond quickly and take control of the situation, would inhibit the Department's ability to enforce the Act against other similarly irresponsible operators.

The Appellant suggests that his limited financial resources prohibit the Department from suspending his permits. The cases cited by Appellant in no way support such a contention. Some

of these cases involve "takings" law. *See, e.g., Adams Sanitation Co. v. Department of Environmental Protection*, 715 A.2d 390 (Pa. 1998). The Appellant does not allege that there was a taking in violation of his constitutional rights. The cases involving abatement orders and contentions that these orders were beyond the Department's constitutional powers are similarly inapplicable to the question of whether the suspension of Appellant's permits were reasonable, appropriate and necessary as an aid to the enforcement of the Storage Tank Act. To the extent that the Appellant argues that his financial inability to comply excuses his failure to comply, such an argument has no place in Board proceedings. *Ramey Borough v.* DER, 351 A.2d 613, 615-16 (Pa. 1976) The proper focus is not on the Appellant's financial ability to comply with the order of the Department, but must be on whether the Department's action is reasonable and appropriate in view of the goals to be achieved by the order.

To the extent that an alternatives analysis might be appropriate in assessing whether the Department's order was reasonable and appropriate, a permit suspension may be appropriate regardless of the party's financial status. *See Fulkroad v. DER*, 1993 EHB 1232 (an order requiring the appellant to remove waste from his property was reasonable and appropriate; the Department was not required to permit the appellant to bury the waste simply because it was less expensive to do so, since burying the waste would not adequately protect the environment).

Finally, we reject the claim that the Department can never suspend their permit of a party who is financially unable to comply with a cleanup order simply because the party has been generally cooperative with the Department's cleanup efforts. As indicated above, the circumstances of this case make suspension of the Appellant's permits reasonable, appropriate and necessary as an aid to the enforcement of the Storage Tank Act despite the Appellant's cooperation with the Department long after he should have detected the release and long after

corrective action should have been instituted in accordance with the Department's direction.

The Appellant next argues that the Department's order suspending his permits was an abuse of discretion because the Department can not hold him responsible for performing the remedial activities and at the same time undertake the corrective action itself. We find this argument without merit.

Section 107(g) of the Storage Tank Act, 35 P.S. § 6021.107(g), provides:

> The department shall have the authority to order corrective action to be undertaken, to take corrective action or to authorize a third party to take corrective action.

The Appellant argues that under the rules of statutory construction, the word "or" in this section is strictly disjunctive, precluding the Department from utilizing more than one of the tools provided by the General Assembly at one time. We do not believe this interpretation does justice to the statutory scheme of the Storage Tank Act.

The Act clearly evidences an intent by the General Assembly to invest the Department with a broad range of regulatory tools to protect the environment and health and welfare of the Commonwealth's citizens. There is no language anywhere in the Act which would justify limiting the Department's authority to seek enforcement of the corrective action requirements at the expense of the health and welfare of the residents affected by the release. Section 107(g) is a remedial provision of a remedial statute, and given the broad purposes of the Storage Tank Act described above, it must be interpreted in favor of protecting the environment. 1 Pa. C.S. § 1929(c); *cf. Bethenergy Mines v. Department of Environmental Protection*, 676 A.2d 711 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 685 A.2d 547 (Pa. 1996)(observing that the statement of purpose of mining legislation requires the Department to interpret all provisions in favor of protecting the environment); *Township of Monroe v. Department of Environmental*

Resources, 328 A.2d 209, 211 (Pa. Cmwlth. 1974)(*en banc*)(given the salutary purpose of the Clean Streams Law, "the broadest interpretation consistent with the express language of the statute, should be applied.")

The Storage Tank Act clearly places the burden for taking corrective action squarely on the shoulders of the owner or operator of storage tanks. 35 P.S. § 6021.501(a)(5). Yet, in view of the "grave threat to health" of residents resulting from contamination caused by a release, the Act also authorizes the Department to clean up a release when the owner or operator is unwilling or unable to do so. There is nothing which suggests that these two scenarios are intended to be mutually exclusive. We fail to see how such a reading of Section 107(g) would further the purposes of the Act. Therefore, the Department's interpretation of this section, allowing it to order the Appellant to perform corrective action as required by Section 501(a), while at the same time cleaning up pollution due to the Appellant's inability to do so, is not unreasonable. *See McIntyre v. Board of Supervisors*, 614 A.2d 335 (Pa. Cmwlth. 1992)(deferring to an agency interpretation of an ordinance that interprets the word "and" to mean "or" because the interpretation is not clearly erroneous.)

The Appellant also argues that he was precluded from performing any corrective action after the Department took responsibility because to do so would constitute unlawful interference with the activities of the Department. We find this argument specious. There is absolutely no evidence that had the Appellant approached the Department with credible resources to resume corrective action himself, and that he would have been prevented from doing so.

The Appellant next contends that the Board should suspend or eliminate the deadlines for completing the site characterization and remedial action plan imposed by the Department's letter dated October 2, 1998. Because there is no evidence that the deadlines were unreasonable, we

decline to do so.

Section 245.310 of the Department's regulations provides that a party responsible for a release must prepare a site characterization within 180 days of reporting it, unless the Department determines that an alternative time frame should be imposed. 25 Pa. Code § 245.310. The release in this matter was reported to the Department on May 9, 1998, and by order dated July 2, 1998, the Department ordered the Appellant to submit a site characterization by October 2, 1998 and a remedial action plan by November 27, 1998. Stephan Sinding testified that these deadlines were somewhat shorter than called for in the regulations because of the urgency of the situation and the need to get information quickly since the Appellant had not performed any site characterization work and the Department had recently learned that the release was much larger than a few gallons. (N.T. 314) Subsequently the Appellant requested an extension of those deadlines when the complexity of the work became evident. Accordingly, by letter dated October 2, 1998, the Department granted the Appellant's request setting new deadlines of January 15, 1999, for the submission of a site characterization and March 1, 1999, for the submission of a remedial action plan.

The Appellant's argument seems to be that the deadlines he requested himself should be considered unreasonable because the Department's remediation contractor, Foster Wheeler, did not meet those deadlines. We disagree. First, the deadlines were not arbitrarily imposed by the Department, but were the deadlines requested by the Appellant himself. In fact, the 1999 deadlines are longer than the 180 days called for in the regulations which make them reasonable per se. Second, the fact that the Department's contractor did not meet the deadlines is irrelevant to the question of whether the Department properly exercised its discretion in granting the Appellant's request for an extension. There is no evidence that the Department's contractor was

operating under the same constraints as the Appellant, in terms of the scope of work that the Department requested it to perform and the time limitations involved. There could be a variety of reasons why the Department would impose certain deadlines on a responsible individual in order to impress upon him the need for prompt remediation yet impose different deadlines upon its own contractor whose activities it has contractual authority to control. Therefore the fact that Foster Wheeler did not complete the work according to the deadlines imposed on the Appellant does not prove that those deadlines were unreasonable or impossible to meet.

We do note that the only issue we have decided here is the issue of whether the Department erred by imposing the deadlines requested by the Appellant. We are *not* deciding the extent to which the Appellant may or may not be liable for failing to meet those deadlines in any future enforcement proceedings.

Finally, the Appellant challenges some of the factual statements and legal conclusions in the Department's July 2, 1998 order and January 19, 1999 order. We need not reach these arguments because we have performed our own independent review of the evidence and have made our own findings and conclusions of law. We have fully explained our reasons for upholding the Department's orders above. Therefore the Department's findings in those orders have no legal effect. *Harbison-Walker Refractories v. DEP*, 1996 EHB 116, 161-62.

Accordingly, we make the following:

CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this appeal. 25 Pa. Code § 1021.101(b).

2. Orders of the Department suspending operating permits pursuant to the Storage Tank Act and its regulations must be both reasonable and appropriate and "necessary to

aid in the enforcement of the act." 35 P.S. § 6021.1309.

3. The Department properly suspended the Appellant's underground storage tank permits and directed the Appellant to cease operations because the Department's action was reasonable, appropriate and necessary to aid in the enforcement of the Storage Tank Act.

4. The Department may properly hold the Appellant legally responsible for corrective action while at the same time performing these activities itself. 35 P.S. § 6021.107(g).

5. The deadlines which the Department ordered for the submission of a site characterization and remediation plan were not unreasonable. 25 Pa. Code § 245.310.

6. The Board is not bound by the factual findings or conclusions of law in the Department's orders. *Harbison-Walker Refractories v. DEP,* 1996 EHB 116, 161-62.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

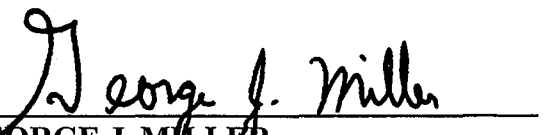
THOMAS F. WAGNER, INC., d/b/a	:	
BLUE BELL GULF; and	:	**EHB Docket No. 98-184-MG**
BLUE BELL GULF	:	**(consolidated with 98-133-MG,**
	:	**98-164-MG, 98-213-MG**
v.	:	**and 99-016-MG)**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
the DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SETH GRANT,	:	
Intervenor	:	

ORDER

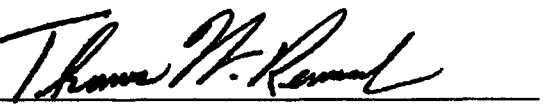
AND NOW, this 29th day of August, 2000, the appeals of Thomas F. Wagner, Inc. d/b/a Blue Bell Gulf and Blue Bell Gulf in the above-captioned matter are hereby **DISMISSED**.

It is FURTHER ORDERED that the supersedeas entered by the Board on February 11, 1999, is hereby **WITHDRAWN**.

ENVIRONMENTAL HEARING BOARD



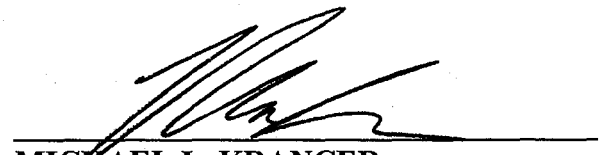
GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: August 29, 2000

c: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF EDINBORO and EDINBORO MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2000-070-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 11, 2000**

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

A Department letter which expressly withdraws a previously issued letter renders an appeal moot because a party no longer has a legally cognizable interest in its outcome.

OPINION

The Board recently issued an opinion and order denying a motion to dismiss filed by the Borough of Edinboro and the Edinboro Municipal Authority (hereinafter collectively referred to as "Edinboro"). *See Borough of Edinboro v. DEP*, EHB Docket No. 2000-070-L (opinion issued June 26, 2000). There, the Department of Environmental Protection (the "Department") had sent a letter on March 7, 2000 to Edinboro which referenced problems with its sewerage system and required Edinboro to establish a plan to correct them. In the opinion, the Board concluded that the letter imposed duties and obligations on Edinboro. The Board then held that a second letter sent to Edinboro on April 24, 2000, which attempted to characterize the

first letter as nonappealable, but did not withdraw the requirement for Edinboro to undertake certain actions, did not affect the appealability of the first letter.

In response to the Board's decision, the Department sent a third letter to Edinboro on July 13, 2000. That letter specifically withdrew the original letter "in its entirety" and stated that Edinboro was not required to take any action. Based on the contents of its third letter, the Department has filed a second motion to dismiss. In the motion, the Department asserts that the Board lacks subject matter jurisdiction because there is no action or adjudication which adversely affects Edinboro's rights. Specifically, the Department claims that the third letter's explicit withdrawal of the first letter has rendered Edinboro's appeal moot. We agree.

A matter becomes moot when an event occurs which eliminates a party's legally cognizable interest in its outcome. *West v. DEP*, EHB Docket No. 98-114-R, slip op. at 2 (opinion issued April 18, 2000). Without the existence of a justiciable controversy, the Board is unable to provide effective relief. *Id.*

Here, the Department's July 13, 2000 letter completely withdrew the March 7, 2000 letter which the Board previously determined to be an appealable action. In the absence of an appealable action which the Board could resolve by granting meaningful relief, this appeal is rendered moot. *See Grazis v. DEP*, 1997 EHB 576, 578 (stating that a second Department letter withdrawing any aspects of a prior letter which constituted an appealable action rendered the matter moot because the Board is unable to grant effective relief); *Kilmer v. DEP*, 1999 EHB 846, 848 (an appeal from a compliance order that the Department vacated is moot because the Board cannot grant any meaningful relief regarding an order that no longer exists); and *West*, slip op. at 2-3 (same).

Accordingly, we issue the following order:[1]

---

[1] The Board's decision in this matter does not affect Edinboro's appeal docketed at 2000-125-R.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF EDINBORO and EDINBORO MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2000-070-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of September, 2000, the Department's motion to dismiss is GRANTED. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **September 11, 2000**

c: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

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bap/jh

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DALLAS AREA JOINT SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2000-091-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 12, 2000

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss is granted. Under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act), and the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7511-7514, the Board lacks subject matter jurisdiction over an appeal seeking to challenge the Department's failure to act on a letter sent to it by a municipal authority. The Department cannot be estopped from raising the issue of the Board's subject matter jurisdiction.

OPINION

This appeal concerns a contract between Dallas Area Municipal Authority (Appellant) and the General Municipal Authority of the Borough of Harveys Lake (Authority) in which the Authority agreed to pay Appellant to collect and treat wastewater and sewage from the Borough of Harveys Lake (Borough). On March 17, 2000, Appellant sent the Department of Environmental Protection (Department) a letter informing the Department that Appellant had

terminated the contract on January 1, 2000, because the Authority failed to pay for services. (Motion, Ex. A, p. 3.) The letter also requested that the Department authorize Appellant "to terminate service to the Borough" and "that the Department immediately order the Borough ... to revise the official Act 537 Plan for [the Borough] by making arrangements for the pumping and treatment of sewage ... outside of [Appellant's] system...." (Motion, Ex. A, p. 1.)

The Department did not respond to Appellant's letter.[1] On April 24, 2000, Appellant filed a notice of appeal asserting that, by failing to respond, the Department had abrogated its duties under the Sewage Facilities Act; acted arbitrarily and capriciously; violated article I, section 27, of the Pennsylvania Constitution; violated Appellant's rights to substantive and procedural due process; and otherwise acted contrary to law.

On May 25, 2000, the Department filed a motion to dismiss and a memorandum of law in support. The Department asserts that the Board lacks jurisdiction over the appeal because (1) the Department's failure to respond to the letter is not an appealable "action" or "adjudication"; (2) the Board lacks the power to issue a writ of mandamus; (3) the Board lacks the power to grant declaratory relief; and (4) the Board lacks the authority to resolve contractual disputes between private parties.

Appellant filed an answer and memorandum in opposition on June 16, 2000. Rather than pointing to facts or law to refute the Department's arguments, Appellant points to statements made by the Department in preliminary objections to a related action Appellant filed in the

[1] The Department did respond, however, to an October 22, 1999, letter in which Appellant also asked it to terminate the contract. There, Kate Crowley, the Program Manager for the Department's Northeastern Office explained, "[T]he Department cannot and will not allow [Appellant] to terminate service to [the Borough]. While I can appreciate the situation [you are] in[,] putting the environment and citizens of [the Borough] in harms way is not a solution." (Motion to dismiss, Ex. B, p.1.)

Commonwealth Court's original jurisdiction. In that proceeding—an action for mandamus and declaratory relief—the Department filed preliminary objections asserting that the Board was the proper forum for the action.

Administrative agencies, such as the Board, have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., DER v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. DEP*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). Section 16(b) of the Sewage Facilities Act, 35 P.S. § 750.16(b), provides that persons have a right to appeal "[a]ny order, permit, or decision of the department under this act." Similarly, section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(a), provides, "The Board has the power and duty to hold hearings and issue adjudications ... on orders, permits, licenses or decisions of the Department."

Since the Department did not issue an order, permit, or license here, the only question is whether the Department's failure to act on Appellant's letter is a "decision" of the Department over which we have jurisdiction. Although the Commonwealth Court has never addressed this precise question, the Board has traditionally looked to the Court's interpretation of the word in *Department of Environmental Resources v. New Enterprise Stone and Lime Co.*, 359 A.2d 845 (Pa. Cmwlth. 1976), where the Court construed virtually identical language from section 1921-A(a) of the Administrative Code,[2] the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §§ 510-21(a). *See, e.g., Popple v. DEP,* 1997 EHB 152, 155.

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[2] Section 1921-A(a) of the Administrative Code was repealed by the Environmental Hearing Board Act. Prior to being repealed, section 1921-A(a) provided:

> The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications ... on any order, permit, license or decision of the Department of Environmental Resources.

In *New Enterprise*, the Court held that the Department's refusal to extend a deadline set in an agreement for installing certain air pollution control equipment was not an appealable decision. The Court explained:

> While we have no doubt that the DER can be said to have reached a decision not to modify its agreement with New Enterprise, we do not believe that such a decision, specifically one which does not result in any action being taken against a party and does not, therefore, affect property rights, privileges, liabilities and other obligations, is an appealable "decision" within the concept of the statutory provision here involved. We note that, while the word "decision" is not defined in the [Administrative] Code, administrative agency laws generally refer to the term "decision," as including a determination which can be classified as quasi-judicial in nature and which affects rights or duties. Here, the refusal by the DER to modify the outstanding agreement with New Enterprise lacks the elements which would suggest that a "decision" had been made in the technical sense of the word because the rights and obligations of New Enterprise have not been altered.

359 A.2d at 847 (footnotes and citations omitted). Thus, applying the standard in set forth in *New Enterprise*, whether the Department's failure to act is an appealable "decision" turns on whether the Department's failure to act altered Appellant's legal rights or obligations.

While the Department's failure to respond to Appellant's letter is disconcerting, it did not affect Appellant's "personal or property rights, privileges, duties, liabilities or obligations," and, thus, it is not an "appealable action." Appellant has precisely the same legal rights and obligations now that it did when it wrote the letter. The Board has held that the Department's failure to act is not ordinarily appealable. *See, e.g., Westvaco Corporation v. DEP,* 1997 EHB 275, 277; *Boling v. DEP,* 1995 EHB 599, 600-601; *Westtown Sewer Co. v. DER*, 1992 EHB 979; *Westinghouse v. DER,* 1990 EHB 515, 518. We see no reason to depart from that precedent in this case.

Nor are we persuaded by Appellant's argument that the Department admitted that the Board has jurisdiction over this matter in preliminary objections the Department filed concerning

a related action before the Commonwealth Court. The argument that Appellant is raising is essentially an estoppel argument: that the Department should be estopped from denying that the Board has subject matter jurisdiction based on the representations the Department made to the Commonwealth Court. Yet, as the Supreme Court wrote in *Drummond vs. Drummond,* 200 A.2d 887 (Pa. 1964), "It is well settled that an objection to jurisdiction over the subject matter may never be lost by estoppel, consent or waiver." *Id.* at 888.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DALLAS AREA JOINT SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2000-091-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of September, 2000, it is ordered that the Department's motion to dismiss is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
CHAIRMAN

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: September 12, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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Northeast Regional Counsel

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jb/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER BUCKS COUNTY JOINT MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2000-179-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 18, 2000**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

A supersedeas of a Department Order requiring a municipal authority to submit a plan approval application and ultimately to install malodor control equipment in the form of a scrubber device is denied where in considering the balancing of the factors relating to the granting of a supersedeas it appears that: (1) the petitioner elicited no evidence that the Order would result in irreparable harm to the Authority or any other party; (2) the petitioner failed to convince the Board that it had a reasonable likelihood of success on the merits of the case; and (3) the Board is not convinced that the potential threat to the public is minimal in light of the fact that malodor problems have been chronic and recurrent for years, the Authority has experimented, unsuccessfully, with various programs to control malodors and the current Order, if timely implemented, contemplates installation of malodor control technology in time for next summer when the risk of malodor events is highest.

OPINION

Procedural Background.

Before the Board is Lower Bucks County Joint Municipal Authority's (Lower Bucks or the Authority) Petition For Supersedeas of the Department of Environmental Protection's (DEP or DEP's) July 31, 2000 Air Pollution Abatement Order (AO). The relevant procedural history regarding this matter is set forth below.

On July 31, 2000 DEP issued Lower Bucks the AO for violating the Air Pollution Control Act and its regulations. Specifically, the AO alleges the following: (1) Lower Bucks owns and operates the Kenwood Pumping Station located in Bristol Township, Bucks County, PA; (2) the Kenwood Station emitted malodors on July 8, 23, 25 and 26, 1999; August 1, 11 and 23, 1999; September 19, 1999; and July 16 and 21, 2000; (3) DEP issued Lower Bucks Notices Of Violation, ("NOV" or "NOVs") for emitting malodors from its Kenwood Station, on July 12 and 30, 1999; August 5, 16, 18 and 26, 1999; October 1, 1999; July 19 and 25, 2000;[1] (4) the emission of malodors from the Kenwood Station violates Sections 8 and 13 of the Air Pollution Control Act, 35 P.S. §§ 4008, 4013, and Section 121.31(b) of the Air Pollution Control Act's regulations; (5) Lower Bucks attempted but failed to control the malodors by caulking windows, doorways, and hatches; installing a fan to exhaust air from the facility at a greater height; and treating sewage in the collection system further upstream from the station and; (6) in July 1999 Lower Bucks installed a device with the aid and consultation of Unitech Engineers that also failed to control the malodors. On the basis of the foregoing allegations, the AO orders Lower Bucks to: (1) submit a complete plan approval

application to DEP by September 30, 2000 for an air-cleaning device which demonstrates that the malodorous air contaminants from the Kenwood Pumping Station will be either incinerated at a minimum of 1200 degrees Fahrenheit for at least 0.3 seconds or controlled by other techniques approved by DEP that are equivalent to or better than incineration; (2) place purchase orders for DEP approved odor control equipment within 30 days of receiving DEP's plan approval; (3) begin installation of odor control equipment within 120 days of receiving DEP's plan approval; (4) complete installation of odor control equipment with 210 days of receiving DEP's plan approval and; (5) be in compliance with 25 Pa. Code § 123.31 within 240 days of receiving DEP's plan approval.

On August 18, 2000 Lower Bucks timely appealed DEP's AO to the Board by filing a Notice of Appeal (NOA). The NOA asserts that DEP failed to consider the following when it issued Lower Bucks an AO: (1) proper evidence; (2) "force majeure" circumstances; (3) adverse weather; (4) interference by others; (5) possible vandalism; and (6) mechanical failures. Responding directly to the AO's allegations, the NOA specifically denies that the Kenwood Station emitted malodors during the dates alleged by DEP in the AO, and denies that the alleged emissions violated the Air Pollution Act or its Regulations. However, Lower Bucks asserts that to the extent that any malodors exist, they are not its responsibility. Rather, the Authority argues that the alleged odors are the "result of subjective judgment and/or a breakdown and/or did not occur." Additionally, the NOA maintains that Lower Bucks "implemented techniques and/or other methods or

---

[1] An additional malodor NOV, dated August 30, 2000, covering a malodor incident on August 26, 2000, was issued to the Authority. This will be discussed in connection with our discussion of the evidence presented at the supersedeas hearing.

means to control any odors and said techniques, methods and means have controlled any alleged odors." The NOA also asserts that "[a]t all times relevant, . . . Lower Bucks . . . was affected by 'force majeure' events including, but not limited to, adverse weather conditions, interference by others, unreasonable and overzealous inspections."

On the heels of its Notice of Appeal, on August 23, 2000, Lower Bucks filed a "Petition For Supersedeas" of DEP's July 31, 2000 AO. Lower Bucks supports its Petition with two affidavit/verifications and various attachments. In general the Petition asserts that the malodor control system that the Authority has installed, and which is referred to in DEP's AO is as effective in controlling malodors or more so than the incineration method. As evidence thereof the Authority points to the fact that no malodor NOVs were issued from October, 1999 to July 16, 2000. The Petition also asserts that the Authority had already spent $500,000 in odor control measures and that the steps outlined in the AO would cost an additional $300,000. The Petition does not specifically allege separately that this expenditure would cause the Authority irreparable harm.

The Board held two days of hearings on the Petition For Supersedeas; on September 1 in Conshohocken, Pennsylvania and on September 5, 2000 in Harrisburg. On September 1, 2000 Lower Bucks presented three witnesses: (1) Mr. August A. Baur, the Managing Director of Lower Bucks; (2) Mr. S. J. Campbell, the Chairman of the Board of Unitech Engineers, Inc., who is Lower Bucks' consulting engineer who was qualified by the Board as an expert in engineering with regard to water and wastewater systems; and (3) Philip Smythe, the Field Technician for Lower Bucks in charge of 220 miles of sewer collection system and 225 miles of water main distribution system. DEP presented nine witnesses over two days: (1) Ms. Lisa Ross; (2) Ms. Lisa Schnieder and

(3) Ms. Jane Meier, all of whom are residents of Kenwood who live near the Authority's pumping station who testified, generally, about their experiences and observations of malodors emanating from the facility; (4) Mr. Seven O'Neil, DEP's Operations Chief for the Water Management Program; (5) Ms. Bridget Craig, the DEP Air Quality Specialist and member of the DEP Emergency Response Team who was the primary DEP inspector/investigator of the malodor complaints in this case; (6) Mr. Stephan Brown, a DEP Water Quality Specialist and member of the DEP Emergency Response Team who investigated two malodor complaints in the Kenwood area; (7) Ms. Francine Carlini, DEP's Air Quality Program Manager who the Board qualified as an expert in the field of malodor investigations; (8) Mr. George Monasky, DEP's Air Pollution Control Engineer who the Board qualified as an expert in air pollution control technology and who provided technical review of several of the Authority's submissions regarding the malodor control system which the Authority ultimately installed and which DEP considers unacceptable and; (9) Mr. Thomas McGinley, DEP's Southeastern Regional Office's Engineering Services Chief, who the Board qualified as an expert in air pollution control technology.

The parties submitted post-hearing briefs on September 12, 2000.

Factual and Legal Background.

This case involves the malodor regulations. Under 25 Pa. Code § 121.1 a "malodor" is defined as "[a]n odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public." 25 Pa. Code § 121.1. The control of malodor emissions is required and is governed by 25 Pa. Code § 123.31 which provides as follows:

§ 123.31. Limitations.

(a) Limitations are as follows:

(1) If control of malodorous air contaminants is required under subsection (b), emissions shall be incinerated at a minimum of 1200°F for at least 0.3 second (sic) prior to their emission into the outdoor atmosphere.

(2) Techniques other than incineration may be used to control malodorous air contaminants if such techniques are equivalent to or better than the required incineration in terms of control of the odor emissions and are approved in writing by the Department.

(b) A person may not permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source, in such a manner that the malodors are detectable outside the property of the person on whose land the source is being operated.

(c) The prohibition in subsection (b) does not apply to odor emissions arising from the production of agricultural commodities in their unmanufactured state on the premises of the farm operation.

25 Pa. Code § 121.31.

Lower Bucks County Joint Municipal Authority provides water and sewer services to its 22,000 customers who are residents and businesses within the Levittown area. (N.T. 9/1, 20) Lower Bucks was formed in 1952 and serves four municipalities: Bristol Township, Falls Township, Middletown Township, and the Borough of Tullytown. (N.T. 9/1, 22) The Board of Directors of the Authority consists of six persons, three members chosen by Bristol Township and three members chosen by Tullytown Borough. (N.T. 9/1, 22) The Board hired August A. Baur to be the Managing

Director of Lower Bucks, and he is responsible for its overall management. (N.T. 9/1, 21) Mr. Baur answers to the Board of Directors. (N.T. 9/1, 22)

There are 12 pumping stations whose function is to transport the sewage created by the customers to the Lower Bucks Sewage Treatment Plant (Sewage Plant or Sewage Treatment Plant). (N.T. 9/1, 113; 159; 165) The Kenwood Station is the last in the series of the 12 pumping stations that feed into the Sewage Plant while a 13th pumping station feeds into the Plant from a different direction.[2] (N.T. 9/1, 159) The Kenwood Station is located between Keystone and Kingwood Lanes in a residential section of Levittown, Pennsylvania called Kenwood. (N.T. 9/1, 24; Ex. C-51, P-1, P-2) The Kenwood Station collects wastewater which arrives from the other pumping stations down-line in a wet-well and then pumps the wastewater up and out of the wet-well into a distribution channel of the effluent line which eventually connects with the Sewage Plant. (N.T. 9/1, 163-165; Ex. P-9)

In September 1997, DEP received a referral from the Bucks County Health Department (Health Department) regarding ongoing odor problems at the Kenwood Station. (N.T. 9/1, 289-291) On October 14, 1997 DEP responded by letter from William H. Jolly, III, Compliance Specialist in the Water Management Program to Mr. Baur outlining the numerous odor complaints, informing Lower Bucks of its obligations under its Waste Quality Management Permit not to create a public nuisance, and requesting a meeting on October 20 at the DEP Southeast Regional Offices. (N.T. 9/1,

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[2] From the testimony, it was not completely clear whether the Kenwood Station is the last of 13 pumping stations that feed into the Sewage Treatment Plant or just the last in a series of 12 pumping stations. Nonetheless, the testimony is clear that the Kenwood Station is the last pumping station in a line of pumping stations leading to the Sewage Treatment Plant. It is irrelevant for the disposition of this Petition whether it is the last of 12 pumping stations or the last of 13 pumping stations.

291-293; Ex. C-1) The October 20 meeting never occurred, but around that time representatives of DEP, Lower Bucks, and the Health Department met at the Kenwood Station to observe its operations. (N.T. 9/1, 293) In an attempt to suppress odor emissions at that time, Lower Bucks added hydrogen peroxide to the main trunk lines - before the wastewater reached the Kenwood Station, installed a strobic fan, and considered venting manholes. (N.T. 9/1, 295-6)

However, in March 1998, DEP again received a referral from the Health Department regarding odors from the Kenwood Station. (N.T. 9/1, 298) On April 29, 1998, DEP's Steve O'Neil, Acting Regional Manager, Water Management, directed another letter to Mr. Baur informing him that it had received a petition from Kenwood residents complaining of malodors emanating from the Kenwood Station. The letter also requested Lower Bucks to meet with DEP on May 6, 1998 to discuss the effectiveness of the hydrogen peroxide addition method of odor control. In addition, DEP's letter informed the Authority that DEP "would also like to have a report from you concerning other options being considered by the Authority for odor control such as a wet scrubber or station relocation." (N.T. 9/1, 299; Ex. C-2)[3]

The parties then met on May 6, 1998. Present at that meeting were representatives of DEP, Lower Bucks, the Health Department, as well as, Lower Bucks' consultants from Unitech Engineers, Inc. and Southland Environmental. (N.T. 9/1, 299-300; Ex. C-3) At the meeting, the parties discussed the hydrogen peroxide system and a report of the system prepared by Southland Environmental. (N.T. 9/1, 299-300; Ex. C-4)

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[3] This was the first time that DEP has suggested to the Authority that it should be considering the use of a scrubber to deal with the malodor situation. (N.T. 9/1, 299). As we shall see, DEP repeated this suggestion on numerous occasions.

On August 3, 1998, DEP followed up the May 6, 1998 meeting with a letter from Mr. O'Neil to Mr. Baur. (Ex. C-5) Mr. O'Neil informs Mr. Baur that DEP had continued to receive malodor complaints and had confirmed four objectionable nuisance odors on June 8, 20, 28, and July 1, 1998. He goes on to state that "[c]learly, our observations indicate a need for the Authority to pursue additional options to eliminate nuisance odors". Mr. O'Neil specifically recommends that the Authority "[r]e-think its policy of adding hydrogen peroxide" and "investigate the feasibility of using a wet scrubber" to control its sewage odors. (N.T. 9/1, 304-305; Ex. C-5) Additionally, the letter recommends that Lower Bucks visit the Totem Road Pumping Station to observe how a wet scrubber successfully controls odors. Finally, the Authority is requested to attend a meeting with DEP on August 19, 1998 to further discuss the odor problem. (N.T. 9/1 305; Ex. C-5)

The meeting eventually took place on August 27, 1998. Present were representative of the Authority and DEP. (N.T. 9/1, 306; Ex. C-6) At this meeting, the Authority provided DEP with a copy of a report that Unitech had provided to the Authority on July, 14, 1998 entitled "The Affects of H_2O_2 On Organic Constituents Other Than H_2S." (Ex. C-7) This report discusses, among other things, odor problems at the Kenwood Station and possible solutions to that problem. Among the potential solutions discussed are the addition of potassium permanganate to the wastewater or installation of a wet scrubber. (N.T. 9/1, 307; Ex. C-7) The Report states as follows in this regard:

> However, since CH_2 and CH_3 in this organic is known to react with KMN_{04} or CLO_2, for the ultimate removal of odor, then my suggestion to the Board is that the treatment of the waste stream is feasible with 3-5 ppm of KMN04 during the warm weather months, but at what cost (??), or install a liquid phase counter current scrubber using

> KMN_{04}, CL_{02}, NaOCL, and in the process will scrub the air in the wet well at a dramatically reduced cost and can be released into the atmosphere via the strobic fan.

(Ex. C-7, pp. 4-5) At this meeting DEP informed Lower Bucks that it needed to design and install appropriate air pollution control technology because DEP continued to confirm nuisance odors emanating from the Kenwood Station. (N.T. 9/1, 308)

On September 16, 1998, Mr. O'Neil of DEP sent Mr. Baur another letter, this time as a follow-up to the August 27, 1998 meeting. The letter confirms that, "in a significant change of strategy" Lower Bucks had decided to discontinue the addition of hydrogen peroxide to the wastewater. Mr. O'Neil states that DEP is willing to allow the Authority to try a new proposal, *i.e.*, adding a different chemical to the wastewater and adding an odor absorptive enzyme "ecosorb" to the air inside the Kenwood Station. (N.T. 9/1, 308-10; Ex. C-8) However, Mr. O'Neil requests that by September 29, 1998 the "Authority submit to the Department a report of the effectiveness of these efforts, and proposing additional controls, if necessary, to eliminate nuisance odors." (NT. 9/1 310, Ex. C-8)

The Authority did not submit the report requested in Mr. O'Neil's letter dated September 16, 1998. (N.T. 9/1, 311) However, on October 6, 1998, Mr. Baur sent a letter to DEP indicating that the Authority was trying various new ways to control the odors by adding chemicals to the wastewater. (Ex. C-9) Mr. Baur also stated, in essence, that the Authority had considered the use of a scrubber system but was declining to go in that direction. Mr. Baur states in that regard as follows:

> The Authority's engineers have investigated the use of a wet well scrubber application for odor control at the station. It appears that the scrubber ... require[s] enclosure

> or elaborate winterizing. If not enclosed, leakage through the joints and fan could nullify the effectiveness of the system, since this application, we are looking for almost 100% efficiency. Other factors are high initial cost (over $200,000), high maintenance cost, and costly safety measures to handle hazardous chemicals.

(N.T. 311-12; Ex. C-9) The Authority, though, did not close the door completely on the idea of installing a scrubber. Mr. Baur states that, "should all the described modifications/improvements fail, the Authority may still consider a scrubber". (Ex. C-9)

Shortly after receiving Lower Bucks' October 6, 1998 letter, DEP determined that Lower Bucks' attempts to control odors emanating form the Kenwood station had failed. Therefore, it decided that air pollution control technology in the form of a scrubber was the best way to control the Kenwood Station odors. (N.T. 9/1, 315-17) DEP memorialized these determinations in a December 1, 1998 letter from Mr. O'Neil to Mr. Baur. (N.T. 9/1, 313-318; Ex. C-10) Additionally, the letter requested a meeting with the Authority on December 14, 1998 to discuss a schedule of abatement. Attendees at the December 14, 1998 meeting included representatives of DEP and its counsel, representatives of the Authority, its counsel and its consulting engineers, Unitech, and representatives of the Health Department. (N.T. 9/1 319; Ex. C- 11) At this meeting, DEP told Lower Bucks that it had 45 days to submit a malodor abatement plan utilizing appropriate air pollution control technology. (N.T. 9/1, 319-20) DEP followed up the December 14, 1998 meeting with a letter from Mr. O'Neil to Mr. Baur informing the Authority that DEP "believes that air pollution control technology needs to be applied to this problem, as required by the Department's malodor regulations". The letter further states that:

> "[b]ecause the Department has documented malodors at the lift station, the air regulations require that the Authority either incinerate emissions or control them by other techniques equivalent to or better than incineration. Accordingly, we are requesting that by February 1, 1999, the Authority submit a malodor abatement plan and schedule to us for installation of appropriate malodor control technology at the lift station.

(Ex. C-13)

On February 15, 1999 the Authority submitted an abatement plan and schedule, but not one involving incineration or a scrubber.[4] (N.T. 9/1, 323-24; Ex. C-15) Instead, the plan, the idea of which came from Mr. Smythe, involved, in essence, the attempted capture of potentially malodorous air, its reinjection into the effluent in the piping system and transportation or transference down the line to the Sewage Treatment Plant. (Ex. C-15, N.T. 9/1, 155-175) In the words of the Authority's expert witness, Mr. Campbell, "instead of it emanating out of the station, we're transferring it away from the station, into the main effluent line. And, instead of allowing the odors to emanate out of the building, we're now leaving the odors—or actually transferring the odors to the wastewater treatment facility". (N.T. 9/1, 166)

George Monasky, an air pollution control engineer for DEP, reviewed the Authority's abatement plan and drafted his review memorandum on April 21, 1999 reporting his analysis. (N.T. 9/5, 66, 69; Ex. C-16) Mr. Monasky's comment memorandum notes the following deficiencies:

> 1) The schematic shows that the slots of the perforated pipe would be in the raw sewage flowing through the sewer. It would appear that this arrangement may generate

[4] The Authority submitted a letter to DEP dated February 2, 1999 requesting an extension of ten (10) days to submit its abatement plan due to the illness of its engineer. (Ex. C-14)

even more odors due to the air stripping effect on the raw sewage. This is prohibited by 25 Pa. Code § 123.31(a)(2).

2) How will the Authority prevent the odors from being released to the atmosphere at the nearest downstream exit?

3) What will happen to the perforated pipe in the sewer main when the sewer main completely full?

4) Is the fan large enough to push the air through the sewer main to the plant? Calculations given only indicate the fan is large enough to push the malodorous air into the sewer main?

5) The proposed odor abatement plan does not show how the odors will be eliminated. It only shows the displacement of the odors to another place.

6) The Authority should provide proof that the proposed system has been installed and worked successfully in other applications if the Authority wants to pursue this application.

(Ex. C-16)

On May 3, 1999, DEP sent Mr. Baur a letter informing him that DEP was "not convinced that the Authority's proposal is a viable or effective control option." (Ex. C-17, N.T. 9/5, 71) The letter identified four reasons that DEP was not convinced that the plan was sufficient, namely,

1. The schematic shows a perforated pipe suspended in the raw sewage flowing through the sewer leaving the station. We believe that this arrangement may generate even more malodors due to the air stripping effect on the raw sewage, and is contrary to air quality regulations (25 Pa. Code § 123.31(a)(2)).
2. Discharging malodorous emissions down the sewer line would serve only to relocate the odors rather than eliminate them. How will the Authority prevent the odors from being released to the atmosphere at the nearest downstream exit?
3. Calculations included in the plan do not demonstrate that the fan is large enough to push the air collected in the pipe all the way to the treatment plant.

4. We are concerned about the effect the perforated pipe may have on the hydraulic carrying capacity of the sewer main, particularly during periods of high flow.

(N.T. 9/5, 71; Ex. C-17) DEP requests that the Authority submit a revised proposal by no later than May 24, 1999 which addresses these concerns.

The Authority responded by letter to DEP dated May 13, 1999. (N.T. 9/5, 71-73; Ex. C-18) Mr. Monasky reviewed the letter and determined that it did not address all of the stated deficiencies. (N.T. 9/5, 72-74, 81-87) Specifically, the letter failed to address two items: (1) how Lower Bucks will prevent odors from being released at the nearest point down the line, and (2) whether the fan was large enough to have the odors moved down to the treatment plant. (N.T. 9/5, 72-74; Ex. C-17)

Malodor incidences associated with the Kenwood pumping station continued to be documented in the summer of 1998. Specifically, there were malodor events on July 8, 1999, July 23, 1999, July 25, 1999, July 26, 1999, August 1, 1999, August 11, 1999, August 23, 1999 and September 19, 1999. These events led to the issuance of the following NOVs to the Authority for malodor violations: July 12, 1999 (for the July 8th incident); July 30, 1999 (for the July 23rd and 25th incidences); August 5, 1999 (for the July 26th incident); August 16, 1999 (for the August 1st incident); August 18, 1999 (for the August 11th incident); August 26, 1999 (for the August 23rd incident); and October 1, 1999 (for the September 19th incident). (Ex. C-24 – C-38; N.T. 9/1, 355-377) Ms. Craig testified at the hearing in detail how she personally investigated and documented each of the above-noted incidences. (N.T. 9/1, 355-377) She also testified how she goes about performing a malodor investigation and the criteria she employs in determining whether to document a particular reported incident as a malodor incident. Typically, when Ms.

