

Environmental Hearing Board

Adjudications and Opinions



2009
VOLUME II

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Chairman and Chief Judge

**JUDGES
OF THE
ENVIRONMENTAL HEARING BOARD**

2009

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Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Michael L. Krancer
Judge	Richard P. Mather, Sr.
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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2009.

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 Judges, the jurisdiction of the Board remains unchanged.

ADJUDICATIONS

<u>Case</u>	<u>Page</u>
Angela Cres Trust of June 25, 1998	342
Carroll Township	401
Crum Creek Neighbors	548
DEP v. Dennis S. Sabot, Sr. (Upon Reconsideration – 2007-255-CP)	38
DEP v. George and Shirley Stambaugh	481
Douglass Township	190
Foundation Coal Resources Corporation and Pennsylvania Land Holdings Corporation, and Realty Company of Pennsylvania	49
HouseInspect, Parris Bradley, Peter Bradley and Blaine Illingworth	414
Joseph F. John	121
Kenneth and Kim Jones	509
M & M Stone Co.	495
Mystic Brooke Development, L.P.	146
Michael D. Rhodes and Valley Run Water Company, LLC	599
Dennis S. Sabot, Sr. (Upon Reconsideration – 2007-158)	1
Dennis S. Sabot, Sr., DEP v. (Upon Reconsideration – 2007-255-CP)	38
George and Shirley Stambaugh, DEP v.	481
Wampum Hardware Co.	154

OPINIONS

<u>Case</u>	<u>Page</u>
ADK Development Corp., Inc., et al.	251
Allegheny Milestone, Inc.	441
Amerikohl Mining, Inc.	175
Angela Cres Trust of June 25, 1998 (Motion for Expedited Review of a Motion to Compel)	184
Angela Cres Trust of June 25, 1998 (Motion to Compel Discovery).....	264
Angela Cres Trust of June 25, 1998 (Petition to Reopen Record)	446
Louis Arpino, Gene L. Reed, and Ronald W. Downey	579
Edward Ballas	652
Robert Bishop	259
Richard L. Burrows and Betty Lou Burrows	20
Consol Pennsylvania Coal Company and Consol Pennsylvania Coal Company, LLC	393
D.B. Enterprise Developers and Builders, Inc., DEP v. (Discovery Motion)	278
D.B. Enterprise Developers and Builders, Inc., DEP v. (Corrected Discovery Motion)	290
D.B. Enterprise Developers and Builders, Inc., DEP v. (Motion for Sanctions)	467
James B. Daly, d/b/a JBD Waste Hauling, LLC and Tina M. Daly	647
Mr. Kirk E. Danfelt and Mrs. Eva Joy Giordano, DEP v.	459
DEP v. D.B. Enterprise Developers and Builders, Inc. (Discovery Motion)	278
DEP v. D.B. Enterprise Developers and Buildings, Inc. (Corrected Discovery Motion)	290
DEP v. D.B. Enterprise Developers and Builders, Inc. (Motions for Sanctions)	467

DEP v. Mr. Kirk E. Danfelt and Mrs. Eva Joy Giordano	459
DEP v. Quaker Homes, Inc.....	283
DEP v. Wes Tate	295
Falcon Coal & Construction Co.	209
Hatfield Township Municipal Authority, et al.	587
Lilly E. Hirsch	229
J&D Holdings	15
Lower Salford Township Authority et al.	384
Lower Salford Township Authority and Upper Gwynedd-Towamencin Municipal Authority (Application for Attorneys' Fees)	633
Lower Salford Township Authority and Upper Gwynedd-Towamencin Municipal Authority (Motion to Exclude Evidence)	379
M&M Stone Co.	213
Sidney L. and Debra A. Miles	179
Mystic Brooke Development, L.P. and Britt Energies, Inc.	302
Northampton Township and Northampton, Bucks County, Municipal Authority	202
PA Waste, LLC	317
PDG Land Development, Inc.	268
Barry Pearson	628
Quaker Homes, Inc., DEP v.	283
Michael D. Rhodes and Valley Run Water Company, LLC (Motion in Limine)	237
Michael D. Rhodes and Valley Run Water Company, LLC (Motion to Clarify Issues or Amend)	325
Michael D. Rhodes and Valley Run Water Company, LLC (Motion to File Sur-Reply Brief)	504

Otto N. Schiberl	44
Wes Tate, DEP v.	295
Telford Borough Authority	333
Telford Borough Authority, et al.	434
The Rail Road Action and Advisory Committee and Dan E. Gillis	472
Tilden Township and Frank T. Perano	452
UMCO Energy, Inc.	24
Borough of West Chester and West Goshen Sewer Authority	308
West Norriton Township	9

SUBJECT MATTER INDEX – 2009 EHB DECISIONS

Act 537 (see Sewage Facilities Act) – 401

Act 54 – 393

Administrative Code, Section 1917-A – 24, 49, 146, 154, 295, 401, 414, 481, 495

Administrative finality – 342

Administrative order (see Compliance order) – 154

Admissions – 278, 283, 290, 459

Amendment of pleadings or notice of appeal – 325

Appealable action – 302, 414, 652

Attorneys' Fees and Costs - 24, 379, 587, 633

- Clean Streams Law, Section 307 – 24, 379, 587, 633

Bituminous Coal Mine Act, 52 P.S. § 701.101 et seq. – 49

Bituminous Mine Subsidence and Land Conservation Act (aka Subsidence Act), 52 P.S. § 1406.1 et seq. – 24, 146, 509