Craig investigates a malodor complaint she first goes to the complaint area to observe whether she can detect any odors. Then she usually proceeds to talk with the complainant(s) about the investigation and the circumstances. An Investigation Report is drafted by the DEP investigator. (N.T. 9/1, 348-49, 353) In order to document a malodor under 25 Pa. Code § 123.31(b), DEP must: (1) determine where the odor originates; (2) determine if the odor crosses the property line of its originating source; (3) verify that the odor is the odor the complainants complained about; (4) determine that the odor is objectionable in that it is strong and persistent; and (5) have at least three or four complainants agree that the odor is objectionable. (N.T. 9/1, 349-51, 354-55; Ex. C-24-C-46)

On August 3, 1999 the Authority sent DEP a letter responding to the NOVs of July 12, 1999 and July 30, 1999. (Ex. C-19) This letter informed DEP that the Authority had "changed and modified" its original Air Pollution Abatement Plan. (N.T. 9/5, 74; Ex. C-19) However, despite these changes and modifications, Mr. Monasky testified that he still believed that the Lower Bucks' Air Pollution Abatement Plan was inadequate. (N.T. 9/5, 75-76)

DEP still did not approve the proposed system. The Authority, however, proceeded without DEP approval to install the new system. By letter dated October 4, 1999, Mr. Baur informed DEP that "[a]s of this writing, the [new] system is complete and functioning as designed with the exception of closing it up. This work is presently in progress". (Ex. C-20) Mr. Baur invited DEP to visit the pumping station to "review what I consider an innovative process of odor abatement at this site." *Id.*

Some months later, DEP did respond to Mr. Baur's October 4, 1999 letter. By letter from Ms. Carlini to Mr. Baur dated March 31, 2000, Ms. Carlini, among other things, restates DEP's conclusion that "the control device now installed at the station is not equivalent to incineration at 1200^0F for at least 0.3 seconds, in terms of odor control, as required by Section 123.31(a) of the Rules and Regulations." (Ex. C-21) Ms. Carlini closes by stating that, "[w]ith the approach of warmer weather in the spring, we fully expect odor complaints from nearby residents to resume. If this indeed occurs, the Department will pursue its enforcement options in this case to achieve compliance with all applicable regulations as quickly as possible." (Ex. C-21)

Just as predicted by Ms. Carlini in her letter of March 31, 2000, odor complaints did recur in the warmer months of 2000. Specifically, malodor incidents linked to the Kenwood pumping station occurred on the following dates: (1) July 16, 2000; July 21, 2000; and August 26, 2000. (Ex. C-40, C-42, C-44) These incidents were investigated by Ms. Craig and documented in the same way as discussed before with respect to the incidences in the summer of 1999. (N.T. 9/1, 378-389) These incidents led to the issuance of the following NOVs to the Authority: (1) July 19, 2000 (for the incident of July 16th); (2) July 25, 2000 (for the incident of July 21st); and (3) August 30, 2000 (for the incident of August 26th). (Ex. C-41, C-43, C-46)

In addition, the Board heard testimony from Ms. Ross, Ms. Schneider, and Ms. Meier, local residents, about their extensive experiences with malodors emanating from the Kenwood pumping station, including their experiences with the malodor events which transpired in the year 2000. These witness described the odors in various terms.

Ms. Ross, who lives directly across the street from the Kenwood pumping station, said that she has experienced malodors from the plant since she first moved into her home in July, 1997. (N.T. 9/1, 247-251) She described the malodor as "horrible, without a doubt...a rotten egg smell. It was—it would turn your stomach. My favorite phrase for it—and excuse this phrase—is, it would gag a maggot. And it was that horrible." (N.T. 9/1, 251) She further described that the malodor smelled like "something was decaying or dead". *Id.* She testified that the problem is less severe in cooler weather and that this year, in the warm weather, she observes the malodor about four days per week. (N.T. 9/1, 253) Ms. Ross detailed her observations of malodors occurring during the summer of 2000 including July 16, 2000 and August 21, 2000. (N.T. 9/1, 258-261) The July 16, 2000 incident was investigated by Ms. Craig and it led to her documentation of a malodor and to the issuance to the Authority of an NOV. (Ex. C-40, C-41) On the night of August 21st, Ms. Ross testified that the malodor "got stuck in my furniture" and that she "cleaned the whole next day, trying to get rid of this odor [because] it gets stuck in everything, in the fibers of your carpet". (N.T. 9/1, 259) Ms. Ross testified that the adverse effects of the malodors to her included her being unable to entertain in her home, her embarrassment when guests have been on at least four occasions forced to leave because of unpleasant malodors, her daughter not being able to play in the yard, and an adverse effect on her nerves as the malodor situation makes her upset. She testified that "you'll be eating dinner and everybody drops their fork because it wafts through your front living room". (N.T. 9/1, 262-263)

Ms. Lisa Schneider, who has lived in the Kenwood neighborhood for 17 years, also testified about her experiences with malodors emanating from the Kenwood

pumping station. (N.T. 9/1, 271-278) Ms. Schneider testified that she has experienced malodors from the plant for 17 years. (N.T. 9/1, 272) Since 1997, she said that the smells were "horrible" and that "we always got the smell." (N.T. 9/1, 273) She described one night in 1997 when "it was like 3 o'clock in the morning and this smell came waffing (sic) through our bedroom, woke us up. It was gagging. It was horrible". (N.T. 9/1, 273) Ms. Schneider testified about malodor problems during the summer of 2000. She testified about malodor events on July 16, 2000 and July 21, 2000. (N.T. 9/1, 276-277) These incidences were investigated by Ms. Craig, both led to her documentation of a malodor and to the issuance to the Authority of NOVs. (Ex. C-40, C-41, C-42, C-43) She described the odors as "horrible. They were horrible, definitely horrible". (N.T. 9/1, 276) She also described what she perceived as the adverse effects of the odors on her personally. She testified that, "personally, I've lost 60 pounds since 1997. I've stopped eating. I can't eat. The smell, I can't explain it to you. The smell is so disgusting, if your eating, you'll lose it. I do. I'm under doctor's care". (N.T. 9/1, 277) Moreover, neither Ms. Schneider or her daughter would be able to have friends over". (N.T. 9/1, 278)

Ms. Meier, who has lived in the Kenwood neighborhood all her life also testified. (N.T. 9/1, 279-286) Ms. Meier testified that she recalls malodor problems associated with the Kenwood pumping station all the way back to her High School days in the late 1970s. (N.T. 9/1, 281) The problem was not as severe for her since she lived up a hill but the wind would carry the odor to her home "frequently". (N.T. 9/1, 281-282) She said the "odors would gather and collect in sort of a valley and they were just there thicker than mud, putrid and disgusting". *Id.* She said that the odors were "nauseating"

and that it was "an identifiable sewer odor". (N.T. 9/1, 281, 284) She testified that the malodor, the identifiable sewer odor, comes to her home from an Authority manhole in the road. (N.T. 9/1, 283) She stated that:

> I try to plant aromatic flowers. I do what I can. I plant all these lilies at my front door. I have this—there's a ribbon of odor, and if the air is just right and the wind is just right, this little ribbon of odor comes right from that manhole to my front door. Or in the evening, when, you know, the days are hot, I personally can't afford to run my air conditioning 24/7. I put a fan in my kitchen window, to pull the cool air in. I'm pulling cool odor in. It's disgusting. I burn candles, try to combat it.

(N.T. 9/1, 284-85)

Supersedeas Standard.

The Board may grant a supersedeas of a Department action where a petitioner shows that such relief is appropriate. 35 P.S. § 7514(d)(1). In determining whether to grant a supersedeas the Board is to consider, among other factors: (1) irreparable harm to the petitioner in the absence of the supersedeas; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d)(1)(i)-(iii). In addition, a supersedeas will not issue if pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2). The Board applies a balancing approach with respect to these factors on a case by case basis in determining whether, in its discretion, a supersedeas should issue. In other words, cases will differ with respect to the relative merit, if any, of the factors just stated. Each supersedeas case, then, involves an analysis of each factor and how the factors relate to each. As Judge Labuskes said in *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 651:

> The Board ordinarily requires that all three statutory criteria must be satisfied. *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420; *Kane Gas Light and Heating Co. v. DEP*, 1997 EHB 961, 962; *Oley Township v. DEP*, 1996 EHB 1359, 1362. There have, however, been exceptions. *See, e.g. Mundis, Inc. v. DEP*, 1998 EHB 766, 774 (no irreparable harm or absence of harm to the public needs to be shown where Department acted without authority); *202 Island Car Wash v. DEP* 1998 EHB 443, 450 (same); *Gary L. Reinhart, Sr. v. DEP*, 1997 EHB 401, 419 ("On occasion, we have been persuaded to grant a supersedeas even though we believed that the petitioner would not prevail on the merits."); *Keystone Cement Co. v. DER*, 1992 EHB 590 (same); *Wazelle v. DER*, 1985 EHB 207 (no likelihood of success but harm to the public if supersedeas not issued). In the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *See Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983)(each criterion should be considered and weighed relative to the other criteria).

Global Eco-Logical Services, Inc. v. DEP, 1999 EHB 649, 651.

Irreparable Harm to the Petitioner.

Petitioner has not sustained its burden to show irreparable harm.

Petitioner's Petition For Supersedeas claims that it would have to spend as much as $300,000 to install the system called for in DEP's Order. At the hearing there was somewhat contradictory evidence on this point. Mr. Campbell, the Authority's expert/consultant, stated that in 1997 he was quoted a figure of $500,000 for installation of a scrubber system. (N.T. 9/1, 188) On the other hand, in a letter dated October 6, 1998 from Mr. Baur to DEP, he cites a figure of $200,000 for a scrubber system. (Ex. C-9) Either one of these is high and we recognize that. However, the important point is that at no time did the Authority link this expenditure, whether it be $200,000 on the low end or $500,000 on the high end to causing irreparable harm. There was no evidence of

the Authority's current financial condition. There was no evidence of the Authority's capability, or more importantly from its perspective, its incapability, of undertaking the expenditure. There is no evidence of the impact on the Authority of being forced to make this expenditure.

We heard from the Authority that it is a public authority with rate-payers. That, in itself is not enough to establish *a fortiori* that the expenditure would constitute irreparable harm. We did not hear anything about how the rate-payers would, if at all, be impacted by the expenditure. We have evidence of the potential expenditure of between $200,000 and $500,000 but that is in a vacuum without insight into how, if at all, that will adversely, and irreparably so, harm the Authority. Without this important information the circuit is not closed on the irreparable harm issue.

The Authority also argued that since it has already spent $500,000 on odor control measures to force it to spend more, whether it be $200,000 or $300,000, for scrubber technology *which is not required* would, *a fortiori*, constitute irreparable harm. We reject this reasoning. This argument assumes that the Authority *is not required* to undertake the course of action outlined in DEP's AO requiring it to submit a Plan Approval application for a scrubber and then install one. As we will discuss in more detail in the section of this opinion regarding the Authority's potential of success on the merits of its case, the Authority has not convinced us that it is not required to install the scrubber under the law. We also note in this regard that the $500,000 already spent includes all measures of odor control including chemical additives *and* the newly installed system. (N.T. 9/1, 107-109) Mr. Baur of the Authority was unable to provide any specificity as to what the Authority had spent on the newly installed system. *Id.* The chemical addition methods did not

work and as we will discuss in more detail in the next section of this opinion, we are not at all convinced that the new system works either. The regulation at issue requires written approval of DEP for methods of malodor control other than incineration. 25 Pa. Code § 123.31(a)(2). The new system, which is not incineration, whatever it cost, was installed not only without DEP approval, it was installed in the face of DEP disapproval. We shall discuss later that it was not only DEP as early as April 28, 1998 but the Authority's own consultant in July, 1998 who recommended the use of scrubber technology at this site. One can only conclude that had the Authority accepted the scrubber technology alternative earlier that it would have avoided spending resources on these other less effective items and would have avoided being in the position of which it now complains.

Likelihood of Success on The Merits.

Based on our review of the record at this point, we conclude that the malodors at issue in this case are such that cause annoyance or discomfort to the public, and are such that the Department determined to be objectionable to the public. 25 Pa. Code § 121.1; *DEP v. Franklin Plastics Corporation*, 1996 EHB 645. The testimony of witnesses Ross, Schneider and Meier as well as the testimony of Ms. Craig of the Department is sufficient to convince us that the malodors documented fall within the definition of "malodor". The testimony of these witnesses as to the nature of the malodor and the effects thereof show that the odors were annoying and discomforting and objectionable to the public. Each testified in descriptive terms that the odor was terrible and horrible. Each also testified about the direct and seriously adverse effect of the malodor on them personally, their families and their neighborhood. Moreover, Ms. Craig testified in detail how she

conducted her investigation and came to determine that the incidences for which she issued an NOV were "malodors" within the meaning of the regulation. In light of the testimony of the aforementioned witnesses we also conclude that the Kenwood pumping station is the source of the malodors. Thus, we conclude that DEP has demonstrated a malodor problem associated with the Kenwood pumping station in this case.

Not even the Authority seems to deny that, historically, there has been a malodor problem associated with the Kenwood pumping station. The Authority has tried, especially since 1997, various methods to try to control the problem. Its latest effort in that regard is the system it began to install in the summer of 1999 without the Department's approval.

The issue then is whether the odor control system in place, not being incineration, is "equivalent to or better than the required incineration in terms of control of odor emissions" as set forth in 25 Pa. Code § 123.31(a)(2). Both parties agree that the answer to this question whether the Authority's odor control system is equivalent to or better than required incineration is answered by the question, does the new system work or does it not? The Authority tried to meet its burden on this issue in two related ways. First, it offered the expert testimony of Mr. Bruce Campbell. Second the Authority tried to show, as a matter of fact, that the system works in practice. Analysis of the second component of the question is, perhaps, more problematic in this case because the "does it work test" necessarily involves a review of the function of two variables: performance over time. We are looking at this issue as of the date of the close of the Supersedeas hearing which necessarily places an outward limit on the time variable. While it may have been nice to have had a longer temporal data input we do not have that luxury in this case and we

must make the judgment based on the quantum of data that we have now. We must focus on the period of time that the new system has been in place and make a judgment on its performance based thereon.

In any event, we do not believe that the Authority succeeded on either of the two components.

Mr. Campbell testified that in his opinion, the system in place was equivalent to or better than incineration in terms of control of the odor emissions. (N.T. 9/1, 177, 210) He said that he based his conclusion on considerations of relative cost and reliability of the current system versus an incinerator system. In other words, the current system is more cost effective and more mechanically reliable in terms of maintenance. Although, we believe Mr. Campbell is an experienced expert in the field of engineering with respect to water and wastewater systems, his conclusion on this specific question is not credited. On cross-examination, Mr. Campbell admitted that he had not undertaken any analysis whatsoever of the potential costs to the Authority of installing and operating a scrubber at the Kenwood site. (N.T. 9/1, 198-200) Also, he could not provide any answer to the question of what precise concerns he had with respect to the reliability of incinerators. (N.T. 9/1, 200)

Mr. Campbell had himself recommended to the Authority the use of scrubber technology for odor control at least as early as July 14, 1998. In a report entitled "The Affects of H_2O_2 on Organic Constituents Other Than H_2S", which deals with the chemical addition method of trying to control malodors and which was transmitted to Mr. Baur of the Authority on July 14, 1998, after analyzing the chemical addition method, Mr. Campbell states:

> However, since CH_2 and CH_3 in this organic is known to react with KMN_{04} or CLO_2, for the ultimate removal of odor, then my suggestion to the Board is that the treatment of the waste stream is feasible with 3-5 ppm of KMN_{04} during the warm weather months, but at what cost (??), or install a liquid phase counter current scrubber using KMN_{04}, CL_{02}, NaOCL, and in the process will scrub the air in the wet well at a dramatically reduced cost and can be released into the atmosphere via the strobic fan.

(Ex. C-7) Thus, Mr. Campbell recommended the use of a scrubber system to the Authority as a technically sound and economically desirable alternative over two years ago. When asked what response he received from the Authority on this recommendation he said, "I never received an answer from them". (N.T. 9/1, 209)

Also a factor in our analysis of this question is the fact that this type of system is not in operation anywhere else in the world to anyone's knowledge. Mr. Baur testified that he was not aware of this system's use anywhere else. (N.T. 9/1, 98-99) This is not a case of technology which is tried and proven and being applied to this case. On the other side of the ledger, Mr. McGinley, testified that scrubber malodor control technology is effective in a broad range of applications, including, importantly, sewage treatment plant pumping stations. (N.T. 9/5, 109-110) In fact, he testified that three sewage pumping stations in Bucks County have successfully implemented scrubber technology to control malodors. (N.T. 9/5, 110) Thus, scrubber technology has proven to be "equivalent to or better than the required incineration in terms of odor emissions". 25 Pa. Code § 121.31(a)(2).

Related to the concept just mentioned is the fact that the system in place now at the Kenwood pumping station does not treat malodors but, instead, transfers the malodors

down-stream to the Sewage Treatment Plant. (N.T. 9/1, 166) DEP's written response dated May 3, 1999 to the Authority's plan notes this specifically in stating "discharging malodorous emissions down the sewer line would serve only to relocate the odors rather than eliminate them. How will the authority prevent the odors from being released to the atmosphere at the nearest downstream exit?" (Ex. C-17) Ms. Ross, Ms. Schneider, Ms. Meier and Ms. Craig each testified that in the malodor incident of July 16, 2000 that a manhole was "dancing" or "jumping" meaning that, due to excess water pressure, the lid would lift off its placement in the street. (N.T. 9/1, 258-259, 275, 282, 379) Ms. Meier testified about odor emanating from the manhole to her home. (N.T. 9/1, 284-85) This "jumping" or "dancing" manhole seems to be precisely the realization of DEP's concern about transferring the malodor as opposed to treating it.[5]

For these reasons, we do not credit Mr. Campbell's opinion that the system in place is equivalent to or better than incineration.

We do not think that the Authority demonstrated that the system works in practice either. While the Authority's witness continually asserted that "it works", we see the contrary.

The Authority's executive director, Mr. Baur, as well as Mr. Campbell, told us that the system was in place in June or July, 1999 and was completely on-line with shakedown completed by about October, 1999. (N.T. 9/1, 66, 174) The original plan for the system had been submitted to DEP in a letter dated February 15, 1999 from Mr. Baur to Mr. O'Neil of DEP. (Ex. C-15) In that letter, Mr. Baur stated that he estimated that

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[5] The record at this point does not establish that even in the presence of DEP's proffered solution, *i.e.*, a scrubber, that malodors would not occur in the event of recurrence of the "jumping" or "dancing" manhole. This point could be developed

the system would be completely installed by May 15, 1999. *Id.* DEP did not approve the system as proposed. (Ex. C-16; C-17; C-18) In spite of DEP's lack of approval of the system, in an August 3, 1999 letter from Mr. Baur to Ms. Craig of DEP it is stated that the system, with some modifications from the original plan, "is now in operation since July 27, 1999". (Ex. C-19) Thus, the system was operational by no later than July 27, 1999.

The Authority's repeated assertions that "it works" come in the face of continuing and unabated odor complaints in the summer and fall of 1999 and now again in the summer of 2000. There was no evidence of the specifics of the alleged "shakedown" period which was said to have lasted through October, 1999 or how the "shakedown" period might have caused odors to result. Even if we accept the "shakedown" period as safe harbor period as the Authority apparently would like us to do, the malodor problems have recurred in the summer of 2000.

It is true that odor complaints took a hiatus from October, 1999 until July, 2000. The Authority contends that this is proof that the system works. We reject that theory of the relationship between the hiatus in malodor complaints and the functionality of the system. Instead, we credit the evidence, some of which comes from the Authority's own expert and contractor, which demonstrates that the malodor problem, both in general and with respect to this particular plant, is seasonal with the warmer months of spring and summer being the periods of time at which the conditions favorable for malodor are most favorable.

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further at the full hearing on the merits. In any event, this particular consideration is not dispositive with respect to the denial of this Petition.

Francine Carlini, DEP's Regional Air Program Manager and a former investigator of malodor complaints, was qualified as an expert in the field of malodor investigations. She has many years of personal experience investigating malodor complaints having done over 500 such investigations. (N.T. 9/5, 7) Part of her responsibilities at one time was to train new staff on how to investigate malodor complaints. *Id.* Ms. Carlini testified that cooler weather would be less conducive for production of malodors at the Kenwood plant. (N.T. 9/5, 31-35)

Mr. McGinley, who spent 14 years in enforcement before becoming Engineering Services Chief, agreed. He testified that, "[g]enerally, from my experience, the winter months are not—when it's cold are not the times when we get odor complaints." (N.T. 9/5, 117)

As to this plant, the Authority retained Southland to perform a study of its chemical additive method of odor control wherein it noted that cooler ambient temperatures had the effect of reducing the potential for malodor production. (Ex. C-4) This is because cooler temperatures inhibit the production of Hydrogen Sulfate which is the compound which causes the odor in this case. Indeed, Southland concluded that during winter and early spring, there would be significant periods of time in which no chemical addition would be necessary because Hydrogen Sulfide production would be sufficiently inhibited. It should also be noted here that Mr. Campbell, the Authority's expert, is in agreement with the assertion that the time of prime malodor risk is during the warm weather months. In his July 14, 1998 report on "The Affects of H_2O_2 on Organic Constituents Other Than H_2S", which we have quoted from before, he notes that

treatment of the waste stream for odor control would be "*during the warm weather months*". (Ex. C-7)

Thus, the absence of complaints from October, 1999 through mid-July, 2000 is not indicative of a system that works.

Even if we could draw the conclusion about the lack of malodor complaints from October, 1999 to July 2000 that the Authority would like, the malodor incidents have been numerous during the summer of 2000. There have been the following documented malodor incidences so far this summer: (1) July 16, 2000; (2) July 21, 2000; (3) July 25, 2000; and (4) August 26, 2000. DEP issued Notices of Violation for each of those incidences. (C-40-46; N.T. 9/1 378-389)

The Authority's Petition suggested that these problems were due to breakdowns or mechanical problems. There was no evidence of that at all at the hearing. In fact, when Mr. Smythe was asked what happened with respect to the most recent malodor incident on August 26, 2000 he responded, "[a]ctually, I've lost track of what's happened from one time to the next out there". When asked over objection whether he had any idea what happened on that date he responded, "I can't say with any certainty". (N.T. 9/5, 133-34)

We cannot accept either the claim by the Authority that the documented malodor problems were attributable to a nearby drainage ditch or the main Sewage Treatment Plant located about one-quarter mile away. The Authority offered no affirmative evidence that the odors were emanating from either the ditch or the Sewage Treatment Plant. As for the ditch, no evidence was offered showing even how a ditch might produce odors in general or odors of the nature experienced here. On the other side, DEP

offered not only affirmative evidence linking the malodor incidences to the Kenwood plant but also a credible basis to conclude that the Sewage Treatment Plant is not implicated with respect to the malodor complaints at issue here. Ms. Craig, the Department investigator of the malodor problems, testified that as a general matter she would go to the perimeter of the pump station fence to ascertain the source of the malodor. (N.T. 9/1, 406) Ms. Carlini pointed out that there were other businesses and residences closer to the Sewage Treatment plant and if the odor was emanating from there, complaints from the vicinity closer to the Sewage Treatment Plant would be received. Also, the odor that would emanate from the Sewage Treatment Plant would be different from the odor that was detected with respect to the Kenwood malodor incidences. (N.T. 9/5, 35-37)

As summation to this section of the discussion, we think that the evidence taken at this stage of the proceeding demonstrates that while scrubber technology *is* a proven method of malodor control in the context of a sewage pumping station which is "equivalent to or better than the required incineration in terms of odor control", the Authority has not demonstrated a likelihood of showing that the system it installed here is likewise, either in theory or in practice.

Likelihood of Injury to the Public.

Some, but not all, of the analysis of the likelihood of injury to the public is subsumed in our analysis of petitioners likelihood, or in this case, unlikelihood, of its succeeding on the merits. On the one hand we have discussed our view that the evidence does not support a conclusion at this point that the system works. On the other hand, as we have discussed, the risk of malodor problems in general and those associated with this

plant are likely to diminish as cooler weather sets in. As it is now the middle of September, one could, in the abstract, consider that the risk of malodor incidences will diminish as a function of the passage of time as we move from the end of summer into fall and, then, into winter.

We cannot, however, on that basis, totally discount the likelihood of injury to the public because we have to weigh this factor in light of as it interplays with the other factors, especially the likelihood of success on the merits factor. One cannot rule out the possibility that there may be a hot spell or two left in this summer/fall season and in light of the track record of this system we do not have confidence that malodor incidences will not occur in such circumstances. Also, given that the evidence we have been presented does not instill the Board's confidence in the Authority's system there would be a significant risk of a recurrence of malodor problems with the onset of warmer weather in 2001. Finally, we decline to, in essence, sweep the problem under the rug by employing the rationale that since cold weather is coming the risk of injury due to malodor is not a factor. The people of this community, who are the victims of the malodor problems over the years, should not have to bear the risk that the chronic problems, which have continued even under the Authority's new system, will go on hiatus for the winter only to recur again next warm season. This is especially so when one considers that by the time next warm season starts, many months of time will have been irretrievably lost and it will be too late for the Authority to have a scrubber system up and running for the summer of 2001 which seems to be the intent of DEP's Order.[6]

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[6] Viewed this way, there would be irreparable harm to DEP and to the citizens of Kenwood if the DEP order was superseded. Time is one commodity the loss of which is an irreparable harm.

Also, in connection with the potential threat to the public, we are concerned about the "dancing" or "jumping" manhole situation that we talked about before. This phenomenon has already occurred at least once. Its recurrence presents a concern that malodors would be emanated.[7]

Conclusion.

Based on our review of the record presented and weighing the factors for supersedeas relative to each other, we conclude that the Authority has not sustained its burden to show that it qualifies for a supersedeas of DEP's Order. The Authority has been living on borrowed time with respect to this problem for too long already and we decline to extend another loan of that commodity now based on the record we have seen.[8]

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[7] *See* Footnote No. 5, *supra*.

[8] In light of our discussion of the three factors outlined in 35 P.S. § 7514(d)(1)(i)-(iii), especially the harm to the public factor, we do not see that it is necessary to discuss 35 P.S. § 7514(d)(2) which provides that a supersedeas shall not issue in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period of the supersedeas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER BUCKS COUNTY JOINT MUNICIPAL AUTHORITY	:	
v.	:	
	:	**EHB Docket No. 2000-179-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

Upon consideration of the Petition of the Lower Bucks County Joint Municipal Authority for a Supersedeas from the Department of Environmental Protection's July 31, 2000 Air Pollution Abatement Order, the evidence produced by both parties at the two days of hearing and the parties' post-hearing briefs, IT IS HEREBY ORDERED that said Petition is DENIED.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: September 18, 2000

(Via Telecopy and Regular Mail)

c: **DEP Bureau of Litigation**
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STANLEY L. GRAZIS	:	
	:	
v.	:	**EHB Docket No. 2000-017-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 19, 2000**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

On cross motions for summary judgment in this appeal of DEP's bond forfeiture action, Appellant's motion is granted in part and denied in part while DEP's motion is denied. An oil and gas well operator who was in violation of the requirement that wells be plugged and who had been issued a Notice of Intent to Forfeit his existing single blanket bond proffered seven individual replacement security bonds to replace his existing blanket bond. DEP declined to review the proffered replacement bonds and proceeded to forfeit the blanket bond after Appellant had proffered his proposed replacement bonds. DEP returned the proffered replacement bonds unreviewed to Appellant. Neither the presence of a violation of the substantive operational requirements of the Act nor the issuance of a Notice of Intent to Forfeit act as an absolute negation of an operator's right to replace his or her security. DEP acted contrary to law when it forfeited Grazis's blanket bond without first having reviewed the proffered replacement bonds. Thus, DEP's forfeiture of the blanket bond cannot be upheld at this stage of the proceedings. The question of whether the original blanket bond or the seven proffered replacement bonds are

the subject of forfeiture cannot be resolved at this stage of the proceedings.

OPINION

Procedural Background

Before the Board are the DEP's (Department of Environmental Protection) and Appellant, Stanley Grazis's (Grazis), Cross Motions For Summary Judgment.[1] The relevant procedural history regarding these motions is set forth below.

Grazis initiated this matter on February 1, 2000 by timely filing a Notice of Appeal (NOA) with the Board regarding DEP's December 22, 1999 Declaration Of Bond Forfeiture (Bond Forfeiture). The Bond Forfeiture alleges the following: (1) "Grazis is the 'operator,' as that term is defined in Section 103 of the Oil and Gas Act, 58 P.S. § 601.103, of nine wells located in Eulalia and Abbott Townships, Potter County, Pennsylvania"; (2) DEP permitted the wells; (3) Grazis bonded the wells with a $25,000 blanket certificate of deposit collateral bond (Blanket Bond) from the American Bank and Trust Company pursuant to Section 215 of the Oil and Gas Act, 58 P.S. § 610.215; (4) "[t]he Wells are . . . 'abandoned' as that term is defined in Section 103 of the Oil and Gas Act, 58 P.S. 601.103"; (5) "Grazis' failure to plug the abandoned wells violates Section 210(a) of the Oil and Gas Act, 58 P.S. § 610.210(a), and constitutes unlawful conduct and a public nuisance pursuant to Sections 502 and 509 of the Oil and Gas Act, 58 P.S. § 601.502 and 601.509"; (6) by Order dated June 16, 1999 DEP had ordered Grazis to begin plugging the wells by August 31, 1999 which Order also set forth a Notice of Intent to Forfeit Bonds in which DEP notifies Grazis of DEP's intent to forfeit the Blanket Bond if he did not begin plugging the Wells; (7) Grazis did not plug the wells; (8) "Section 215(c) of the Oil

[1] Chairman Miller did not participate in the deliberations or the disposition of this Opinion and Order.

and Gas Act, 58 P.S. 601.215(c), and Section 312(a) of the Oil and Gas Wells regulations, 25 Pa. Code § 78.312(a), authorize the Department to declare the bond fortified if the owner or operator fails to comply with the well plugging requirements of the Act." (NOA Ex.-1)

Grazis does not challenge the propriety of the bond forfeiture as such. The cornerstone of Grazis's NOA is the argument that DEP should not have forfeited the $25,000 Blanket Bond, but instead forfeited seven single well replacement bonds he submitted on September 13, 1999. He argues that Section 215(a)(3) of the Oil and Gas Act, 58 P.S. § 601.215(a)(3) and Section 310 of the Oil and Gas Wells regulations, 25 Pa. Code § 78.310, provide him the right to substitute and replace existing collateral. According to Grazis, DEP's failure to substitute the proffered replacement bonds and forfeit them was arbitrary and capricious, an abuse of discretion, and violates his constitutional due process and equal protection rights.

On August 1, 2000 both parties timely filed with the Board their respective Motions For Summary Judgment and accompanying memoranda of law in support thereof.[2] Neither party has proffered any expert evidence to support its Motion.

Grazis's Motion requests the following relief: (1) that the Board find that the Tract 365 Nos. 1 and 2 wells are not required to be covered by bond and deleting them from Grazis's bonding coverage; (2) that the Board find that DEP, by refusing to review the seven single bonds proffered as replacement for the Blanket Bond, acted improperly or contrary to law; and (3) that the Board limit DEP's bond forfeiture action against the Blanket Bond to the amount of $17,500.

Grazis's Motion attaches Exhibits 1 through 6 which are: (1) "Assignment Of Certificate Of Deposit Oil and Gas Collateral Bond" (which is the Blanket Bond)[3]; (2) Grazis's NOA; (3)

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[2] Grazis's Motion will be cited as "GMSJ" and his memorandum of law as "GMOL". DEP's Motion will be cited as "DEPMSJ" and its memorandum of law as "DEPMOL".

[3] The attached "Assignment of Certificate of Deposit" refers to an attached "Collateral

"Department's Answers To Appellant's Request For Admissions, Interrogatories, And Request For Production Of Documents" (specific pages); (4) DEP's June 16, 1999 Order; (5) Peggy Smith's, (DEP Program Support/Bonding, Oil and Gas Management) January 31, 1999 letter to Grazis returning the original applications for the seven single well collateral bonds; and (6) "Department's Answers To Appellant's Request For Admissions, Interrogatories, And Request For Production Of Documents" (specific pages).

DEP's Motion counters Grazis's by stating that based on the undisputed facts and relevant law, Grazis's claims are legally insufficient to support relief from the Board and that the Board should therefore dismiss Grazis's appeal. DEP's Motion attaches Exhibits A through F which are: (A) Grazis's NOA; (B) "Department's Answers To Appellant's Request For Admissions; Interrogatories And Request For Production Of Documents"; (C) DEP's June 16, 1999 Order and an "Attestation" that it is a true and correct copy and is an official record of DEP; (D) "Appellant's Responses to Department's First Set Of Admissions, Interrogatories And Request For Production of Documents"; (E) Richard Ford's Inspection Report dated November 4, 1999 reporting that the Wells had not been plugged; and (F) Grazis's June 4, 1993 "Notice of Intention To Plug."

Grazis filed a response to DEP's Motion For Summary Judgment on August 27, 2000. DEP did not file a response to Grazis's Motion For Summary Judgment. On September 13, 2000, DEP filed a reply to Grazis's response to DEP's Motion for Summary Judgment.[4]

Bond Agreement" which has not been presented by either party in their respective filings.

[4] DEP's reply is captioned "Department's Reply To Appellant's Response To The Department's Motion For Summary Judgment And Motion To Amend Motion For Summary Judgment". This reply/motion merely clarifies what was apparently perceived as an inaccuracy in DEP's original Motion and brief regarding various deadlines outlined in a DEP's June 16, 1999 Order which ordered Grazis to cap his wells in a certain time frame. The particulars of the June 16, 1999 Order are discussed in more detail later. DEP thus moves to amend it original

Factual and Legal Background

Grazis is the operator of 10 oil and gas wells in Eulalia and Abbot Townships in Potter County. Section 215(a) of the Act, 58 P.S. § 601.215(a) establishes and defines the bonding requirements applicable to gas and oil wells. A well owner has two options for satisfying the bonding requirements. He can submit a bond of $2,500 per well. Alternatively, an operator may choose to submit a so-called "blanket bond" covering all of his wells. 58 P.S. § 601.215(a).[5] It is apparent that the blanket bond option is attractive to one who operates many wells because a single blanket bond of $25,000 would satisfy the financial security requirements for his entire portfolio of Pennsylvania wells. For example, if an operator owned 1000 wells in Pennsylvania, he could be in full compliance with Section 215(a) of the Act by posting a single blanket bond for $25,000 and he would not have to post 1,000 separate bonds in the total amount of $250,000.[6]

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summary judgment papers to conform to the actual schedule of deadlines outlined in the June 16, 1999 Order. The June 16, 1999 Order in question was submitted as Exhibit "C" to DEP's Motion for Summary Judgment. The Board reviewed that Order in detail in its deliberations on these cross motions. Any possible inaccuracy in DEP's description of it in its Motion and brief was of no consequence.

[5] There are other financial security options available besides bonds for those operators who, because of financial inability, cannot obtain a bond. First there is the so-called "fee in lieu" program. Under this program an operator of not more than 200 wells who cannot obtain a bond because of financial inability may pay an annual fee of $50 per well or a blanket fee of $500 for 10 to 20 wells or $1,000 for more than 20 wells. 58 P.S. § 601.215(d)(1)(i). This financial security option is referred to as the "fee in lieu" program. *See Marwell v. DEP*, 1997 EHB 1150. In addition, there is a system of "phased deposits" where an owner makes phased deposits of collateral to which will eventually fully collateralize a security bond. 58 P.S. § 601.215(d)(1)(ii). Neither the "fee in lieu" program nor the "phased deposit" program are involved in this case.

[6] This statutory structure was challenged by the Pennsylvania Independent Petroleum Producers (PIPP) as unconstitutionally favoring large operators, *i.e.*, those owning over 10 wells and posting a blanket bond, over small ones. PIPP argued that the law was violative of the equal protection clause of the United States and Pennsylvania Constitutions in that the law discriminated against small producers in favor of large ones. The Commonwealth Court held, however, that the statutory scheme did not violate the equal protection clauses. *Pennsylvania Independent Petroleum Producers v. DER*, 525 A.2d 829 (Pa. Cmwlth. 1987), *aff'd*, 550 A.2d 195 (Pa. 1988), *cert. denied*, 489 U.S. 1096 (1989).

In 1986, in order to comply with the Act's financial responsibility requirements, Grazis submitted the $25,000 Blanket Bond dated February 21, 1986 to DEP to cover the ten wells. (NOA Ex. 4) The ten wells are designated: Tract 364 wells No. 1, 2, and 3; and Tract 365 wells No. 1, 2, 3, 4, 6, 10, and 11.

On June 16, 1999, DEP issued to Grazis a Compliance Order and a Notice Of Intent To Forfeit Bond (the portion of this document which is the Compliance Order will be referred to as the Compliance Order or CO) requiring him, among other things, to plug 9 of the 10 wells, *i.e.*, wells No. 1, 2, 3, 4, 6, 10, and 11 on Tract 365 and wells No. 1, and 2 on Tract 364. (DEPMSJ Ex. C) Well Tract 364, No. 3 was not covered by the CO since it had been plugged in 1993 by Mr. Grazis. (GMSJ ¶ 2) The CO was based on the findings that: Grazis was the operator of the wells as that term is defined in 58 P.S. § 601.103 (¶ C); the wells had not been used to produce, extract, or inject any gas, petroleum, or other liquid in the past 12 month period (¶ F); therefore, the wells are "abandoned wells" as that term is defined in Section 103 of the Oil and Gas Act, 58 P.S. § 601.103 (¶ G); Grazis has not plugged the abandoned wells as required by 58 P.S. § 601.210(a) nor has Grazis requested inactive status for the wells in accordance with 58 P.S. § 601.204 (¶ H); and Grazis's failure to plug the abandoned wells violates 58 P.S. § 601.210(a) and constitutes a nuisance under 58 P.S. §§ 601.502 and 601.509 (¶ I). The CO ordered Grazis to submit a Notice Of Intent By Well Operator to Plug a Well for each of the nine wells (Wells) by August 1, 1999 (¶ (1)(a)); begin plugging the Wells by August 31, 1999 (¶ (1)(b)); have at least four Wells plugged by September 30, 1999 (¶ (1)(c)); and have all the Wells plugged by November 30, 1999 (¶ (1)(d)).[7]

The "Notice of Intent To Forfeit Bond" is contained in the same document as the CO and

[7] Additionally, the CO ordered Grazis to completely reclaim the Well sites by July 1,

is clearly directly tied to the CO. The Notice of Intent to Forfeit is presented as conditional in the event Grazis does not show compliance with the CO. It states in the event Grazis fails or refuses to begin plugging the wells by no later than September 1, 1999, DEP intends to forfeit Grazis's Blanket Bond. (DEPMSJ Ex. C)

Grazis did not appeal the June 16, 1999 CO. (Grazis Response to DEP Request For Admission No. 3, DEPMSJ Ex. D). Thus, the CO is administratively final. *Kresge v. DEP*, Consolidated No. 99-149 (Opinion and Order issued January 27, 2000). Moreover, Grazis admits that he did not begin plugging the wells by September 1, 1999 and that he has not plugged any of the wells. (Grazis Response to DEP's Requests For Admission 2, 4; DEPMSJ Ex. D; *See also* DEPMSJ Ex. E) Grazis states in his summary judgment papers that, despite what he calls good faith efforts, he did not comply with the CO. (GMSJ ¶ 4)

On September 13, 1999, Grazis submitted to DEP seven single well bonds to replace his $25,000 Blanket Bond. (GMSJ ¶ 5; DEPMSJ ¶ 10) Grazis asserts that Section 215(a)(3) of the Oil and Gas Act, 58 P.S. § 601.215(a)(3) and Section 310 of the Oil and Gas Wells regulations, 25 Pa.Code § 78.310, allow him to substitute and replace his existing $25,000 Blanket Bond with single well bonds. (NOA; GMOL)

It is undisputed that DEP not only did not approve the proffered replacement bonds, it declined even to review them. DEP states in its response to Grazis's interrogatory on this subject that, "[t]he replacement bonds were not reviewed by the Department because the Department received the Replacement Bonds after it commenced its action to forfeit the Blanket Bond". (GMSJ Ex. 3; DEP Answer to Interrogatory No. 3) DEP does not specify what exactly it is referring to by its reference to "action to forfeit the Blanket Bond". Since the appeal was filed,

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2000 (¶(2)).

DEP has returned to Grazis the unreviewed proffered seven individual replacement bonds. (Grazis Response to DEP Request For Admission No. 5, DEPMSJ Ex. D; GMSJ Ex. 5)

As noted, when Mr. Grazis first bonded his 10 wells in 1986 he chose to use the Blanket Bond in the amount of $25,000 instead of 10 individual bonds which would have totaled $25,000. At that time, the total bonding amount of $25,000 would have been the same under either method of bonding. Although it is not relevant to the disposition of the matter before us, we assume that it was less costly in terms of bonding fees to obtain a single blanket bond in the amount of $25,000 as opposed to obtaining 10 separate bonds in the amount of $2,500 each.

In any event, since Mr. Grazis obtained the Blanket Bond, events have transpired independent of this litigation which have impacted the status of Mr. Grazis's bonding position. Pursuant to a change in Pennsylvania law, two of the 10 wells, *i.e.*, Tract 356 Nos. 1 and 2, are no longer covered under the bonding requirements. DEP admits in its response to Grazis's Request For Admission No. 1 that these wells are no longer required to be covered by an operator's bond under the Act and are not covered by the Blanket Bond as a matter of law. (GMSJ Ex. 3) Also, as noted, Tract No. 364, No. 3 was plugged in 1993. (GMSJ ¶ 2, Ex. 4)

Summary Judgment Standard

Under the Pennsylvania Rules of Civil Procedure, a party may move for summary judgment "after the relevant pleadings are closed, but within such time as not to unreasonably delay trial." Pa. R.C.P. 1035.2. When a motion for summary judgment is timely filed, the Board will assess it and "grant summary judgment only when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law." *County of Adams v. DEP*, 687 A.2d 1222,

1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. In order to reach this standard and prevail on a motion for summary judgment, the movant must meet the burden of setting forth "with adequate particularity the reasons for summary judgment [and, such] reasons must be apparent from the face of the motion." *Barkman v. DEP*, 1993 EHB 738, 745. Further, the Board cannot speculate or supply the legal or factual arguments lacking in the movant's motion. *See id., Gambler v. DEP*, 1997 EHB 751, 754. Rather, when evaluating a motion for summary judgment, the Board must "view the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." *Pappas v. Asbel*, 724 A.2d 889, 891 (1999); (citing *Pennsylvania State University v. County of Centre*, 615 A.2d 303, 304 (1992)); s*ee Wayne v. DEP*, 1999 EBH 395, 397; *Bentley v. DEP*, 1999 EBH 447, 449.

Legal Analysis

The core of the tug of war between the parties is evident. The seven individual bonds Grazis proffered on September 13, 1999 as replacements for the Blanket Bond and which DEP declined to review are in the total amount of $17,500 while the Blanket Bond which DEP forfeited on December 22, 1999 is in the amount of $25,000. DEP, in response to a Grazis interrogatory, characterizes this as "an attempt by [Grazis] to limit his financial liability by offering replacement bonds at a significantly lesser value than the $25,000." (GMSJ Ex. 6) Regardless of how the parties characterize the matter for rhetorical purposes, the situation as presented must be reviewed under the guidance of the interrelationship between the law applicable to bonding for oil and gas wells, forfeiture of such bonds and the owner's right to replace existing bonds with new ones.

Not even Grazis is contesting DEP's authority to forfeit in this case. The crux of the

dispute between Grazis and DEP is put simply: to forfeit what, the $25,000 Blanket Bond declared forfeited on December 22, 1999 or the seven individual replacement bonds which had been proffered by Grazis on September 13, 1999 which DEP declined to review and eventually returned.

The particular timing of the events presented here, with Grazis proffering the replacement bonds before DEP declared the existing bond forfeited makes this case different from any other bond forfeiture case to which our attention has been directed or that we have been able to find independently. Clearly, the facts presented and both DEP's and Grazis's presentation of the issue makes it impossible to divorce DEP's forfeiture of the $25,000 Blanket Bond from DEP's action, or inaction, with respect to the proffered replacement bonds. We view the two as inextricably intertwined such that they virtually constitute a single transaction. In order for DEP's forfeiture *of the $25,000 Blanket Bond* to be deemed proper, its treatment of the proffered replacement bonds must pass legal scrutiny as well.

For the reason just discussed, we find it logical to discuss Grazis's second request for relief first, *i.e.*, that the Board finds that DEP, by refusing to review the seven single bonds proffered as replacement for the blanket bond acted improperly or contrary to law. Moreover, our consideration of Grazis's first and third requests are somewhat dependent upon the direction we take with the first.

The statue and the regulations provide the owner with the right to obtain a replacement for an existing bond by submitting a replacement bond which meets certain substantive criteria. 58 P.S. § 601.215(a)(3); 25 Pa. Code § 78.310. A replacement is accomplished through a series of substantively and temporally related and interdependent steps as follows: (1) new replacement collateral is proffered; (2) DEP reviews the proffered replacement collateral for compliance with

the statutory and regulatory prerequisites as to, among other things, form and amount; (3) if DEP finds that the proffered collateral is appropriate, it is accepted by DEP; (4) the old collateral is then released; and finally (5) the old bond collateral, now released, is returned to the owner who requested bond replacement. 58 P.S. § 601.215(a)(3); 25 Pa. Code § 78.310. The replacement process is completed upon the occurrence of step no. (5), the return of the old collateral to the owner.

This integrated process of temporally related steps is set forth by the language of the statute and the regulation relating to bond replacement. The portion of 58 P.S. § 601.215(a)(3) which relates to replacement of bonds states that,

> [t]he operator making deposit shall be entitled from time to time to demand and receive from the state treasurer, on written order of the secretary, the whole or any portion of any collateral so deposited, upon depositing with him, in lieu thereof, other collateral [of certain classes] having a market value at least equal to the sum of the bond.

58 P.S. § 601.215(a)(3). Here, as can be seen, the statute contemplates receipt by the owner of a return of his old collateral after the qualifying new replacement collateral has been accepted and deposited. Then, 52 P.S. § 601.215(b) outlines the negative mandate that:

> [n]o bond shall be fully released until all requirements of this act identified [58 P.S. § 601.215(a) and 58 P.S. § 601.213] are fully met. Upon release of all of the bonds and collateral as herein provided, the State Treasurer shall immediately return to the owner the amount of cash or securities specified therein.

58 P.S. § 601.215(b). Clearly then, the statute specifies that "release" is part and parcel of bond replacement and that "release" is a necessary condition precedent to the accomplishment of the return of the old collateral. Release is not to occur, however, until the requirements of 58 P.S. § 601.215(a) and 58 P.S. § 601.213, which we will talk about in more detail later, are fully met.

The regulation relating to bond replacement, 25 Pa. Code § 78.310, confirms the interrelationship between the various steps for bond replacement discussed above. 25 Pa. Code § 310(a) provides that "[a]n owner or operator may replace an existing [bond] with another [bond]." The very next subsection, 25 Pa. Code § 78.310(b), outlines the qualification that "[t]he Department will not release existing bonds until the operator has submitted and the Department has approved acceptable replacement bonds."

Under this statutory and regulatory structure, the owner is entitled to submit proffered replacement bonds, have DEP review them for compliance with statutory and regulatory requirements and, if the bonds meet those requirements, and there is compliance with 58 P.S. § 601.215(a) and 58 P.S. § 601.213, have the replacement effectuated and his original collateral returned.

DEP admits that it did not even review the form or substance of Grazis's proffered replacement bonds in this case because "the Department received the replacement bonds after it commenced its action to forfeit the Blanket Bond." (DEP Response to Interrogatory No. 3) DEP relies on the negative mandate of 58 P.S. § 601.215(b) in defending the propriety of its action in not even reviewing the proffered replacement bonds. DEP argues that under that negative mandate, "[b]ecause appellant did not meet the requirements of the Oil and Gas Act at the time he submitted the Proposed Replacement Bonds, the Department, by law, could not release and replace the Appellant's existing Bond." (DEPMOL p. 4-5) If the negative mandate presents the absolute bar to replacement as DEP contends, DEP's review of the proffered bonds would have been unnecessary and even pointless.

We think, however, that DEP's reading of the negative mandate on bonding replacement in 58 P.S. § 601.215(b) to cover that activity is too broad. Section 215(b) does not say, as DEP

maintains, that release is precluded on the basis of *any* failure to meet *any* of the requirements of the Oil and Gas Act. On the contrary, this section specifically limits the mandatory preclusion of release of bonds to only those instances where the operator is not in full compliance with requirements of two specific provisions of the Act, namely, 58 P.S. § 601.215(a) or § 601.213.

Section 215(a) sets forth the bonding requirement itself. That subsection, provides the parameters for the amount of the bond and dictates what the bond shall cover. In other words, this section outlines the technical details of the bond itself. Significantly this provision is neither intended to nor does it attempt to detail the substantive operational mandates for operation of a well. The substantive requirements, which include such things as drilling location, well site restoration, protection and replacement of water supplies, use of safety devices, and plugging are set forth at 58 P.S. §§ 601.205, 601.206, 601.207, 601.208, 601.209, and 601.210. The other section referenced in the negative mandate of 58 P.S. § 601.215(b), namely 58 P.S. § 601.213, requires an owner to notify DEP of the sale or transfer of a well within 30 days of such transaction.

DEP directs our attention to the part of 58 P.S. § 601.215(a) which mentions substantive operational requirements. The relevant portion of 58 P.S. § 601.215(a) reads as follows:

> (a)(1) Except as provided in subsection (d) hereof, upon filing an application for a well permit and before continuing to operate any oil or gas well, the owner or operator thereof shall file with the department a bond for the well and the well site on a form to be prescribed and furnished by the department. Any such bond filed with an application for a well permit shall be payable to the Commonwealth *and conditioned that the operator shall faithfully perform all of the drilling, water supply replacement, restoration and plugging requirements of this act. Any such bond filed with the department for a well in existence on the effective date of this act shall be payable to the Commonwealth and conditioned that the operator shall faithfully perform all of the water supply replacement, restoration and plugging requirements of this act.* The amount of the bond required shall be in the amount of $2,500

> per well for at least two years following the effective date of this act, after which time the bond amount may be adjusted by the Environmental Quality Board every two years to reflect the projected costs to the Commonwealth of performing well plugging.

58 P.S. § 601.215(a) (emphasis supplied). However, the substantive requirements in this provision relate only to what the bond must cover. Both the context of this language in this subsection and the context of this language in the Act as a whole show that this language is directed specifically and solely to what the bond must provide. The language itself is specific in that it directly refers to what the bond must provide. The bond must state that it is conditioned upon the operator's faithful performance of those requirements which, as we have noted, are set forth in other provisions of the Act. Thus, the bond is to be written so as to be forfeitable by DEP in the event the operator does not faithfully comply with the stated operational requirements set forth in the other sections of the Act. This language does not, in our view, incorporate so as to restate in this section as affirmative prescriptions the statute's substantive operational requirements which, as we have seen, have already been stated in other sections of the Act. In other words, this portion of the subsection provides that "thy bond shall be conditioned as follows" it does not provide that "thou shall replace water supplies, cap etc." The latter function is fulfilled through other sections of the Act. In this case, there is no allegation that either the Grazis original Blanket Bond or the proposed replacement bonds do not contain the required conditional language.

If the Legislature had meant to create a broader prohibition it could have done so. Indeed, in the very next section of the Act relating to actual bond forfeiture the Legislature did exactly that. The section at issue, 58 P.S. § 601.215(c), provides that DEP may declare a bond forfeited "if the well owner or operator fails or refuses to comply with the applicable

requirements of this act identified in subsection (a), the regulations promulgated hereunder or the conditions of the permit relating thereto". 58 P.S. § 601.215(c). A comparison of these two provisions demonstrates their difference in purpose and scope and that this difference is intentional.

Also, a comparison to the bond release provisions of the statutes relating to coal mining is instructive in this regard. The bond release provision of the Noncoal Surface Mining and Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P. S. §§ 3301-3326 ("Noncoal SMCRA") provide that bond release is conditional upon DEP's satisfaction that the substantive reclamation requirements have been satisfied. 52 P.S. § 3309(j). Likewise, the bond release requirements of the Coal Mining and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§ 1396.1-1396.19a (Coal SMCRA) provide for bond release, in stages, conditioned upon completion of the various stages of reclamation. 52 P.S. § 1396.4(g). In short, while reclamation and compliance with substantive reclamation requirements of the two coal acts are written into their respective bond release provisions as conditions precedent, plugging of an oil and gas well and compliance with the Oil and Gas Act's substantive standards is not written into that statute's bond release provision as a condition.[8]

Thus, we cannot agree with DEP's position that the negative mandate of 58 P.S. §

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[8] This, of course, does not mean that a well owner will necessarily be entitled to outright release of his or her existing bonds during the pendency of his or her non-compliance with the plugging or other like requirement of the Act, leaving the Commonwealth with no financial resources to address problems. Under 58 P.S. § 601.215(c), DEP has the authority to declare bonds forfeited in the event of non-compliance with any substantive operational provision of the Act. Indeed, that is what DEP did in this case, albeit *after* Grazis submitted his proffered replacement bonds. 58 P.S. § 601.215(b) does not *prohibit* the Commonwealth from releasing bonds in the face of non-compliance, other than non compliance with 58 P.S. § 601.215(a) or 601.213. Stated differently, Section 215(b) does not *require* that the Commonwealth *not* release bonds during a period of non-compliance. If the Commonwealth were satisfied that whatever problem had been or was being addressed, then it could release the bond during a period of non-compliance. On the other hand, as noted, if there was a problem, the Commonwealth could forfeit whatever bonds were in place.

601.215(b) provides an absolute bar to release of bonds in connection with a replacement process in the circumstances presented here. This result, which is compelled by the language of the statute in question, is not inimical to the Act's policy of mandating compliance with its substantive provisions nor DEP's mission to enforce compliance. Assuming compliance with 58 P.S. § 601.215(a), regarding the form and amount of the bond, and the proffer of acceptable replacement bonds, there will be viable bonds in place at all times. Also, in the event of the well operator's failure to comply, DEP can forfeit whatever bonds are in place. Thus, there will be no time when the Commonwealth is left vulnerable on account of a lack of available financial resources in the form of posted security.

If DEP's refusal to review the bonds cannot stand on 58 P.S. § 601.215(b) then its sole remaining basis for declining to review the bonds is "because the Department received the Replacement Bonds after it commenced its action to forfeit the Blanket Bond" as stated in its answer to Grazis's interrogatory. (GMSJ Ex. 3) As noted, we take this as a reference to the Notice of Intent to Forfeit portion of the June 16, 1999 Order and Notice of Intent to Forfeit Bond document. This position cannot be correct. If accepted, this would mean that the issuance of a Notice of Intent to Forfeit alone would act as an absolute block to the Section 601.215(a)(3) bond replacement right. This result is not consistent with the Act which nowhere provides that the right to bond replacement is to be overridden in this fashion. This is sensible when one considers that DEP has always maintained and the Board has agreed that a Notice of Intent to Forfeit is not an appealable action. *Bituminous Processing Co., Inc. v. DEP*, Docket No. 99-172-L (opinion issued January 18, 2000). In addition, as we have noted, the Notice of Intent to Forfeit is conditional. It states that "*in the event* Grazis fails or refuses to begin plugging the Wells by no later than September 1, 1999, *the Department hereby notifies Grazis that it intends*

to forfeit Grazis's bond". (DEPMSJ Ex. B)[9] We cannot hold that the issuance of a conditional, non-appealable Notice of Intent to forfeit has the effect of overriding a specific statutory right to replace bonds.[10]

Consequently, for the reasons discussed above, Grazis is entitled to summary judgment in his favor with respect to his second claim for relief. DEP acted contrary to law when it forfeited Grazis's Blanket Bond without first having reviewed the proffered replacement bonds. DEP is not entitled to have its forfeiture of the $25,000 Blanket Bond upheld at this stage of the proceedings on this record.

The issue remains; what is DEP entitled to forfeit here? That question cannot be resolved at this stage of the proceedings on this record. There are issues of fact outstanding regarding whether the proffered replacement bonds meet the requirements of 58 P.S. § 601.215(a) and 25 Pa. Code §78.303 and §78.310 so as to constitute satisfactory replacement security. Those questions cannot be resolved on this record. Indeed DEP has not even considered and passed upon those questions because it never reviewed the proffered seven replacement bonds in the first place.[11]

Our discussion of Grazis's request for relief no. 1 connects to and is an important input to our analysis of the first and third of Grazis's tripartite requests for relief. As to the second

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[9] We do not view the failure of Grazis to start plugging the Wells by September 1, 1999 as somehow automatically, by operation of law, altering the legal status of Mr. Grazis with respect to his right to seek replacement of his security. The actual bond forfeiture action did not come until December 22, 1999 which, as we have noted, came well *after* Grazis submitted his proffered replacement bonds.

[10] Grazis contends that there are serious constitutional problems to having a non-appealable Notice of Intent To Forfeit act as an absolute bar to the statutory right to replace security. In light of our view that the statute does not provide for a Notice of Intent To Forfeit to be a bar to bond replacement we need not address this constitutional claim.

[11] It seems sensible that, in the first instance, DEP make the determination whether the

request, *i.e.*, that we find that the Tract 365 Nos. 1 and 2 wells are not required to be covered by bond and deleting them from Grazis's bonding coverage, we decline to do so at this time for several reasons. Grazis has cited no statutory or case-law authority that would either allow or support the Board's "deletion" of these two wells from Grazis's bonding coverage. In any event, DEP has already admitted that these wells are no longer required to be covered by an operator's bond under the Act and are not covered by the Blanket Bond as a matter of law. (GMSJ Ex. 3, DEP Response to Grazis's Request For Admission No. 1) Also, the existing Blanket Bond, which is the only bond in place unless and until a replacement is effectuated, is a blanket bond. The $25,000 Blanket Bond is in the amount of $25,000 whether it covers 7 wells or 10 wells. Thus, even if the Board could delete wells from bond coverage, we fail to see what this would accomplish under the present state of the record. Thus, this requested relief would seem to be either moot, pointless or both. In short, we see no legal or factual basis to grant Grazis's second request for relief based on the record presented.

We reach the same conclusion as to Grazis's third request for relief, *i.e.* that the Board limit DEP's bond forfeiture action against the Blanket Bond to the amount of $17,500. Grazis cites to no statutory authority which would permit the Board to do this. In fact, the regulation specifically provides that bonds under the Oil and Gas Act are "penal in nature" 25 Pa. Code § 78.303(c). A penal bond is to be distinguished from an indemnity bond. For a penal bond, specific damages need not be proven to recover the full value of the bond. In other words, "the full penalty of the bond may be recovered in the event of a breach". *American Casualty Company of Reading v. DER*, 441 A.2d 1383 (Pa. Cmwlth. 1982). Moreover, the statute provides that a blanket bond is to be forfeited in its entirety even where the violation is at only a

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proffered individual replacement bonds meet the requirements to qualify as replacement security.

single site of the many covered by the blanket bond. 58 P.S. § 601.215(c). Thus it would appear that the forfeiture of a $25,000 blanket bond is an "all or nothing" situation.

Grazis also raises constitutional arguments in connection with his requests that the Board delete the two wells from the bond and limit DEP's recovery on the Blanket Bond to $17,500. These arguments, though, are inextricably intertwined with his main complaint that DEP should have effectuated the replacement of his $25,000 Blanket Bond with the proffered seven individual $2,500 bonds totaling $17,500. He claims that the Act specifically states that the bond ceiling is $2,500 per well and to limit an operator's replacement right so as to penalize him as much as $25,000 per well would be a denial of equal protection and due process. In this regard he states that there is no rational basis for subjecting blanket bond operators to ten times the penalty single well bond operators face. (GMOL 6) First we note that Grazis is an operator of 10 wells, 9 of which have not been plugged which is a violation of the law. Thus, he does not even fit the shoes of a single well bond operator. Also, this is exactly the constitutional challenge which the bonding provisions of the Act passed in *Pennsylvania Independent Petroleum Producers v. DER*, 525 A.2d 829 (Pa. Cmwlth. 1987), *aff'd,* 550 A.2d 195 (Pa. 1988), *cert denied,* 489 U.S. 1096 (1989) which is discussed in footnote no. 6 herein. In any event, if such constitutional claims were ever to be ripe for consideration they could only be so at a later time, in the event DEP would reject proffered replacement bonds after reviewing them and setting forth its reasons for rejection.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY L. GRAZIS	:	
	:	
v.	:	**EHB Docket No. 2000-017-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of September, 2000, IT IS HEREBY ORDERED that:

1. Grazis's Motion For Summary Judgment is denied in part and granted in part. It is granted insofar as the Board finds, as a matter of law, that DEP acted contrary to law when it forfeited Grazis's Blanket Bond without first having reviewed the proffered replacement bonds. Grazis's Motion is denied in all other respects.

2. DEP's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: September 19, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Mary Susan Davies, Esquire
Northwest Region

For Appellant:
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 99-215-CP-L**
v.	:	**Issued: September 25, 2000**
LAND TECH ENGINEERING, INC.	:	

OPINION AND ORDER ON MOTION FOR SANCTIONS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis

The Board precludes a party from presenting expert testimony as a discovery sanction where the party has, despite multiple Board orders, failed to provide complete responses to the Department's expert interrogatories.

OPINION

Background

On July 24, 2000, the Department of Environmental Protection (the "Department") filed a motion asking that sanctions be imposed on Land Tech Engineering, Inc. ("Land Tech") for failing to comply with this Board's orders and the discovery rules. Land Tech did not respond to the motion. We deem Land Tech's failure to respond to be an admission of all of the properly pleaded facts in the Department's motion for purposes of ruling upon that motion. 25 Pa. Code § 1021.70(f). Accordingly, the following background facts are derived from the Department's motion.

The Department served written interrogatories on Land Tech on November 19, 1999. Land Tech advised the Department that it would provide answers to the interrogatories at a meeting scheduled for December 16, 1999. Land Tech did not come to the meeting. The parties then agreed to exchange discovery on January 11, 2000. Again, Land Tech did not show up. Thereafter, the parties postponed discovery efforts for a time to pursue settlement discussions that were ultimately unsuccessful.

The parties again agreed to meet on April 20, 2000 to exchange discovery materials. Land Tech produced documents but provided no interrogatory answers. Land Tech promised to provide answers before April 28, 2000. In addition, the Department served Land Tech with a notice of deposition of George Saad, Land Tech's principal, to be held on May 3.

Land Tech did not respond to the interrogatories by April 28, and it postponed the deposition. On May 2, the Department moved this Board to compel Land Tech to answer the interrogatories and to produce Mr. Saad for deposition. Land Tech did not respond to the motion. The Board granted the motion by Order dated May 19, 2000. The order directed Land Tech to answer the interrogatories before May 30 and make Mr. Saad available for deposition within two weeks thereafter. As it turned out, Land Tech had answered the interrogatories on May 10. Unfortunately, the Board was not advised by either party of that development, which is why it issued its order of May 19.

On May 22, 2000, the Department amended its motion to compel. (Apparently, the Department's amended motion and this Board's May 19 order crossed in the mail.) The Department noted Land Tech's agreement to make Mr. Saad available for deposition on June 2, but insisted that Land Tech's interrogatory responses were deficient in several respects. We issued an order on May 23 that directed the parties to proceed with Mr. Saad's deposition as

planned. We ordered the Department to advise the Board before June 12, 2000 whether it wished to pursue its amended motion to compel in light of the results of the deposition. We ordered Land Tech to file its response to the Department's notification before June 27, 2000.

The deposition went forward as scheduled, but the Department notified us on June 14 (two days late) that it wished to pursue several (but not all) of the deficiencies raised in its amended motion to compel regarding the interrogatory responses. Land Tech filed no response to the Department's notification.

On June 30, 2000, we issued an order granting the Department's unopposed amended motion to compel. We ordered Land Tech to answer the portions of the interrogatories identified in the Department's June 14 uncontested notification on or before July 14, 2000. We added: "Land Tech is cautioned that failure to comply with this Order could result in the imposition of serious sanctions."

Land Tech did not answer the interrogatories. The Department filed the motion for sanctions that is the subject of this Opinion and Order on July 24, 2000. The Department's motion is based upon Land Tech's failure to provide several documents and its inadequate response to expert interrogatories. Once again and as noted above, Land Tech did not respond to the Department's motion.

The Department in its motion asked the Board to preclude Land Tech from introducing any evidence. Rather than impose such a severe sanction, we issued an order on August 9, 2000 which required Land Tech to produce several documents. With regard to the expert interrogatories, the Order stated:

> **Interrogatories 5, 6, and 7** – Land Tech shall respond to the interrogatories in full compliance with Pa.R.C.P. 4003.5(a). Failure to do so shall result in an order precluding Land Tech from presenting any expert testimony.

The order required the Department to advise the Board in writing with a copy to Land Tech on or before August 23, 2000 whether it believed that Land Tech had complied with the order. Land Tech was given the right to respond to the Department's notice, if necessary, on or before August 25, 2000.

On August 21, 2000, we received a copy of a letter from Land Tech's attorney to the Department's attorney covering several documents intended to be responsive to the Department's interrogatories. The Department described why it believed that the package did not fully comply with this Board's order in its report to the Board of August 23. It complained that the answers to some of the interrogatories were still inadequate, including the answers to the expert interrogatories. It again urged this Board to not only compel responses, but to preclude Land Tech from presenting any documentary evidence or expert testimony. Once again, Land Tech did not file a response to the Department's report.

We held a lengthy conference call with counsel for both parties on August 31, 2000. The end result of the call was that we warned Land Tech in the strongest of terms that the time for making excuses had long since passed. Land Tech agreed to make the requested discovery materials available no later than September 8. We required the Department to file yet another report on September 11 if it was not satisfied with the responses, and if necessary, Land Tech was to respond to that report by September 13.

Land Tech sent the Department a letter dated September 5, 2000, which provided as follows:

> Pursuant to Judge Labuskes' Order, I am providing to you the following documents:
>
> * * *

> 4. By way of further answer to interrogatories 5, 6, and 7: Mr. Brenner and Mr. Sobol will testify that based upon their experience in the field of wetland determinations that the rules and regulations do not and did not require an on-site inspection by George Saad and that his submission of the NOI-E&S application based on the existing hydric soils map did not constitute a violation of the Clean Streams Law, Dam Safety Act or any other statute of the Commonwealth of Pennsylvania.
>
> I intend to have a narrative letter concerning both experts [sic] opinion for your review on September 7, 2000. If you have any questions please feel free to contact me at my office.

The Department advised the Board on September 11 that Land Tech's responses to the Department's expert interrogatories were still inadequate. The Department also noted that no reports were available as promised on September 7. Land Tech responded to the Department's September 11 letter report on September 13. (It should be noted that this letter was the first written contact from Land Tech to the Board since the discovery difficulties began last year.) Land Tech's letter indicated that it had provided supplemental interrogatory responses, which were identified as Exhibit A to the letter. No "Exhibit A" was attached to the letter. (We suspect that Land Tech may have been referring to its September 5 letter to the Department, quoted above.) Land Tech's September 13 letter went on to state:

> The supplemental responses indicate that the individuals called will testify that in their opinion the actions of the Defendant were sufficient to comply with the two acts. There is nothing else relevant to the Department's claim that any expert could testify to; therefore, the fact that a written narrative was not completed does not prejudice the Department. Counsel for the Department will be free to cross examine them on their opinion based on the Department's interpretation of the regulations. What the Department's counsel wants by way of sanctions is to eliminate the Defendant's right to due process concerning the alleged violations.

Thus, Land Tech appeared to concede that it did not provide the narrative that it promised to

provide in its September 5 letter to the Department. It seems to excuse its failure by arguing that the subject of the expert's opinions should be obvious, and the Department will have the right of cross-examination.

Discussion

With only a few exceptions not relevant here, discovery proceedings before the Board are governed by the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code § 1021.111. Pursuant to those rules, a party is required to respond to interrogatories that direct the party to identify its experts, the subject matter, facts, and opinions to which the experts will testify, and the grounds for the experts' opinions. Pa.R.C.P. 4003.5. In lieu of an interrogatory response, the responding party may provide a report. *Id.* In either event, the expert must sign the report or the answers. *Id.* Our Pre-Hearing Order No. 2-CP reinforced the obligation to exchange expert materials. (Paragraph 3.)

The Department's pertinent expert interrogatories and Land Tech's responses were as follows:

> 4. IDENTIFY each expert witness that YOU intend to call at the hearing in this matter.
>
> **ANSWER:** a.) Dr. Fred J. Brenner, Ph.D. [address omitted]
> b.) Scott Hans / Rich Sobol [addresses omitted]
> c.) John Atwood [address omitted]
>
> 5. For each person identified in response to Interrogatory No. 4, state the subject matter on which each expert will testify.
>
> **ANSWER:** a.) The Wetland procedure and requirements.
> b.) The Wetland requirements and the adequacy (accuracy) of the delineation with 6" of snow cover on the ground.
> c.) The request of authorization to perform field Wetland Report and provide a written contract, and any ground disturbance

performed on the site, completed by who?

6. For each person identified in response to Interrogatory No. 4, state the substance of the facts and opinions to which each expert will testify and summarize the grounds for each opinion.

ANSWER:
a.) Could a determination be completed without field inspection ? (Should for some reason the maps show no indications of hydric soils.)
b.) The delineation provided with 6" snow ground cover.
c.) Never requested any disturbance on the site, what kind of harm to the environment was made by design engineer.

7. IDENTIFY all DOCUMENTS and COMMUNICATIONS relied on by each expert identified in response to Interrogatory No. 4 in reaching the opinion(s) summarized in response to Interrogatory No. 6.

ANSWER: Analysis based on previous jobs.

a.) Such conclusion could be made from available maps.
b.) With 6" snow cover, a determination could not be made.
c.) Developer is responsible for establishing all required environmental permits.

8. For each expert identified in response to Interrogatory No. 4, please list the educational background, employment in the last five (5) years, present employment and all texts, articles, reports, theses, or other publications that relate to the subject matter upon which each expert will testify.

ANSWER:
a.) Fred J. Brenner, Ph.D.Consulting Ecologist and Biologist
b.) Rich Sobol Wetland expert, Corps. of Engineers
c.) Developer, his level of development experience

As previously noted, the only additional information that has been provided was set forth in the September 5, 2000 letter to the Department and the September 13 letter to the Board.

It is important to point out that Land Tech has never claimed that its responses were compliant with Pa.R.C.P. 4003.5. Its only defense to the way that it conducted itself is its claim in the September 5 and 13 letters that the Department has not been prejudiced by its deficient performance. This defense goes to what sanction is appropriate, not whether there has been compliance. Its conclusory statement that two of the four identified experts will testify that Land Tech did not violate the law falls far short of the information mandated by Pa.R.C.P. 4003.5. To the extent that two of the experts were being offered to provide legal opinions, the testimony would have been unnecessary in any event. In short, there is no reasonable dispute here that Land Tech has failed to comply with this Board's orders and the discovery rules.

The only determination left to be made, then, is what sanction is appropriate. We are well past the point of giving further warnings, providing opportunities to cure, or imposing contingent sanctions. Despite multiple motions, Board orders, reports, and a conference call, Land Tech has inexcusably failed to comply with the rules. Land Tech's conduct, if not willful, exhibits a callous disregard for the rules and the orders of this Board. Expert testimony is at the heart of many Board cases, and such callous disregard must be deterred. For example, this case involves the delineation and alleged filling of wetlands. Wetlands issues frequently involve conflicting expert testimony.

We are cognizant of the fact that the preclusion of expert testimony is a very significant sanction. *Caernavon Township Supervisors v. DEP*, 1997 EHB 601, 605-06 (citing *Green Construction Company v. Department of Transportation*, 643 A.2d 1129, 1139 (Pa. Cmwlth. 1994)). We are also aware that no such sanction is appropriate unless the noncomplying party has refused to comply with a Board order compelling compliance or otherwise acted in bad faith, or the complaining party has been prejudiced from properly preparing its case for hearing. Here,

any one of these factors would justify the imposition of a sanction. Land Tech has failed to comply with multiple orders of the Board. Land Tech's unfulfilled promises to comply demonstrate a knowing failure to act and bad faith. We cannot expect the Department to prepare for cross-examination of Land Tech's experts or prepare its own experts properly given Land Tech's perfunctory descriptions. We accept the Department's claim of prejudice as credible.

Based upon these considerations, the only fitting sanction in this case is an order precluding Land Tech from presenting any expert testimony. Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA,
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 99-215-CP-L**
LAND TECH ENGINEERING, INC.	:	

ORDER

AND NOW, this 25th day of September, 2000, it is hereby ORDERED that Land Tech Engineering, Inc. is precluded from presenting any expert testimony.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **September 25, 2000**

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
George Jugovic, Jr., Esquire
Gail Guenther, Esquire
Southwestern Regional Counsel

For Land Tech Engineering, Inc.:
Richard K. Witchko, Esq.
7805 McKnight Road
Pittsburgh, PA 15237

bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LEWIS J. BRANDOLINI, III	:	
	:	
v.	:	**EHB Docket No. 96-162-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 26, 2000

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss an appeal of the Department's denial of a private request to revise a official sewage facilities plan is granted. The appeal became moot when the municipality involved revised its plan to incorporate the change appellant requested. Whether the municipality is implementing the revised plan is irrelevant to the whether the Department properly denied the private request concerning the original plan.

The law of the case doctrine does not preclude the Department from raising the issue of mootness. The doctrine bars the litigation of an issue at the trial level only where the issue was previously decided in the same case by either an appellate court or a different judge at the trial level.

OPINION

This appeal concerns a private request to revise the official plan (request) of Bethel Township (Township), Delaware County, under section 5(b) of the Pennsylvania Sewage

Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.5(b). Lewis Brandolini, III (Appellant) submitted the request to the Department on February 5, 1995, concerning some property in Township that he would like to develop (proposed development). In the request, Appellant asked the Department to "order Bethel Township to revise its Official Plan in order to allow the [proposed development] to discharge its effluent to the SDMCA [Southern Delaware County Municipal Authority] via the Longmeadow Subdivision, or, in the alternative, to authorize the construction of an interim on-site sewage treatment plant." (Motion to dismiss, Ex. A, p. 5.)

On July 24, 1996, the Department denied the request. The Department explained that (1) Appellant's request failed to include sufficient documentation to show that Township's official plan was inadequate, (2) Appellant failed to include complete sewage facilities planning modules, (3) Appellant's request violated 25 Pa. Code § 71.61(c) because it failed to choose one alternative, and (4) Appellant's request violated 25 Pa. Code § 71.53(d) because it did not include a written commitment from the owner of the entity that would potentially receive the sewerage.

On August 14, 1996, Appellant filed a notice of appeal challenging the denial of his request. The notice of appeal asserted that the Department's denial was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law.

On September 22, 1999, the Department approved a sewage facilities plan update by Township that provided that effluent from Township sewer districts 1, 2, and 11—which include the proposed development—would "be conveyed to the [Southern Delaware County Municipal Authority] conveyance system to the DELCORA Western Regional Wastewater Facility." (Motion, ¶ 13, Ex. C; Response, ¶ 13.) On March 6, 2000, the Department approved a planning

module for the proposed development. Among other things, the Department letter approving the planning module states that the development would be connected to the Township's sewage collection system and that the DELCORA facility would treat the wastewater. (Motion, ¶ 14, Ex. D; response, ¶ 14.)

On May 3, 2000, the Board issued Appellant a rule to show cause why his appeal should not be dismissed as moot. The rule directed Appellant to respond by May 31, 2000. Appellant filed his response on May 30, 2000. Although the Board never formally ruled on the rule to show cause, on June 2, 2000, it issued an order providing the parties with another opportunity to file dispositive motions. Rather than filing a reply to the rule to show cause, the Department opted to file a motion to dismiss on July 7, 2000.

In the motion and supporting memorandum, the Department argues that Appellant's appeal is moot because the Township has approved his planning module and the Township has revised its official plan to provide for the proposed development sending its effluent to the Southern Deleware County Municipal Authority via the Longmeadow Subdivision. The Department also argues that the administrative finality doctrine bars Appellant from challenging the adequacy of the revised plan because Appellant did not appeal the Department's approval of that plan revision.

Appellant filed a response and memorandum of law in opposition on July 31, 2000. In his response and memorandum, Appellant argues that (1) the Board has previously considered and rejected the Department's mootness arguments, in relation to the rule to show cause the Board issued to him, and that result is now the "law of the case"; (2) his appeal of the Department's denial of his request is not moot because the Township has failed to implement the revised plan; and (3) the administrative finality doctrine does not bar Appellant's challenges

because, while the Township has revised its official plan since Appellant filed its appeal and the revised plan would be adequate to meet the sewage needs of the proposed development, the Township has failed to implement the revised plan.

The Department filed a reply and memorandum in support on August 7, 2000. In its reply and memorandum, the Department argues that (1) the Board has not previously ruled on the question of mootness, and thus the "law of the case" doctrine does not apply; and (2) whether the Township is properly implementing the revised plan is irrelevant to the challenge Appellant raised in his notice of appeal: whether the plan was adequate *prior* to being revised.

The Board will grant a motion to dismiss where there are no material issues of fact in dispute and the moving party is entitled to judgment as a matter of law. *See Smedley v. DEP,* 1998 EHB 1281, 1282. All doubts are resolved in favor of the non-moving party. *Id.* After a careful review of the law and facts here, we conclude that no material issues of fact remain in dispute and that the Department is entitled to judgment as a matter of law.

I. THE LAW OF THE CASE DOCTRINE DOES NOT PREVENT THE BOARD FROM EXAMINING THE MOOTNESS ARGUMENT RAISED IN THE DEPARTMENT'S MOTION TO DISMISS

Appellant is incorrect when he argues that the Board cannot consider the Department's motion to dismiss for mootness because of law of the case doctrine. As Appellant concedes in his memorandum in opposition, the law of the case doctrine in Pennsylvania was traditionally limited to appellate courts. However, Appellant argues that the doctrine should also apply in proceedings before the Board, where the Board has previously ruled on an issue. In support of his argument, Appellant points to *Commonwealth v. Starr,* 664 A.2d 1326 (Pa. 1995), and argues that *Starr* shows that "Pennsylvania courts have ... expanded [the law of the case doctrine] to include rulings in the same case at the trial level." (Memorandum in opposition, p. 3 n.1)

However, a careful reading of *Starr* shows that the Supreme Court's decision there did not markedly expand the traditional law of the case doctrine, as Appellant implies. *Starr* involved a trial court's determinations concerning whether a defendant in a capital murder trial (Starr) could represent himself before the Allegheny County Court of Common Pleas. The judge initially presiding over the case ordered that Starr could represent himself. Subsequently, however, the case was transferred to another judge, who revoked the prior order and ordered that the public defender's office represent Starr. After the defendant was found guilty and sentenced to death, there was an automatic direct appeal to the Supreme Court. The sole issue on appeal was whether the second judge erred by revoking the order allowing Starr to represent himself.

The Supreme Court reversed the conviction and held that the law of the case doctrine prevented the second judge from revoking the order that Starr could represent himself. In its decision, the Court went to great lengths to explain that it was not making a major departure from its traditional, limited view of the law of the case doctrine by holding that the doctrine precluded one trial judge from revoking an order issued by another in the same case. The Court wrote:

> [T]his Court has long recognized [the "coordinate jurisdiction rule,"] that judges of coordinate jurisdiction sitting in the same case should not overrule each others' decisions....
>
> In our view, this coordinate jurisdiction rule falls squarely within the ambit of a generalized expression of the "law of the case" doctrine. This doctrine refers to a family of rules which embody the concept that a court involved in the later phases of a litigated matter should not reopen questions decided *by another judge of that same court* or *by a higher court in the earlier phases of the matter*....
>
> ...
>
> [T]he traditional application of the law of the case doctrine in Pennsylvania jurisprudence has been limited to only those cases in which an appellate court has considered and decided a question submitted to it upon appeal.... [T]he "appellate only" restriction on the doctrine arose from the notion that once an appellate court issues an order in a particular case, it loses

> jurisdiction over the case and, thereby, the power to modify its judgment.... [T]his Court has previously declined to apply the law of the case doctrine to those cases in which no appellate decision has been rendered. *See, e.g., Filanowski v. Zoning Board of Adjustment*, 439 Pa. 360, 363, 266 A.2d 670, 672 (1970) (the law of the case is established only by a decision of an appellate court); *Kuchinic v. McCrory*, 222 A.2d 897, 900 (Pa. 1966) (the law of the case doctrine, which only applies to appellate courts, should not be confused with either *res judicata* or *stare decisis*).
>
> [O]ur extension today of the law of the case doctrine to include the coordinate jurisdiction rule amounts to nothing more than a distinction without a difference. The purposes served by both rules and the limitations regulating both rules are virtually identical; the integration of both rules, then, does not represent any profound departure from the precedential mandate of our traditional formulation of the law of the case doctrine.

664 A.2d at 1331, 1333 (footnotes and citations omitted, emphasis added).

Given the Court's careful and qualified opinion in *Starr*, and its pronouncement that the case did not signal a marked departure from its prior precedent on the law of the case doctrine, we believe that the doctrine precludes the litigation of issues at the trial level only if those issues have been previously decided in the same case by an appellate court or by a different judge at the trial level. Neither of those situations apply here. The same administrative law judge has presided over this appeal since before the rule to show cause was issued, and the appellate courts have not ruled on any aspect of the case.

Furthermore, even assuming that the law of the case doctrine would ordinarily preclude the Board from revisiting an issue that had been previously decided in the same case, the doctrine would not apply here. On May 3, 2000, the Board issued Appellant a rule to show cause why his appeal should not be dismissed as moot. The rule directed Appellant to respond by May 31, 2000. Unlike the rules to show cause contemplated under Pa. R.C.P. 206.4 to 206.7, the Board issued the rule *sua sponte*—a routine Board practice—rather than in response to a petition. The rule to show cause did not address the possibility of the Department filing a reply

to Appellant's response to the rule, nor do the Board's rules of practice and procedure address that contingency.