Bonds – 121

Burden of proof – 401, 509, 548

Civil penalties – 1, 20, 38, 44, 278, 283, 290, 295, 325, 441, 459, 467, 481, 504, 599

Clean Streams Law, 35 P.S. § 691.1 et seq. – 24, 121, 146, 154, 251, 278, 283, 290, 295, 379, 384, 441, 459, 467, 481, 495, 587, 633

- Section 307 (attorneys' fees and costs) (see Attorney's Fees) – 24, 379, 587, 633
- Section 316 (landowners and occupiers) – 251, 481

Coal Refuse Disposal Control Act, 52 P.S. § 30.51 et seq. – 146

Compel, motion to – 184, 264, 434, 587

Compliance order/Administrative order – 154

Continuance and extensions – 184

Dam Safety and Encroachments Act, 32 P.S. § 693.1 et seq. – 1, 38, 295, 446

Default judgment – 295, 459

Depositions – 317

Discovery – 184, 202, 283, 317, 434, 467, 587

Dismiss, motion to – 20, 175, 229, 302, 308, 333, 441, 452, 652

Dismissal, of appeal – 175, 179, 209, 229, 259, 268, 302, 401, 414, 441, 495, 628, 647, 652

Enforcement order – 1, 24

Evidence – 213, 237, 379, 393, 459, 472

Experts – 237, 384, 548

Extensions (see Continuance) – 184

Failure to comply with Board orders – 179, 259, 459, 467, 628, 647,

Failure to defend or prosecute – 15, 295, 459

Failure to perfect – 259

Finality (see Administrative finality) – 342

Hazardous Sites Cleanup Act, 35 P.S. § 6020.202 et seq. – 251

Interrogatories – 283, 467

Jurisdiction – 302, 384, 434, 579, 633

Limine, motion in – 213, 237, 379, 384, 393, 472

Mootness – 175, 229, 264, 495

Notice – 308, 333, 579

Notice of appeal – 20, 259, 308, 333, 579

Notice of appeal, timeliness (see Timeliness) – 20, 308, 333, 579

NPDES – 452, 548

Oil and Gas Act, 58 Pa. C.S. § 3201 et seq. – 49

Pennsylvania Bulletin – 579

Pennsylvania Rules of Civil Procedure – 9, 278, 283, 290, 467

Permits (specify which statute, if applicable) – 1, 24, 49, 342, 548, 599

- Dam Safety and Encroachments Act – 1, 342
- Bituminous Mine Subsidence and Land Conservation Act – 24
- Oil and Gas Act – 49
- Safe Drinking Water Act – 599

Post hearing briefs – 414, 504

Pre hearing memoranda – 237

Prejudice – 325

Prepayment of civil penalty – 441

Privilege – 213, 317

- Attorney client – 213, 317
- Work product – 213, 317

Production of documents – 264, 283, 467

Pro se appellant – 179

Prosecutorial discretion – 302, 342

Protective order – 202, 213, 317, 434

Quash, motion to – 202, 213

Radon Certification Act – 414

Reconsideration – 1, 38

Relevancy – 472

Remand – 509, 548

Reopen record – 446

Representation – 209

Ripeness – 452

Safe Drinking Water Act, 35 P.S. § 721 et seq. – 325, 504, 599

Sanctions – 179, 259, 283, 295, 434, 459, 467, 628, 647

Scope of review – 342

Service – 20

Sewage Facilities Act, 35 P.S. § 750.1 et seq. – 9, 15, 401, 452

- Official plans (§ 750.5) – 401, 452

Solid Waste Management Act, 35 P.S. § 6018.101 et seq. – 20, 44, 190

- Municipal waste – 190
- Residual waste – 190
 - o Beneficial use – 190

Standard of review – 472

Standing – 452, 548

Subpoena – 202, 213

Summary judgment – 9, 15, 44, 251, 268

Supersedeas – 229

Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 et seq. – 121, 146, 154, 268, 441

- Affecting water supply (§ 1396.4b(f)) – 146
- Blasting (§ 1396.4b(b)) – 154
- Buffer zones (§ 1396.4b(c)) – 268

Timeliness – 20, 308, 333, 579

TMDLs – 308, 333, 379, 384, 434, 633

Weight and credibility – 548



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 :

v. :

COMMONWEALTH OF PENNSYLVANIA, :

DEPARTMENT OF ENVIRONMENTAL :

PROTECTION and MILLCREEK :

TOWNSHIP, Permittee :

EHB Docket No. 2006-086-R
(Consolidated with 2006-006-R)

Issued: June 25, 2009

ADJUDICATION

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

In this appeal by a landowner challenging the Department of Environmental Protection's decision to extend a water obstruction and encroachment permit authorizing a Township to widen and deepen a channel located in part on the landowner's property, a majority of the Board remands the matter to the Department where evidence indicates that flooding will occur downstream of the project. Although the Township argued that computer modeling done by its expert showed that flooding already occurs in the area downstream of the project site, testimony by area residents contradicted the computer modeling. Moreover, if flooding does already occur in the area, the Board is hesitant to permit the further extension of the permit which will send an even higher volume of storm water to the area. Witnesses for both the Department and the Township acknowledged that flooding will occur at a fish hatchery located immediately downstream of the project.