Appellant filed his response on May 30, 2000. Although the Board never formally ruled on the rule to show cause, on June 2, 2000, it issued an order providing the parties with another opportunity to file dispositive motions. Rather than filing a reply to the rule to show cause, the Department opted to file a motion to dismiss on July 7, 2000.

The law of the case doctrine does not bar us from considering whether the appeal is moot because the Board never formally ruled on Appellant's response to the rule to show cause. Thus, by considering the argument in the Department's motion that the appeal is moot, we are not revisiting an issue that we decided previously. Furthermore, given that neither the rule to show cause nor the Board's rules of practice and procedure provide for a reply to the response to a rule, and that the Department did not have an opportunity to address the issue in a petition for the rule, the Department was reasonable to address it in a motion to dismiss and was not limited to filing a reply to the rule.

II. APPELLANT'S APPEAL IS MOOT

The Department argues that Appellant's appeal is moot because the Township has approved his planning module and revised its official plan to provide for the proposed development sending its effluent to the SDMCA via the Longmeadow Subdivision. The Department also argues that Appellant cannot challenge whether the revised plan is being implemented because that issue is irrelevant to this appeal and barred by the doctrine of administrative finality. We agree that the appeal is moot and that the issue of whether the Township is implementing the revised plan is irrelevant.

"In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of the necessary stake in the outcome, or whether the court (or agency) will be able to grant effective relief." *Al Hamilton Contracting Co. v. Department of Environmental Resources,* 496 A.2d 516, 518 (Pa. Cmwlth. 1985) (citations omitted). Appellant's appeal of the Department's decision to deny his private request is moot because the Township subsequently revised its official plan to incorporate the change that Appellant sought in his request. In his request, Appellant asked the Department to "order Bethel Township to revise its Official Plan in order to allow the [proposed development] to discharge its effluent to the [Southern Delaware County Municipal Authority] via the Longmeadow Subdivision, or, in the alternative, to authorize the construction of an interim on-site sewage treatment plant." (Motion to dismiss, Ex. A, p. 5.) Although the Department denied Appellant's request on July 24, 1996, the Department later approved a sewage facilities plan update that provided for precisely what Appellant sought in his request: that effluent from the proposed development would be discharged to the Southern Deleware County Municipal Authority via the Longmeadow subdivision. (Motion, ¶ 13, Ex. C; Response, ¶ 13.) Because the Department has already granted the relief Appellant sought in his private request, Appellant no longer has a real stake in his appeal of the private request, and the Board can grant him no effective relief on that issue. Accordingly, Appellant's challenge to the Department's denial of his private request is moot. *See Wunder v. DEP,* 1993 EHB 1244, 1245.

Appellant concedes that, if implemented, the revised plan would meet his proposed development's sewage disposal needs.[1] (Appellant's memorandum in opposition, p. 6.)

[1] This, incidentally, amounts to a tacit admission that Appellant no longer has a real stake in this appeal, since the appeal goes to the contents of the then-existing official plan, and not to how the plan was implemented.

Nevertheless, Appellant argues that he continues to have a stake in this appeal because the Township has failed to implement the revised plan. We disagree.

When the Township revised its plan to incorporate the change that Appellant had sought in his request, Appellant effectively lost any stake he may have had in the contents of the plan before the revision. Whether the Township has adequately implemented the revised plan is irrelevant to this appeal: it has nothing to do with whether the terms of the plan were adequate before the plan was revised. Rather than challenging the terms of the original plan, Appellant is trying to raise an entirely new issue, one unrelated to the subject matter of this appeal. To the extent that Appellant is dissatisfied with the Township's implementation of the revised plan, his recourse is to file a private request to revise *that* plan under section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b).[2] He cannot simply append that issue to his appeal of the original plan.

Accordingly, we enter the following order:

---

[2] Section 5(b) provides, in pertinent part:

> Any person who is a ... legal property owner in a municipality may file a private request with the department requesting that the department order the municipality to revise its official plan if the ... property owner can show that the official plan is not being implemented....

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LEWIS J. BRANDOLINI, III	:	
	:	
v.	:	**EHB Docket No. 96-162-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of September, 2000, it is ordered that the Department's motion to dismiss is granted.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

The Honorable George J. Miller is recused from this matter.

DATED: September 26, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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Southeast Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LISA and STEVEN GIORDANO	:	
	:	
v.	:	**EHB Docket No. 99-204-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL, Permittee	:	**Issued: September 26, 2000**

OPINION AND ORDER
ON PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

A township located approximately two miles from a landfill is permitted to intervene on the side of individual neighbors in their appeal from the Department's approval of a major modification to the landfill's permit. The Township has adequately alleged that it is an interested party entitled to intervene. The landfill retains the right to challenge the Township's continuing standing at the hearing. Significant limitations are placed on the Township's right to participate due to its petition having been filed about one year after the appeal was filed and only a few months prior to the evidentiary hearing. Provision is made for conducting discovery against the Township on an expedited basis.

OPINION

Lisa and Steven Giordano (the "Giordanos") have filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a major permit modification to Browning-Ferris Industries, New Morgan Landfill Company, Inc., and Conestoga Landfill (hereinafter collectively referred to as "BFI"), which allowed BFI to increase its average daily tonnage at its Conestoga Landfill in New Morgan Borough, Berks County. The Township of Robeson (the "Township") has petitioned to intervene on the side of the Giordanos.

We previously enunciated some of the general principles regarding intervention in *Conners v. State Conservation Commission*, 1999 EHB 669, 670-71, as follows:

> Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), provides that "[a]ny interested party may intervene in any matter pending before the board." The Commonwealth Court has explained that, in the context of intervention, the phrase "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) *("BFI")*. The interest required must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination. *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI*, 598 A.2d at 1060-61; *Wurth v. DEP*, 1998 EHB 1319, 1322-23.
>
> Gaining or losing by direct operation of the Board's determination is just another way of saying that an intervenor must have standing. Stating the Commonwealth Court's holdings another way, a party who has standing must be permitted to intervene. *Fointaine v. DEP*, 1996 EHB 1333, 1346. Considerations concerning whether the intervenor's rights will be adequately protected by existing parties and whether the intervenor will add anything new to the proceedings are irrelevant. *General Glass Industries Corp. v. DER*, 1995 EHB 353, 355 n.2.

See also Pennsylvania Game Commission v. DEP, EHB Docket No. 2000-067-R (Opinion issued

June 19, 2000), slip op. at 2-3; *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (Opinion issued January 31, 2000), slip op. at 3-4; *Heidelberg Township v. DEP*, 1999 EHB 791, 793-94.

A person has standing—and is, therefore, entitled to intervene – if the person is among those who have been or are likely to be adversely affected in a substantial, direct, and immediate way. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000) ("*FOE* "); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975); *Wurth v. DEP*, EHB Docket No. 98-179-MG, slip op. at 16-17 (Opinion issued February 29, 2000). We must determine whether the intervenor would have been an appropriate party to seek relief in the first instance because he personally has something to gain or lose as a result of the Board's decision. This question cannot be answered affirmatively unless the harm suffered by the would-be intervenor is greater than the population at large (i.e. "substantial"), and there is a direct and immediate connection (i.e. there is causation in fact and proximate cause) between the action under appeal and the person's alleged harm. *William Penn, supra.* In the context of an appeal from the issuance of a permit, intervention will ordinarily be appropriate if (1) the person uses the area affected by the permitted activity and (2) the permittee's conduct has (or will) adversely effect that use by, e.g., lessening the aesthetic and recreational values of the area. *Cf. FOE, supra; O'Reilly v. DEP*, EHB Docket No. 99-166-L, slip op. at 2 (Opinion issued May 24, 2000); *Ziviello v. DEP*, EHB Docket No. 99-185-R slip op. at 6 n. 9 (Opinion issued July 31, 2000); *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944 n.5; *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951.

Although we understand that the Township is not the host municipality, it is nevertheless worth noting that a host municipality has standing to appeal the actions relating to a permit for a waste disposal facility within its borders. *Borough of Glendon v. DER*, 603 A.2d 226, 233 (Pa.

Cmwlth. 1992). *See also Fontaine v. DEP*, 1996 EHB 1333, 1345; *Multilee, Inc. v. DER*, 1994 EHB 989, 993; *Keystone Sanitation Company, Inc. v. DER*, 1989 EHB 1287.

Although the Township is a bordering, as opposed to a host, municipality, we have little hesitation in granting the Township's petition to intervene. The Township boundary lies less than two miles from the landfill. The Township alleges in its verified petition that its residents have suffered from malodors, litter, noise, and traffic problems associated with the increased pace of operations at the landfill. It alleges that the increased pace of landfill operations has increased the strain placed upon its own police, fire, and ambulance services. It has expressed the objectively reasonable concern that the increased pace of landfill operations will adversely affect groundwater underlying the Township, which is utilized by Township residents for drinking water. Finally, it asserts that the effects of the increased landfill operations will adversely affect property values in the Township, and therefore, decrease its tax revenues. These allegations are sufficient to demonstrate in the context of a petition to intervene that the Township and its residents have suffered substantially, directly, and immediately from the issuance of the major permit modification.

BFI has vigorously challenged the veracity of the Township's allegations of harm, and it has supported its challenge with affidavits that contradict the Township's claims. BFI's response raises disputed issues of fact that are material to the Township's right to participate as a party. Although we will add the Township as a party-intervenor, we will allow BFI the continuing right to prove at the evidentiary hearing that the Township lacks standing.

BFI argues that the petition should be denied because it is an improper attempt to circumvent the requirement that aggrieved parties file an appeal within thirty days. BFI's argument does not withstand scrutiny. Because the standards for standing to file an appeal and

to intervene in an existing appeal are identical for all intents and purposes, *Connors, supra*, any party who is authorized to intervene almost certainly also had standing to file its own appeal. If BFI's argument were correct, no party would ever be able to intervene on the side of an appellant after thirty days. While allowing a recipient of a Departmental action to intervene is simply too much of an affront to the thirty-day appeal rule to tolerate, *Jefferson Township Supervisors v. DEP,* 1999 EHB 693, 695, the mere fact that an intervenor was also a person who had standing to bring an appeal does not by itself prevent intervention. In fact, very nearly the opposite is true. Otherwise, the statutorily mandated right of intervention would be eviscerated. In evaluating these sorts of questions, it is important to keep in mind that the Board appeal is ordinarily the only opportunity for a due process hearing addressing Departmental actions that affect people's rights. If there is only one opportunity to be heard, the Board should not rush to prevent interested persons from participating in that process.

BFI argues that the petition to intervene must be denied as untimely because the Board's rules only allow intervention "prior to the initial presentation of evidence." 25 Pa. Code § 1021.62(a). BFI argues that exhibits attached to the parties' motions for summary judgment previously filed in this matter constitute the "initial presentation of evidence." We do not agree. The Board has already interpreted the rule to refer to the merits hearing, which we continue to believe is the only justifiable interpretation. *City of Harrisburg v. DER*, 1988 EHB 1706, 1708 n. 2; *Campbell v. DER*, 1977 EHB 338. We do not believe the rule was ever intended to cut off intervention simply because a party has attached exhibits to a prehearing motion, or because the Board has held a supersedeas or ability-to-pay hearing for that matter.

BFI asks us to deny the petition as untimely under Pa.R.C.P. 2329(3), which allows a court to deny on unduly delayed petition. That rule, however, does not apply to Board

proceedings. As already discussed, the Board has adopted its own rule regarding intervention, and that rule does not authorize this Board to deny petitions as untimely unless they are filed after the merits hearing has begun. 25 Pa. Code § 1021.62(a).

A far more troubling question is how to practically and fairly accommodate the Township's new status as an intervenor so late in the proceedings. This appeal was filed in September 1999. The periods for completing discovery, exchanging expert materials, and filing dispositive motions are closed. All that remains is the filing of prehearing materials, the hearing itself, and posthearing briefs. While intervention is permissible up to the initial presentation of evidence, 25 Pa. Code § 1021.62(a), the Board's rules also provide that "[a]n order granting intervention allows the intervenor to participate in the proceedings remaining at the time of the order granting intervention." 25 Pa. Code § 1021.62(f). In this case, that essentially means the evidentiary hearing.

It would be unfair to the existing parties who would be adverse to the Township's position, particularly BFI, but to some extent, the Department as well, to allow the Township to participate in the hearing without having first provided the adverse parties with the opportunity to conduct discovery. On the other hand, the evidentiary hearing has already been scheduled for January 2001. To further prolong this appeal is unfair to the Giordanos, who would undoubtedly like a prompt resolution of their claims, if possible, and BFI, who would undoubtedly like to see the cloud removed from its permit modification, if possible.

We believe that the best way to reconcile these competing considerations is to define the Township's right "to participate in the proceedings remaining at the time of the order granting intervention" (25 Pa. Code § 1021.62(f)) as follows. It is too late for the Township to conduct any discovery or submit any prehearing motions of its own. The Township may not present any

expert testimony, although it may participate in the examination of the other parties' experts (if any) at the hearing. The existing parties may conduct discovery against the Township on an expedited basis. All of that discovery shall be completed before November 17, 2000. The Township shall respond to written discovery requests within ten days, and make persons under its control available for deposition upon reasonably short notice. Any failure on the part of the Township to cooperate in the effort to complete discovery on an expedited basis could result in a further restriction of its right to participate in the hearing. The Township will be strictly limited to presenting evidence and legal argument concerning the issues expressly identified in its petition to intervene. *See* 25 Pa. Code § 1021.62(f). The Township's prehearing memorandum is due on December 1, 2000. All other provisions of the previously issued Pre-Hearing Order 2 (scheduling the hearing) apply to the Township.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LISA and STEVEN GIORDANO	:	
	:	
v.	:	**EHB Docket No. 99-204-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL, Permittee	:	

ORDER

AND NOW, this 26th day of September, 2000, the Township of Robeson's petition to intervene is GRANTED, with the restrictions described in the foregoing opinion. The case caption is revised to read as follows:

LISA and STEVEN GIORDANO and TOWNSHIP OF ROBESON, Intervenor	:	
	:	
v.	:	**EHB Docket No. 99-204-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL, Permittee	:	

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 26, 2000

See next page for a service list

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LISA and STEVEN GIORDANO and TOWNSHIP OF ROBESON, Intervenor	:	
v.	:	**EHB Docket No. 99-204-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL, Permittee	:	**Issued: September 26, 2000**

OPINION AND ORDER ON MOTION TO VIEW

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board grants the permittee's request for a view over the objection of the third-party appellants because the benefit of the view in assisting the Board understand the issues presented in the appeal outweighs the cost and inconvenience and any prejudicial effect likely to be occasioned thereby. The Board understands and will take appropriate account of the fact that a view only provides a "snapshot" of site conditions.

OPINION

Lisa and Steven Giordano (the "Giordanos") have filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a major permit modification to Browning-Ferris Industries, New Morgan Landfill Company, Inc., and Conestoga Landfill (hereinafter collectively referred to as "BFI"), which allowed BFI to increase its average daily

tonnage at its Conestoga Landfill in New Morgan Borough, Berks County. BFI has requested that this Board conduct a view of the landfill, the Giordanos' property, the area between the landfill and the Giordanos' property, and traffic routes to the landfill. The Department does not object to a view. The Giordanos do. They assert that a view would serve no probative purpose, that BFI would be able to take steps to minimize the nuisances created by the landfill in anticipation of the view, and that weather conditions could affect those alleged nuisances. Therefore, they argue that a view might not be representative of conditions that prevail over extended periods of time. It would offer, at best, a "snapshot" of conditions at the site.

The Board's rule regarding views provides as follows:

> The Board may upon reasonable notice and at reasonable times inspect any real estate including a body of water, industrial plant, building, or other premises when the Board is of the opinion that a viewing would have probative value in a matter in hearing or pending before the Board.

25 Pa. Code § 1021.98. The decision on whether to conduct a view is committed to the Board's discretion. *Lucky Strike Coal Corporation v. DER*, 1986 EHB 1233, 1235. *Cf.* Pa. R.C.P. 219. A view will never be allowed as a substitute for a party's case-in-chief, *Lucky Strike*, 1986 EHB at 1236, but as an aid to furthering the Board's understanding of a case, it can be extremely helpful.

The Giordanos' argument in opposition to a view somewhat misapprehends the purpose of a view. A view is not normally thought to serve as record evidence in and of itself. Rather, a view is a secondary tool designed to help the Administrative Law Judge better understand the record evidence and formulate the most accurate findings of fact possible. Those findings of fact must be based upon the evidence of record, and they must be approved by a majority of the Board Members,

four of whom ordinarily would not have participated in the view. If the record evidence supports one conclusion but a view would support quite another, the finding of fact must be based upon the evidence of record. *See generally Standard Pennsylvania Practice 2d* § 48.49.

There is a certain amount of cost and inconvenience associated with a view. In cases where the incremental value of the view as an aid to understanding does not outweigh that cost and inconvenience, a view should not be conducted. *See Goodrich-Amram 2d* § 219.6. For example, there are some cases where the issues are simply straightforward enough that a view is not necessary. There are other cases where site conditions are not particularly relevant, so a view would add little or no value.

In contrast to such cases, site conditions are at the heart of the Giordanos' appeal. The appeal involves complex issues of fact and law. Some of the issues of fact involve matters that are spacial or three-dimensional in nature, or involve local topographical features. A field visit would greatly assist the fact finder in understanding such issues. It will, quite literally, help us to visualize the maps and diagrams that we suspect will serve as important exhibits in the case. In fact, as an appeal involving an active landfill and its effects on the local environment, this appeal is a classic example of a case where a view would be helpful.

Of course, a view would not be appropriate if its prejudicial effect would outweigh its value as an aid to understanding. In other words, we should balance the value of the view not only against the cost and inconvenience associated therewith, but against its potentially negative consequences as well. Although we suspect that such cases will be exceedingly rare in Board proceedings, we can imagine a situation, for example, where the passage of time or on-site activities have so changed a

site that to view it at a later time would give a seriously misleading impression of the site as it presented itself at the relevant time period. (Of course, in such a case, a view might not be particularly helpful in any event.)

The danger of a prejudicial effect appears to be the true basis for the Giordanos' concern. The Giordanos are concerned that site conditions on the day of the view might mislead the Administrative Law Judge into thinking that site conditions are always consistent with conditions that day. To be blunt about it, if the landfill is not emitting malodors on the day of the view, the Giordanos are afraid that we will conclude that it never emits odors, even if other evidence suggests that it does. The Giordanos are concerned that this prejudicial impact will outweigh the value of the view as an aid to understanding.

We return to our original point: Our site visit is not intended to serve as independent evidence of whether the landfill is creating nuisance conditions. It is only to help us understand the evidence that has been entered into the record and any other disputed issues concerning the existence of such conditions. For example, if the preponderance of the credible record evidence showed that the site does or does not create a malodor problem but the site view did not confirm that, we would nevertheless be required to base our findings upon the record evidence.

Although, strictly speaking, the view does not serve as independent evidence, we acknowledge that it would be disingenuous for us to ignore the fact that the Administrative Law Judge will have sensory impressions during the view. We are, however, capable of understanding that a view merely provides a "snapshot," in the Giordanos' words, of site conditions. We are accustomed to understanding the temporal nature of all evidence and taking that account. A

photograph only captures a moment in time. An inspection report only describes the condition of a site on the day of the inspection. A site drawing of an active landfill can be inaccurate in some ways the day after it is prepared. To the extent that human nature prevents us at some unconscious level from totally ignoring our personal sensory impressions, we are confident of our ability to appreciate the limited significance of one isolated day of viewing a landfill that has been operating for seven years and may operate for several more years. If it rains on the day of the view, we will not assume that the site is in a rainy location.

In the final analysis, even if we accept that there might be some prejudicial impact, and acknowledge that the view will involve some cost and inconvenience for all concerned, we nevertheless conclude that the value of a view in helping this Administrative Law Judge understand the issues so that he can do his best to prepare intelligent and accurate findings of fact substantially outweighs that cost and presumed prejudicial impact.

We believe that the best time to conduct the view in this case will be at some point in close proximity to the evidentiary hearing. The goal of the view is to help the Board understand the record evidence. If we conduct the view too far in advance of the hearing, we may not understand the significance of what we are seeing. We might also waste time viewing areas or conditions that prove to not be particularly relevant. We would prefer to conduct the view in the context of the presentation of all the other evidence in the case. *See generally Goodrich-Amram 2d* § 219.2. We do not accept BFI's invitation to conduct a view as an aid to resolving the motions for summary judgment that are pending in this case.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LISA and STEVEN GIORDANO and TOWNSHIP OF ROBESON, Intervenor	:	
v.	:	**EHB Docket No. 99-204-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL, Permittee	:	

ORDER

AND NOW, this 26th day of September, 2000, upon consideration of the motion to view and the opposition thereto, it is hereby ORDERED that the motion is GRANTED. The view will take place at a time to be announced.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 26, 2000

See next page for a service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-068-C**
	:	**(consolidated with 99-099-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**and 2000-104-C)**
	:	
	:	**Issued:** September 28, 2000

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss challenges to two of three surface coal mining license renewals involved in an appeal is denied. Although the renewals have expired, and therefore the Board can grant no effective relief concerning them, the mootness doctrine does not apply to the appellant's challenges because the issues appellant raises are capable of repetition yet would evade review.

OPINION

This appeal concerns three coal mining license renewals (renewals) that the Department issued to Harriman Coal Corporation (Appellant) under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1-1396.19a (Surface Mining Conservation and Reclamation Act), in 1999 and 2000. The Department issued the first renewal on March 16, 1999 (motion and response, paragraphs 11); the second on April

28, 1999 (motion and response, paragraphs 15); and the third on April 24, 2000 (motion and answer, paragraphs 18).

Appellant filed appeals to each of the renewals. The Board docketed its appeal of the first renewal—filed on April 14, 1999—at EHB Docket No. 99-068-C. And we docketed Appellant's appeal of the second renewal—filed on May 5, 1999—at EHB Docket No. 99-099-C. We then consolidated both appeals at EHB Docket No. 99-068-C on June 18, 1999.

The Board initially docketed Appellant's appeal of the third renewal, filed on May 15, 2000, at EHB Docket No. 2000-104-C. On June 8, 2000, however, we consolidated that appeal with the appeals of the first and second renewals at EHB Docket No. 99-068-C.

On May 5, 2000, the Department filed a motion to dismiss for mootness and a memorandum in support. In the motion and supporting memorandum, the Department argues that Appellant's appeals of the first and second renewals are moot because the third renewal superseded the earlier ones. According to the Department, Appellant no longer has a stake in the superseded renewals, and the Board can grant it no effective relief with respect to those renewals.

Appellant filed a response and memorandum of law in opposition on June 19, 2000. In its response and memorandum, Appellant argues that the Department's motion to dismiss is itself moot, since the appeal of the third renewal was consolidated with the appeal of the first and second renewals after the Department filed its motion to dismiss. Appellant also argued that its challenges to the first and second renewals fall within an exception to the mootness doctrine because they are capable of repetition yet would evade review. The Department did not file a reply.

The Board will grant a motion to dismiss where no material issues of fact remain in dispute and the moving party is entitled to judgment as a matter of law. *See Smedley v. DEP,* 1998 EHB 1281, 1282. All doubts are resolved in favor of the non-moving party. *Id.* Where a movant files a motion to dismiss but is entitled to judgment as a matter of law on only part of an appeal, the Board ordinarily grants the movant's motion to dismiss in part. *See, e.g., Felix Dam Preservation Association, et al v. DEP*, EHB Docket No. 2000-009-K (opinion issued April 10, 2000); *Thomas v. DEP,* 1998 EHB 93; and *Township of Florence v. DEP,* 1996 E.H.B. 871. Thus, the fact that all three appeals have been consolidated will not save Appellant's challenges to the first and second renewals if we determine that those challenges are moot.

After a careful review of the law and facts, we conclude that the mootness doctrine does not apply to Appellant's challenges to the first and second renewals. "In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of the necessary stake in the outcome, or whether the court (or agency) will be able to grant effective relief." *Al Hamilton Contracting Co. v. Department of Environmental Resources*, 496 A.2d 516, 518 (Pa. Cmwlth. 1985) (citations omitted). Generally, tribunals may not decide moot issues. *See, e.g., Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117, 119 (Pa. Cmwlth. 2000). However, exceptions to the mootness doctrine exist "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest, or where a party will suffer some detriment without the court's decision." *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa.Cmwlth.1997), *aff'd*, 731 A.2d 1133, 1134 (Pa. 1999).

The Department argues that Appellant's challenges to the first and second renewals are moot because the third renewal expressly superseded the earlier renewals, (motion, paragraph

18) and, thus, the Board can grant no meaningful relief on Appellant's challenges to the earlier renewals. We disagree.

The Department is correct to the extent that it argues that the Board can grant no meaningful relief on Appellant's challenges to the earlier renewals. While the third renewal never expressly states that it superseded the first and second renewals, (motion, exhibit F), the two earlier renewals have already expired by their own terms. The first renewal, issued on March 16, 1999, provides that it expired on May 31, 1999. (Motion and response, paragraphs 14; motion, exhibit D.) The second renewal, issued on April 28, 1999, provides that it expired on May 31, 2000. (Motion and response, paragraphs 15; motion, exhibit E.) Since the first and second renewals have already expired, we can grant no meaningful relief on Appellant's challenges to them. *Cf. Del-Aware Unlimited, Inc. v. DER,* 1994 EHB 983 (holding that the Board can grant no meaningful relief in an appeal of a permit that has expired by operation of law).

Indeed, while the Department argues that the third renewal rendered the first appeals of the first two renewals moot, the third renewal has itself expired. The terms of that renewal provide that it expired on May 31, 2000. (Motion, exhibit F, p. 1.)

Ordinarily, an appeal of a Department action would be moot where we can grant no meaningful relief. However, Appellant's challenges to the first and second renewals fall within an exception to the mootness doctrine because they are capable of repetition yet would evade review.

The renewals at issue in this appeal existed for only a relatively short time. The first renewal expired 75 days after it was issued. (Motion, exhibit D, p. 1.) The second expired 400 days after it was issued. (Motion, exhibit E, p. 1.) And the third expired 37 days after it was

issued. (Motion, exhibit F, p. 1.) Appellant filed appeals challenging each of the renewals, but, because the renewals existed for only a short time, Appellant was unable to obtain a resolution of its challenges to any of the renewals before the renewals expired.

Significantly, the first and second renewals contain conditions that differ from those in the third renewal. For instance, the March 16, 1999, renewal provides that "within 90 days of [March 16, 1999], the license will become null and void without prior notice if [Appellant] fails to submit cross sections and revised mapping for the Good Spring site addressing excess spoil calculations and spoil to be used for backfilling purposes ... or if [Appellant] fails to respond, fully and completely within seven days to deficiency letters." (Motion, exhibit D, p. 2.) Similarly, the April 28, 1999, renewal provides that "the license will become null and void without prior notice if [Appellant] fails to submit cross sections and revised mapping by June 16, 1999 ... or if [Appellant] fails to respond, fully and completely within seven days, to deficiency letters." (Motion, exhibit E, p. 2.) The third permit renewal, by contrast, says nothing about the submission of cross sections or responses to deficiency letters.

Appellant challenged these conditions in its appeals of the first and second renewals. Although the third renewal did not contain similar provisions, that renewal has expired, and the Department could conceivably insert similar conditions in Appellant's next license (if the Department issues Appellant another license). Since the Department must issue renewals annually, *see* 52 P.S. § 1396.3(a)(1) and 25 Pa. Code § 86.356(a), it is doubtful whether the Board could review challenges to similar conditions in a future license were we to hold that the mootness doctrine prevented Appellant from challenging an expired license or renewal. This is a classic case of an issue being capable of repetition but evading review. *Cf. Keystone Mining Company, Inc. v. DER,* 1985 EHB 542 (holding that an appeal of a surface mining license denial

was not moot—even after the year for which the license was requested had passed—since the licenses are issued annually, and, thus, the Department's denial was capable of repetition yet would evade review).

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-068-C**
	:	**(consolidated with 99-099-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**and 2000-104-C)**

O R D E R

AND NOW, this 28th of September, 2000, IT IS ORDERED that the Department's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 28, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION	:	
v.	:	**EHB Docket No. 98-039-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 29, 2000**

OPINION AND ORDER ON. PETITION FOR LEAVE TO INTERVENE

By Thomas W. Renwand Administrative Law Judge

Synopsis:

The Board grants a petition to intervene despite the objection of the Department. The petitioner, the major airline at Pittsburgh International Airport, has adequately alleged that it is an interested party entitled to intervene in an appeal filed by the operator of the Airport. The major issue in the appeal concerns the environmental impact of spent deicing fluid. The Department retains the right to challenge the airline's continuing standing at the hearing

OPINION

Presently before the Board is the Petition for Leave to Intervene filed by US Airways, Inc. (US Airways). US Airways seeks to intervene in this Appeal of an Order of the Pennsylvania Department of Environmental Protection (Department) filed by the County of Allegheny, Department of Aviation (Allegheny County). Allegheny County and the Department

have resolved numerous issues set forth in the Order. However, several issues remain. These issues mainly involve the deicing of airplanes and the problems surrounding the spent deicing fluids used at the Pittsburgh International Airport. These issues involve both safety and the environment.

US Airways is the major airline at the Pittsburgh International Airport. As such, it contends that any resolution of these important issues will likely have a substantial impact on its operations in Pittsburgh. US Airways further states that agreements it has with Allegheny County make it responsible for a major share of the general operation and maintenance costs at the Airport. Therefore, US Airways contends that "any settlement or adjudication of [this Appeal] will directly affect US Airways' operations, potentially including flight scheduling, safety procedures, deicing practices of aircraft, taxiways and runways, costs of providing deicing services of aircraft, taxiways and runways; and allocation of general operation and maintenance costs at the Pittsburgh International Airport." (Petition to Intervene, Affidavit of Kevin A. Gurchak, Senior Engineer of Environmental Programs for US Airways, ¶15)

Allegheny County did not file a response to the Petition. The Department filed a response opposing the Petition. The Department basically argues that the Petition should be denied because: 1) the Order does not affect US Airways' existing legal obligations; 2) alleged findings of violations do not give US Airways an interest in this appeal; 3) the agreements between US Airways and Allegheny County referenced in the Petition were not attached; and 4) US Airways' Petition is premature. We disagree and grant the Petition.

Section 4(e) of the Environmental Hearing Board Act, 25 P.S. § 7514(e), provides that "[a]ny interested party may intervene in any matter pending before the Board." Our Rules allow a person to "petition the Board to intervene in any pending matter prior to the initial presentation

of evidence." 25 Pa. Code § 1021.62(a). In reviewing a petition to intervene, the Board will grant intervention when that person is determined to be an "interested party." *Browning-Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). The interest required must be more than a general interest in the proceedings. It must be such that the person seeking intervention will either gain or lose by direct operation of the Board's adjudication. *Browning-Ferris, Inc.*, 598 A.2d 1057, 1060-61; *Jefferson County v. Department of Environmental Protection*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K, slip op. at 4 (Opinion issued January 31, 2000); *Conners v. DEP*, 1999 EHB 669, 670.

A petitioner has standing to intervene if its interests in the Appeal are substantial, direct and immediate. *Ainjar Trust*, slip op. at 4. As recently pointed out by Judge Labuskes, the question we must decide is whether the intervenor would have been an appropriate party to seek relief in the first instance because he personally has something to gain or lose as a result of the Board's decision. *See Girodano v. DEP*, EHB Docket No. 99-204-L, slip op. at 3 (Opinion issued September 26, 2000). "This question cannot be answered affirmatively unless the harm suffered by the would-be intervenor is greater than the population at large (i.e. "substantial"), and there is a direct and immediate connection (i.e. causation in-fact and proximate cause) between the action under appeal and the person's alleged harm." *Girodano*, slip op. at 3. *See also William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 283 (Pa.1975); *Conners v. State Conservation Commission*, 1999 EHB 669, 671; *Tortorice v. DEP*, 1998 EHB 1169, 1170; *Belitskus v. DEP*, 1998 EHB 846, 859; *Barshinger v. DEP*, 1996 EHB 849, 853. We certainly believe US Airways satisfies this test.

US Airways is an "occupier" of the airport, as defined in the underlying Consent Order

and Adjudication. Moreover, as the major airline at the Airport its interest in the subject matter of this Appeal is certainly more than the general interest of the public. It seems clear after reviewing the Petition and accompanying Affidavit of Mr. Gurchak that US Airways' operations and costs would be directly impacted by any settlement or adjudication in this Appeal. The Department's arguments that US Airways' existing legal obligations and alleged violations do not give it standing in this case are legal arguments that depend on the application of law to disputed facts. These arguments probably must await a hearing but certainly are not lost by virtue of US Airways' intervention. As Judge Krancer stated in *Pennsburg Housing Partnership, L.P. v. DEP*, 1999 EHB 1031, 1032 n.1, "review and deliberation of those matters is to be the subject of future forensic combat. [US Airways] is seeking here merely to enlist in the fight."

We are also not persuaded by the Department's contention that since US Airways did not attach the agreements referenced in their Petition, we should not consider their arguments regarding their duties and responsibilities under those agreements. The Department contends that any written agreements relied upon by US Airways should have been attached to the Petition in conformance with Pennsylvania Rule of Civil Procedure 1019(h). The Rule requires that:

> a pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing. Pa.R.C.P.No.1019(h)

While we agree with the Department that the better practice would be for a petitioner to attach any document it claims supports its petition for intervention, it is not required to do so. The definition of a pleading before the Board does not include a Petition to Intervene. *See* 25 Pa. Code § 1021.2. We are reasonably confident that US Airways has accurately summarized their

duties and responsibilities under these agreements based upon the notarized statement of its representative. However, the Department is certainly free to revisit this issue after it conducts discovery.

The Board's Rule at 25 Pa. Code § 1021.62(a) states that "[a] person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence." Although US Airways certainly has filed its Petition before the presentation of evidence in this appeal, it is long after the appeal has been filed. Since the parties have only conducted minimal discovery in this case, having concentrated their efforts in resolving and narrowing the issues, we are not faced with the problem of redoing depositions, interrogatories, and other discovery.

The Department's assertion that US Airways should not be allowed to intervene before the Board decides the issues in this case would result in a complete evisceration of our Rule regarding intervention. The nature of intervention is that a petitioner may intervene at *any* time prior to the presentation of evidence, providing the petitioner's interests are "substantial, direct, and immediate." 25 Pa. Code § 1021.62(a); *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth. 1992). Given the significant proportion of all airline activities conducted by US Airways at the airport, it is likely that any resolution of the deicing issue cannot be undertaken or implemented without creating a substantial, direct and immediate impact on US Airways' operations.

For the reasons stated above, US Airways is an interested party which may intervene in this appeal. Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTEAL PROTECTION

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION	:	
v.	:	**EHB Docket No. 98-039-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of September, 2000, US Airways' Petition to Intervene is **granted**. The caption is amended to read as follows:

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, Appellant and US AIRWAYS, INC., Intervenor	:	
v.	:	**EHB Docket No. 98-039-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 29, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LISA and STEVEN GIORDANO and TOWNSHIP OF ROBESON, Intervenor	:	
v	:	**EHB Docket No. 99-204-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL, Permittee	:	**Issued: October 4, 2000**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

In an appeal from the issuance of a major permit modification allowing a landfill to increase its average daily tonnage, the landfill permittee's motion to dismiss the appeal brought by individuals who live about two miles away from the landfill for lack of standing is denied because there are disputed issues of fact about whether the individuals have been harmed by the change in the landfill's operations. The Department's dispositive reliance upon the balancing test set forth in the very same guidance document that was determined to be an invalid regulation in *Dauphin Meadows, Inc. v. DEP* was in error in this case as well. The Board rejects an interpretation of potentially applicable regulations posited by the landfill that it did not need to prepare an environmental assessment for its application to increase its average daily tonnage. Disputed issues of fact and law prevent the Board from ruling in the context of a summary

judgment motion whether the Department should apply a balancing test to an application for a major permit modification. The Board concludes that, notwithstanding the Department's improper reliance on an invalid regulation, it would be more efficient to proceed with the appeal than it would be to remand the permit to the Department for further consideration.

OPINION

Lisa and Steven Giordano (the "Giordanos") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a major permit modification to Browning-Ferris Industries, New Morgan Landfill Company, Inc., and Conestoga Landfill (hereinafter collectively referred to as "BFI"), which allowed BFI to increase its average daily tonnage at its Conestoga Landfill in New Morgan Borough, Berks County from 5,210 tons per day to 7,210 tons per day. The Giordanos filed a motion for summary judgment, which they were permitted to supplement following this Board's decision in *Dauphin Meadows, Inc. v. DEP*, EHB Docket No. 99-190-L (Opinion and Order issued April 27, 2000). BFI has opposed that motion and filed a motion of its own. The Department has weighed in by conceding in its briefs that a remand would be appropriate in light of *Dauphin Meadows*. It has also disputed some of BFI's arguments.

A. Standing

BFI challenges the Giordanos' standing to pursue this appeal. In order to establish standing, appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services, Inc.*,

120 S. Ct. 693, 704-05 (2000) *("FOE"); William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975); *Wurth v. DEP*, EHB Docket No. 98-179-MG, slip op. at 16-17 (Opinion and Order issued February 29, 2000). The first question expresses the Board's gatekeeper function; the Board will not allow a waste of resources on cases where there is no actual harm or credible threat of any harm **to anybody** and, therefore, no legitimate case or controversy. The appellants are not required to prove their case on the merits, but they must show that they have more than subjective apprehensions, and that the likelihood of adverse effects occurring is not merely speculative. *Ziviello v. DEP,* EHB Docket No. 99-185-R, slip op. at 7 (Opinion and Order issued July 31, 2000). The second question focuses on the particular appellants to ensure that they are the appropriate parties to seek relief because they personally have something to gain or lose as a result of the Board's decision. The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial"), and there is a direct and immediate connection between the action under appeal and the appellants' harm (i.e. causation in fact and proximate cause). *William Penn, supra.* Ultimately, "[t]he purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department." *Ziviello,* slip op. at 7 (citing *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944).

In the context of a third-party appeal from the issuance of a permit, these principles have been more simply expressed as follows: Appellants have standing if (1) they use the area affected by the permitted activity and (2) the permittee's conduct has (or will) adversely effect that use by, e.g., lessening the aesthetic and recreational values of the area. *FOE, supra*; *O'Reilly v. DEP*, EHB Docket No. 99-166-L, slip op. at 2 (Opinion and Order issued May 24,

2000); *Ziviello,* slip. op. at 6 n.9; *Valley Creek Coalition*, 1999 EHB at 944 n.5; *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951.

The appropriate evidentiary standard of review in evaluating a standing challenge depends upon when standing is challenged. In that respect, the standing issue is really no different than any other issue in the case. Although it is not necessary to plead standing, *Ziviello,* slip op. at 5; *Tessitor v. DER*, 1995 EHB 603, 606, *aff'd*, 682 A.2d 434 (Pa. Cmwlth. 1996), it is the appellants who are ultimately required to prove that they have standing if the question is put at issue. If the question is raised in a motion to dismiss early in the case, we essentially accept all of the appellant's allegations as true and decide whether the opposing party is nevertheless entitled to judgment as a matter of law. *Beaver Falls Municipal Authority v. DEP*, EHB Docket No. 2000-098-R (Opinion and Order issued August 25, 2000); *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. If the question is raised at or near the conclusion of discovery in the context of a summary judgment motion, we will only rule on the issue if there are no genuine issues of material fact and it is clear that the appellant does or does not have standing as a matter of law. Pa. R.C.P. 1035.2; *Ziviello,* slip op. at 4. If the question is still contested after the evidentiary hearing, we determine whether the appellants have carried their burden of proving that they have standing by a preponderance of the evidence. 25 Pa. Code §1021.101; *see, e.g., Township of Florence*, 1997 EHB 763, 773-74.

BFI has challenged the Giordanos' standing in a summary judgment motion. (The Giordanos did not file a motion on this issue.) Accordingly, we must determine whether BFI is entitled to judgment as a matter of law based upon the undisputed issues of fact. In other words, to the extent that there are disputed issues of fact that are material to the standing question (or to the extent that BFI is not entitled to judgment given the facts that are undisputed), BFI's motion

must be denied.

A review of the record that has been generated so far in this appeal reveals that there are numerous issues of disputed material fact that prevent us from granting summary judgment regarding the standing issue in favor of BFI. BFI has been operating for approximately one year under its permit as modified. Therefore, it is not necessary in this situation to address potentialities so much as what has already occurred. The Giordanos have testified that the accelerated pace of landfill operations as authorized by the increase in permitted daily volume has resulted in increased malodors, blowing litter, noise, vectors, and truck traffic. BFI has disputed most of these allegations (it concedes that there has been an increase in truck traffic), but those disputes merely raise genuine questions of material fact. The factual dispute is not appropriate for resolution on summary judgment.

The Giordanos have testified, sworn in affidavits, and pointed to other record evidence that indicates that they live about two miles from the landfill, use the roads that are close to the landfill, and have personally suffered the adverse effects of the increased landfill activities. Again, BFI attacks the credibility of these assertions and points to contrary record evidence, but again, the attacks simply put the assertions at issue for hearing. They do not entitle BFI to summary judgment. Accordingly, its motion is denied with regard to standing.

B. The Guidance Document

There is no genuine dispute that, in reviewing and approving BFI's application for a permit modification, the Department dispositively relied upon the balancing test set forth in Guidance Document No. 254-2100-101, the very same document that we ruled is an invalid regulation in *Dauphin Meadows, Inc. v. DEP*, EHB Docket No. 99-190-L (Opinion and Order issued April 27, 2000). The Department concedes the point in its response to the Giordanos

motion. So does BFI. (BFI motion, ¶¶ 304-05.) In this appeal, as in that case, the Department's improper reliance upon the invalid regulation was an error. The Giordanos' motion for summary judgment is granted on that point.

C. The Need to Perform an Environmental Assessment for a Request to Increase Daily Tonnage

BFI argues that the Department is not required to balance the harms and benefits of a mere increase in the allowable average daily tonnage at an existing facility, so the Department's reliance on the Guidance Document was, in effect, harmless error. To be clear, BFI does not argue that the Department should never balance harms and benefits, evaluate the need for facilities, or perform environmental assessments. Rather, it simply argues that such an exercise should not have been applied to **its** permit-modification application, which was merely a request to increase a previously permitted facility's average daily waste volume limit. BFI's argument is based entirely upon interpretations of the potentially applicable regulations.

The key regulation is 25 Pa. Code § 271.126, which reads in the pertinent part as follows:

> (a) Except as provided in subsection (b), an application for a municipal waste disposal or processing permit shall include an environmental assessment on a form prescribed by the Department.
>
> (b) The following do not require an environmental assessment...:
>
> > (3) Permit modification applications that are not for major modifications under [25 Pa. Code] § 271.144....

25 Pa. Code § 271.126. The next regulation in the Code, Section 271.127, goes on to describe what must be included in an environmental assessment if one is required.

BFI's first regulatory argument is that an application for an average daily tonnage increase is not an application for a "major modification," and therefore, no environmental

assessment is required pursuant to the exception set forth at 25 Pa. Code § 271.126(b)(3).[1] BFI refers us to 25 Pa. Code § 271.144(a), which defines an application to make a "[c]hange in daily waste volume" as an application for a major permit modification. 25 Pa. Code § 271.144(a)(2). BFI suggests that Section 271.144(a)(2) should be read to mean that only requests to change *maximum* daily waste volume should constitute major modifications. The only basis for that interpretation cited to us by BFI is that some (but not all) DEP regional offices interpret the regulation that way. We see no merit in BFI's argument.

In interpreting regulations, we follow Pennsylvania's Statutory Construction Act of 1972, 1 Pa. C.S.A. § 1501, *et seq.* *See* 1 Pa.C.S.A. § 1502(a); *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 590 A.2d 384, 387 (Pa. Cmwlth. 1991). When a regulation is clear and free from ambiguity, any deliberation regarding the promulgators' intent is unnecessary. *See Meier v. Maleski*, 670 A.2d 755, 759 (Pa. Cmwlth. 1996), *aff'd per curiam*, 700 A.2d 1262 (Pa. 1997). This Board should not insert words into regulation where the promulgators failed to do so. *See Worley v. Augustine*, 456 A.2d 558, 561 (Pa. Super. 1983). BFI's interpretation would have us do exactly that. BFI would effectively have us add the word "maximum" to the regulation so that only "changes in *maximum* daily waste volumes" would constitute major modifications.

The drafters of the regulation could have very easily added the modifier "maximum" themselves had they wanted it in the regulation. BFI does not provide us with a reason why we would add "maximum" instead of "average" as a qualifier, except that some (but not all) DEP regions have interpreted it that way. Mixed interpretations by the regulators, however, fail to

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[1] BFI makes the argument and "reserves the right to more fully argue this issue later." BFI Brief, p. 17, n. 24. See also BFI Brief, p. 77, n. 206, Reply Brief, p. 20, n. 20. Because the issue was raised and it could have affected the resolution of the motions, we deem it appropriate

convince us that we should effectively rewrite the regulation. In fact, as a limiting factor on the pace of landfill operations, the restriction on average daily waste volume is at least as significant as maximum daily volume. While the maximum volume limit allows for an occasional spike, operations must be geared over the extended term to ensure that the average limit is not exceeded. While the maximum limit may reflect operations occasionally, the average limit gives a better picture of what operations will be like on a day-to-day basis. An increase in a maximum limit might change operations a few days a quarter; a change in the permissible average is more likely to change operations more days that not. Lest there be any doubt on this point, BFI in this case has expended considerable effort to increase its average limit. It has not bothered with its maximum limit. In short, a change in the average volume limit is at least as significant as a change in the maximum volume limit, and we see no logical reason to interpret 25 Pa. Code § 271.44(a)(2) to only apply to a change in the maximum limit.

It is far more natural to simply read 25 Pa. Code § 271.144(a)(2) to refer to *any* change in the daily volume. Although we see no need to look beyond the face of the regulation, we would nevertheless point out that legislators and regulators have not distinguished between average and maximum daily volumes in other contexts. *See, e.g.*, Sections 1111 and 1112 of the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.1111 (discussing protection of capacity) and 4000.1112 (discussing the setting of maximum or average daily volumes in permits); 25 Pa. Code §§ 273.140 (application requirements regarding daily volume limits) and 273.221 (permittees' obligation to comply with daily maximum and average limits).

We find still further support for our conclusion that the existing regulations require an environmental assessment to be performed in 25 Pa. Code § 273.140. That section requires an

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to address the issue now.

applicant for a new landfill permit to include a detailed justification for its proposed average and maximum daily volumes for the facility based upon Sections 271.126 and 271.127. If an existing facility wishes to increase those volumes, it makes sense that the change should also be justified in accordance with Sections 271.126 and 271.127. Indeed, 25 Pa. Code § 271.126(c) specifically makes allowance for this process by providing that a facility that has previously been subject to an environmental assessment is only required to submit assessment information that is limited to the proposed modification to the facility. 25 Pa. Code § 271.126(c)(1).

BFI's second regulatory-interpretation argument, as refined in its reply brief, relies upon language in 25 Pa. Code § 271.127(d)-(g), which are the regulatory provisions that describe some of the information that must be included in an environmental assessment **if** one is required. For example, Section 271.127(d) states that the social and economic benefits of a project must be described in the assessment if the application is for "the proposed operation" of a landfill. Subsection (f) relates to the "need" for the "proposed operation." BFI argues that the regulatory language demonstrates that the provisions were not intended to apply to permit modifications.

The problem with BFI's argument is that it de-emphasizes the regulation that is directly on point, 25 Pa. Code § 271.126, which, as discussed above, unambiguously describes exactly which applications require an assessment. With a clear regulation directly on point, there is no need to dwell on the nuances of § 271.127. There is no indication in the directly applicable regulation, Section 271.126, that only parts of Section 271.127 apply in some cases. While the regulatory drafters may have been guilty of some shorthand in 25 Pa. Code § 271.127, we suspect that an attempt to make that regulation comport with every word of Section 271.126 would have rendered it unreadable. We, of course, are required to read regulations in their proper context and as part of an integral, harmonious package, *Department of Public Welfare v.*

Woolf, 419 A.2d 535, 537 (Pa. Super. 1980), and when we do so, we are clearly prevented from accepting BFI's argument. BFI's motion for summary judgment on this point is denied.

D. The Need to Apply a Balancing Test to a Request to Increase Daily Tonnage

BFI argues that 25 Pa. Code § 271.201(a)(3) does not require that a balancing test be performed for applications to increase average daily tonnages. Again, BFI's point is that, since the application of *any* balancing test here was unnecessary, reliance on the Guidance Document was, at worst, harmless error, and no further proceedings are required.

Section 271.201(a)(3) provides that a "permit application" for a municipal waste landfill may not be issued unless the need for the facility clearly outweighs the potential harm posed by the operation of the facility. (Interestingly, no such balancing analysis is enunciated in Section 271.127, the section describing the contents of the environmental assessment.)

Unlike Sections 271.126 and 271.144, Section 271.201(a)(3) is ambiguous. On the one hand, Section 271.201(a) refers to "permit applications." A "permit" is defined very broadly in Section 271.1 to include "a general permit, permit-by-rule, permit modification, permit reissuance and permit renewal." 25 Pa. Code § 271.1. The operative part of Subsection (3) of Section 271.201(a), however, only refers to applications for "a municipal waste landfill, construction/demolition waste landfill or resource recovery facility." Section 271.201 is contained in a series of regulations listed under the heading "Permit Review"; a separate regulation relating directly to permit modifications, § 271.222, is not. *See* 1 Pa. C.S.A. § 1924 (headings may be used as an aid to construction). In short, unlike Section 271.126, Section 271.201(a)(3) is not clear on its face. Where a regulation is not clear on its face, we must delve into the promulgators' intent. 1 Pa. C.S.A. § 1921; *see also LTV Steel Company, Inc. v. Workers' Compensation Appeal Board (Mozena)*, 754 A.2d 666, 674 (Pa. 2000). This exercise

will require further factual development and legal argument. It is not clear as a matter of law based upon undisputed facts that BFI's proposed interpretation is correct. Therefore, BFI's motion is denied on this point.

E. The Appropriate Relief

One of the more hotly contested questions in the parties' motions for summary judgment is whether a remand is necessary or appropriate in light of the Department's reliance upon an invalid regulation and our rejection of BFI's arguments that no further review is otherwise necessary in this case. The Giordanos argue that a remand is essential. The Department concedes that a remand would be appropriate. BFI argues that a remand would be a waste of time.

A remand to the Department will rarely be "necessary" in the strict sense of the word because this Board is capable of developing its own record to determine the correct result. It will, however, often be appropriate. It is important not to lose sight of the fact that the ultimate goal of the Department's as well as this Board's review of a permit application is to determine whether a party may go forward with its plans. For example, in this case, the goal is to decide whether BFI should be allowed to increase its average daily tonnage to 7,210 tons per day. In deciding whether a remand is appropriate, the key question is what will be the most efficient way of reaching the goal. If remanding the matter to the Department for further consideration would be more efficient than simply continuing the appeal, then a remand will ordinarily be appropriate.

One factor to be considered is the extent to which new technical, scientific, or other factual work needs to be developed as a result of our ruling. Although a technical record can be developed in the context of our *de novo* proceedings, it will frequently make more sense to allow

the public and private sector experts to develop their data and conclusions at least in the first instance outside of the adversarial litigation context. In contrast, legal questions, or questions involving the application of facts to the law, can often be resolved just as easily before the Board. *See, Valley Creek Coalition v. DEP*, 1999 EHB 935, 953 (there is no purpose to be served by remanding the permit if the evidence is that the project as constructed will in fact improve the water quality of the watershed); *Belitskus v. DEP*, 1998 EHB 846, 864 (no remand necessary to evaluate compliance history, effect of project on receiving stream); *Oley Township v. DEP*, 1997 EHB 660, 692 (no purpose served by remand of a technical issue). Here, BFI has developed extensive studies and other technical information and the Department's experts reviewed that information over the course of a year. Although the Giordanos argue that the record is incomplete, the greater thrust of most of their arguments goes to the conclusions drawn from the data rather than a lack of data *per se*. We believe that we can flush out these issues in further proceedings. This is simply not a case where further data gathering and review is likely to add value or speed the final resolution of the controversy.

Another key factor in deciding whether to remand is the likelihood that a remand would significantly focus or narrow the issues in dispute. The best-case scenario, of course, is a remand that is likely to result in a final resolution without the need for *any* further litigation. Here, we strongly suspect that a remand would simply put off for another day our need to resolve the difficult legal issues that have been raised in connection with BFI's modification request.

The point in the proceedings at which we are making our decision will obviously be a key factor in deciding whether a remand is appropriate. For example, if we are issuing an adjudication after a full evidentiary hearing that finds that critical determinations still need to be made, particularly the development of factual or technical information, a remand will often be in

order. *See, e.g., P.U.S.H. v. DEP*, 1999 EHB 457, 580 (remand for determination of bond amount). Although we have the option of reopening proceedings, it will frequently be preferable to give the parties the first opportunity to fill in the gaps. In this appeal, in contrast, we are only at the summary judgment phase. Lengthy discovery has been completed. Our sense is that it is certainly worth attempting to move forward at this juncture rather than conceding the futility of further Board effort by way of a remand order.

The severability of the issue that results in a remand can be a factor. For example, in *P.U.S.H., supra,* the Board rejected the vast majority of the challenges to a deep mining permit, but concluded that an insufficient bond had been required. We allowed the permit to remain in place while remanding the bond determination, with the proviso that the bond be recalculated and replaced in short order. The severability of the bonding issue allowed for a fair correction of the Department's error with the least disruption to the otherwise appropriate status quo. No such severability is apparent in this case.

In some appeals, a remand may be necessary in any event on one issue, which might tip the balance toward a remand on other issues. Here, the opposite is true. We must conduct further proceedings regarding the standing issue. The standing issue actually overlaps the central substantive issues in the case. The fact that we must move forward and hold a hearing in this appeal in any event on the standing issue militates against a remand.

If we were to remand this matter now, we expect that the Department would need to determine which regulations apply and in what way, and then analyze the information that has already been generated in light of those regulations to determine if the modification should be approved. Without direction from this Board, and because some of the parties' arguments will in effect have been left unresolved, there will be doubt about whether the correct regulations are

being applied in the correct way, and whether the correct information is being considered. Inevitably, those questions will return to this Board. We believe it would conserve the resources of this Board and all parties concerned by simply moving forward with this appeal.

Finally, the magnitude of the Department's action weighs in our decision on whether to remand. We will be less hesitant to develop our own record without a remand if the action under appeal is relatively limited in scope, such that the task is correspondingly more manageable in the context of a Board appeal. Here, BFI applied for an increase in its average tonnage limit. While the request is a very serious matter deserving of our utmost attention, it raises issues more limited in scope than, say, a permit for a new landfill.

This appeal is to be distinguished from *Dauphin Meadows*, where we remanded the permit for further review. In that case, the Department never got past the balancing analysis mandated by the Guidance Document. In contrast to this appeal, the Department in *Dauphin Meadows* had not conducted any technical review of the application. No party contested the need for a remand. Even Dauphin Meadows conceded in its motion for summary judgment that the best relief it could expect from the Board would have been a remand with instructions to perform a technical review. We did not go that far, of course, preferring instead to order a more general remand that did not necessarily preclude the Department from performing an environmental assessment so long as it did not rely upon the balancing test set forth in the Guidance Document. Admittedly, the broad nature of our remand, in effect, gave the Department the opportunity to determine which statutory and regulatory provisions apply in what way in the first instance. Given the somewhat open-ended nature of our remand, however, and in order to, e.g., protect against inactivity or abuse of the remand order, we retained jurisdiction and the appeal remains open. Our result was driven in part by the fact that a remand was

necessary in any event. Moving ahead by way of adversarial litigation to determine whether the expansion request should have been granted would have been a daunting, inefficient effort. In short, it appeared to us that the most efficient way to move forward in the long run was a remand, but in case we predicted wrongly, we retained jurisdiction.

Here, the request at issue is for an increase in average daily tonnage only. The majority of the technical work has already been done. We must hold evidentiary hearings in any event to address standing. We are at least as competent as the Department is to address the legal issues that remain in this case. We doubt that a remand would further focus, narrow, or refine the issues in dispute. In sum, the most efficient way to achieve a final resolution of BFI's request is to move forward with this appeal.

This case is also to be contrasted with the Board's decision in *Ong v. DEP*, EHB Docket No. 2000-16-R (Opinion and Order issued July 5, 2000). In *Ong*, third-party appellants challenged the issuance of a noncoal surface mining permit. The Department advised the Board at a very early juncture in the proceedings that it had failed to apply recently promulgated anti-degradation regulations in reviewing the noncoal mining permit application. It "admitted its oversight" and specifically asked the Board to remand the permit for further review. In other words, the Department was not prepared to defend its action. Pointedly, no other party, including the permittee, objected to the remand. Accordingly, we granted the Department's unopposed request.

We cannot overemphasize that our selection of what relief is appropriate following a finding of Departmental error is entirely dependent upon the unique circumstances of each case. That said, there are several differences between this case and *Ong*. First and foremost, the need for a remand was not questioned in *Ong*. Here, DEP has conceded (but not requested) the need

for a remand but BFI has opposed it. This compels a closer look at the issue. Secondly, *Ong* involved the issuance of an entirely new permit, and there was at least the suggestion that the Department's oversight could affect whether **any** permit should be issued. Here, the permit modification, which has now been in place for more than a year[2] only relates to the daily volume at a facility that has now been in operation for seven years. There was no issue in *Ong* that would have required further hearings in any event such as the standing issue here. The remand request was made at a very early point in the proceedings in *Ong*. Here, the parties have already made a substantial investment in not only the lengthy permit review, but this litigation as well. There has already been extensive discovery and motions practice in this appeal. In short, in *Ong,* the oversight was revealed so early that we had little pause in approving the uncontested remand request. Here, in our best judgment, a remand would be a counterproductive use of time and resources.

The Department suggests that we should remand this permit so that it can be re-reviewed under forthcoming revisions to the solid waste regulations. We fail to see the merits or fairness of that approach. Although we are advised that the Environmental Quality Board discussed the proposed regulations at its September meeting, it can still take months and sometimes even years to move a regulatory package through the entire review process. There is no guarantee that that process will resolve any of the basic issues in this appeal. Finally and perhaps most fundamentally, we are not aware of any authority for putting permit applications on an indefinite hold pending regulatory developments. In short, the pendency of regulatory developments does not compel a remand under the circumstances of this case.[3]

---

[2] The Giordanos did not seek a supersedeas or expedited review in this appeal.

[3] The parties argue strenuously and at considerable length on the effect of a remand, with the Giordanos making the relatively remarkable claim that a remand would mean that BFI would

F. Performing a De Novo Assessment

Having decided that this matter will move forward, we are left to respond to the invitation of both the Giordanos and BFI to review the record and decide in the summary judgment stage whether the permit modification was properly approved. For example, BFI argues that it has satisfied the "needs" and "benefits" regulations that remain in place following *Dauphin Meadows.* The Giordanos, of course, argue precisely the opposite. Even if we put aside issues concerning the technical review of the application, which go beyond the "needs" analysis, however, we are left with myriad issues of law and fact relating to the harms and benefits resulting from the modification (to the extent that they are relevant), and the balancing of those harms and benefits (to the extent such an exercise is appropriate). Therefore, resolution by summary judgment is inappropriate for the remaining issues set forth in the parties' motions. *See Pen Argyl Borough v. DEP,* 1999 EHB 701 (numerous disputed factual and legal challenges to landfill expansion not appropriate for resolution on summary judgment).

Accordingly, we issue the following Order:

---

have no permit at all and would need to cease operations. BFI counters with the almost as far-fetched proposition that the increase in daily volume authorized by the permit modification would remain in place, even if we concluded that it had been issued in error. Our decision to move forward with the proceedings obviously obviates the need to resolve this issue.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LISA AND STEVEN GIORDANO	:	
	:	
v.	:	**EHB Docket No. 99-204-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL, Permittee	:	

ORDER

AND NOW, this 4th day of October, 2000, in consideration of the Giordanos' Motion for Partial Summary Judgment and Supplemental Motion for Summary Judgment, and BFI's Motion for Summary Judgment, and the various responses thereto, IT IS HEREBY ORDERED that the Giordanos' Supplemental Motion is GRANTED to the extent that it argued that the Department erred in relying upon the balancing test set forth in Guidance Document 254-2100-101. The parties' motions are in all other respects DENIED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **October 4, 2000**

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

P.H. GLATFELTER COMPANY	:	
	:	
v.	:	**EHB Docket No. 2000-194-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER ON PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board allows local citizens and environmental groups to intervene in a pulp and paper mill's appeal from the color limitations in the mill's NPDES permit because the use and enjoyment of the receiving stream by the citizens and the environmental groups' members is credibly alleged to have been adversely affected on an ongoing basis by the mill's discharge.

OPINION

P. H. Glatfelter Company ("Glatfelter") filed this appeal from the effluent limits for color set forth in its September 7, 2000 NPDES permit. The permit authorizes Glatfelter to discharge wastewater containing color from its pulp and paper mill to the Codorus Creek in York County. John Klunk, Thomas Foust, the Codorus Monitoring Network, Inc. ("CMN"), the Pennsylvania Public Interest Research Group, Inc. ("PennPIRG"), and the American Canoe Association, Inc. ("ACA") filed a verified petition to intervene in Glatfelter's appeal. With the concurrence of the

parties, we allowed the petitioners to participate on a provisional basis in supersedeas proceedings that have now been concluded. We now must decide whether the petitioners should be accorded more permanent status as intervenors.

The Department previously indicated that it supports the petitioners' right to intervene. Glatfelter opposes it, or failing that opposition, it asks that the intervenors' participation rights be severely limited. We will allow the petitioners to intervene.

We addressed intervention in *Giordano v. DEP*, EHB Docket No. 99-204-L (Opinion and Order issued September 26, 2000), as follows:

> We previously enunciated some of the general principles regarding intervention in C*onners v. State Conservation Commission*, 1999 EHB 669, 670-71, as follows:
>
> > Section 4(e) of the Environmental Hearing Board Act, 35 P.S. §7514(e), provides that "[a]ny interested party may intervene in any matter pending before the board." The Commonwealth Court has explained that, in the context of intervention, the phrase "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("*BFI*"). The interest required must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination. *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI,* 598 A.2d at 1060-61; *Wurth v. DEP,* 1998 EHB 1319, 1322-23.
> >
> > Gaining or losing by direct operation of the Board's determination is just another way of saying that an intervenor must have standing. Stating the Commonwealth Court's holdings another way, a party who has standing must be permitted to intervene. *Fointaine v. DEP*, 1996 EHB 1333, 1346. Considerations concerning whether the

> intervenor's rights will be adequately protected by existing parties and whether the intervenor will add anything new to the proceedings are irrelevant. *General Glass Industries Corp. v. DER*, 1995 EHB 353, 355 n.2.

See also Pennsylvania Game Commission v. DEP, EHB Docket No. 2000-067-R (Opinion issued June 19, 2000), slip op. at 2-3; *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (Opinion issued January 31, 2000), slip op. at 3-4; *Heidelberg Township v. DEP*, 1999 EHB 791, 793-94.

> A person has standing—and is, therefore, entitled to intervene – if the person is among those who have been or are likely to be adversely affected in a substantial, direct, and immediate way. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000) ("*FOE* "); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975); *Wurth v. DEP*, EHB Docket No. 98-179-MG, slip op. at 16-17 (Opinion issued February 29, 2000). We must determine whether the intervenor would have been an appropriate party to seek relief in the first instance because he personally has something to gain or lose as a result of the Board's decision. This question cannot be answered affirmatively unless the harm suffered by the would-be intervenor is greater than the population at large (i.e. "substantial"), and there is a direct and immediate connection (i.e. there is causation in fact and proximate cause) between the action under appeal and the person's alleged harm. *William Penn, supra.* In the context of an appeal from the issuance of a permit, intervention will ordinarily be appropriate if (1) the person uses the area affected by the permitted activity and (2) the permittee's conduct has (or will) adversely affect that use by, e.g., lessening the aesthetic and recreational values of the area. *Cf. FOE, supra; O'Reilly v. DEP*, EHB Docket No. 99-166-L, slip op. at 2 (Opinion issued May 24, 2000); *Ziviello v. DEP*, EHB Docket No. 99-185-R, slip op. at 6 n. 9 (Opinion issued July 31, 2000); *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944 n.5; *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951.

Here, John Klunk has verified that he has canoed and fished on Codorus Creek over the years and that his use has been limited and otherwise adversely affected by the discoloration of the stream caused by Glatfelter's permitted discharge. He has reduced his use of the stream but would increase that use if its color improved. This substantial, direct, and immediate interest in

the condition of the stream confers standing to intervene upon Mr. Klunk.

Thomas Foust also recreates along the banks of Codorus Creek and has had his use of the stream as a recreational resource adversely affected by the discoloration of the stream caused by Glatfelter's discharge. His substantial, direct, and immediate interest gives him standing to intervene.

An organization has the right to intervene if at least one of its members has that right. *Conners, supra,* 1999 EHB at 671. Because Mr. Klunk is a member of CMN, Messrs. Klunk and Foust are members of PennPIRG, and Messrs. Klunk and Foust have standing to intervene, CMN and PennPIRG also may intervene. Similarly, ACA has members whose enjoyment of the Codorus has been hampered by its coloration. Accordingly, ACA also may intervene derivatively because of the substantial, immediate, and direct interest in the stream of its members. Glatfelter's intimation to the contrary notwithstanding, ACA is not required to identify one (or more) of its members by name.

Glatfelter argues that Messrs. Klunk and Foust's failure to testify at a recent supersedeas hearing should be held against them. That hearing, however, was directed at the determination of whether preliminary relief was appropriate. It was not intended to address the issue of intervention. Indeed, Glatfelter conceded that the petitioners could participate in the hearing in order that the Board and the parties would be able to better direct their resources in an extremely compressed period of time to the merits of the supersedeas petition, rather than the question of intervention. We draw no adverse inference from Messrs. Klunk and Foust's decision not to testify at those proceedings.

Glatfelter argues that, even if the petitioners have an interest in the quality of the stream, they do not have an interest in the stream achieving a specific standard for color (namely, 50

platinum-cobalt units). Glatfelter essentially contends that the petitioners do not have standing to intervene unless they allege that changing the stream from its current condition to the condition that might be achieved if Glatfelter complies with its 2000 NPDES permit will benefit them or resolve all of their concerns. In point of fact, however, the petitioners have alleged that improving the color of the stream would enhance their use and enjoyment (or their members' use and enjoyment) of the resource. We have never required would-be interveners to allege that a numerically precise amount of enhancement is necessary, and we will not start such a practice now. Whether compliance with the new permit limits will make a noticeable difference in stream quality goes more to the merits of the appeal than it does to gauging the petitioners' level of interest.

Glatfelter disputes many of the factual averments that the petitioners made in support of their intervention rights and suggests that an evidentiary hearing would be appropriate. Although we are loathe to bog down the administrative process by holding mini-hearings for such purposes absent unusual circumstances not present here, and in fact we chose not do so here, Glatfelter retains the right at the hearing on the merits to prove that the petitioners lack standing. *See Giordano, supra*, slip op. at 4; *County of Allegheny Department of Aviation v. DEP*, EHB Docket No. 98-039-R, slip op. at 5 (Opinion and Order issued September 29, 2000).

Glatfelter argues that Mr. Klunk has somehow "waived" his right to intervene in an appeal from a permit issued in 2000 because he circulated a petition in 1995 encouraging the Department and this Board to enforce the water quality limit for the Codorus, but did not submit that petition to the Board as an appeal. We fail to see how a party can waive a right to intervene in an appeal from a Departmental action taken in 2000 as a result of his activities in 1995. We fail to see how circulating a petition asking for enforcement of the law could preclude a party

from filing an appeal to this Board from a Departmental action. Glatfelter's argument is entirely without merit.

We agree with Glatfelter that the petitioners should and will be limited to offering evidence and argument on the issues identified in their petition. 25 Pa. Code §§ 1021.62(b)(4) and 1021.62(f); *Connors, supra*, 1999 EHB at 678. To the extent the petitioners attempt to go beyond those issues as this appeal moves forward, Glatfelter may object.

Finally, Glatfelter argues that the petitioners should not be permitted to block any settlement that is reached between Glatfelter and the Department. We will not speculate at this early juncture at what rights the petitioners may have vis-a-vis any hypothesized settlement. What rights the petitioners may eventually have in that regard do not factor into our decision to permit intervention in the first instance.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

P.H. GLATFELTER COMPANY	:	
	:	
v.	:	**EHB Docket No. 2000-194-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of October, 2000, the petition of the Codorus Monitoring Network, Inc., the Pennsylvania Public Interest Research Group, Inc., the American Canoe Association, Inc., John Klunk, and Thomas Foust to intervene is GRANTED. The caption in this appeal is revised to read as follows:

P.H. GLATFELTER COMPANY	:	
	:	
v.	:	**EHB Docket No. 2000-194-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE CODORUS MONITORINGNETWORK, INC., THE PENNSYLVANIA PUBLIC INTEREST RESEARCH GROUP, INC., THE AMERICAN CANOE ASSOCIATION, INC., JOHN KLUNK, and THOMAS FOUST, Intervenors	:	

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 13, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PATRICIA A. GROVE	:	
	:	
v.	:	**EHB Docket No. 2000-216-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWBERRY TOWNSHIP SUPERVISORS	:	**Issued:** October 18, 2000

OPINION AND ORDER ON
PETITION FOR TEMPORARY SUPERSEDEAS AND
PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board denies a petition for supersedeas and petition for temporary supersedeas where the petitions cite no legal authority, contain factual averments but no supporting affidavits, and request that the Board stay eminent domain proceedings that might be brought before other tribunals.

OPINION

This appeal concerns the Department's August 8, 2000, approval of a revision to the official plan of Newberry Township (Township), York County, under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.1-

750.20a. The revision was necessary to accommodate a development consisting of single and multi-family homes on a 60-lot subdivision.

On October 13, 2000, Patricia A. Groves (Appellant) filed a notice of appeal challenging the plan revision approval. Appellant's notice of appeal asserts, among other things, that the proposed development would require a right-of-way across her property, and that she has received no written notification from Township or the developer about acquiring the right-of-way, how much land would be required for it, or where the right of way would be located. Appellant's notice of appeal also contends that the plan revision approval could result in harm to her property, including soil erosion and the destruction of trees and shrubs; in her well water being compromised; and in her having to connect to a sewer.

On the same day she filed her notice of appeal, Appellant also filed a petition for temporary supersedeas and a petition for supersedeas. In both petitions, Appellant asks the Board to stay any eminent domain proceedings against her property pending the Board's review of the plan revision approval. Appellant's petitions also included several factual averments that she felt supported her request for the stay.

After a careful examination of both petitions, we conclude that we cannot grant the relief Appellant requests in either of her petitions. Section 1021.77(c) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.77(c), provides:

> A petition for supersedeas may be denied ... *sua sponte*, without hearing, for one of the following reasons:
>
> (1) Lack of particularity in the facts pleaded.
> (2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.
> (3) An inadequately explained failure to support factual allegations by affidavits.
> (4) A failure to state grounds sufficient for granting of a supersedeas.

Even assuming Appellant pleaded the facts in her petitions with adequate particularity, her petitions fail to meet the other criteria listed in section 1021.77(c). They cite no legal authority, for instance, and the petitions neither include affidavits to support the factual averments in them, nor do they attempt to explain the absence of affidavits. We have denied petitions for supersedeas and for temporary supersedeas for these reasons alone in the past. *See, e.g., Abod v. DEP,* 1997 EHB 512, 515.

Furthermore, we simply lack the power to grant the relief that Appellant requests in her petitions: that we stay any eminent domain proceedings against her property pending the Board's review of the plan revision approval. Appellant is not merely asking the Board to supersede her permit, treating the plan revision as though the Department never approved it; she is asking us to enjoin other tribunals, affirmatively prohibiting them from entertaining an eminent domain proceeding until after she has had an opportunity to litigate her appeal before us. As we made clear in *Thomas v. Department of Environmental Protection,* 1998 EHB 778, the Board lacks the power to grant such relief because it sounds in equity, and the Board lacks equitable powers. 1998 EHB at 782-783.[1] *See also Marinari v. Department of Environmental Resources,* 566 A.2d 385 (Pa. Cmwlth. 1989).

---

[1] *Thomas* was similar to the instant appeal in a number of respects: it involved a plan revision approval and *pro se* appellants, the petition for supersedeas was not properly supported by affidavits, and the petition requested what was essentially injunctive relief. In *Thomas*, appellants challenging a plan revision approval filed a petition for supersedeas requesting that the Board enjoin certain activities by municipalities, the Department, and a joint municipal authority. We denied the petition, explaining that the Board did not have the power to grant the relief the appellants requested:

> Appellants are requesting an injunction, not a mere supersedeas. Although the two bear some superficial similarities, they are distinctly different. When a person would like to prevent another from engaging in a particular activity, he

Indeed, the relief that Appellant seeks from us, she must obtain—if at all—from her county Court of Common Pleas. Section 303 of the Eminent Domain Code, the Act of June 22, 1964, P.L. 84, 26 P.S. § 1-303 (the Code), provides that the Code "provide[s] a *complete and exclusive procedure and law to govern all condemnations of property* for public purposes and the assessment of damages therefore...." (Emphasis added.) And section 401 of the Code, 26 P.S. § 1-401, provides, "All condemnation proceedings shall be brought in the court of common pleas...." Nowhere does the Code authorize the Board to interfere with those proceedings in the manner Appellant requests.

Accordingly, we enter the following order:

---

must ordinarily secure an injunction, an equitable remedy. A supersedeas, by contrast, is a much narrower remedy: it merely supersedes an action by an agency or tribunal pending a review of challenges to the action. *See, e.g.,* "supersedeas" in *Black's Law Dictionary* 1437-438 (6th ed. 1990). The difference is significant because, while the Board has the statutory authority to issue a supersedeas, we lack the power to grant equitable relief, like injunctions. *Marinari v. DER*, 566 A.2d 385 (Pa. Cmwlth. 1989), *City of Scranton v. DER*, 1995 EHB 104, 123-124. The remedy that Appellants request is in the nature of an injunction, rather than a supersedeas, because Appellants are asking the Board to do more than simply treat the requests to revise the official sewage facilities plans as though the Department never approved them. Appellants are asking that we affirmatively prohibit [the municipalities] and the Department from engaging in certain activities—activities which, based on Appellants' petition, seem to bear only an attenuated relationship to the Department's conditional approval of the plan revisions. Since Appellants are requesting injunctive relief, and the Board does not have the power to grant injunctions, we could not grant the petition even assuming Appellants supported it with adequate affidavits and the petition was otherwise procedurally sound.

1998 EHB at 782-783.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. GROVE	:	
	:	
v.	:	**EHB Docket No. 2000-216-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWBERRY TOWNSHIP SUPERVISORS	:	

O R D E R

AND NOW, this 18th day of October, 2000, it is ordered that Appellant's petition for temporary supersedeas and petition for supersedeas are denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 18, 2000

See following page for service list:

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, and DEFENSE SUPPLY CENTER PHILADELPHIA	:	**EHB Docket No. 2000-004-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 23, 2000**

OPINION AND ORDER ON MOTION TO LIMIT DISCOVERY

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to bar the deposition of an attorney representing the Department of Environmental Protection concerning communication with Department staff who provided technical advice or reviewed an enforcement order issued by the Department.

OPINION

On September 26, 2000, the Department filed a Motion to Limit Discovery which sought to bar the depositions of several individuals of the Department by the Defense Logistics Agency (Appellant), including the Secretary of the Department, James Seif, Regional Director Joseph Feola, Community Relations Coordinator John Gerdelmann, and Department counsel in this matter, Wm. Stanley Sneath. The Appellant filed a response opposing the Department's motion

on September 29, 2000. The presiding Administrative Law Judge, George J. Miller, held a conference call on the motion and by order dated October 2, 2000, placed limitations on the depositions of Secretary Seif and Mr. Feola, denied the Department's motion as to Mr. Gerdelmann, and reserved ruling on the issue of Mr. Sneath's deposition. Judge Miller ordered the Appellant to file with the board a written statement detailing what discovery they intend to solicit from Mr. Sneath which would not be protected by the attorney-client privilege. This statement[1] and the Department's response were promptly filed on October 11, 2000 and October 20, 2000 respectively. For the reasons that follow, we will grant the Department's motion to bar the deposition of Mr. Sneath.

In its motion, the Department opposes the deposition of Mr. Sneath because it contends that Mr. Sneath has been acting as an attorney to the Department in this matter and in that role has been privy to attorney-client confidences and has provided legal advice concerning the Department's legal strategy for pursuing enforcement action in this matter. The Appellant contends that no attorney-client privilege exists between Department counsel and the staff of the Department who had input into the content of the order. We find this argument without merit and unsupported by recent case law.

The attorney-client privilege is not only a time-honored tradition in American jurisprudence, but is considered important enough to be codified in the Pennsylvania Judicial Code:

> In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor

[1] The Appellant also stated that it did not intend to seek the disqualification of Mr. Sneath as the Department's counsel in this matter.

> shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

42 Pa. C.S. § 5928. Although the privilege is in derogation of the truth-seeking function of a tribunal, the protection of the confidences between a client and his lawyer nevertheless served a vital function in our judicial system:

> The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. The disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged . . . .

Slater v. Rimar, Inc., 338 A.2d 584, 589 (Pa. 1975)(quotation omitted). This privilege is important not only to individuals, but to government entities as well. Accordingly, it is well settled in Pennsylvania law that the attorney-client privilege applies to governmental agencies and their lawyers who are acting in their professional capacities. *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243 (Pa. Cmwlth.1994); *Okum v. Unemployment Board of Review*, 465 A.2d 1324 (Pa. Cmwlth. 1983). Specifically, government entities "may claim the privilege for communications between their attorney and their agents or employees who are authorized to act on behalf of the entities." *Gould v. City of Aliquippa*, 750 A.2d 934, 937 (Pa. Cmwlth. 2000).

The seminal case discussing the application of the attorney-client privilege to Department

attorneys is the Commonwealth Court's decision in *Sedat, Inc. v. Department of Environmental Resources*, 641 A.2d 1243 (Pa. Cmwlth. 1994). In that case the petitioner sought to compel the production of two legal memoranda prepared by attorneys for the Department. One memoranda discussed the implication of a Superior Court decision related to the litigation in which the Department was involved, and which was distributed to other Department attorneys. The other memoranda also discussed the Superior Court decision in response to an inquiry from a section chief involved with an application submitted by the petitioner. The court held that the first memorandum was protected from discovery by the work-product doctrine. The court went on to conclude that the second memorandum was clearly protected by attorney-client privilege because it constituted legal advice in response to a client inquiry. The court further rejected the petitioner's argument that there was an exception to the attorney-client privilege when a lawyer participates in the adjudicatory process:

> While it is true that when an attorney is the decision-maker, as opposed to legal counsel giving advice to the decision-maker, the attorney-client privilege does not apply. However, when the attorney merely gives legal advice to decision-makers, his advice can be rejected, so that it does not rise to the level of policy and retains its privileged nature.

Sedat, 641 A.2d at 1245. Accordingly neither document was discoverable.

We fail to see a basis upon which to distinguish the court's holding in *Sedat* from the matter before us. Clearly the order in this matter was a collaborative effort with input from many individuals within the Department in consultation with counsel. Department attorneys refer to these individuals as their "clients" and provide them with a legal analysis of the decisions that they make every day. In this specific case, Mr. Sneath was included in the many meetings which culminated in the Order for the purpose of soliciting his legal advice. *See Kocher Coal Co. v.*

DER, 1986 EHB 945 (letters from Department personnel to Department legal counsel concerning ongoing or possible litigation and counsel's response thereto are protected by attorney-client privilege).

The Appellant contends that only communications with Department officials who are "authorized to act on behalf of the Department" are protected by privilege. Those Department employees who played a technical or review role are not "clients" and communications with them are not protected. The Appellant relies on *Gould v. City of Aliquippa*, 750 A.2d 934 (Pa. Cmwlth. 2000). Although *Gould* applied an "authorized to act" test to determine the existence of an attorney-client relationship, it rejected the narrow view espoused by the Appellant.[2]

In *Gould* accident victims sued the City of Aliquippa and others for the negligent design and maintenance of the roadway. The city retained the services of outside counsel to represent it in the matter. In that capacity, the attorney interviewed several individuals including the chief of police, the city administrator, the street superintendent and a police officer. The petitioners sought discovery of the statements made by the individuals to the attorney. The petitioner argued that the individuals were not members of the city's governing body and were therefore not "clients" for the purpose of the attorney-client privilege. The court was not persuaded and noted that the titles of the individuals at least suggested positions of "authority" and that the petitioners had failed in their burden of proving that disclosure of the content of the interviews would not violate attorney-client privilege.

Although it is difficult to discern exactly what the court means by "authorized to act" it is clear that it did not intend to reserve the application of the attorney-client privilege for those few

---

[2] The Appellant's approach was also rejected by the U.S. Supreme Court as applied to corporations in *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

individuals in the highest eschelons of authority within a government entity, but the privilege may also be applied to lower level individuals such as police officers. Department staff routinely act on behalf of the Department when communicating with the public by performing a variety of activities from performing inspections and issuing field orders, to representing the Department's position at public meetings. Accordingly, we believe that this decision supports our conclusion that Department staff who consult with their agency's attorney concerning an enforcement matter also may expect those communications to be confidential and not discoverable.