The landowner's appeals of the permit extensions are not barred by administrative finality. However, while the Board may consider the merits of the permit, our examination is limited to determining whether the permit should be extended, not whether it should have been issued in the first instance.

Finally, objections pertaining to the Township's storm water management plan are outside the scope of this appeal. The Board's jurisdiction is limited to reviewing actions of the Department.

INTRODUCTION

This case arises from two consolidated appeals filed by the Angela Cres Trust of June 25, 1998 (the Trust), challenging the Department of Environmental Protection's (Department) decisions to extend a water obstruction and encroachment permit issued to Millcreek Township (referred to herein as either Millcreek or the Township). The permit, which was issued in 2000, authorizes the Township to widen and deepen a channel¹ that runs through property owned by the Trust, as well as replace culverts on the Trust property. The Township contends the work is necessary in order to prevent flooding along a township road known as Heidler Road and to provide drainage for runoff originating south of Heidler Road. The project is known interchangeably as the "Heidler Road Channel Improvement Project" or "Heidler Road Drainage Improvement Project." We will refer it herein as "the channel project."

The "channel project" is part of an overall plan by the Township aimed at reducing flooding and providing drainage for runoff originating to the south of Heidler Road. The overall plan also consists of the construction of a new storm sewer system along Heidler Road, known as

¹ The Trust refers to the area in question as being a "ditch" while the Township and the Department refer to it as a "channel." Although the area in question does vary in size, we see no reason to differentiate between the terminology used to describe it. A "water of the

the “storm sewer project.” The permit at issue in this appeal covers only the “channel project.”

Two site views were conducted in this matter, the first one prior to the hearing in 2007 and the second one more recently on April 27, 2009. A seven-day hearing was held in Pittsburgh and Erie before Acting Chairman and Chief Judge Thomas W. Renwand. Based on the record, we make the following findings of fact:

FINDINGS OF FACT

Background:

1. The Angela Cres Trust of June 25, 1998 (the Trust) is the appellant in this matter. The Trust is the owner of property located along Heidler Road in Millcreek Township where Millcreek Township proposes to conduct a portion of the work authorized by the permit that is the subject of this appeal. (Notices of Appeal)
2. Lori Hirt is the Trustee of the Angela Cres Trust and has full authority to act on behalf of the Trust. (T. 814)
3. Millcreek Township is the holder of Permit E25-602 issued under the Dam Safety and Encroachments Act for the project known alternatively as the “Heidler Road Drainage Improvement Project” or “Heidler Road Channel Improvement Project” (hereinafter “channel project.”) (Notices of Appeal)
4. The Department of Environmental Protection (Department) is the agency authorized to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§ 693.1-693.27; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1-691.1001; and the regulations promulgated thereunder.

Commonwealth” may be either a ditch or a channel of conveyance. 35 P.S. § 691.1.

The 2,600 Foot Channel Project:

5. Millcreek Township submitted a permit application to the Department on January 21, 2000 proposing to widen and deepen 2,600 feet of an area that consists of a channel, ditch or drainage area of varying width and depth (hereinafter referred to as “the channel”), running from Heidler Road to a driveway on the Parker property (the January 2000 permit application). (Trust Ex. 1; T. 479)

6. By letter dated February 2, 2000, the Department informed Millcreek Township that the January 2000 permit application was administratively incomplete. Among other things, the Department requested Millcreek to provide revised hydrologic and hydraulic calculations, a stream survey, justification for the project and signed releases from affected property owners showing acceptance and support for the project. (Trust Ex. 15)

7. In a telephone conversation with Millcreek Township engineer Rick Morris and representatives of Hill Engineering, Department engineer Karl Gross advised the Township that the project should involve the least amount of environmental incursion necessary to accomplish the goals of the project. (T. 530-31; Trust Ex. 23)

8. In a telephone conversation on May 15, 2000, Millcreek Township engineer Rick Morris asked the Department for a letter stating that it would not issue a permit for the entire length of the channel project, i.e., 2,600 feet, which Mr. Gross declined to do. However, Mr. Gross agreed to waive the stream assessment and hydraulic and hydrologic assessment for a shorter project. (T. 258-59; Trust Ex. 23)

9. The Township did not resubmit the application with the information requested by the Department; therefore, by letter dated May 18, 2000, the Department informed the Township that because no response had been received to the February 2, 2000 letter, the January 2000

permit application would be considered withdrawn. (T. 502; Trust Ex. 16)

The 800 Foot Channel Project:

10. Millcreek Township submitted a revised permit application on August 10, 2000 (the August 2000 permit application). (Trust Ex. 2; T. 38, 502-03)

11. The August 2000 permit application reduced the total length of the channel project (i.e., the deepening and widening of the channel) to 800 feet. (Trust Ex. 2; T. 503)

12. The project was shortened at the request of the Department on the basis that Chapter 105 of the regulations requires that environmental incursion be kept to a minimum and water courses be maintained as close to their natural course as possible. It was the Department's determination that the 2,600 foot project would have impacted a stable vegetative channel. (T. 1190-95)

13. The August 2000 permit application identified Millcreek Township as the "owner" and the Trust as an adjoining property owner. (Trust Ex. 2)

14. The August 2000 permit application for the 800 foot project included the same hydraulic and hydrologic analysis as that submitted with the January 2000 permit application for the 2,600 foot project. (T. 504-05; Trust Ex. 2)

15. The August 2000 permit application states that the purpose of the channel project is "to provide 25 year runoff conveyance of upstream drainage runoff." (Trust Ex. 2, p. 254)

16. Notice of the permit issuance was published in the Pennsylvania Bulletin.

17. Affected property owners were not given actual notice of the August 2000 permit application or issuance. (T. 837)

18. Laurie Hirt, the trustee of the Angela Cres Trust, was not aware of the permit issuance nor the ability to provide comments to the permit application. (T. 820)

19. Had she been aware of the permit application, she would have provided comments to the Department. (T. 820)

Extensions of the Permit:

20. On November 19, 2003, Millcreek Township requested a two-year extension of the permit, stating that it had not commenced construction of the channel project because it had been unable to obtain the necessary easements. (Millcreek Ex. 6)

21. On December 23, 2003, the Department granted Millcreek Township an extension until December 31, 2005. (Trust Ex. 54)

22. Affected property owners were not given actual notice of the 2003 extension, nor was it published in the Pennsylvania Bulletin. (T. 837, 1220)

23. Ms. Hirt, the trustee of the Angela Cres Trust, was not aware of the 2003 extension request or approval. (T. 820)

24. An action in eminent domain was filed by Millcreek Township against the Trust in the Erie County Court of Common Pleas in 2005. (T. 902) As of the date of this adjudication, there has been no decision or resolution in that action.

25. On August 12, 2005, Millcreek Township requested an additional extension of the permit, again because the Township had been unable to obtain the necessary access to the Trust property. (Millcreek Ex. 8)

26. Affected property owners were given notice of the 2005 extension request and the public was given an opportunity to comment. (T. 1213; Department Ex. F)

27. In response to the 2005 extension request, Patrick Williams of the Department requested an explanation of why the work had not been completed to date, a description of the alternatives that Millcreek Township had considered in connection with the project and an

analysis of why those alternatives were not feasible. (T. 903; Comm. Ex. D)

28. Mr. Williams also requested that Millcreek Township submit a hydraulic and hydrologic analysis in connection with the project and an explanation of how additional development in the watershed would affect peak flows. (Comm. Ex. D)

29. An updated hydraulic and hydrologic analysis was submitted to the Department on November 28, 2005. (Comm. Ex. E)

30. A temporary extension (the 2005 extension) was granted until February 28, 2006, in order to provide the Department with an opportunity to publish the extension request in the Pennsylvania Bulletin and provide the public with an opportunity to comment. (T. 1211-12)

31. The Department complied with its internal guidance document in reviewing the 2005 extension request. The guidance document states that a request for time extension should include a report of the amount of work completed to date and an explanation of why the project has not been completed. (T. 1202-06; Comm. Ex. 1)

32. The Township's request to extend the permit was classified as a category one extension because of its legal significance. The Department's guidance document recommends that category one extensions be published in the Pennsylvania Bulletin. (T. 1205-06; Comm. Ex. 1)

33. The Department granted an additional extension (the 2006 extension) in order to provide the Township with an opportunity to attempt to resolve the property issues involved with the project, and specifically, the eminent domain proceedings filed against the Trust property. (T. 1219)

Overall Project to Reduce Flooding and Convey Runoff:

34. The purpose of the channel project is to convey storm water from the south side

of Heidler Road to an unnamed tributary to Walnut Creek on the north side of Heidler Road and to reduce flooding along Heidler Road. (T. 282; Trust Ex. 2)

35. Until 1997, Heidler Road was owned and maintained by the Commonwealth. In 1997, Heidler Road became a township road, and at that time Millcreek Township became responsible for its maintenance. (T. 62-64)

36. Heidler Road intersects with Sterrettania Road in the area of the Walnut Creek Middle School. (T. 62; Millcreek Ex. 35)

37. Beneath Heidler Road lies a 30 inch concrete pipe that conveys storm water from the area south of Heidler Road to the area north of Heidler Road. The pipe lies several hundred feet west of the intersection with Sterrettania Road. (T. 95)

38. The 30 inch pipe discharges to an area on the north side of Heidler Road on property owned by the Skellys. The area contains a small channel that turns east and north onto the property of the Trust. (Millcreek Ex. 34, 35, 39)

39. The channel runs through a driveway culvert located on the Trust property and then continues north to an area referred to as "Brown's Farm," where it again runs through a driveway culvert. The channel then runs north to the Parker property, through the Parker driveway culvert and finally to Walnut Creek. (Millcreek Ex. 34, 35, 39)