We are further persuaded by the paucity of information in the Appellant's statement concerning exactly what information they seek to elicit from Mr. Sneath. Instead, it generally avers that:

> Appellant seeks facts related to the issuance of the December 10, 1999 Order, e.g. Mr. Sneath's knowledge of any occurrence, including the non-privileged substance, [sic] of any communications with individuals outside PADEP regarding the issuance of the Order.
>
> Appellants also seeks [sic] facts related to the draft Order listing both Sunoco and Appellants as responsible parties which was referenced by PADEP in response to Interrogatory 24.

Appellant's Written Statement of Discovery of Wm. Stanley Sneath, ¶¶ 9, 10. These assertions are simply too vague to provide a basis for us to conclude that any information Mr. Sneath may disclose would not violate attorney-client privilege or the work-product doctrine, and do not surmount the Appellant's burden of demonstrating that the information they seek will not violate these privileges. *In re: Investigating Grand Jury of Philadelphia County, No. 88-00-3503*, 593 A.2d 402 (Pa. 1991); *Gould v. City of Aliquippa*, 750 A.2d 934 (Pa. Cmwlth. 2000)(burden of proof is upon the party asserting that the disclosure of information would not violate the

attorney-client privilege).

Moreover, the Appellant has ample tools provided by the Rules of Civil Procedure with which to ascertain the facts from the myriad of individuals involved in this case. *See Gould.* In fact, the Department avers that it has already provided answers to interrogatories detailing all communications with individuals outside the Department. Further, the Department's recently filed motion for summary judgment sets forth in great detail its legal basis for issuing the enforcement order under appeal. We see no reason to allow the deposition of trial counsel in this matter in view of the significant amount of information which has already been discovered. Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, and DEFENSE SUPPLY CENTER PHILADELPHIA	:	
v.	:	**EHB Docket No. 2000-004-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of October, 2000, the Department's motion to bar the deposition of Wm. Stanley Sneath, Esq. in the above-captioned matter is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **October 23, 2000**

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 98-242-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** October 27, 2000

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board denies a motion for summary judgment seeking the dismissal of a permittee's appeal of its surface mining permit. There is no support for the Department's argument that a permittee cannot appeal terms in its permit that are less restrictive than those in its permit application. Furthermore, even if a permittee were barred from challenging less restrictive terms in the permit, the terms permittee objects to are not less restrictive than those set forth in its application.

OPINION

This appeal concerns a coal surface mining permit that the Department of Environmental Protection (Department) issued to Harriman Coal Corporation (Appellant) on November 24, 1998. The permit authorizes reclamation activities at Appellant's Good Spring #1-East Operation, in Hegins and Porter Townships, Schuylkill County.

On December 21, 1998, Appellant filed a notice of appeal challenging the permit. It raised only one objection:

> [Appellant] objects to special condition no. 21 of the issued permit which states that [Appellant] must insure complete reclamation within 5 years of the issued renewal date. [Appellant] indicated the potential to reclaim the area within 5 years based on the best projected estimate of fly ash materials to be received. [Appellant] cannot guarantee complete reclamation of the site in the stated time frame.

(Notice of appeal, p. 2.)

The Department filed a motion for summary judgment and supporting memorandum of law on June 30, 2000. In its motion and memorandum, the Department argues that we should grant it summary judgment because:

1. Appellant projected in its permit application that it could reclaim the Penag Pit (pit) in 4.9 years;

2. spoil is available on site which could be used to reclaim the pit;

3. rather than reclaiming the pit, Appellant is keeping the pit open in the hopes of obtaining a long term contract to dispose of ash there;

4. the October 12, 1990, permit transfer that first gave Appellant the authority to operate the site, and the October 23, 1992, permit renewal, both provided that the Department could accelerate the ash disposal schedule or require other actions to ensure timely backfilling;

5. because Appellant failed to comply with the reclamation requirement in a timely manner, the Department required Appellant to submit a schedule from backfilling the pit as part of its permit renewal application; and,

6. Appellant is bound by the assertion in his permit application that the pit could be backfilled within 4.9 years and cannot challenge the longer period provided for in the permit.

On August 25, 2000, Appellant filed a response and memorandum in opposition to the Department's motion for summary judgment. In its response and memorandum, Appellant argues that:

1. a genuine issue of material fact remains concerning how the Department arrived at the five-year deadline for reclaiming the pit;

2. while the approved permit application became part of the permit pursuant to 25 Pa. Code § 86.41, Appellant is not bound by the 4.9 year figure it listed for reclamation of the pit in its permit application because Appellant qualified that figure by noting that it was a projected estimate and subject to change; and

3. the Department failed to consider other reclamation projects that Appellant is currently undertaking, on pits that Appellant is not liable for and that present more of a danger than the Penag pit.

On September 22, 2000, the Department filed a letter stating that it would not file a reply to Appellant's response.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record—and affidavits, if any—show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997). The motion must set forth, with adequate particularity, the reasons for summary judgment. *See, e.g., Barkman v. DER*, 1993 EHB 738, 745. When deciding the motion, we view the record in the light most favorable to the nonmoving party and will enter summary judgment only where the right is clear and free from doubt. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

The Department has failed to establish that its right to judgment as matter of law on the instant motion is clear and free from doubt. For purposes of its motion, the Department is not arguing that the five-year deadline for reclaiming the pit is reasonable. Instead, the Department simply argues that Appellant cannot challenge the reasonableness of the deadline in the permit because Appellant's application stated that the pit could be reclaimed in an even shorter time.

Thus, the Department's argument rests on two premises: (1) a permittee cannot challenge any terms of its permit that are less restrictive than the terms in its permit application; and (2) the deadline for reclaiming the pit in Appellant's permit was less restrictive than the time for reclaiming the pit set forth in Appellant's application. Both premises are problematic, however.

Consider, for instance, the proposition that a permittee cannot challenge any terms of its permit that are less restrictive than the terms in the permit application. The Department's motion and memorandum in support fail to cite any authority that supports this proposition. Under section 86.41(a)(1) of the Department's regulations, 25 Pa. Code § 86.41(a)(1), the provisions of a permit application become part of the permit, except to the extent that the terms of the permit conflict with the application.[1] But the fact that the application's terms become part of the permit does not necessarily mean that a permittee is barred from challenging those terms in an appeal. After all, a permittee can challenge other aspects of its permit by filing a notice of appeal. Therefore, the fact that a provision becomes part of the permit does not necessarily mean that the permittee is barred from challenging that provision.

The Department's second premise is also suspect. It is not clear that the deadline for reclaiming the pit in Appellant's permit is less restrictive than the time for reclaiming the pit set forth in Appellant's application.

Appellant's application did not initially contain an estimate of how long it would take to backfill the pit. (Response, Lickman affidavit, Ex. A, paragraph 4.) However, after the Department received the application, the Department requested that Harriman submit a Module 25.10 with that estimate. *Id.* The only portion of the permit application that the Department

provided in support of its motion for summary judgment was the Module 25.10, which reads, in its entirety:

> Module 25.10
> Reclamation of Affected Area
> * Existing Capacity = 2,809,662 cu. Yds [sic].
> **Projected Average Daily Flyash Disposal = 1910 TPD from Approved Sources.
> Estimated Time to fill pit to approximate capacity:
> 2,809,662 cu.yds x 1ton/cu.yd x 1day/ 1910 tons x 1yr/ 300 working days = 4.9 years
>
> * NOTE: Based on 2nd. Half [sic] 1997 report.
> **NOTE: Flyash receipt and disposal projected only. Actual disposal may vary according to source and is dependent on economics and generation.

(Motion, Menghini affidavit, paragraph 9, Exhibit C.)

The Department addressed the reclamation of the pit in special condition 21 of the permit. It provides:

> The permittee shall insure that the "Penag Pit" outlined as bonded area on the Surface Mining Permit is backfilled with available spoil material and/or coal ash to approved reclamation grades as shown on cross-sections contained in the application within 5 years of this renewal issuance.

(Motion and response, paragraphs 8.)

While the deadline in the permit is longer than the time for reclamation (reclamation time) given in the Module 25.10, the deadline in the permit is more restrictive in other respects than the reclamation time in the Module 25.10. For instance, the Module 25.10 hedges by stating that the reclamation time is "projected only" and that "Actual disposal may vary according to source and is dependent on economics and generation." The deadline in the permit is not similarly qualified. Therefore, even assuming a permittee is precluded from challenging terms in

---

[1] Section 86.41(a)(1) provides, "The permittee shall conduct coal mining activities as described in the approved application, except to the extent that the Department directs otherwise in the permit that specific actions be taken."

the permit that are as restrictive as those in the permit application, Appellant would not be precluded from challenging the deadline in its permit.

Since the Department is not clearly entitled to judgment as a matter of law based on the arguments set forth in its motion, we will deny its motion for summary judgment. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 98-242-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 27th day of October, 2000, it is ordered that the Department's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 27, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ANDREW P. FIFER, et al.	:	
	:	
v.	:	**EHB Docket No. 2000-149-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 3, 2000**
	:	

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a petition for supersedeas which contends that forest material derived from land clearing operations and used to produce mulch, a marketable material, is product rather than waste. Since woody materials derived from land clearing and held for processing are considered waste rather than forest products under the Department's waste regulations, the Department's Order requiring the cessation of Appellants' operations and the disposal of waste at Appellants' processing or storage facilities is reasonable and appropriate. Nevertheless, a conditional supersedeas of the Department's Order with respect to the disposal at a permitted landfill of some of the mulch at Appellant's facilities is granted because Appellants' evidence is sufficient to prove that this mulch is product rather than waste.

BACKGROUND

This appeal is from the issuance of an order by the Department of Environmental Protection (Department) under the Solid Waste Management Act, Act of July 7, 1980,

P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003, the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001, the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4106 and the Department's regulations thereunder. The Order directs Appellants, among other things, to cease receiving, processing or disposing of land clearing wastes at the Schuylkill Township and East Vincent sites without a permit from the Department and to remove all solid waste from these sites within 30 days and dispose of such wastes in a lawfully permitted disposal facility. The Order also assessed a penalty in the amount of $42,000 for violations described in the Order.[1]

The notice of appeal and the Appellants' Petition for Supersedeas are based primarily on the contention that the material that the Department characterizes as waste is in fact forest products including lumber, wood chips and mulch so that the Department's Order is beyond the Department's authority to regulate waste and is unlawful. The Petition for Supersedeas states that Valley Forge Land Clearing & Wood Recycling (VFLC)[2] is engaged in a forest products and land clearing business. It selects and harvests trees and woody shrubs, including their stumps and trimmings for development as mulch or sale as timber. (Petition, ¶ 5) Certain of these forest products are sold to lumber yards or mills while others are retained for grinding, chipping and sale as wood

---

[1] There is a related appeal pending before the Board at EHB Docket No. 2000-187-MG in which Appellant Fifer has challenged the Department's letter dated July 21, 2000 which advised the Appellant that VFLC could not conduct forest process operations at any other site in the Commonwealth without an individual site specific solid waste management permit.

[2] VFLC is an unincorporated division of Appellant Phoenix Mobile Homes, Inc., a Pennsylvania corporation (Petition, ¶3) Appellant Andrew P. Fifer is an employee of both Appellant Phoenix Mobile Homes, Inc. and of VFLC. (Petition, ¶¶1, 5)

chips or mulch, which Appellants characterize as "a primary timber product beneficial to gardeners, commercial landscapers and homeowners throughout the Commonwealth for which there is a well-defined market." (Petition, ¶6) The Petition further claims that since August 1, 1999 VFLC has sold over $140,000 worth of forest products, wood chips and mulch to business entities such as saw mills, landscape contractors, professional centers and private individuals. (Petition, ¶) For these reasons, the Appellants claim that their activity is not solid waste processing, solid waste storage or solid waste disposal under applicable law because none of the materials resulting from this activity is a waste subject to the Department's regulatory authority.

Appellants contend that the Department's Order subjects them to irreparable harm because, among other things, the order directs them to dispose of all inventory at these sites having an estimated value of $262,900 at a permitted landfill. In addition, the costs of disposal would be more than $500,000. Because this would have to be done during a period of peak demand, the Petition states that the resulting loss of inventory might seriously jeopardize VFLC's business reputation. (Petition, ¶17)

The Department's response denies that the Appellants' operations can be characterized as a forest product business. The Department acknowledges that VFLC is in the land clearing business. As a part of these operations VFLC brings trees and woody shrubs, including stumps and trimmings from its land clearing jobs, to either the Schuylkill Township or East Vincent sites where they are ground to produce mulch, large amounts of which exist at these sites. (Department Response, ¶5) The Department contends that the materials at these site constitute municipal waste known more specifically as "construction/demolition waste" under the Department's municipal waste

regulations at 25 Pa. Code §§ 271.1 and 271.101 so that its Order is a lawful exercise of its jurisdiction under the Solid Waste Management Act. In addition, the Department states that the Order could not subject Appellants to irreparable harm because Appellants could not operate its facilities in any event. The Department claims that Appellants do not have proper zoning approval for the East Vincent site, do not have appropriate permits under the Air Pollution Control Act for its grinding operations, do not have a necessary approval from the relevant Soil Conservation District and their operations are causing stream pollution in violation of the Clean Streams Law. (Department Response, ¶17) The Department also argues that the Board cannot issue a supersedeas under the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516, because such a supersedeas would permit pollution or injury to the public health, safety or welfare during the period the supersedeas would be in effect. 35 P.S. § 7514(d)(2).

A hearing on the Petition for Supersedeas was held before Administrative Law Judge George J. Miller on October 25-27, 2000. Because of the importance of a prompt resolution of the Appellants' petition, this Opinion and Order is issued on the basis of the testimony and exhibits entered into evidence without waiting for the production of a transcript of the proceedings.

DISCUSSION

Appellants bear the burden of proof on the petition for supersedeas. *Global Eco-Logical Services v. DEP*, EHB Docket No. 2000-128-L, Issued June 23, 2000. In order to obtain a supersedeas, Appellants must sufficiently establish that (1) they are likely to prevail on the merits of their appeal; (2) there is little or no chance of injury to the public

or other parties if the supersedeas is granted; and (3) they will suffer irreparable harm if the supersedeas is not granted. *202 Island Car Wash, L.P. v. DEP,* 1998 EHB 443, 449-450; Sections 4(d)(1)(i-iii) of the Environmental Hearing Board Act (Act), Act of July 13, 1988, P.L. 530, *as amended,* 35 P.S. § 7514(d)(1)(i-iii); 25 Pa. Code §§ 1021.78(a)(1-3). The Board's Rules of Practice and Procedure further declare that a supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. Section 4(d)(2) of the Act, 35 P.S. § 7514(d)(2), 25 Pa. Code § 1021.78(b). However, if the challenged action of the Department is without authority, the petitioner may be entitled to a supersedeas irrespective of proof of irreparable harm. *202 Island Car Wash, L.P.,* 1998 EHB 443, 450.

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria be satisfied. *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB at 651; *Svonavec, Inc. v. DEP*, 1998 EHB at 420; *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808, 810; *see also Chambers Development Company, Inc. v. Department of Environmental Resources,* 545 A.2d 404, 407-409 (Pa. Cmwlth. 1988). Although there have been exceptions, in the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *Global Eco-Logical Services, Inc.,* 1999 EHB at 651; *Svonavec, Inc.,* 1998 EHB at 420; *see also Pennsylvania PUC v. Process Gas Consumers Group,* 467 A.2d 805, 809 (Pa. 1983).

Whether a material is waste or product under Pennsylvania Law turns on the definitions of terms under the Solid Waste Management Act and on the Department's regulations thereunder. That Act defines "Solid Waste" as:

> "Any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials."

35 P.S. § 6018.103.

The Appellants and the Department agree that the logs created through Appellants' operations that are to be sold directly to lumber yards or mills are product, and not waste. (See testimony of William Pounds) The primary question is whether the tree stumps, bush trimmings and wood chips created from them which require further processing and storage at Appellants' Schuylkill Township and East Vincent facilities in order to produce a "product" is product or waste. The second question is whether the mulch stored at Appellants' facilities is waste or product.

The Appellants' Evidence

The Appellants' evidence of these operations designed to prove that all of these materials are product rather than waste was presented principally by Appellant, Andrew P. Fifer. Mr. Fifer testified that VFLC is a division of Appellant Phoenix Mobile Homes, Inc. (Phoenix) He testified that VFLC's land clearing activities were a result of contracts primarily with excavation contractors to remove trees, bushes and all other materials from a particular site primarily relating to the construction of buildings, homes, sewers and highways. He said that all timber on these jobs was harvested, the logs were cut off, the stumps excavated and the tree limbs and other bushes chipped. He testified that the logs were frequently sold at the land clearing site but that whole trees, stumps and tree

branches were either chipped and ground at the land clearing site or taken back to the Appellants' processing and storage facilities for further processing to produce mulch as a final product. This processing includes grinding and regrinding of stump material. He testified that since sales of mulch are seasonal in the Spring, Summer and Fall from March to October an inventory must be created during other months of the year to meet his reasonable needs for the sales of mulch.

Appellants' facilities at the Schuylkill Township site consist of approximately two acres which is shared with other Phoenix activities such as a dumpster, trucks and shipping containers. He testified that the wood chip materials, including stumps or stump grindings, were processed at this site by regrinding in order to produce mulch. He testified that there was no mixing of other materials with the wood chips or mulch such as leaves, chemicals or any other wastes. He said that there was presently at the Schuylkill Township site 300 cubic yards of mulch and 6,000 cubic yards of wood chips. He acknowledged that there had been a maximum volume of up to 15,000 yards of wood chips at this site.

The Appellants' East Vincent site consists of approximately 14 acres, of which seven acres are used for processing activities. Some of the wood chips and the mulch which had been stored at the Schuylkill Township site were removed to the East Vincent site for either storage or further processing, particularly stump regrinding. He said that at the time of his testimony there were 19,000 cubic yards of wood chips and mulch at this site but acknowledged that there had been as much as 30,000 cubic yards of these materials at this site. He said that the difference between these two figures was mulch removed for sales.

The bookkeeper for Phoenix Homes and VFLC, Margaret Arsenich, testified to the value of mulch sales through the presentation of Appellants' Exhibits P-1 through P-3. She and Mr. Fifer testified that during the year 2000, the company sold 19,751 cubic yards of mulch for a total sales price of $203,160. (Ex. P-2) The mulch sales in 1999 were higher at 24,088 cubic yards for a revenue of $102,925. (Ex. P-3) Whether all of these sales were sales of mulch is open to considerable question. Appellants' Exhibit P-1, covering the general ledger for the period from August 1, 1999 to September 30, 2000 includes, in addition to sales of mulch, sales of stem chips, stump grindings, old tree chips, as well as some logs.

Appellants also presented the testimony of James P. Ferver of the Mr. Mulch Company. He testified that his company sells about 100,000 cubic yards of mulch per year of which 16,000 cubic yards were purchased from Appellants this year. He testified that he would need to double his supply to about 30,000 cubic yards next year.

Gary R. Brown, President of RT Environmental Services, testified to a number of recommendations he had made with respect to environmental controls at both sites. (Ex. C-35) He recommended a change in the soil sedimentation plan for the East Vincent site involving an extension of existing berms and relocation of the sedimentation pond. He testified that he had seen reddish brown runoff from the mulch piles. He acknowledged this water may contain tannic acid and other organic material but he took no samples of this water. He testified that he had learned of a fire in the mulch at the East Vincent site. He testified, however, that he thought that the sites presented no significant threat to health or to the environment. He acknowledged that the source of the discolored water was water infiltrating the pile of mulch which was reddish in color and bore a sheen in

some places and that this water may contain tannic acid. He acknowledged that Appellants should engage in a turnover of the piles to avoid hot spots or fires and proper management of the piles including an inventory by aging of the product. He acknowledged that there was not enough berm at the Schuylkill Township site to control storm water runoff. (Ex. C-2)

The Appellants' evidence with respect to its claimed irreparable harm from the Department's Order came from Catherine P. Berky of BFI Waste Systems and Mr. Brown. Ms. Berky testified that the cost of removal would be $225 per haul for transportation and $38 per ton for disposal. Mr. Brown testified based on the inventory information given to him by Mr. Fifer, as well as certain information given to him with respect to information needed to identify the density of the material, that the cost of the disposal of all chips and mulch at the site would amount to approximately $521,620. This estimate was based on information supplied to him by Mr. Fifer which led him to estimate that as of July there were 18,300 cubic yards of wood chips and mulch at the East Vincent site and approximately 5,600 cubic yards of wood chips and mulch at the Schuylkill Township site. He calculated a density based on information given him by Mr. Fifer of 970 pounds per cubic yard. (Exs. P-7, P-8, P-11)

The Department's Evidence

Evidence presented by the Department tended to show that the Appellants' operations at both sites created significant environmental problems including a threat of water pollution from water runoff from the piles of chips and mulch, malodors beyond the boundaries of the sites resulting from fire and related smoke beyond the boundaries of

the site and the operation of a tub grinder to convert the mulch and stump grinds to mulch without a permit required by the Air Pollution Control Act.

Benjamin L. Williams, a Department inspector, testified to both the numerous visits he made to both sites and to his site inspection reports. (Exs. C-5, C-6, C-7, C-9, C-11, C-12, C-14, C-16, C-18) He testified that there were residences about 40 feet from the Schuylkill Township facility. (Ex. C-2) He said that this site did have some features to control water runoff, but that storm water from the piles of wood chips and mulch would flow to neighboring houses and to the nearby school. He testified that at the East Vincent site large portions of a berm designed to control water runoff had not been constructed and that the sedimentation plan shown by a construction plan had never been completed. (Ex. C-3) Mr. Williams testified to the existence of leachate at both the Schuylkill Township and East Vincent sites. By leachate he meant liquid from the piles of "waste" material on site which might include tannic acid, nitrates, nitrogen fixing bacteria and biosolids which could pose a biochemical oxygen demand (BOD) problem for nearby streams. He also testified to finding leaves mixed with the wood chips at the East Vincent site. (Ex. C-7) He took no samples of this water to determine what the water contained. He described the piles of wood material at the East Vincent site as being 15-20 feet high and from 15-30 feet in diameter. He also presented a video taken of the material at both sites as well as related photographs of the piles and of the material and the water runoff which he described as leachate. (Exs. C-4, C-8, C-10, C-13, C-17, C-21) He also testified to the existence of strong odors of burnt mulch at the East Vincent site and leachate there with a petroleum or oily sheen runoff. He acknowledged that some of the water runoff or leachate may have resulted from water used by the Fire

Department to put out a fire in one of the piles and that some of the water may also have been contributed by Hurricane Floyd in September 1999.

Neighbors of the East Vincent site, Steven L. Neff and Dr. Frederick Romano, testified to the extreme noise created by truck traffic and the operation of the tub grinder at the East Vincent site as well as strong malodors from the mulch stored at this site particularly following a fire or hot spot incident resulting in smoke. They testified that others at their homes or nearby homes confirmed the existence of high noise levels from the tub grinder and traffic as well as the presence of malodors. They acknowledged that most of the truck traffic was on a state highway and that the entrance to the East Vincent site was from the state highway and is a significant distance from their homes.

The Department called William F. Pounds, the Department's Chief of the Municipal Division and Residual Waste, with respect to the Department's regulation of land clearing materials. He testified that the land clearing materials in this case would be classified as wood debris and construction materials, and are only exempt from permit requirements if used as clean fill. He said these materials are regulated as waste because of their potential for ground and surface water contamination and nuisance complaints if not properly handled. He testified that disposal of this waste required an individual permit and that processing of this waste to be used beneficially can be done either by an individual permit or a permit-by-rule in accordance with the Department's regulations at 25 Pa. Code § 271.103. He said that the permit-by-rule process provides a level of environmental protection but enables the Department to require an individual permit as circumstances warrant.

Mr. Pounds also testified that there was no Department Central Office policy contrary to the Department's position in this case that the processing of the tree limbs, tree stumps and brush required a permit under the Department's regulatory scheme.

On cross-examination, Mr. Pounds acknowledged that the logs were not a waste if they were manufactured into a product and that particle board manufactured from wood chips is not a waste. He also said during cross-examination that a material is not a waste if it is manufactured into a product and that produced 2x4 timber is not a waste. He said that under the municipal waste regulations, the material would not be a waste only if it could be used as clean fill and that wood could be used as a clean fill but not decomposable materials such as mulch.

Nancy Roncetti, Operations Manager of the Solid Waste Program in the Southeast Region, testified to the Department's rationale in issuing the Order. She said that she and other Department representatives had offered to help Mr. Fifer come into compliance through meeting the permit-by-rule requirements. At a January, 2000 meeting requested by Mr. Fifer, they discussed concerns of the need for environmental controls at the processing and storage sites and compliance with the permit-by-rule requirements. Mr. Fifer said at this meeting that there was no market for mulch at that time, but that The Mr. Mulch company could accept a large volume of the mulch materials in the Spring. She advised him that he had to comply with the permit-by-rule requirements and market the mulch in any way that he could.

The Appellants' operation was brought to her attention by complaints of odor and noise from neighbors at these sites. The Department decided to issue the Order in June, 2000 because no mulch was coming off Appellants' facilities. (C-24) She said that Mr.

Fifer had not produced evidence of sales of the mulch as the Department had requested, and there were numerous complaints from residents neighboring these sites. She recommended issuance of the order primarily out of concern about the nuisance of malodors and noise and of potential water pollution of both surface and ground water at Appellants' facilities.

She had also recommended the denial of a request of an application for a permit-by-rule for a facility in Limerick Township because of continuing noise and compliance problems at the Schuylkill Township and East Vincent sites. Accordingly a letter was issued by the Department that the Appellants would need individual permits for the existing sites as a result of these considerations. (Ex. C-27) Ms. Roncetti acknowledged that it might take six months to get an individual permit for the sites involved.

The Wood Chipped Materials Held For Processing Are Waste

The Department contends that the tree stumps, bush trimmings and wood chips created from them are municipal waste under the Solid Waste Management Act. The term "municipal waste" is defined as:

> Any garbage, refuse, industrial lunchroom or office waste and other material including solid, liquid, semisolid or contained gaseous materials resulting from operation of residential, municipal, commercial or institutional establishments and from community activities and any sludge not meeting the definition or residual or hazardous waste hereunder from a municipal, commercial or institutional water supply treatment plant, waste water treatment plant, or air pollution control facility.

35 P.S. § 6018.103.

While the term "waste" is not defined by the Act, it is defined by the Department's municipal waste regulations:

> *Waste* – A material whose original purpose has been completed and which is directed to a disposal or processing facility or is otherwise disposed of. The term does not include source separated recyclable materials, material approved by the Department for beneficial use under a beneficial use order issued by the Department prior to May 27, 1997, or material which is beneficially used in accordance with a general permit issued under Subchapter 1 (relating to beneficial use) or Subchapter J if a term or condition of the general permit excludes the material from being regulated as a waste.

25 Pa. Code § 271.1

The Department further contends that Appellants' land clearing materials specifically are included in the definition of "construction/demolition waste" as defined by the Department's regulation at 25 Pa. Code § 271.1:

> Solid waste resulting from the construction or demolition of buildings and other structures, including, but not limited to, wood, plaster, metals, asphaltic substances, bricks, block and unsegregated concrete. The term also includes dredging waste. The term does not include the following if they are separate from other waste and are used as clean fill:
>
> (i) Uncontaminated soil, rock, stone, gravel, unused brick and block and concrete.
> (ii) Waste from land clearing, grubbing and excavation, including trees, brush, stumps and vegetative material.

In support of this legal position, the Department refers us to the Board's recent denial by Judge Labuskus of a supersedeas petition in *Stine Farms & Recycling v. DEP*, EHB Docket No. 2000-003-L, Supersedeas Verbatim Transcript and Order, March 27, 2000.

Appellants contend that the Department's regulations cannot apply to their harvesting activities because the resulting materials are not a "waste." Appellants argue that each tree (from crown to root) is being directed to the primary purpose of the

production of lumber and mulch. (Appellants Reply Brief, p. 4) Appellants also appear to contend that the definition of construction/demolition waste could not possibly have been intended to apply to timber materials harvested by the Appellants by the definition of "municipal waste" contained in the Solid Waste Management Act at 35 P.S. § 6108.103. Appellants' argument proceeds on the assumption that a material is only a waste if it is disposed of and the woody materials harvested from land clearing activities were not disposed of but are held for processing for the creation of either lumber or mulch.

We reject Appellants' contention that the woody material stored at the Appellants' facilities for processing into mulch is not municipal waste. As indicated above, the statutory definition of municipal waste includes any solid material resulting from the operation of a commercial establishment and from community activities. Mr. Fifer acknowledged that his land clearing activity was done principally for the end purpose of the construction of housing, highways or sewers. The woody materials created from the chipping of tree limbs and stumps falls within the definition of a solid material resulting from a commercial operation.

The Department's municipal waste regulations also indicate that these materials are waste rather than product. As indicated above, these regulations also define "waste" as "[a] material whose original purpose has been completed and which is directed to a disposal or processing facility or is otherwise disposed of."[3] The Department's regulatory definition of "processing" squarely fits the Appellants' operations. The

[3] We reject Appellants' contention that the original purpose of the stump and tree limbs was for the manufacturing of mulch. To the contrary, the original purpose of those materials was to support tree life.

Departments regulations at 25 Pa. Code § 271.1 define processing as: "Technology used for the purpose of reducing the volume or bulk of municipal or residual waste or technology used to convert part or all of the waste materials for off site reuse." That definition squarely fits the Appellants' operation of reducing tree stumps and limbs to wood chips and the further process of grinding and regrinding for purposes of the creation of mulch for sale and use by gardeners.

The Department's interpretation of its regulatory definition of construction/demolition waste to the facts of this case is more difficult since the woody material does not directly result from the construction or demolition of buildings or other structures. The related construction of homes, buildings, sewers and highways is municipal in nature. However, the clear intent of the regulation read with the statutory definition of municipal waste, is to include trees, brush, stumps and vegetative materials in the category of waste. Accordingly, we think that the Department's classification of these materials as construction/demolition waste is not clearly precluded by the language of the regulation.

Counsel for Appellants argue that the wood chips are not waste based in part on Mr. Pounds' testimony on cross-examination that materials used to manufacture a product are not waste. While Mr. Pounds did say this, it was in the context of his acknowledgement that the logs sold by Appellants to lumber yards for making lumber are not waste. While he also said that making mulch is a manufacturing process, this is far from an acknowledgment that the vegetative material from which the mulch is manufactured is not a waste. The totality of his testimony indicates quite clearly that he classifies the tree trimmings and stumps as municipal waste. He said that this material

had to be regulated because of its potential for water contamination if not properly handled. He also said that this material processed for beneficial use had to be processed under either an individual permit or a permit-by-rule. Indeed, he testified that the Department's revised waste regulations recently approved by the Environmental Quality Board and the IRRC made it clear that these materials were municipal waste. Finally, he testified that there was nothing in the Department's policy on waste that is contrary to the position taken by the Department in issuing the Order.

The Board's decision in *General Electric v. DER*, 1983 EHB 63 does not support Appellants' contentions. That decision predates the adoption of the Department's present municipal waste regulations. The practical effect of that decision was to permit General Electric to use mulch generated from land clearing materials along with top soil as final cover for a disposal site. That use would not be permitted today under the Department's regulations relating to clean fill. As Mr. Pounds testified the Department's current clean fill regulation excludes the use of decomposable material such as mulch.

Is the Mulch Stored at Appellants' Facilities a Product Rather Than a Waste

Although the term "product" is not defined by the Solid Waste Management Act, the Department's residual waste management regulations at 25 Pa. Code § 287.1 defines product as follows:

> A commodity that is the sole or primary intended result of a manufacturing or production process. The term does not include materials that do not meet industry or manufacturing quality specifications or are otherwise off specification; the materials may be co-products.

The Appellants' mulch fits within this definition and at least some of it is marketable in the Spring, Summer and Fall. Mr. Ferver's testimony attested to the high

quality of Appellants' hard wood mulch which indicates that some of the mulch meets the definition of "product." However, some of the mulch on these sites may not be saleable in the near term future. The Appellants' evidence indicated that during the year 2000 it had sales of 19,751 cubic yards of mulch. Mr. Fifer testified that there were 6,300 cubic yards of mulch at the Schuylkill Township site and 19,000 cubic yards of mulch at the East Vincent site for a total of more than 25,000 cubic yards of mulch. This evidence alone suggests that the Appellants may not have a market for the full extent of the mulch on site. In addition, the Department strongly challenged the Appellants' evidence on this subject in part on the basis that many of the sales indicated as mulch were actually sales of wood chips as indicated in Appellants' Exhibit P-1. The Appellants' evidence of sales during 1999 were somewhat higher than 2000, but whether those sales were all sales of mulch as compared to fairly large volumes of chips, logs and stump grindings as shown by Appellants' Exhibit P-1 in 1999 is uncertain. James Ferver of the Mr. Mulch company did testify that he wanted to double that company's order for March, 2001, but that increase in sales may well be offset by reduced sales of mulch to other customers when the season for mulch sales begins again in the Spring of 2001.

We do not understand how the Department's Order to dispose of all of the mulch at these sites at a considerable cost to Appellants is either reasonable or appropriate under the circumstances provided that the Appellants comply with all other aspects of the Department's Order and adopt such management practices and environmental controls as the Department may prescribe at the sites where the mulch is stored to assure that storage of so much of the mulch that is product does not result in adverse environmental impacts, including the creation of a nuisance for those who live in the area of the Appellants'

facilities. It certainly is reasonable and appropriate for the Department to require that this product be managed in an acceptable way to avoid smoke and odor associated with any fires that may result in mulch, management of the piles by frequent turning to assure that hot spots do not develop into fires and that all of this material be either sold or otherwise disposed of by October 1, 2001. Because it is uncertain how much of the mulch at Appellants' facilities is product rather than waste, we will supersede the Department's Order to the extent that it requires more than half of the mulch stored at these facilities be disposed of at a landfill subject to the conditions outlined above. These conditions will meet the Department's contention that a supersedeas may not be issued where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas will be in effect.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANDREW P. FIFER, et al.	:	
	:	
v.	:	**EHB Docket No. 2000-149-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of November, 2000, the Appellants' Petition for a Supersedeas is DENIED except to the extent set forth below.

1. The Department's Order is superseded to the extent that it would require the disposal at a permitted landfill of more than one half of the mulch currently stored at Appellants' Schuylkill Township and East Vincent facilities, or such other portion as the parties may agree upon, subject to the conditions set forth below.

2. The Appellants must promptly comply with all other requirements of the Department's Order relating to the cessation of operations at these facilities and disposal of all waste at these facilities in accordance with the Department's Order other than as set forth above.

3. Between now and October 31, 2001, the Appellants must promptly comply with management practices and install environmental controls relating to the presence of the mulch remaining at these facilities as may reasonably be required by the Department to prevent the existence of a threat of ground or surface pollution or a nuisance at these locations including the collection of water runoff from the mulch piles and the turning of the piles of mulch to prevent the occurrence of hot spots or fires in the mulch piles.

4. The remaining mulch at these facilities must be sold or otherwise disposed of by October 1, 2001.

5. Nothing in this order precludes Appellants' application for a permit for the operation of these facilities or the Department from issuing such a permit in accordance with the Solid Waste Management Act and the Department's regulations thereunder.

6. The Department may request the Board to vacate the limited supersedeas granted by this order in the event the Appellants fail to meet the conditions of this order as set forth above.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: November 3, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, Appellant and US AIRWAYS, INC., Intervenor	:	
v.	:	**EHB Docket No. 98-039-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 8, 2000**

OPINION AND ORDER ON MOTION TO COMPEL DISCOVERY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where interrogatory responses provided by the Appellant are deficient or incomplete, the Department's motion to compel discovery is granted.

OPINION

This appeal concerns an administrative order issued by the Department of Environmental Protection (Department) to the County of Allegheny Department of Aviation (County) regarding certain conditions at the Pittsburgh International Airport (airport), including the discharge of deicing fluid. The County appealed the order and on September 29, 2000, US Airways, Inc. was permitted to intervene in the appeal. A hearing is scheduled for March 2001.

Currently before the Board is the Department's motion to compel discovery against the

County. The Department contends that the County has failed to provide full and complete answers to its interrogatories. The County filed a response to the motion on November 7, 2000 stating that it will supplement its answers to all but one of the disputed interrogatories, but will not serve detailed supplemental answers to each of the interrogatories because it believes they are repetitive and overlapping.

Discovery in appeals before the Board is governed largely by the Rules of Civil Procedure. 25 Pa. Code § 111(a). Those rules provide that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ." Pa.R.C.P. 4003.1(a). "Relevancy" for the purposes of discovery is to be broadly construed. *Valley Creek Coalition v. DEP*, EHB Docket No. 2000-068-R (Opinion issued July 26, 2000), *slip op.* at 2; *Harbison-Walker Refractories v. DER*, 1992 EHB 943. The burden is on the party objecting to a discovery request to demonstrate its right to refuse to produce the information. *Valley Creek, supra* at 3.

Interrogatory 13 asks the County if it contends that some discharges of spent deicing fluid from the airport to Commonwealth waters are authorized and then requests further information pertaining to this issue. The County's answer responds only to subparts a and b of the interrogatory and does not provide the information requested in the remaining subparts. The County is ordered to respond to subparts c through e.

Interrogatory 17 asks the County to state the factual basis for a contention made in its notice of appeal pertaining to observations and data contained in appendices to the Department's order. In response, the County states that the Department has the burden of proof of establishing the observations and data contained in its order and that the County will respond to the interrogatory after the Department has fully disclosed the basis for the observations, data and

conclusions. Matters raised in the notice of appeal are relevant subjects of inquiry for the purpose of discovery. *City of Harrisburg v. DER*, 1992 EHB 170. *See also Valley Creek, supra* at 4. This is so even where the Department has the burden of proof. Moreover, according to the Department's motion, the County has not served an interrogatory request on the Department seeking this information. Until it has done so, the County has no basis for expecting the Department to disclose this information in discovery. Therefore, the County is required to respond to interrogatory 17.

Interrogatory 27 asks the County to state the factual basis for its contention in the notice of appeal that the Department used inadequate and inappropriate sampling and analytical techniques. The County refers to its answer to Interrogatory 17, discussed above. For the reasons stated earlier, we find this answer to be insufficient and order the County to provide a more complete response.

Interrogatory 28 asks for specific information on discharges resulting from defrosting, deicing and anti-icing activities that were authorized by the 1994 Consent Order and Agreement. The County has objected to the question as being overly broad and unduly burdensome to answer. In its motion, the Department limits the question to "discharges from the Pad C Culvert and their permanent abatement and the Deicing Action Plan." Pursuant to this limitation, we order the County to answer the interrogatory.

Interrogatory 30 asks the County to identify (a) additional measures it will implement to minimize discharges from defrosting, deicing and anti-icing activities; (b) their schedule of implementation; and (c) how the County will assess the effectiveness of the measures. In response to subparts (a) and (b), the County states that the requested information is contained in plans already submitted to the Department. In response to subpart (c), the County states it will

incorporate a best management practices analysis. The Department asserts that the responses are insufficient on the grounds that the County must identify the specific documents and sections where this information can be found. It is true that a party cannot respond to an interrogatory by simply directing its proponent to a mass of documents. *Envirosafe Services of Pa, Inc. v. DER*, 1988 EHB 1026, 1030-31 (Directing the appellant to a variance proposal, correspondence covering the span of six years, and the site in question was an insufficient response to a discovery request.) That is not the case here. Based on status conferences with the parties, the Board is familiar with the plans submitted by the County, and we are hard-pressed to agree with the Department that unless the County "refers to a specific section and page, its answer is not meaningful." We will, however, order the County to specifically identify the plans to which it refers by name and to further explain its best management practices analysis or refer more specifically to where this information may be found in the documents referenced.

Interrogatory 33 asks whether it is the County's contention that additional measures could not be implemented to abate discharges on January 26, 1998, and if this is not the County's contention, the Department asks the County to identify the additional measures it could have implemented. The County objected to the interrogatory on the ground it calls for speculation. The County further responded that, subject to its objection, it has employed best management practices generally described in documents submitted to the Department. We do not agree that this question calls for speculation, and we order the County to either describe its best management practices in more detail or to more specifically identify where this information can be found in documents submitted to the Department.

Interrogatories 35, 36, and 37 ask for information regarding certain contentions made in the notice of appeal. In response, the County refers to its answers to interrogatories 13 and 28.

Because we have found its responses to these interrogatories to be deficient, its responses to interrogatories 35, 36, and 37 are likewise deficient, and we order it to more fully respond.

Interrogatory 48d asks when the County first became aware that the storm water trenches on the northeast part of Pad C could collect deicing fluids. Although the County's answer provides information about the storm water trench in question, it does not say "when" the County became aware the trench could collect deicing fluids. Nor did the County object to this question. We, therefore, order the County to provide this information.