40. The distance from Heidler Road to the Trust driveway culvert is approximately 800 feet, and from Heidler Road to the Parker driveway culvert is approximately 2,600 feet. (Millcreek Ex. 34, 35, 39)

41. Surface flow in the subdrainage area in question is from south to north. (T. 993-98)

42. Storm water from the south side of Heidler Road drains toward the 30 inch pipe

that crosses under Heidler Road and then discharges from the 30 inch pipe to the channel on the north side of Heidler Road. (T. 734-37, 994-97)

43. New housing developments that have been constructed south of Heidler Road since 1999 have increased the amount of storm water in the area. (T. 600-27)

44. Prior to development in the area, it is reasonable to conclude that Heidler and Sterrattania Roads provided a natural barrier to storm water moving from the south to the north, and storm water would not have topped the roads during a normal storm event. (T. 1091-92)

45. The development of new homes has reduced the infiltration capacity of soils in the area. (T.581, 598-99, 623-27)

46. There is a depression in the land running along the south side of Heidler Road. When the capacity of the 30 inch concrete pipe is exceeded during a rain event, water begins to pond in this depression and then flows over Heidler Road. (T. 1015-18)

Storm Sewer Project:

47. In 1997, Millcreek Township asked its engineer, Rick Morris, to evaluate the flooding problem that existed in the Heidler Road area. (T. 864)

48. Mr. Morris identified the inadequacy of the Township's existing storm water system along Heidler Road. (T. 868-73)

49. As part of his analysis, Mr. Morris concluded that a storm sewer needed to be constructed along Heidler Road to replace the ditches and culverts. He also concluded that the 30 inch concrete pipe under Heidler Road needed to be enlarged and that improvements were needed to the area downstream of where the pipe discharged. (T. 874)

50. Hill Engineering was retained to design the storm sewer improvements, and Royal Homes Construction and Development was retained to construct the project. (T. 70, 106, 203,

874-76)

51. Millcreek's original intent was to construct the channel project before the storm sewer project, but because the Township experienced delays in obtaining easements, the storm sewer project was begun first. (T. 203-04)

52. Construction of the storm sewer project commenced in May 1999. (T. 876)

53. The storm sewer project consisted of a complex arrangement of pipes of various sizes. (T. 188-89, 371-80)

Flooding of Areas Along Heidler Road:

54. Flooding has occurred on Heidler Road and on certain properties situated along Heidler Road. (T. 324-29, 317-18, 64-66) Flooding has occurred both prior to and after the construction of the new housing developments to the south of Heidler Road. (T. 66, 325, 317-18)

55. Mr. Tim Fitzgerald resides at 5182 Heidler Road, on the north side of the road. He has lived there since 1976. (T. 322, 324)

56. When Mr. Fitzgerald and his family moved into the house in 1976, the area to the south of Heidler Road consisted of farmland; today that area is a housing subdivision. (T. 324)

57. Mr. Fitzgerald has experienced flooding on his property. The first flooding event occurred in the winter of 1976. On that occasion, floodwaters overtopped and crossed Heidler Road. (T. 324-25)

58. From 1976 to 1999, the Fitzgerald property was flooded approximately 10 times, and from 1999 to the hearing, the property was flooded approximately three to four times. (T. 325)

59. Mr. John Eller resides at 5201 Heidler Road on the south side of Heidler Road. He has lived there since 1979. (T. 315-16)

60. At the time he moved into his home, the area to the south consisted of planted crops or pasture land. That area today is a housing subdivision. (T. 316-17)

61. Mr. Eller experienced flooding at his home during the first year he lived there, during Christmas of 1979. (T. 317) This occurred prior to any construction of the housing developments to the south. (T. 318)

62. The Eller property has been flooded approximately 10 to 20 times since he has lived there. (T. 318)

63. During one occasion when Heidler Road flooded, a car ended up in the front lawn of the Eller property. (T. 318)

64. Mr. Carl Guerin has spent a great deal of time in the area near where the channel project is proposed to take place. He swam in the area as a child and raised fish at the fish hatchery located on the Trust property. He never observed water overtopping the banks of the channel or ditch. (T. 173, 185)

65. Mr. Jim Parker has lived in the area since 1974. (T. 844) His property is downstream of the Trust property. (T. 845) He has never experienced flooding on his property, other than an incident where a picnic table was thrown into the channel. Nor has he observed flooding on the Trust property or Brown's Farm property. (T. 846)

66. Although the construction of the new storm sewer system alleviated flooding for some residents, flooding worsened for at least one resident, Mr. Tim Fitzgerald. (T. 319, 876, 327)

67. The flooding that occurred on the Fitzgerald property after the Township completed its storm sewer project became more intense. (T. 327)

68. Pipes of the storm sewer project have been blockaded in order to prevent flood

damage to Mr. Fitzgerald's property. (T. 942)

69. The Trustee of the Angela Cres Trust, Laurel Hirt, observed flooding on the Trust property in July 2004 and March 2006, after completion of the Township's storm sewer project. (T. 825-29; Millcreek Ex. 56-57)

The Channel Project:

70. The design of the channel project was completed by Hill Engineering. (T. 118-19, 989)

71. The channel project includes widening and deepening the channel between Heidler Road and the Trust driveway, replacing the culvert at the Trust driveway with three 60 inch storm pipes, replacing the existing culvert at Brown's Farm with three 60 inch storm pipes, and placing concrete blocks in the area of the Parker driveway. It will also include placing rip-rap at the bend in the channel and reseeding the channel with vegetation for the purpose of minimizing scouring. (T. 964-67, 989-91)

72. Upon completion of the project, the channel will measure between 30-35 feet at the top and slope down to 18 feet at the base. (T. 970) These dimensions are similar to the current dimensions of the channel on the downstream side of the Trust driveway. (T. 971)

73. After completion of the project, the depth of the channel will be five feet for approximately 100 feet and then progress to seven to eight feet deep. The existing channel on the other side of the Trust driveway is ten feet deep. (T. 972-73)

74. The larger dimensions of the channel in the area where construction is to take place will allow it to hold a greater volume. (T. 763-64)

75. The original design of the channel project was moved further east at the request of the Skellys who own property immediately north of Heidler Road where the 30 inch pipe

discharges. (T. 402 -03)

76. Hill Engineering performed modeling of the channel area using a HEC-RAS model, which is a computer program produced by the U.S. Army Corps of Engineers. The HEC-RAS model analyzes storm water flows. (T. 413, 414)

77. Hill Engineering's modeling showed that a project of 800 feet could convey a 25-year storm event. (T. 442-45, 1133, 1135)

78. Hill Engineering's modeling showed that the 800 foot portion of the channel where the work was to be done would convey a 25-year storm event; however, areas downstream of the project will experience flooding. (T. 149, 1027-28)

79. It is the position of Millcreek Township and Hill Engineering that only the portion of the channel where work is to be done must convey a 25-year storm event. It is their position that areas downstream of the project need not convey a 25-year storm event if those areas flood under current conditions. (T. 220-23, 1127)

80. Hill Engineering relied on computer modeling to show that without the project there would be extensive flooding of the channel between Heidler Road and the Trust driveway culvert and some flooding in the area of the fish hatchery and on the Parker property. (T. 441-42, 447, 469)

81. Hill Engineering relied on computer modeling to show that the project would eliminate flooding of the channel between Heidler Road and the Trust driveway, would not have an impact on flooding that Hill believes already occurs on the Trust property downstream of the culvert, would improve flooding that Hill believes occurs upstream of the Brown's Farm culvert, and would have no impact on flooding that Hill believes would occur on the Parker property in the event of a 25-year storm event. (T. 1053-69)

82. Hill's modeling covered 25 year and 100 year storm events, not actual rainfall. (T. 686, 1085-86)

83. Hill did not consider the consequences of increased volume in the channel; they considered only velocity. (T. 426)

84. The Department acknowledged that the channel project will allow the channel upstream of the Trust driveway to convey a 25 year storm event, but the channel will flood its banks below the Trust driveway. (T. 525-26)

85. The fish hatchery is immediately downstream of the area where the 800 foot channel improvement project will end. (T. 1129-30)

86. Under the original 2,600 foot design, the area of the fish hatchery would have been included in the channel improvement project. (Trust Ex. 1)

87. Hill's modeling showed that flooding already occurs at the fish hatchery and on the Parker property under pre- project conditions; however, according to area residents, these areas never flooded prior to the construction of the Township's storm sewer project. (T. 421, 846)

88. If the fish hatchery is flooded, it may result in increased silt in the water which can be detrimental to fish. (T. 178)

89. Mr. Carl Guerin has observed sanitary waste flowing in the channel west of the fish nursery during periods of increased flow following a significant rain event. (T. 171, 173)

90. Increased development in the area has resulted in more impervious surface, which has resulted in an increased volume of runoff. (T. 600-27)

91. Requiring the developments in the area to adopt additional best management practices would reduce the amount of surface runoff reaching the channel. (T. 600-27)

92. Millcreek Township has requested that developers incorporate best management practices with regard to the housing developments in the vicinity of Heidler Road, but feels the ultimate choice of whether to adopt a certain best management practice is up to the developer. (T. 936-37)

DISCUSSION

The Channel Project

At issue in this appeal is the Department's decision to extend a water obstruction and encroachment permit issued to Millcreek Township for the widening and deepening of a stream channel that runs through property owned by the Angela Cres Trust to an unnamed tributary to Walnut Creek. As the appellant objecting to the permit extension, the Trust carries the burden of demonstrating by a preponderance of the evidence that the Department erred or abused its discretion in extending the channel project permit. 25 Pa. Code § 1021.122(c)(2).

Section 6 of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27, sets forth that “No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment, without the prior written permit of the Department.” 32 P.S. § 693.6(a). The Department has the discretion to impose such terms and conditions in a “Chapter 105 permit” as it deems necessary to ensure compliance with the Act. *Id.* at § 693.9(b). Section 105.43(a) of the regulations authorizes the Department to set time limits “for the commencement and completion of work” that the Department “deems reasonable and appropriate to carry out the purposes of [Chapter 105].” 25 Pa. Code § 105.43(a).