Interrogatory 61 asks the County to identify each person who participated in the preparation of each answer and to specifically indicate which answers each person participated in preparing. The County objected on the ground the question was unduly broad and would be burdensome to answer and stated that it had already identified such individuals. In its motion, the Department requests that the County be required to specifically identify the persons who answered each interrogatory, but agrees to limit the required answer to only those issues involving the Pad C culvert and Deicing Action Plan. In its response, the County states that it continues to object to this interrogatory because it "has identified such persons by reference to its answer to interrogatory 1, and the Department is well aware of the roles of the identified individuals in the matters in dispute in this appeal." Because we do not have a copy of the County's response to interrogatory 1 before us and because this question is a legitimate area of inquiry by the Department, we order the County to respond to interrogatory 61 with regard to the Pad C culvert and Deicing Action Plan.

Accordingly, we enter the following order:

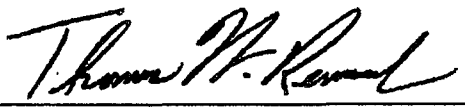
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COUNTY OF ALLEGHENY DEPARTMENT OF AVIATION, Appellant and US AIRWAYS, INC., Intervenor	:	
v.	:	**EHB Docket No. 98-039-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 8th day of November, 2000, the Department's Motion to Compel Discovery is granted and the County is ordered to provide full and complete responses to the interrogatories in question as set forth in this Opinion. The County's responses shall be served on the parties on or before **November 17, 2000**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 8, 2000

Service list next page

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HAMILTON BROTHERS COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 2000-007-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 8, 2000

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion for summary judgment against an appellant where the appellant neither responded to the motion nor explained its failure to do so.

OPINION

This appeal concerns a December 15, 2000, letter that the Department sent to Hamilton Brothers Coal, Inc. (Hamilton) informing it that the Department was forfeiting Hamilton's bonds for surface mining permit 17930116, in Beccaria Township, Clearfield County, because of Hamilton's violations at the site. Utica Mutual Insurance Company (Utica Mutual) had issued a surety bond declared forfeit; the two remaining bonds were collateral bonds secured by letters of credit from Hamilton.

On January 14, 2000, Hamilton filed a notice of appeal challenging the forfeiture. Among other things, Hamilton's notice of appeal argued that the Department should have refrained from forfeiting the bonds because Hamilton was negotiating with another mine

operator for the other operator to assume responsibility for the site, and forfeiture of the bonds would disrupt the negotiations.

On September 1, 2000, the Department filed a motion for summary judgment and a supporting memorandum of law. In its motion and memorandum, the Department argues that:

1. section 4(h) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4(h) (Surface Mining Act), requires that the Department forfeit an operator's bond if he fails to comply with the requirements of the Surface Mining Act "in any way for which liability has been charged on the bond";

2. the bonds forfeited required that Hamilton "faithfully perform and conform to the requirements of ... the Clean Streams Law[,] ... the Surface Mining [ ] Act[,] ... and... all Department orders relating to Operator conduct under the Permit"; and,

3. Hamilton violated the requirements of the Clean Streams Law, the Surface Mining Act, and Department orders concerning the permit site.

Hamilton did not file a response or memorandum in opposition.

When ruling on motions for summary judgment, the Board looks to Pa. R.C.P. Nos. 1035.1-1035.5. *See* 25 Pa. Code § 1021.73(b) and *Kochems v. Department of Environmental Protection,* 701 A.2d 281 (Pa. Cmwlth. 1997). With respect to responses to the motions, Pa. R.C.P. No. 1035.3 says that "[t]he adverse party may not rest upon the mere allegations of denials of the pleadings but must file a response," and that "[s]ummary judgment may be entered against a party who does not respond." Pa. R.C.P. No. 1035.3(a) and (d). Thus, the Board may dismiss an appeal where an appellant fails to file a response to a motion for summary judgment. *See Kochems,* 701 A.2d at 282.

We will dismiss Hamilton's appeal. Hamilton's response was due on September 26, 2000. However, Hamilton not only failed to respond to the Department's motion by September

26, it failed to file a request for an extension or explain its failure to file a response. Nor, in the time since its deadline expired, has Hamilton filed a response or explained its failure to do so. While Hamilton does not appear to be represented by counsel[1]—and, therefore, may not have been aware of Pa. R.C.P. 1035.3(d)—that does not mitigate against dismissing Hamilton's appeal under the circumstances. Hamilton is a corporation, and section 1021.22(b) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.22(b), requires that corporations be represented by counsel. In addition, the notice of appeal form—which Hamilton used to file its appeal—expressly provides that corporations must be represented by counsel.

Accordingly, we enter the following order:

[1] Hamilton's appeal was filled out by its president, Fred Kuzemchak, and submitted by Jeff Polenik, who identified himself as an "Agent." Kuzemchak struck the references in the notice of appeal to "appellant's counsel," so presumably he is not an attorney. There is no indication in the filings that Polenik is an attorney.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HAMILTON BROTHERS COAL, INC.	:	
	:	
v.	:	**EHB Docket No. 2000-007-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of November, 2000, it is ordered that the Department's motion for summary judgment is granted and Hamilton's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
CHAIRMAN

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 8, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Matthew B. Royer, Esquire
Southcentral Regional Counsel

For Appellant:
Fred Kuzemchak, President
Hamilton Brothers Coal, Inc.
R. R. 2, Box 562
Clymer, PA 15728

jb/bl

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ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOSEPH J. PELES	:	
	:	
v.	:	**EHB Docket No. 2000-008-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAMILTON BROTHERS COAL, INC., Permittee	:	**Issued:** November 8, 2000

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion for summary judgment against an appellant where the appellant neither responded to the motion nor explained his failure to do so.

OPINION

This appeal concerns a December 15, 2000, letter that the Department sent to Hamilton Brothers Coal, Inc. (Hamilton) informing it that the Department was forfeiting Hamilton's bonds for surface mining permit 17930116, in Beccaria Township, Clearfield County, because of Hamilton's violations at the site. Utica Mutual Insurance Company (Utica Mutual) had issued a surety bond declared forfeit; the two remaining bonds were collateral bonds secured by letters of credit from Hamilton.

On January 14, 2000, Joseph J. Peles (Appellant) filed a notice of appeal challenging the forfeiture. Appellant asserted that he was filing the appeal because he had an interest in the

collateral bonds forfeited. Among other things, Appellant's notice of appeal argued that the Department should have refrained from forfeiting the bonds because Hamilton was negotiating with another mine operator for the other operator to assume responsibility for the site, and forfeiture of the bonds would disrupt the negotiations.

On September 1, 2000, the Department filed a motion for summary judgment and a supporting memorandum of law. In its motion and memorandum, the Department argues that:

1. section 4(h) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4(h) (Surface Mining Act), requires that the Department forfeit an operator's bond if he fails to comply with the requirements of the Surface Mining Act "in any way for which liability has been charged on the bond";

2. the bonds forfeited required that Hamilton "faithfully perform and conform to the requirements of ... the Clean Streams Law[,] ... the Surface Mining [ ] Act[,] ... and... all Department orders relating to Operator conduct under the Permit"; and,

3. Hamilton violated the requirements of the Clean Streams Law, the Surface Mining Act, and Department orders concerning the permit site.

Appellant did not file a response or memorandum in opposition.

When ruling on motions for summary judgment, the Board looks to Pa. R.C.P. Nos. 1035.1-1035.5. *See* 25 Pa. Code § 1021.73(b) and *Kochems v. Department of Environmental Protection,* 701 A.2d 281 (Pa. Cmwlth. 1997). With respect to responses to the motions, Pa. R.C.P. No. 1035.3 says that "[t]he adverse party may not rest upon the mere allegations of denials of the pleadings but must file a response," and that "[s]ummary judgment may be entered against a party who does not respond." Pa. R.C.P. No. 1035.3(a) and (d). Thus, the Board may dismiss an appeal where an appellant fails to file a response to a motion for summary judgment. *See Kochems,* 701 A.2d at 282.

We will dismiss Appellant's appeal. His response was due on September 26, 2000. However, Appellant not only failed to respond to the Department's motion by September 26, it failed to file a request for an extension or explain its failure to file a response. Nor, in the time since its deadline expired, has Appellant filed a response or explained his failure to do so.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH J. PELES	:	
	:	
v.	:	**EHB Docket No. 2000-008-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HAMILTON BROTHERS COAL, INC., Permittee	:	

ORDER

AND NOW, this 8th day of November, 2000, it is ordered that the Department's motion for summary judgment is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
CHAIRMAN

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 8, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Matthew B. Royer, Esquire
Southcentral Regional Counsel

For Appellant:
Joseph J. Peles
222 Forest Ridge Road
Indiana, PA 15701

For Permittee:
Fred Kuzemchak, President
Hamilton Brothers Coal, Inc.
R. R. 2, Box 562
Clymer, PA 15728

jb/bl

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WWW.EHB.VERILAW.COM

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UTICA MUTUAL INSURANCE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2000-002-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 8, 2000

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion for summary judgment against appellants where they neither responded to the motion nor explained their failure to do so.

OPINION

This appeal concerns a December 15, 2000, letter that the Department sent to Hamilton Brothers Coal, Inc. (Hamilton) informing it that the Department was forfeiting Hamilton's bonds for surface mining permit 17910122, in Beccaria Township, Clearfield County, because of Hamilton's violations at the site. Utica Mutual Insurance Company (Utica Mutual) had issued five surety bonds declared forfeit.

On January 6, 2000, Utica Mutual and Hamilton (collectively Appellants) filed a notice of appeal challenging the forfeiture. Among other things, Appellants' notice of appeal argued that the amount of the bond forfeit exceeded the cost of correcting the violations, that the site

does not pose a current threat of pollution, and that Hamilton was willing to comply with the applicable statutes and regulations.

On September 1, 2000, the Department filed a motion for summary judgment and a supporting memorandum of law. In its motion and memorandum, the Department argues that:

1. section 4(h) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4(h) (Surface Mining Act), requires that the Department forfeit an operator's bond if he fails to comply with the requirements of the Surface Mining Act "in any way for which liability has been charged on the bond";

2. the bonds forfeited required that Hamilton "faithfully perform and conform to the requirements of ... the Clean Streams Law[,] ... the Surface Mining [ ] Act[,] ... and... all Department orders relating to Operator conduct under the Permit"; and,

3. Hamilton violated the requirements of the Clean Streams Law, the Surface Mining Act, and Department orders concerning the permit site.

Appellants did not file a response or memorandum in opposition.

When ruling on motions for summary judgment, the Board looks to Pa. R.C.P. Nos. 1035.1-1035.5. *See* 25 Pa. Code § 1021.73(b) and *Kochems v. Department of Environmental Protection,* 701 A.2d 281 (Pa. Cmwlth. 1997). With respect to responses to the motions, Pa. R.C.P. No. 1035.3 says that "[t]he adverse party may not rest upon the mere allegations of denials of the pleadings but must file a response," and that "[s]ummary judgment may be entered against a party who does not respond." Pa. R.C.P. No. 1035.3(a) and (d). Thus, the Board may dismiss an appeal where an appellant fails to file a response to a motion for summary judgment. *See Kochems,* 701 A.2d at 282.

We will dismiss Appellants' appeal. Appellants' response was due on September 26, 2000. However, Appellants not only failed to respond to the Department's motion by September

26, they failed to file a request for an extension or explain their failure to file a response. Nor, in the time since their deadline expired, have they filed a response or explained their failure to do so. Significantly, Appellants are represented by counsel, and therefore, they should have known that summary judgment could be entered against them for failing to respond to the Department's motion.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UTICA MUTUAL INSURANCE COMPANY	:	
	:	
v.	:	EHB Docket No. 2000-002-C
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of November, 2000, it is ordered that the Department's motion for summary judgment is granted and Appellants' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
CHAIRMAN

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 8, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Matthew B. Royer, Esquire
Southcentral Regional Counsel

For Appellant:
John W. Bruni, Esquire
PIETRAGALLO, BOSICK & GORDON
38th Floor, One Oxford Centre
Pittsburgh, PA 15219

jb/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UTICA MUTUAL INSURANCE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2000-006-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 8, 2000

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion for summary judgment against appellants where they neither responded to the motion nor explained their failure to do so.

OPINION

This appeal concerns a December 15, 2000, letter that the Department sent to Hamilton Brothers Coal, Inc. (Hamilton) informing it that the Department was forfeiting Hamilton's bonds for surface mining permit 17930116, in Beccaria Township, Clearfield County, because of Hamilton's violations at the site. Utica Mutual Insurance Company (Utica Mutual) had issued a surety bond declared forfeit; the two remaining bonds were collateral bonds secured by letters of credit from Hamilton.

On January 14, 2000, Utica Mutual and Hamilton (collectively Appellants) filed a notice of appeal challenging the forfeiture. Among other things, Appellants' notice of appeal argued that the amount of the bond forfeit exceeded the cost of correcting the violations, that the site

does not pose a current threat of pollution, and that Hamilton was willing to comply with the applicable statutes and regulations.

On September 1, 2000, the Department filed a motion for summary judgment and a supporting memorandum of law. In its motion and memorandum, the Department argues that:

1. section 4(h) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4(h) (Surface Mining Act), requires that the Department forfeit an operator's bond if he fails to comply with the requirements of the Surface Mining Act "in any way for which liability has been charged on the bond";

2. the bonds forfeited required that Hamilton "faithfully perform and conform to the requirements of ... the Clean Streams Law[,] ... the Surface Mining [ ] Act[,] ... and... all Department orders relating to Operator conduct under the Permit"; and,

3. Hamilton violated the requirements of the Clean Streams Law, the Surface Mining Act, and Department orders concerning the permit site.

Appellants did not file a response or memorandum in opposition.

When ruling on motions for summary judgment, the Board looks to Pa. R.C.P. Nos. 1035.1-1035.5. *See* 25 Pa. Code § 1021.73(b) and *Kochems v. Department of Environmental Protection,* 701 A.2d 281 (Pa. Cmwlth. 1997). With respect to responses to the motions, Pa. R.C.P. No. 1035.3 says that "[t]he adverse party may not rest upon the mere allegations of denials of the pleadings but must file a response," and that "[s]ummary judgment may be entered against a party who does not respond." Pa. R.C.P. No. 1035.3(a) and (d). Thus, the Board may dismiss an appeal where an appellant fails to file a response to a motion for summary judgment. *See Kochems,* 701 A.2d at 282.

We will dismiss Appellants' appeal. Appellants' response was due on September 26, 2000. However, Appellants not only failed to respond to the Department's motion by September

26, they failed to file a request for an extension or explain their failure to file a response. Nor, in the time since their deadline expired, have they filed a response or explained their failure to do so. Significantly, Appellants are represented by counsel, and therefore, they should have known that summary judgment could be entered against them for failing to respond to the Department's motion.

Accordingly, we enter the following order:

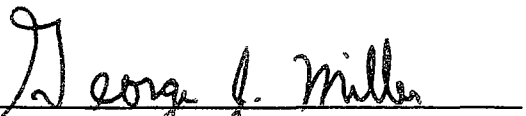
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UTICA MUTUAL INSURANCE COMPANY	:	
	:	
v.	:	EHB Docket No. 2000-006-C
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of November, 2000, it is ordered that the Department's motion for summary judgment is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
CHAIRMAN

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 8, 2000

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library

For the Commonwealth, DEP:
Matthew B. Royer, Esquire
Southcentral Regional Counsel

For Appellant:
John W. Bruni, Esquire
PIETRAGALLO, BOSICK & GORDON
38th Floor, One Oxford Centre
Pittsburgh, PA 15219

jb/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HENRY McCOOL, et al.	:	
	:	
v.	:	**EHB Docket No. 2000-103-K**
	:	**(Consolidated with EHB Docket**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SONIE'S MINE INC., Permittee	:	**No. 98-214-K)**
	:	
	:	**Issued: November 9, 2000**
	:	

OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER

By Michael L. Krancer, Administrative Law Judge

Synopsis:

Appellants residing in Monroe County have appealed from an action of DEP's Pottsville District Mining Office relating to a mine site located in Monroe County. The defense of this matter is being handled by DEP's Southcentral Regional Counsel's Office which is located in Harrisburg. The appeal is pending in the Board location at Harrisburg. DEP noticed the depositions of eleven Appellants for its Southcentral Regional Office in Harrisburg. Appellants filed a Motion For A Protective Order seeking a blanket order requiring DEP to take all eleven depositions in Monroe County. Later, DEP suggested that the depositions be held in its Pottsville District Mining Office which is about halfway between Monroe County and Harrisburg. Appellants rejected that offer and pressed for the Order requiring DEP to take all depositions in Monroe County. The Board orders that, as per DEP's suggestion, the depositions shall take place at DEP's Pottsville District Mining Office. This solution best reconciles both

parties' conflicting and competing views on what constitutes the most efficient, economical and least burdensome prosecution of the litigation as to these depositions.

OPINION

This action is an appeal by eleven individuals from an action of DEP's Pottsville District Mining Office relating to a mine site in Monroe County. Ten of the appellants live in Stroudsburg, Monroe County and one lives in Scotia, Monroe County which is about six to ten miles by road from Stroudsburg. DEP's defense of this appeal is being handled by its Southcentral Regional Counsel's Office which is located in Harrisburg. The case is pending before the Board's Harrisburg venue.

On October 27, 2000 DEP noticed the depositions of each of the eleven appellants for DEP's Southcentral Regional Office in Harrisburg. On October 30, 2000, Appellants filed a Motion For A Protective Order seeking an order requiring DEP to take these depositions in Monroe County, where the deponents reside and Appellants' counsel is located. On October 31, 2000 this Board entered an Order requiring both parties to file letter briefs supporting their respective positions by November 6, 2000. DEP filed a letter brief on November 2, 2000 and Appellants filed a letter brief on November 6, 2000. On Tuesday, November 7, 2000 a conference call was held with the Board and all parties to discuss the pending dispute about the location of the depositions. In DEP's letter brief and again during the conference call, DEP suggested that the depositions be held at DEP's Pottsville District Mining Office instead of Harrisburg. Pottsville is approximately halfway between Monroe County and Harrisburg. Appellants, however, pressed their Motion For A Protective Order insisting that the depositions be held in Monroe County.

Appellants rely primarily on 25 Pa. Code § 1021.4 which provides that the Board's Rules "shall be liberally construed to secure the just, speedy and inexpensive determination of every

appeal." 25 Pa. Code § 1021.4 They also refer us to Pa. R. Civ. P. 4012(a)(2) which allows the Court to issue protective orders from discovery to protect the party or person from whom discovery is sought from unreasonable annoyance, embarrassment, oppression burden or expense and allows the Court to prescribe limitations on discovery such as ordering that the discovery or deposition shall only be on specified terms and conditions including the designation of the time and place for the deposition. [1] DEP, on the other hand, argues that there is no proscription at all from its noticing and requiring the depositions to take place in Harrisburg at its Southcentral Regional Office. DEP cites 25 Pa. Code § 1021.111(c) which provides that in the event a person must travel more than 100 miles to his or her deposition such person may file a motion for payment of reasonable expenses as confirmatory that a party in fact is obligated to travel to where DEP has noticed the deposition.

The Board will not require that DEP travel to Monroe County to take the eleven depositions at issue nor will we require the eleven appellants to travel to Harrisburg. The depositions may proceed in Pottsville. Pottsville is approximately 70 to 90 road miles from Stroudsburg. It is approximately halfway between Stroudsburg, where the deponents reside, and Harrisburg, the location of both the DEP Regional Counsel's Office defending Appellants' action and the Board's location wherein this action is pending. Pottsville is readily accessible from Stroudsburg via, among other routes, Interstate 80 and Interstate 81. Interstate 80 passes through Stroudsburg. Going west on Interstate 80, it intersects with Interstate 81 about 15 miles

[1] 25 Pa. Code § 1021.111(a) provides that except as provided by the Board's Rules or by order of the Board, discovery in proceedings before the Board shall be governed by the Pennsylvania Rules of Civil Procedure.

south of Wilkes-Barre. Then going south on Interstate 81 there is an exit for Route 61 and Pottsville is about seven miles south on Route 61 from the exit.[2]

The Appellants have not shown via affidavit or other means that there is any particular or specific burden on or impediment to any of the deponents travelling from Stroudsburg or Scotia to Pottsville. The Board is also mindful of DEP's point that there is an expense to the citizens of the Commonwealth to have DEP travel the approximately 100 or slightly more miles to Monroe County and conduct eleven depositions there.

In addition, the deponents are *Appellants* in this matter and have invoked the jurisdiction of the Board. We do not think that it is on its face unreasonable for DEP to request these parties, who initiated the action, to travel to Pottsville one time to be deposed. We thus reject the Appellants' contention that requiring them to travel to Pottsville for deposition is *penalizing* them for exercising their rights to file an appeal before the Board. We have no hesitation agreeing with Appellants' premise that nobody should be penalized for invoking or exercising a right. However, we think Appellants' view that in this case they are being penalized is both exaggerated and wrong. Rights do not exist in a vacuum. The exercise of a right by a person necessarily entails the assumption of responsibility which goes along with the right. We have the right to freedom of speech together with the responsibility to not yell "fire" in a crowded theatre. In a similar vein, the exercise by one party of a right necessarily interacts and possibly conflicts with the rights of others. Here, as DEP has argued, it and the people of the Commonwealth for whom DEP work, have the right to not automatically be assigned to carry the entirety of the expense and burden of the litigation which Appellants have commenced. Being appellants or plaintiffs necessarily entails some degree of effort and the undertaking of burdens and does not,

---

[2] The routes and approximate distances mentioned in this paragraph are derived from our inspection of the Pennsylvania Official Transportation Map published by the Pennsylvania Department of Transportation, copyright 1991.

nor should it, as Appellants' proffer, *immunize* appellants therefrom. Indeed, some level of exertion associated with being an appellant goes together with and is a function of the interest that an appellant is expected to have in asserting his or her claim. Expecting some degree of exertion by an appellant does not amount to penalizing the appellant for exercising a right. We think that the level of exertion being requested here is not out of line. If we thought that it were we would not hesitate to shield the Appellants.

Based on the foregoing factors, the Board finds that permitting these depositions to take place in Pottsville is the solution that best reconciles both parties' conflicting and competing views on what constitutes the most efficient, economical and least burdensome prosecution of the litigation as to these depositions and avoids placing the burden of the depositions entirely on one side or the other.

While we do not believe that it is unreasonable to have the Appellants travel this reasonable distance to be deposed, the Board will impose the following limitations on these depositions to minimize the burden on the Appellants. The Department shall take these depositions such that three per day are completed. This three per day schedule was mentioned by counsel for DEP in the conference call as a method of lessening the imposition on the deponents and we will accept the invitation to impose that limitation. The "day" means from the hours of no earlier than 8:30 a.m. to no later than 5:15 p.m. These depositions shall be scheduled with reasonable advance notice at a time mutually convenient to the particular deponents and all counsel. All depositions shall be completed by Friday, December 15, 2000. Either party may access the Board by telephone if any difficulty arises with respect to the scheduling or taking of these depositions which require Board intervention.

Based on the foregoing, the Board enters the following Order:

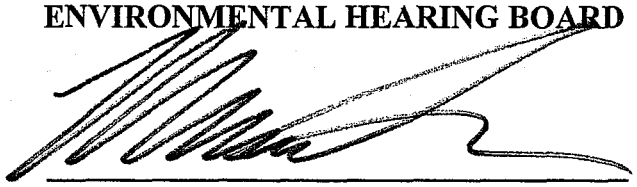
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HENRY McCOOL, et al.	:	
	:	
v.	:	**EHB Docket No. 2000-103-K**
	:	**(Consolidated with EHB Docket**
COMMONWEALTH OF PENNSYLVANIA,	:	**No. 98-214-K)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SONIE'S MINE	:	
INC., Permittee	:	

ORDER

AND NOW, this 9th day of November 2000, upon consideration of the Motion For A Protective Order filed on October 30, 2000 by Appellants, the letter brief filed by DEP on November 2, 2000, the letter brief filed by Appellants on November 6, 2000 and the conference call held with the Board and all counsel on Tuesday, November 8, 2000, it is hereby ORDERED THAT the depositions of Pearl Allabaugh, Henry McCool, Donald Green, Christopher Sweeney, Cynthia Weede, Dawn Minton, Frank Schumaker, Sheldon Mergan, Sally Mergan, Lawrence Swink, and Richard Eva referenced in the letter dated October 27, 2000 from counsel for the Department to counsel for Appellants may proceed at the Department's Pottsville District Mining Office in Pottsville, Pennsylvania. The Department shall take these depositions such that three per day are completed. The "day" means from the hours of no earlier than 8:30 a.m. to no later than 5:15 p.m. These depositions shall be scheduled with reasonable advance notice at a time mutually convenient to the particular deponent and all counsel. All eleven depositions shall be completed by Friday, December 15, 2000. Either party may access the Board by telephone if any difficulty arises with respect to the scheduling or taking of these depositions which requires Board intervention.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 9, 2000

Via Fax and Regular Mail to:

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COLUMBIA GAS TRANSMISSION CORPORATION	:	
v.	:	**EHB Docket No. 2000-111-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	**Issued: November 27, 2000**

OPINION AND ORDER ON MOTION FOR LEAVE TO FILE AMENDED STATEMENT OF OBJECTIONS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The appellant's motion for leave to amend its appeal is granted. Where no dispositive motions have yet been filed, the hearing is scheduled for October 2001, and additional discovery will be permitted based on the amendment to the appeal, the Department and permittee are not prejudiced by the amendment.

OPINION

On May 19, 2000, Columbia Gas Transmission Company (Columbia Gas) filed an appeal of the Department of Environmental Protection's (Department) revision of an underground mining permit held by Eighty-Four Mining Company (Eighty-Four Mining). The revision added 100 acres to the permit and subsidence control plan boundary for an underground mining

operation known as "Mine No. 84." The Department took its action on April 19, 2000, but according to the notice of appeal, Columbia Gas did not receive written notice of the action until May 18, 2000. Columbia Gas filed its notice of appeal the following day. The notice of appeal contains a "statement of objections" consisting of three numbered paragraphs.

Before the Board is a Motion for Leave to File Amended Statement of Objections filed by Columbia Gas on October 6, 2000. By its motion, Columbia Gas seeks to add the following objection to its notice of appeal:

> The Department's proposed procedure for compliance with regulations relating to subsidence control, as set forth in number 4 of Section F of the permit, does not allow for adequate notice to or comment by Columbia or other parties. The Department improperly delegated to Eighty-Four the Department's obligation to determine if the mining plans were in compliance with the law.

Columbia Gas asserts that amendment of its appeal to include the above objection will cause no prejudice to the other parties on the basis that it merely clarifies legal issues already articulated in the statement of objections.

Eighty-Four Mining and the Department filed answers objecting to the motion for leave to amend. Both Eighty-Four Mining and the Department contend they will be prejudiced by the proposed amendment because it raises new legal and factual issues. In addition, Eighty-Four Mining cites two Superior Court decisons holding that the introduction of a new cause of action after the statute of limitations has expired is prejudicial.[1]

In reply, Columbia Gas argues that no prejudice will result to either party since discovery was only recently served upon Eighty-Four Mining and the Department, no depositions have yet been taken and no dispositive motions have been filed. Nor had a hearing been scheduled at the

[1] *Romah v. Hygienic Sanitation Co.*, 705 A.2d 841 (Pa. Super. 1997); *Matos v. Rivera*, 648 A.2d 337 (Pa. Super. 1994).

time it filed its motion and reply. Columbia Gas also asserts that the cases cited by Eighty-Four Mining are not applicable because neither deals with motions to amend under this Board's rules.

The Board's rules on amendments of appeals are set forth at 25 Pa. Code § 1021.53. An appeal may be amended as of right within 20 days after the filing thereof. *Id.* at § 1021.53(a). After 20 days, "the Board, upon motion by the appellant, may grant leave for further amendment of the appeal." *Id.* at § 1021.53(b). Such leave may be granted if it meets any one of three conditions, such as the proposed amendment "includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor." *Id.* at § 1021.53(b)(3). No such leave shall be granted after the Board has either decided any dispositive motions or the case has been assigned for hearing, whichever is later. *Id.* at § 1021.53(c).

Columbia Gas has demonstrated that it meets the criteria for allowing an amendment of its appeal. Contrary to the Department and Eighty-Four Mining's assertions, it does not appear that any prejudice will result from allowing Columbia Gas to amend its appeal at this early stage of the proceeding. Dispositive motions have not yet been filed or decided by the Board, and the hearing in this matter is not scheduled to take place until October 2001.[2] Moreover, there is no suggestion by the Department or Eighty-Four Mining that they have changed their positions based on the limited issues raised in the amendment. Columbia Gas asserts that the amendment is simply an amplification of its earlier issues. While the Board does not necessarily agree with this characterization, we do not find that the new issue raised by Columbia Gas rises to the level of causing prejudice to Eighty-Four Mining or the Department. Moreover, in the event Eighty-Four Mining and the Department find that additional discovery is necessary based on the

[2] At the time Columbia Gas filed its motion and reply, no hearing had been scheduled.

amendment, we will grant an extension of the discovery period that ended on November 21, 2000.

The Superior Court cases cited by Eighty-Four Mining deal with actions in civil court and the addition of new causes of action by a plaintiff after the statute of limitations has run. They are inapposite to administrative proceedings, particularly where the Board's rules specifically allow for amendment of appeals not only after the initial 30-day statute of limitations has run, but also after the 20-day period for amendment as of right.

The following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COLUMBIA GAS TRANSMISSION CORPORATION	:	
v.	:	**EHB Docket No. 2000-111-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 27th day of November, 2000, Columbia Gas Transmission Corporation's Motion for Leave to File Amended Statement of Objections is **granted**. Should the Department of Environmental Protection or Eighty-Four Mining Company wish to file a request to extend discovery, they should do so on or before **December 5, 2000**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 27, 2000

Service list next page

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 98-235-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** November 30, 2000

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for partial summary judgment is denied. The Board has jurisdiction over a mining company's appeal of an inspection report issued to it under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1-1396.19a (Surface Mining Act), where the inspection report reinstates a previous Department compliance order directing the company to cease all active mining and begin reclamation. The company's appeals of the compliance order and inspection report are not moot—despite the Department's subsequent lifting of the order—where the violations alleged in the order and inspection report might still be used to increase subsequent civil penalty assessments against the company under 25 Pa. Code § 86.194(b)(6). The Board will not grant a motion for summary judgment that centers on evidence concerning settlement negotiations that is inadmissible under Rule 408 of the Pennsylvania Rules of Evidence, Pa. R.E. 408.

OPINION

This consolidated appeal concerns a November 25, 1998, compliance order (compliance order) and a May 10, 1999, inspection report (inspection report) that the Department of Environmental Protection (DEP) issued to Harriman Coal Corporation (Appellant) of Valley View, Pennsylvania. Both Department actions relate to Appellant's Good Spring South mining operation, in Porter Township, Schuylkill County. The compliance order cited Appellant for exceeding the 1500-foot limit on the length of an open pit; directed Appellant to backfill and regrade the site by December 28, 1998, so that the open pit fell within the 1500-foot limit; and directed Appellant to cease all other mining activities at the site. The inspection report asserted that Appellant failed to comply with the backfilling requirements in the compliance order, reinstated the compliance order, and directed Appellant to immediately cease all active mining and begin backfilling and reclamation.

On December 17, 1998, Appellant filed a notice of appeal challenging the compliance order. The Board docketed the appeal at EHB Docket No. 98-235-C. Later, on May 8, 1999, Appellant filed a notice of appeal challenging the inspection report. The Board docketed that appeal at EHB Docket No. 99-119-C. On June 18, 1999, at the request of the parties, we consolidated both appeals at EHB Docket 98-235-C.

The Board has issued one previous opinion and order in this appeal: on July 21, 2000, we denied a Department motion to dismiss Appellant's objections to the compliance order.

On March 31, 2000, Appellant filed a motion for partial summary judgment and supporting memorandum of law, requesting that the Board grant Appellant summary judgment concerning the inspection report and award it all attorneys fees and costs for the litigation. The

Department filed an answer and memorandum in opposition on May 5, 2000. Appellant filed a reply on September 15, 2000.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record—and affidavits, if any—show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997). The motion must set forth, with adequate particularity, the reasons for summary judgment. *See, e.g., Barkman v. DER*, 1993 EHB 738, 745. When deciding the motion, we view the record in the light most favorable to the nonmoving party and will enter summary judgment only where the right is clear and free from doubt. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995). We shall address the issues raised by the parties individually below.

IS APPELLANT'S APPEAL MOOT?

In its answer and memorandum in opposition, the Department argues that Appellant's appeal is moot because:

> (1) a June 7, 1999, Department inspection report lifted the November 25, 1998, compliance order;
>
> (2) the parties agreed in the March 15, 1999, consent order and agreement to a civil penalty for the violations listed in the November 25, 1998, compliance order; and,
>
> (3) the Department approved the mining plan required by the November 25, 1998 compliance order and issued a mining permit for the Good Spring South site on September 20, 1999.

In its reply, Appellant contends that the Department's mootness argument is itself moot because the Board previously denied a Department motion to dismiss the appeal as moot.

"In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of the necessary stake in the outcome, or whether the court (or agency) will be able to grant effective relief." *Al Hamilton Contracting Co. v. Department of Environmental Resources*, 496 A.2d 516, 518 (Pa. Cmwlth. 1985) (citations omitted). Generally, tribunals may not decide moot issues. *See, e.g., Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117, 119 (Pa. Cmwlth. 2000). However, exceptions to the mootness doctrine exist "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest, or where a party will suffer some detriment without the court's decision." *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa.Cmwlth.1997), *aff'd*, 731 A.2d 1133, 1134 (Pa. 1999).

We stand by our determination that the mootness doctrine does not bar Appellant's appeal. In its motion to dismiss, the Department argued that Appellant's appeal was moot because an inspection report the Department issued on June 7, 1999, lifted the November 25, 1998, compliance order. Looking to the Commonwealth Court's decision in *Al Hamilton Contracting v. Department of Environmental Resources,* 496 A.2d 516 (Pa. Cmwlth. 1985), we held that Appellant's appeal was not moot because Appellant continued to have a stake in the appeal—even after the November 25, 1998, compliance order had been lifted—by virtue of the penalty escalation provisions in 25 Pa. Code § 86.194.[1] *See Harriman Coal Corporation v. DEP,* EHB Docket No. 98-235-C (opinion issued July 21, 2000).

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[1] The penalty escalation provision at 25 Pa. Code § 86.194(b)(6) provides, in pertinent part:

> *History of previous violations.* In determining a penalty for a violation, the Department will consider previous violations of applicable laws for which the same person or municipality has been found to be responsible in a prior adjudicated proceeding, agreement, consent order or decree....

The Department argues that Appellant no longer has a stake in this appeal because the parties agreed in the March 15, 1999, consent order and agreement to a civil penalty for the violations identified in the November 25, 1998, compliance order, and thus, the penalty escalation issue no longer exists. However, the Department's argument is flawed in two respects. First, under 25 Pa. Code § 86.194(b)(6), the violation listed in the November 25, 1998, compliance order could potentially be used to escalate civil penalties for future violations, even though Appellant has already paid a civil penalty on that particular violation.[2] Thus, Appellant continues to have a stake in its appeal of the November 25, 1998, compliance order notwithstanding the March 15, 1999, consent order and agreement.

Second, even assuming that Appellant had no remaining stake in its appeal of the November 25, 1998, compliance order, Appellant continues to have a stake in the May 10, 1999, inspection report. The May 10, 1999, inspection report not only reinstated the November 25, 1998, compliance order, it also alleged that Appellant violated the general backfilling requirement in 25 Pa. Code § 88.115. (Motion, exhibit 16.) Thus, even though the Department subsequently lifted the November 25, 1998, compliance order, Appellant continues to have a stake in its appeal of the May 10, 1999, inspection report. The violation alleged in the May 10,

[2] It is unclear from the Department's June 7, 1999, inspection report whether, by "lifting" the compliance order, the Department simply released Appellant from the deadlines and other duties imposed by the order, or whether the Department meant to completely extinguish the previous order—including withdrawing the alleged violations identified in the order. The inspection report simply says, "The operator has submitted an approvable mine plan for this site, and therefore CO #98-5-0895 [the November 25, 1998, compliance order] and CO+A #98-5-065 [the December 8, 1998 consent order and agreement] can now be lifted." (Answer, exhibit A., p.1.) Significantly, the Department "lifted" at least a portion of the November 25, 2000, compliance order when it issued the December 8, 1998, consent order and agreement, but then went on to resurrect that portion of the compliance order in its May 10, 1999, compliance order. (Motion, exhibit 7, p. 3, paragraph I(3)(b); exhibit 16, pp. 1-2.)

1999, inspection report might still be used to increase civil penalties assessed for Appellant's subsequent violations, pursuant to 25 Pa. Code § 86.194(b)(6).

IS THE INSPECTION REPORT APPEALABLE TO THE BOARD?

In its answer and memorandum in opposition, the Department argues that Appellant is not entitled to judgment as a matter of law on its appeal because the inspection report is not a Department decision appealable to the Board. Appellant argues, however, that the inspection report *is* appealable to the Board.

We agree with Appellant that the inspection report is appealable. Administrative agencies, such as the Board, have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., DER v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. DEP*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). Therefore, whether the Board has jurisdiction to hear Appellant's appeal of the inspection report depends on whether a statute confers that power upon us.

Although the Surface Mining Act expressly states that the Board has jurisdiction over appeals of certain Department actions,[3] the Act is silent on whether the Board has jurisdiction over appeals of inspection reports. Therefore, whether one may challenge an inspection report issued pursuant to the Surface Mining Act by appealing to the Board turns on the "general rule" for appealing Department actions, at section 4(a) of the Environmental Hearing Board Act, 35 P.S. § 7514(a). Section 4(a) provides, "The Board has the power and duty to hold hearings and issue adjudications ... on orders, permits, licenses or decisions of the Department."

[3] *E.g.* 52 P.S. § 1396.4b(4) (regarding Department orders concerning the replacement of water supplies).

The Board has jurisdiction over Appellant's appeal of the inspection report because the report is an "order" within the meaning of section 4(a) of the Act. Since the inspection report reinstates the November 25, 1998, compliance order, and directs Appellant to immediately cease all active mining and begin backfilling and reclamation, the inspection report is itself an order. *Cf. 202 Island Car Wash v. DEP,* 1996 EHB 1048, 1050 ("the appealability of a Departmental communication is dictated by the language of the letter or notice, and not by the title"); *Goetz v. DEP,* EHB Docket No. 97-226-C slip op. 18 (June 26, 2000) ("inspection reports that contain mandates are by their nature orders").

DOES APPELLANT'S MOTION FOR SUMMARY JUDGMENT IMPROPERLY RELY ON EVIDENCE CONCERNING SETTLEMENT NEGOTIATIONS?

In its answer and memorandum in opposition, the Department argues that paragraphs 47-54, 57, and 62 of Appellant's motion for summary judgment improperly rely on evidence concerning a proposed amendment to a December 8, 1998, consent order and agreement; and paragraphs 58-61, 63, 71-73, and 116-117 of the motion improperly rely on evidence concerning settlement negotiations. According to the Department, Pa. R.E. 408 prohibits references to both types of evidence.

In its reply, Appellant argues that the evidence it relies on is proper because it consisted entirely of admissions of fact by the Department, and "the plain language of Pa. R.E. 408 states that admissions of fact presented in the course of compromise negotiations are not excluded." (Reply, p. 4.) Appellant also argues that Pa. R.E. 408 does not preclude the use of evidence concerning the discussions about the proposed amendment to the consent order and agreement because Appellant had not filed its notice of appeal at the time the discussions took place, and thus the discussions did not relate to the settlement of any pending litigation.

We agree with the Department that Rule 408 of the Pa. R.E. precludes the evidence that the Department objects to in Appellant's motion for summary judgment. Pa. R.E. 408 provides, in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Notwithstanding Appellant's arguments to the contrary, Pa. R.E. 408 bars the use of admissions of fact that occur during compromise negotiations. Formerly, Pa R.E. 408 provided, "This rule does not require the exclusion of an admission of fact merely because it is presented in the course of compromise negotiations."[4] Pa. R.E., Rule 408, 42 Pa. C.S.A. (West 1999). But, on July 1, 2000, Pa. R.E. 408 was amended and the sentence providing that admissions of fact were admissible was replaced with the sentence reading, "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." Pa. R.E., Rule 408, 42 Pa. C.S.A. (West Supp. October 2000). At the same time, the official comment to the rule was amended to read, "The 2000 amendments abolish the common law rule that distinct admissions of fact made during settlement discussions are admissible." *Id. See also Winchester Packaging, Inc. v. Mobil Chemical Company,* 14 F.3d 316, 320-321 (7th Cir. 1994) (holding that the exception admitting unqualified factual statements did not survive passage of F.R.E. 408, which is identical to the amended Pa. R.E. 408).