The permit issued by the Department to Millcreek Township in this matter required completion of the channel project by December 31, 2003, and stated that the permit would

become void if construction were not completed by that date, unless the deadline were extended. In this case, the Department extended Millcreek Township's permit three times, the latter two being appealed by the Trust. Millcreek has not commenced the channel project due to its inability to obtain an easement from the Trust. In considering the 2005 request to extend the permit, the Department opened the extension request to public comment. According to the Department, the purpose of the public comment period was to "carry out the purposes of Chapter 105 because it allowed for the public to voice its concerns for proper planning, design, construction, maintenance and monitoring" of the project and Article I, Section 27 of the Pennsylvania Constitution. (Department's Post Hearing Brief, p. 10)

The purpose of the channel project is to control flooding along Heidler Road and to provide an outlet for storm water runoff that flows from the area south of Heidler Road to the channel on the northern side of Heidler Road. The amount of storm water has increased as a result of residential developments to the south of Heidler Road. The storm water flows toward a 30 inch concrete pipe that runs under Heidler Road and discharges to the channel on property owned by the Skellys,² which is adjacent to the Trust's property. During storm events, the pipe has not been able to handle the increase in flow and the roadway and neighboring properties have been flooded. By undertaking the channel project, the Township hopes to provide a larger outlet for the storm water by widening and deepening the channel into which the water flows. The channel project was to be done in conjunction with a separate, but related, storm sewer project. That project was undertaken in 1999 and consisted of installing a series of storm sewer pipes to replace the 30 inch concrete pipe that currently discharges to the channel. However, when the Township attempted to utilize the new storm sewer pipes without the channel project having been

² The channel project will actually begin to the east of the current discharge point. The

completed, flooding increased in intensity on one of the neighboring properties owned by Mr. Tim Fitzgerald. The new storm sewer pipes have been boarded up, pending action on the channel project.

Under the original design and application submitted to the Department, the Township intended to widen and deepen 2,600 feet of the channel. The Department advised the Township that it should affect the minimal amount of stream channel actually necessary to accomplish the goals of the project, and indicated it would not approve a length of 2,600 feet. The Township submitted a new application for widening and deepening of only 800 feet of the channel. The area affected will begin at Heidler Road and run through property owned by the Trust and end at the Trust driveway. The channel will be left as is on the downstream side of the Trust driveway.

Scope of the Appeal

The Trust did not appeal the original permit issuance nor its first extension in 2003. Although notice of the permit issuance was published in the Pennsylvania Bulletin, no actual notice was provided to the Trust. When the first extension of the permit was granted in 2003, no notice was provided either directly to the Trust or in the Pennsylvania Bulletin. When the Township submitted its second request for an extension, in 2005, the Department published the extension request and opened it up for public comment, pursuant to its guidance manual. The Department granted a temporary extension of the permit in 2005, pending an opportunity for the public to comment on the request. In 2006, following the public comment period, the Department granted a two year extension of the permit. The Trust appealed both the 2005 and 2006 extensions.

Millcreek and the Department argue that all matters pertaining to the permit are final, and

Township agreed to move the project a few feet to the east at the request of the Skellys.

that we may consider only whether the Department had good cause to extend the construction deadline set forth in the permit. They argue that good cause did exist for extending the deadline since the Township had not yet obtained all of the necessary easements for going forward with the project. The Trust, on the other hand, would have us consider whether the permit should have been issued in the first place.

While we disagree with the Department and Millcreek's narrow reading of the issue, we also disagree with the Trust's broad interpretation that this appeal is a comprehensive review of whether the permit should have been issued in the first instance. We are limited to reviewing whether the Department erred or abused its discretion in extending the permit. In conducting that review, however, we disagree that we must wear blinders as to what is authorized by the permit. As Judge Labuskes has stated in *Wheatland Tube Co. v. DEP*, 2004 EHB 131, the determinative issue is not whether the permit was appropriate in the first place, but whether it "should have continued in place" for an additional period of time. *Id.* at 135.

In *Tinicum Township v. DEP*, 2002 EHB 822, the Board considered an appeal of the renewal of an NPDES permit. The Department argued that the Board should consider only whether the permit limits had changed from the original permit and, if so, whether those changes were appropriate. Any conditions in the permit renewal that had also existed in the original permit, argued the Department, could not be considered on the basis that they were administratively final. The Board rejected the argument, stating that, even in the absence of changes to the permit terms, the renewal required the Department to ensure that a permit issued years earlier was still appropriate based upon facts known at the time of the permit renewal.

Likewise, in the present case, the Department's decision to extend the permit necessarily involved "an examination of whether the continuation or *extension of the permitted activity* is

appropriate based upon up-to-date information.” *Tinicum Twp., supra* at 835-36 (emphasis added) In response to the 2005 extension request, the Department requested that Millcreek Township submit a hydraulic and hydrologic analysis in connection with the project, an explanation of how additional development in the area would affect peak flows, an explanation of why the work had not been completed to date, a description of the alternatives that Millcreek Township had considered in connection with the project and an analysis of why those alternatives were not feasible. (F.F. 88, 89) Additionally, in compliance with its guidance manual, the Department wisely decided to allow a public comment period in response to the extension request in 2005. The decision whether to extend the permit involved an analysis of whether the project was appropriate at that time. The Department considered more than the simple question of whether there was good cause to extend the permit because easements had yet to be obtained. It considered updated hydraulic and hydrologic information. It considered changed circumstances in the watershed. It allowed the public to comment on the permit and considered those comments in reaching a decision on whether to grant an additional extension to the permit. To say that the Board is limited to reviewing the simple question of whether the lack of an easement constituted “good cause” for extending the permit is asking us to review only a very small part of the Department’s action.