We also reject Appellant's argument that evidence concerning the proposed amendment is permissible under Pa. R.E. 408 because Appellant filed its notice of appeal after the

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[4] Appellant relies on this version of Rule 408 in its reply.

discussions concerning the proposed amendment occurred, and thus the discussions concerning the proposed amendment did not relate to the settlement of pending litigation. When Pa. R.E. 408 states that it applies to evidence regarding the settlement of "a claim which was disputed," the rule applies to more than just evidence concerning settlement of pending litigation. The Pennsylvania courts have yet to construe this provision of Pa. R.E. 408. However, Rule 408 of the Federal Rules of Evidence, F.R.E. 408, is identical to Pa. R.E. 408, and the Federal courts have construed the phrase "a claim which was disputed" there to include disputes that were not the subject of litigation at the time of the settlement discussions. For instance, in *Affiliated Manufacturers, Inc. v. Aluminum Company of America,* 56 F.3d 521 (1995), the Third Circuit Court of Appeals held that F.R.E. 408 precluded evidence relating to an offer to settle a contract dispute—although no litigation was pending at the time. The Court explained, "[T]he [F.R.E.] Rule 408 exclusion applies where an actual dispute or difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation." 56 F.3d at 527. "As a matter of interpretation, the meaning of 'dispute' as employed in the rule includes both litigation and the less formal stages of a dispute.... The district court properly interpreted the scope of the term 'dispute' to include a clear difference of opinion between the parties here concerning payment of two invoices." 56 F.3d at 528.

Each of the paragraphs that the Department objects to in Appellant's motion concerns evidence that falls within this definition of a "dispute." Paragraphs 58 and 116-117 of the motion involve negotiations surrounding the issuance of the December 8, 1998, consent order, which sought to resolve certain differences of opinion between the parties concerning the

November 25, 1998, compliance order.[5] Paragraphs 54, 57, 59-63, and 71-73 of the motion involve the parties' negotiations concerning the proposed amendment to the December 8, 1998, consent order, which sought to resolve certain differences between the parties concerning that consent order.[6] Since Pa. R.E. 408 precludes the admission of this evidence, we shall not consider it for purposes of ruling on Appellant's motion for summary judgment.

---

[5] Among other things, the December 28, 1998, consent order and agreement provided that:

> (1) the Department would lift the November 28, 1998, compliance order to the extent that it banned mining at the Good Spring South site;
>
> (2) the November 28, 1998, compliance order would be immediately reinstated if Appellant failed to comply with the deadlines in the consent order and agreement or failed to submit an acceptable detailed mining plan by January 19, 1999; and,
>
> (3) the Department would lift the November 28, 1998, compliance order in its entirety upon approval of Appellant's detailed mining plan.

(Motion, exhibit 7, paragraph 3(b), 3(f), and 3(i).)

[6] The Department sent Appellant the proposed amendment to the December 28, 1998, consent order and agreement on April 28, 1999. (Motion, paragraph 47 and exhibit 15.) The cover letter accompanying the proposed amendment stated that the Department was "following up on several conversations concerning the amendment to the December 8, 1998, Consent Order and Agreement"; that the Department believed the proposed amendment "accurately reflects the terms agreed to at the March 11, 1999, meeting"; and that "continued failure to execute this amendment ... will result in the Department enforcing the terms of the December 8, 1998, [consent order and agreement]" because "the compliance dates in the [consent order and agreement] have long since passed." (Motion, paragraph 47 and exhibit 15.) In addition to setting deadlines for acting on certain items concerning the mining plan, the proposed amendment provided that:

> (1) the November 28, 1998, compliance order would be immediately reinstated if Appellant failed to comply with the deadlines in the consent order and agreement or failed to submit items by the dates required in the amendment; and
>
> (2) the Department would lift the entire November 28, 1998, compliance order upon approval of Appellant's mining plan.

SHOULD THE DEPARTMENT'S RESPONSE AND MEMORANDUM IN OPPOSITION BE STRICKEN—IN WHOLE OR IN PART—BECAUSE THE DEPARTMENT ALLEGEDLY FAILED TO PROVIDE PROPER SUPPORT FOR ITS DENIALS TO AVERMENTS IN APPELLANT'S MOTION?

In its reply, Appellant argues that the Department's entire response and memorandum in opposition should be stricken because the Department failed to provide proper support for many of its denials to the averments in Appellant's motion. Appellant also requests that, if the Board refuses to strike the Department's entire response and memorandum in opposition, the Board should at least strike paragraphs 24, 28, 41, 42, 44 of the Department's response, because the Department failed to provide adequate support for the denials contained in those paragraphs.

We will not strike the entire response and memorandum in opposition. Appellant cites no authority for the proposition that a tribunal can strike an entire response or memorandum in opposition simply because they contain denials of certain factual averments in the motion for summary judgment yet provide inadequate support for the denials. Nor are we aware of such authority ourselves.

We also decline to strike the individual paragraphs that Appellant points to in the Department's response. Striking individual paragraphs of the response for inadequate support will not affect the outcome of Appellant's motion in any way. To prevail against a properly supported motion for summary judgment, the non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that the trier of fact could possibly enter judgment in his favor after a hearing. Pa. R.C.P. 1035.2; *Ertel v. Patriot News Co.,* 674 A.2d 1038 (Pa. 1996). Thus, to the extent that the factual averments in the Department's response are not properly supported, they cannot thwart Appellant's motion for summary judgment—whether we strike those averments or not.

UNDER THE PROMISSORY ESTOPPEL DOCTRINE, WAS THE DEPARTMENT BARRED FROM ISSUING THE INSPECTION REPORT BY VIRTUE OF THE DECEMBER 8, 1998, CONSENT ORDER AND AGREEMENT WITH APPELLANT?

In its motion and supporting memorandum, Appellant argues that the promissory estoppel doctrine barred the Department from issuing the inspection report because (1) the Department agreed in the December 8, 1998, consent order and agreement that Appellant remained free to appeal the November 25, 1998, compliance order; (2) the amendment that the Department proposed to the December 8, 1998, consent order and agreement would have required Appellant to abandon its appeal of the December 8, 1998, consent order and agreement; and (3) the Department issued the inspection report in retribution for Appellant's failure to agree to the proposed amendment to the December 8, 1998, consent order and agreement.

In its response and memorandum in opposition, the Department argues that the *equitable* estoppel doctrine did not bar the Department from issuing the inspection report, because the Department made no misrepresentation to Appellant and because the Department cannot be estopped from enforcing the law.

We will not grant Appellant summary judgment on this issue because Appellant failed to provide adequate support for the central factual allegations underpinning its argument. Appellant asserts that the proposed amendment to the December 8, 1998, consent order and agreement would have required Appellant to abandon its appeal of the November 25, 1998, compliance order. (Memorandum in support, pp. 20-21.) However, as explained above, Pa. R.E. 408 precludes Appellant from relying on this evidence because the evidence concerns settlement negotiations between the parties.

DID THE DEPARTMENT ISSUE THE INSPECTION REPORT SOLELY BECAUSE APPELLANT WOULD NOT WITHDRAW ITS APPEAL OF THE ORDER, THEREBY DEPRIVING APPELLANT OF DUE PROCESS?

In its motion and supporting memorandum, Appellant argues that the Department issued the inspection report solely because Appellant refused to withdraw its appeal of the November 25, 1998, compliance order, thereby depriving Appellant of its right to a meaningful opportunity to be heard, a violation of due process. In support of its position, Appellant contends that the amendment that the Department proposed to the December 8, 1998, consent order and agreement would have required Appellant to abandon its appeal of the December 8, 1998, consent order.

In its response and memorandum in opposition, the Department argues that it did not violate Appellant's right to due process by reinstating the November 28, 1998, compliance order. According to the Department, it did not deprive Appellant of a meaningful opportunity to be heard because Appellant currently has appeals pending concerning both the November 28, 1998, compliance order and the inspection report.

Appellant cannot prevail on the "due process" aspect of its motion for summary judgment for reasons similar to those that we cited when we denied its promissory estoppel argument above: Appellant failed to provide adequate support for the central factual allegations underpinning the argument. Appellant asserts that the proposed amendment to the December 8, 1998, consent order and agreement would have required Appellant to abandon its appeal of the December 8, 1998, consent order and agreement. (Memorandum in support, pp. 17-19.) However, as explained above, Pa. R.E. 408 precludes Appellant from relying on this evidence because it concerns settlement negotiations between the parties.

Since Appellant has failed to prevail on any aspect of its motion for summary judgment, we will deny its motion. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 98-235-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

O R D E R

AND NOW, this 30th day of November, 2000, IT IS ORDERED that Appellant's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 30, 2000

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES	:	
	:	
v.	:	**EHB Docket No. 97-262-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	**Issued: December 28, 2000**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Appellant has legal standing to pursue this appeal because it has established that it had a direct, immediate, and substantial interest in the renewal of the mining permit. The Department of Environmental Protection did not err in granting a renewal permit for the operator of an underground coal mine even though the permit application was filed less than 180 days before the expiration date of the permit. Where the renewal permit was issued after the date of expiration in order to allow for the scheduling of an informal public conference, the Department did not err in issuing the renewal. The issue of the adequacy of the subsidence bond is moot where the Department has recalculated and the mining company has posted a new bond in an increased amount.

INTRODUCTION AND PROCEDURAL HISTORY

This appeal stems from the Department of Environmental Protection's (Department) November 4, 1997 issuance of a renewal permit to Eighty-Four Mining Company for its Eighty-Four Coal Mine. The mine is located in Washington County, Pennsylvania.

This appeal follows an earlier appeal by Appellant, People United to Save Homes (PUSH) regarding an approval by the Department of a permit revision (1995 Revision) to allow Eighty-Four Mining Company to longwall mine additional areas in Washington County. Following an 18-day hearing the Board issued its Adjudication on July 2, 1999. *People United to Save Homes v. DEP*, 1999 EHB 457 (*PUSH I*). In *PUSH I* the Board found the Department erred in not requiring the coal mining company to post a subsidence bond in an amount greater than $10,000. The Board found that where the statute and regulations require that the Department conduct an analysis as to the proper amount of the subsidence bond, the Department may not simply apply a uniform amount for all permit applications. We remanded the matter to the Department to calculate an appropriate subsidence bond in accordance with the Mine Subsidence Act and the regulations as directed in our Adjudication. We ordered that the mining company file a bond in the amount so calculated by the Department within 120 days of our Order as a condition of further mining. The Department recalculated the subsidence bond in the amount of $2,150,498.50. The mining company posted a bond in this amount.

Regarding the Renewal Permit, which is the subject of this appeal, PUSH filed a timely appeal on December 3, 1997. On February 2, 1998, PUSH filed its Motion for Summary Judgment. The Department filed its response and brief in opposition to the Motion on February 27, 1998. Eighty-Four Mining Company filed its response and brief in opposition to Appellant's Motion on March 2, 1998. On March 11, 1998, PUSH filed a Motion to Quash [Eighty-Four

Mining Company's] Untimely Response together with a Memorandum of Law. On March 13, 1998, PUSH filed its Reply to the Department's Response to PUSH's Motion for Summary Judgment together with a Memorandum of Law.

On March 13, 1998, the Board issued its Opinion and Order denying PUSH's Motion to Quash. We held that although parties should timely file documents, PUSH's request to strike the coal company's response and enter judgment against it for being one business day late was a drastic sanction not warranted under the circumstances as set forth in PUSH's Motion to Quash. *People United to Save Homes v. DEP,* 1998 EHB 194, 197.

The Board then denied Appellant's Motion for Summary Judgment on April 6, 1998. We found that since the regulations, and specifically 25 Pa. Code § 86.55, do not "require the Department to refuse to process a late application or mandate any specific sanction" we refused to find as a matter of law in the context of a summary judgment motion that the Department erred or acted contrary to law. We held that the parties could present evidence on this issue at the hearing. 1998 EHB 250, 257.

At the request of the parties, the Board stayed proceedings in this matter pending the issuance of our Adjudication in *PUSH I.* Following our issuance of the *PUSH I* Adjudication, the Appellant abandoned numerous issues initially raised in *PUSH II. See* Board's Order of September 29, 1999.

A hearing was held before Administrative Law Judge Thomas W. Renwand on May 16, 2000. The record consists of a joint stipulation, nine other exhibits, and a transcript of the hearing totaling 105 pages. All of the parties filed post-hearing briefs with the final brief filed on September 25, 2000. After a full, careful and complete review of the record we make the following:

FINDINGS OF FACT

1. Appellant, People United to Save Homes (PUSH), is an organization of property owners which appealed the Department's action in this matter. (Notice of Appeal)

2. The Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1-1406.21 (Mine Subsidence Act); Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 - 1396.31 (Surface Mining Act); § 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (Administrative Code); and the rules and regulations promulgated thereunder. (Board Exhibit 1)[1]

3. Eighty-Four Mining Company is a Pennsylvania corporation with a mailing address of 1400 Washington Road, Pittsburgh, Pennsylvania 15241-1421, and is the permittee and operator of the Eighty-Four Mining Company Mine (Mine 84). Mine 84 is a bituminous underground coal mine located in Washington County, Pennsylvania. (Board Exhibit 1)

4. Charles Murray was the only witness called by the Appellant on the issue of the legal standing of PUSH.

5. Mr. Murray testified that he is the Treasurer of PUSH. (N.T. 9)

6. Mr. Murray testified that PUSH does not have members, it has supporters. (N.T. 14)

7. Mr. Murray stated that PUSH is an organization of people who banded together to

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[1] The parties submitted a Joint Stipulation which is identified as "Board Exhibit 1". "N.T. - __ refers to the page of testimony in the transcript. "Exhibit P-__" identifies PUSH's exhibits and "Exhibit C-__" refers to exhibits of the Commonwealth. The Permittee did not

prevent damage and destruction to their homes and water wells by longwall mining. (N.T. 13)

8. Mr. Murray testified that he had not suffered any adverse affects from Eighty-Four Mining Company's mining activities. (N.T. 17)

9. Eighty-Four Mining Company operates Mine 84 pursuant to Coal Mining Activities Permit (CMAP) No. 63831302 (Permit). (Board Exhibit 1)

10. Eighty-Four Mining Company submitted a renewal application on June 6, 1997. (Board Exhibit 1)

11. Prior to the renewal the permit was amended in the fall of 1995 (1995 Revision). The 1995 Revision was treated by the Department as a new application and the Department thoroughly reviewed the impacts of Eighty-Four Mining Company's mining activities. (N.T. 45-46)

12. The renewal application covered the same area as was covered by the 1995 Revision reviewed by the Department less than two years previously and did not add any additional acreage. (N.T. 47)

13. In connection with a prior appeal involving the 1995 Revision, the Pennsylvania Environmental Hearing Board thoroughly examined the impacts of Eighty-Four Mining Company's mining activities and the issues raised by the parties during an 18 day hearing. (N.T. 46)

14. As of the date the Department renewed the permit, November 4, 1997, the Environmental Hearing Board had not issued its opinion in *PUSH I* concerning the amount of subsidence bond that Eighty-Four Mining Company was required to post.

15. After the permit was renewed, the Environmental Hearing Board issued an

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identify or move any exhibits into evidence.

Adjudication in the appeal involving the 1995 Revision (July 2, 1999 Adjudication), which held that the Department had abused its discretion by not requiring Eighty-Four Mining Company to post a subsidence bond greater than $10,000.

16. As required by the Board's July 2, 1999 Adjudication, the Department calculated a new subsidence bond for Mine 84, and prior to the hearing in this case, Eighty-Four Mining Company posted a subsidence bond in the amount of $2.1 million dollars. When issued, this bond covered the entire area covered by the 1997 renewal application, retroactively bonding areas that had, as of the date the bond was posted, already been mined. (N.T. 60)

17. The state regulation dealing with submission of renewal qualifications provides that such applications are to be filed 180 days prior to the stated expiration date of a coal mining activities permit. 25 Pa. Code § 86.55(c).

18. The federal regulation dealing with submission of renewal applications provides that such applications are to be filed 120 days prior to the stated expiration date of a coal mining activities permit. (N.T. 49) Eighty-Four Mining Company's renewal application was filed on June 6, 1997, more than 120 days prior to the stated expiration date of the permit. (Board Exhibit 1)

19. The Department did not send a notification letter to Eighty-Four Mining Company prior to April 7, 1997 reminding it to submit its renewal application at least 180 days before the permit's stated expiration date pursuant to 25 Pa. Code § 86.55(c). It is the Department's practice to send such reminder letters to permittees. (N.T. 50-51)

20. Department regulations dealing with renewals contain no sanction for submitting a renewal application "late." 25 Pa. Code § § 86.55, 92.13(a)(2).

21. In a letter dated April 11, 1997, the Department advised Eighty-Four Mining

Company that it should have submitted its permit renewal application by April 7, 1997. The letter directed Eighty-Four Mining Company to submit its renewal. Copies of the necessary renewal forms were attached. (N.T. 24-25, 51-52; Exhibit P-2)

22. In a subsequent letter dated April 22, 1997, the Department advised Eighty-Four Mining Company that its renewal application was late under the regulations. This letter authorized Eighty-Four Mining Company to submit such an application on or before June 7, 1997. (N.T. 25-27, 52-53; Exhibit P-3)

23. The Department has developed a policy for dealing with renewal applications submissions. This policy provides for sending reminders to a permittee which, if ignored, are followed up with a subsequent notice informing the permittee that a renewal application must be received by a set date. (N.T. 53; Exhibit P-4)

24. Eighty-Four Mining Company complied with the Department's request that it submit its renewal application on or before June 7, 1997.

25. Eighty-Four Mining Company submitted its renewal application on June 6, 1997. (Board Exhibit 1)

26. Eighty-Four Mining Company did not propose to add any acreage to the mine in the renewal application. (N.T. 47)

27. The Department has accepted, in other situations, renewal applications for coal mining activity permits less than 180 days prior to the stated expiration date of the permit; Eighty-Four Mining Company did not receive "special" treatment. (N.T. 69)

28. The purpose of the 180 day requirement in 25 Pa. Code §§ 86.52(b) and 86.55(c) is primarily for the Department's administrative convenience. The corresponding Federal requirement is 120 days. *See* 30 CFR § 774.15(b)(1). (N.T. 50)

29. The Department had ample time within which to consider and review Eighty-Four Mining Company's renewal application prior to its stated expiration date. (N.T. 56-57)

30. Coal Mining Activities Permit (CMAP) No. 63831302 was issued under the Department's current regulatory program in 1994. The permit was also revised and reissued on September 22, 1995 following an extensive administrative and technical review. (N.T. 45-47)

31. Prior to reissuing CMAP No. 63831302 the Department conducted a compliance review. No violations which would preclude reissuance of the permit existed. (N.T. 53-56; Exhibit C-5)

32. Under Pennsylvania regulations, mining permits carry a presumption of successive renewals. 25 Pa. Code § 86.55(a).

33. The permit was formally renewed after October 8, 1997 because the Department had to schedule an informal conference on the application that had been requested by "supporters" of PUSH. (N.T. 56)

34. The Department issued the 1997 renewal of CMAP No. 6831302 on November 4, 1997. (Board Exhibit 1)

35. A renewal permit was not issued before October 8, 1997 due to the Department's inability to schedule and conduct an informal public conference prior to that date. A member of the public requested a public conference pursuant to the Department's regulations. (N.T. 56)

36. After the informal public conference was held, the Department acted promptly to consider comments from the public conference and to issue the 1997 renewal. (N.T. 57-58)

37. The Department found no violations of permit standards, regulatory standards or statutory standards at Mine 84 between October 7, 1997 and November 4, 1997. (N.T. 58-59)

38. Eighty-Four Mining Company was in compliance with performance standards

imposed by the permit, the law and applicable regulations as of the date the Department approved its renewal application. (N.T. 58-59)

39. The permit is a "combined" permit, including both permits to mine and a National Pollution Discharge Elimination System (NPDES) permit that authorized Eighty-Four Mining Company to discharge into waters of the Commonwealth. (N.T. 63-65)

40. Eighty-Four Mining Company's NPDES permit had the same stated expiration date as the mining permit. (N.T. 65)

41. Regulations implementing the NPDES permit program predated the coal mining regulations governing the coal mining activities permit program. (N.T. 66)

42. The NPDES permit program regulations expressly authorize the Department to accept for processing renewal applications that are filed less than 180 days prior to the stated expiration date of such a permit. These regulations also governed Eighty-Four Mining Company's renewal application that is the subject of this appeal. (N.T. 67)

43. On or about October 5, 1999, the Department directed Eighty-Four Mining Company to submit an additional subsidence bond in the amount of $2,150,498.50. This request was made pursuant to the Board's Order in its July 2, 1999 *PUSH I* Adjudication. This figure was determined based upon the area covered by the 1997 renewal. (N.T. 59-61; Exhibit C-6)

44. In compliance with the Department's direction, Eighty-Four Mining Company posted the requested bond on or about October 21, 1999. (N.T. 61; Exhibit C-7)

45. The Department revised CMAP No. 63831302 to incorporate the increased subsidence bond on December 15, 1999. Eighty-Four Mining Company appealed the December 15, 1999 permit reissuance to the Environmental Hearing Board. No other party, including PUSH, has appealed the December 15, 1999 permit revision. (N.T. 62: Exhibit C-8)

46. The Department renewed the Mine 84 permit on November 4, 1997, and amended the permit on November 7, 1997. These letters together transmitted the renewal permit. (N.T. 9, 56; DEP Admission No. 1)

47. No testimony or other evidence was introduced to establish that any person who was a supporter of PUSH had any direct interest that was harmed by the Department's decision to accept and process a mining permit renewal application less than 180 days prior to the stated expiration date of the permit.

48. No testimony or other evidence was introduced that the Department's decision to accept and process a mining permit renewal application less than 180 days prior to the stated expiration date of the permit would cause (or did cause) any harm to any individual or the environment.

49. The Appellant did not establish that the Department erred in this case by accepting Eighty-Four Mining Company's application for a renewal of its NPDES permit and the mining permit less than 180 days prior to the stated expiration dates of these permits.

DISCUSSION

PUSH, as the party challenging the issuance of the renewal permit, has the burden of proving by a preponderance of the evidence that the issuance of the renewal permit was contrary to law or unreasonable and inappropriate. 25 Pa. Code § 1021.101(c)(2). Our review of the Department's action is *de novo* as set forth in the landmark Commonwealth decision of *Warren Sand & Grave Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

PUSH argues that its appeal should be sustained on three grounds. First, PUSH contends that the permit should not have been renewed because the mining company's renewal application

was filed less than 180 days from the expiration date of the permit. Second, PUSH argues that since the revised permit expired on October 7, 1997, the Department could not renew an expired permit and so should have required the mining company to submit a new application and go through a full permit review. Finally, PUSH argues that the Department erred in issuing the renewal permit by only requiring a $10,000 subsidence bond.

The Department argues that PUSH cannot raise the late filing of the permit application because the Board's opinion dismissing PUSH's Motion for Summary Judgment decided this very issue and the Board should not revisit the question. In addressing PUSH's second contention, the Department argues that Eighty-Four Mining Company's actions between the permit's stated expiration date and the date the permit was renewed were lawful and authorized by law. The Department points to the mining regulation which states that permits carry a presumption of successive renewals and no basis for denying a renewal of Eighty-Four Mining Company's permit existed. 25 Pa. Code § 86.55(a). Furthermore, the Department contends that the delay in issuing the 1997 Renewal Permit was through no fault of the mining company. The delay allegedly occurred because the Department was not able to schedule an informal public conference.

Finally, regarding PUSH's third argument, the Department points out that pursuant to the Board's Adjudication issued in *PUSH I*, it promptly recalculated the subsidence bond. The recalculated bond was submitted by Eighty-Four Mining Company and incorporated into the Renewal Permit.

Eighty-Four Mining Company echoes the arguments advanced by the Department and further contends that PUSH failed to prove that it has standing to contest the issuance of the Renewal Permit. The coal mining company argues that PUSH offered no evidence that any of its

members had a direct, immediate, or substantial interest in this permit so as to confer legal standing to the organization. PUSH responds to the standing argument by insisting that it proved standing at the hearing. In addition, PUSH argues that since Eighty-Four Mining Company did not raise this argument in its pre-hearing memorandum, it has waived the argument. *See Oley Township v. DEP*, 1996 EHB 1098. PUSH also argues that based on the doctrine of collateral estoppel, PUSH's standing was determined in *PUSH I.*

Preliminarily, we will address the issue of PUSH's standing. We disagree with PUSH's contention that Eighty-Four Mining Company can not raise this issue based on the doctrine of collateral estoppel. Under the doctrine of collateral estoppel, the determination of a fact in a prior action is deemed conclusive between the parties in a subsequent action involving different causes of action if the fact or issue (1) is identical; (2) was actually litigated in the prior action; (3) was essential to the judgment; and (4) was material to the adjudication. *Mason v. Workmen's Compensation Appeal Board (Hilti Fastening Systems Corp.)*, 657 A.2d 1020, 1023 (Pa. Cmwlth. 1995); *Fiore v. Department of Environmental Resources*, 508 A.2d 37 (Pa. Cmwlth. 1986); *Lucchino v. DEP*, 1999 EHB 214. Although some of the same parties were involved in *PUSH I*, the legal and factual issues that PUSH pursued at the hearing on the merits were distinct from those raised in *PUSH I.* Therefore, the doctrine of collateral estoppel is not applicable.

Contrary to the coal mining company's assertion, the issue of standing in an administrative hearing before the Environmental Hearing Board is not a jurisdictional issue that can be raised at any time. It is a waivable issue. *See Mixon v. Commonwealth of Pennsylvania,* 759 A.2d 442, 452 (Pa. Cmwlth. 2000) (standing, in Pennsylvania, is a waivable issue); *Raymond Proffitt Foundation v. DEP*, 1998 EHB 677 (since standing is not a jurisdictional issue, it is not necessary for an organization to demonstrate that it had members who were aggrieved by

the Department's action at the time the appeal was filed; it must be demonstrated that the individuals were members by the expiration of the thirty-day appeal period); *Oley Township v. DEP*, 1996 EHB 1090 (standing is waived where the permittee fails to raise the question of whether the appellants have standing either in dispositive motions or pre-hearing memorandum). Nevertheless, we disagree that the issue of standing has been waived in this appeal. The situation here can be distinguished from the Board's holdings which dictate that the issue of standing must be raised before post-hearing briefs are filed. *See Blose v. DEP*, EHB Docket No. 98-034-R (Adjudication issued March 7, 2000) slip op. 3, n.2; *Oley Township v. DEP*, 1996 EHB 1090. In the present case, PUSH called Mr. Murray as a witness for the specific purpose of demonstrating that the Appellant had standing, the other parties had an opportunity to cross-examine him on that issue, and the issue has been fully and extensively briefed in the post-hearing briefs. Therefore, the issue of standing is properly before the Board.

The question remains whether PUSH established at the hearing, through the testimony of Mr. Murray, that it has standing to pursue this Appeal. Where standing is not conferred by statute, a private party has standing to maintain an action so long as he has a direct, immediate and substantial interest in an appeal. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). It is well-settled that an organization can have standing either in its own right or as a representative of its members. *Barshinger v. DEP*, 1996 EHB 849. Mr. Murray testified that "PUSH is an organization of people who banded together to try to prevent serious damage [and] destruction to their homes and water wells by longwall mining." (N.T. 13) Mr. Murray was also able to name other property owners who belong to PUSH who have been affected by Eighty-Four Mining Company's mining activities. (N.T. 13) Although on cross-examination Mr. Murray's testimony was somewhat confusing as to PUSH's members and the

harm they have suffered, on the whole we find his testimony to be legally sufficient to establish PUSH's legal standing in this appeal.

We base this conclusion on the well-established principle that individuals in an organization do not necessarily have to be parties to an action for the organization to have standing to pursue the action on their behalf. *Chestnut Ridge Conservancy v. DEP*, 1997 EHB 45, 55. As treasurer of this non-profit organization, Mr. Murray testified that his property is within the Subsidence Control Plan and is located on unmined coal. (N.T. 13-14, 17) In addition, both the Department and Eighty-Four Mining Company argue strenuously that this renewal permit involves the same permit area that the Board extensively reviewed in the appeal concerning the 1995 Revision. In that case, the Board heard extensive testimony as to how property owned by individuals identified as members of PUSH would allegedly be affected by the longwall mining conducted by Eighty-Four Mining Company. Therefore, based on the testimony of Mr. Murray and the property interests of the PUSH members, we find that PUSH has a direct, immediate and substantial interest in the renewal of the coal mining permit.

We now turn our attention to the substantive issues raised by PUSH. PUSH continues to argue that the Board should revoke Eighty-Four Mining Company's permit because its renewal application was not filed more than 180 days before the expiration of its mining permit. The applicable regulation, 25 Pa Code § 86.55(c), provides as follows:

> Complete application, for renewal of a permit...shall be filed with the Department at least 180 days before the expiration date of the particular permit in question.

The rules of statutory construction apply to regulations as well as to statutes. *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 590 A.2d 384 (Pa. Cmwlth. 1991). It is therefore presumed that every word, sentence, or provision of a statute is intended for some

purpose and accordingly must be given effect. *Commonwealth v. Lobiondo*, 462 A.2d 662 (Pa. 1983). A regulation shall not be presumed to have an interpretation which is absurd or unreasonable. *Philadelphia Suburban Corp. v. Commonwealth of Pennsylvania*, 601 A.2d 893 (Pa. Cmwlth. 1992).

As we indicated in ruling on PUSH's Motion for Summary Judgment, critical to our decision is whether the word "shall" in this regulation is mandatory or merely directory. The Department contends that the 180-day requirement set forth in the regulation exists primarily for the convenience of the Department to assure that the Department has adequate time to review the application. Indeed, the federal regulation only requires that coal mining companies submit renewal applications within 120 days of the permit expiration date. 30 C.F.R. § 774.15(b)(1).

The Department, since 1988, has had a written policy to address this very issue. (N.T. 27-28; Exhibit P-1) Basically, the policy involves prodding the coal company to file its renewal application with increasing sanctions the longer the delay.

As pointed out by the Department, this is not a case about claims of pollution to the waters of the Commonwealth. Neither is it a case about claims of unsafe, environmentally damaging coal mining practices. This is not a case about claims that the public was not given notice of the Department's actions or mining activity. Instead, the Department argues persuasively that this is simply about fixing or resolving problems during a permit review. As we noted in *PUSH I,* it is a common practice and integral to the permitting process that the Department indicate problems in the application and give the mining company an opportunity to correct these problems. It should also be emphasized that some of these problems are based on comments or testimony from the public during the permit review stage. In fact, during the review of the Permit Application in *PUSH I,* the Department sent three correction letters to

Eighty-Four Mining Company. These correction letters set forth certain deficiencies in the permit application including missing, incomplete, inadequate, or erroneous information. *PUSH v. DEP,* 1999 EHB 914.

In its post-hearing brief, PUSH ignores our earlier holding in which we reviewed the case law and regulations to determine that the word "shall," when used in the mining regulation in question, is directory rather than mandatory, and as such, the regulation does not, as a matter of law, require the Department to refuse to process a late application or mandate any specific sanction. *PUSH v. DEP,* 1998 EHB 250, 255-257. We did provide the Appellant with the opportunity to come forward with facts at the hearing to prove their argument that the Department erred in not rejecting the permit within 180 days. The Appellant did not do so. The record is devoid of even a scintilla of evidence establishing this premise.

An interesting twist to the Appellant's original argument is set forth in PUSH's reply brief. (*See* PUSH's reply brief at 9-17). PUSH asserts that courts have concluded that statutory language is directory when applied to a public body and mandatory when directed to a private party, such as the coal mining company in this case. The Department and Eighty-Four Mining Company strongly disagree.

A close review of all the cases cited by the parties reveals that whether the party being directed to act was a private party or a public body was neither controlling nor germane to whether the courts construed the word "shall" as directory or mandatory. *See Francis v. Corleto,* 211 A.2d 503 (Pa. 1965) (the word shall may be interpreted as either mandatory or directory); *Allegheny County v. Pennsylvania Public Utility Commission*, 159 A.2d (Pa. Super. 1960) (when time and manner are not the essence of the thing required to be done, the statute will be regarded as directory and proceedings under it will be held valid); *Kowell Motor Vehicle Registration*

Case, 228 A.2d 50 (Pa. Super. 1967) (when referring to the time of doing something, shall has usually been considered as directory); *Delaware County v. Department of Public Welfare*, 382 A.2d 240 (Pa. Cmwlth. 1978) (since time is not the essence of the statute section in question, the word shall is directory only). What is relevant is that the regulations at issue relate to a time within which something is to be done, and as a general rule, the courts of this Commonwealth have held, regardless of whether the party so charged is a private or public entity, that such time frames are directory.

It has been noted that whether a particular statute is mandatory or directory does not depend upon its form, but upon the intention of the legislature, which is to be ascertained from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. *McQuiston's Adoption*, 86 A. 201 (Pa. 1913). In *Kowell Motor Vehicle Registration Case*, the court stated:

> To hold that a provision is directory rather than mandatory, does not mean that it is optional--to be ignored at will. Both mandatory and directory provisions of the legislature are meant to be followed. It is only in the **effect** of non-compliance that a distinction arises. A provision is mandatory when failure to follow it renders the proceedings to which it relates illegal and void; it is directory when the failure to follow it does not invalidate the proceedings.

228 A.2d at 52. (Emphasis in original)

In addition, the regulation is silent as to a penalty for its violation. Appellant presents no authority in support of its harsh, hypertechnical, and draconian argument that the coal mining company's failure to file its renewal permit more than 180 days prior to the permit expiration date should result in the forfeiture of its right to mine coal pending the submittal and approval of an entirely new application. This is especially true when, as here, Appellant did not present any

evidence showing that the coal mining company's failure to file its renewal application more than 180 days prior to the permit expiration had any effect on when the Department actually issued the permit. In fact, the Department's witness testified that the coal company's submittal date had absolutely no effect on when the renewal permit was actually issued. In other words, the fact that the renewal permit was issued on November 4, 1997 when the permit had expired on October 7, 1997 was not related to the fact that the coal mining company's renewal application was filed less than 180 days prior to the expiration of its mining permit.

Our holding is further supported by 25 Pa. Code § 86.55(a) which states that once a permit is issued there is a presumption that it will be renewed:

> A valid, existing permit issued by the Department will carry with it the presumption of successive renewals upon expiration of the term of the permit. Successive renewals will be available only for areas which were specifically approved by the Department on the application for the existing permit.

25 Pa. Code § 86.55(c) contains the requirement that directs that permit renewal applications should be filed "at least 180 days before the expiration date of the permit."

The subsection contains no penalty for a late filing. Significantly, subsections (f) and (g) of this same regulation make no mention of a late permit renewal filing:

> (f) Unless the Department finds that the permit should not be renewed under subsection (g), it will issue a permit renewal after finding that the requirements of this chapter and that requirements of public participation and notification are satisfied.
>
> (g) A permit will not be renewed if the Department finds one of the following:
>
> (1) The terms and conditions of the existing permit are not being satisfactorily met.
>
> (2) The present mining activities are not in compliance with the environmental protection standards of the

Department.

(3) The requested renewal substantially jeopardizes the operator's continuing ability to comply with the acts, this title and the regulatory program on existing permit areas.

(4) The operator has failed to provide evidence that a bond required to be in effect for the activities will continue in full force and effect for the proposed period of renewal, as well as an additional bond the Department might require.

(5) Revised or updated information required by the Department has not been provided by the applicant.

(6) The permittee has failed to provide evidence of having liability insurance as required by § 86.168 (relating to terms and conditions for liability insurance).

The specific violation of the 180 day renewal submittal is notably absent. PUSH's proposed sanction of not renewing the permit strikes us as particularly egregious especially in the context of the overall regulatory framework. PUSH's argument that mistakes in the permitting application process cannot be later corrected in appropriate cases is as shortsighted as it is incorrect.

We hasten to add that although there is a presumption that permits should be renewed unless one of the enumerated exceptions exist, the permits should be renewed *before* the underlying permit expires. Neither the Department nor the coal mining company point to any statutory or regulatory authority authorizing the operation of an underground longwall coal mine after the expiration of the underlying permit while the Department is reviewing the renewal permit. While in this case we believe that the evidence conclusively shows that no

environmental harm occurred during this short period after the underlying permit expired and before the renewal permit was issued, and that Eighty-Four Mining Company operated Mine 84 in accordance with the permit conditions, technically there was no permit. Although we believe that the error in this case was *de minimus* and certainly does not justify the revocation of Eighty-Four Mining Company's coal mining permit, we strongly emphasize that both the Department and coal mining company should take the necessary steps to make sure such an occurrence does not happen again.

PUSH's continued reliance on our decision in *Tinicum Township v. DEP*, 1998 EHB 1119, *aff'd.* 722 A.2d 1129 (Pa. Cmwlth. 1998) is misplaced. In ruling on PUSH's motion for summary judgment we dismissed this same argument. *Tinicum Township* is based upon much different regulations and much different facts and is thus not germane to the case presently before us.

Tinicum Township involved a waste transfer facility that had been permitted in 1976 under prior waste management regulations. 1997 EHB at 1121, 1135. No waste had ever been processed at the transfer facility. In 1988, new waste regulations became effective. These new regulations were much more comprehensive and rigorous than the previous regulations. 1997 EHB at 1135. The new regulations specifically addressed the continuing viability of permits issued under the prior, less protective, regulations. Indeed, 25 Pa. Code § 271.211(e) provided that if no waste was processed at a facility for a five year period, the permit would become null and void.

No waste was ever processed at the transfer station in *Tinicum Township*. Thus, by clear operation of law under the concise language of the regulation, the transfer station permit was void. 1997 EHB 1135-37. Here, the regulation in question has no corresponding sanction if the

permit renewal application is not filed within 180 days of the permit's expiration.

Secondly, the policy underpinnings of the two regulations are vastly different. In *Tinicum Township*, the transfer station was permitted long ago under obsolete regulations and had never been in operation. The Department argued that it had a strong environmental regulatory interest in having these "dinosaurs" brought under the new regulations. No such concern exists with the coal mine operated by Eighty-Four Mining Company under current coal mining regulations. Its permit and permit revision were reviewed and approved under the current modern mining regulations. Mine 84 has operated under the current permit and regulations. N.T. at 45-47. Thus, current environmental coal mining standards already govern the operation of this mine unlike the situation in *Tinicum Township*.

Finally, PUSH argues that the Department erred in requiring Eighty-Four Mining Company to post only a $10,000 subsidence bond for the renewal permit. For the reasons set forth in our July 2, 1999 Adjudication in *PUSH I*, we agree that the Department may not simply require a uniform $10,000 bond for all underground coal mining permit applications but must conduct a proper analysis to determine an appropriate amount. However, PUSH's objection regarding the amount of the subsidence bond appears to be moot at this stage of the appeal.

It is true that at the time the Department reissued the renewal permit, it required Eighty-Four Mining Company to post a bond in the amount of only $10,000. Subsequent to the reissuance of the permit, and PUSH's appeal thereof, the Board held in *PUSH I* that the Department may not simply require bonds in the uniform amount of $10,000 for all underground mining permit applications but must conduct an analysis in accordance with the requirements of the Mine Subsidence Act and regulations. *People United to Save Homes v. DEP,* 1999 EHB 457, 538-543. The Department recalculated the subsidence bond in the amount of $2,150,498.50

and Eighty-Four Mining Company posted a bond in this amount.

Where an event occurs during the pendency of an appeal that deprives the Board of the ability to provide effective relief, the matter becomes moot. *Ziviello v. DEP,* 1999 EHB 889, 891; *Buddies Nursery, Inc. v. DEP*, 1999 EHB 885, 886. In this case, the question of whether the $10,000 bond is adequate has been litigated and adjudicated. The Department has recalculated the bond and the coal mining company has posted a bond in the increased amount. PUSH has made no allegation that the amount of the new bond is inadequate; nor has it appealed the Department's recalculation. Quite simply, there is no further relief the Board can provide.

In its reply brief, PUSH asserts that the matter is not moot since Eighty-Four Mining Company has appealed the recalculation of the bond. While the issue of the bond amount may not be moot in that appeal, there is no further action that the Board can take with regard to the amount of the bond in *this* appeal. We, therefore, find that PUSH's objection as to the adequacy of the original $10,000 bond posted in this appeal is now moot.

CONCLUSIONS OF LAW

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

2. PUSH has legal standing to pursue this appeal because it has established that it has a direct, immediate and substantial interest in the renewal of the mining permit. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Raymond Proffitt Foundation v. DEP*, 1998 EHB 677.

3. The Environmental Hearing Board's review of the Department's action in issuing a renewal coal mining permit is to make a *de novo* determination of whether the coal mining permit should have been issued. *Warren Sand & Gravel Co., Inc. v. Department of*

Environmental Resources, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

4. Coal mining permits carry a presumption of successive renewals and no basis for denying a renewal of Eighty-Four Mining Company's permit existed. 25 Pa. Code § 86.55(a).

5. The Department did not err in granting a renewal permit to Eighty-Four Mining Company.

6. PUSH's objection regarding the adequacy of the $10,000 subsidence bond is moot.

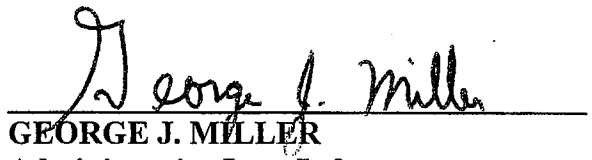
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES	:	
	:	
v.	:	**EHB Docket No. 97-262-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 28th day of December, 2000, the appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: December 28, 2000

c: **DEP Bureau of Litigation**
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