As explained by Judge Miller in *Solebury Township v. DEP*, 2004 EHB 95, administrative actions require “some level of uncontestability which is critical to the ‘orderly operations of administrative law.’” *Id.* at 112-13. In other words, there needs to be some finality to permitting actions so that a permittee may proceed with its project free of the fear of a challenge at some indefinite time in the future. However, where some action or condition causes a reexamination of the permit, the concept of administrative finality may not be applicable.

Millcreek and the Department argue that the Board's cases addressing the issue of finality deal only with renewals of a permit and not extensions. We see no reason to differentiate between an action that is labeled a "renewal" and one labeled an "extension" where the analysis is the same. The evidence indicates to us that the 2005 and 2006 decisions to allow the permit to continue in place involved a consideration of whether the extensions were appropriate based on up-to-date information. In fact, the decision of whether to extend the permit in this case seems to us to have involved at least as much analysis as that involved in a permit renewal.

The dissent expresses the opinion that the Department went too far when it opened up the permit for public comment and consideration of changed circumstances. We disagree; we find that the Department took the prudent course of action. It followed the procedures outlined in its guidance manual which provide for public comment and additional analysis when a project has not been completed due to the types of circumstances encountered by Millcreek in this matter. It requested up-to-date information, given the fact that the initial approval had been granted five years earlier. It took into consideration the fact that the Township's ability to construct the project was subject to a legal dispute. Had the Department not taken these steps and had simply approved the extension without consideration of these factors, it would have had a much tougher battle defending against charges that it abused its discretion. We believe the Department acted wisely and appropriately when it requested updated information from the Township and allowed public comment on the extension request.

Finally, even if we were to adopt the viewpoint stated in the dissent that, in the case of permit extensions, our review should be limited to determining whether the Department had good cause to grant the extension, we would be disinclined to do so in this case. Here, the appellant was given no notice of the permit issuance nor its first extension in 2003. Although

notice of the permit issuance was published in the Pennsylvania Bulletin, no direct notice was provided to the Trust even though the work authorized by the permit was to be conducted on its property. Laurie Hirt, the trustee of the Trust, testified that she was given no notice of the permit application in 2000 nor the ability to provide comments to the application. (F.F. 18) Had she been aware, she testified that the Trust would have provided comments to the Department regarding the proposed project. (F.F. 19) As we will discuss later in this adjudication, in its permit application the Township incorrectly listed itself as the owner of the property on which the project was to be constructed, and not the Trust. Had the Trust been listed as the owner of the property, it is quite possible that it would have been provided with notice of the permit application and its ability to submit comments to the Department, as well as notice of the actual permit issuance.³

Storm Water Management

A number of the Trust's objections are with Millcreek Township's storm water management plan, or what the Trust contends is the Township's failure to develop a current, comprehensive storm water management plan for the Walnut Creek watershed. The Trust points out that Millcreek has not undertaken a comprehensive storm drainage study since the early 1970's, and that at the time of the hearing, Erie County had not updated its storm water management plan for 12 years, despite the requirement in Act 67 that such plans be updated every five years. 68 Pa. C.S.A. § 680.5(a). The Trust argues that if the Township had required developers to employ best management practices in developments constructed to the south of Heidler Road, there would be no need to widen the channel that runs along the Trust property in

³ An issue currently being considered by the Environmental Hearing Board's Rules Committee is the type of notice that must be given to trigger the start of the 30 day appeal period before the Board.

order to accommodate the additional surface runoff. The Trust further asserts that the channel project is an attempt by Millcreek to divert storm water runoff from the new housing developments to private property owners to the north of Heidler Road.

The Township and the Department argue that these issues are beyond the scope of the Board's jurisdiction. We must agree. There is no question that the amount of storm water in the area has increased following extensive development in the vicinity of Heidler and Sterrettania Roads, particularly the construction of new housing developments. However, the Board's jurisdiction is limited to reviewing actions of the Department. 35 P.S. § 7514. The action that is before us in this case is the Department's extension of a water obstruction permit for the channel project, and our review is limited to an examination of that permit and the work authorized by it. While we understand that the Trust is unhappy with how the Township manages storm water in the area, the Township's management of storm water is not an "action of the Department" that is reviewable by this Board.

Likewise, much has been made of the fact that the Township obtained no permit from the Department for completion of the separate, but related "storm sewer project." Whether a permit should have been required for the storm sewer project, or whether the storm sewer project should have been part of a comprehensive permit that encompassed both it and the channel project, is a matter that is within the prosecutorial discretion of the Department and, therefore, is not reviewable by the Board. *Law v. DEP*, 2008 EHB 213, 215, *aff'd*, No. 1071 C.D. 2008, slip op. (Pa. Cmwlth. Jan. 23, 2009).

Where Millcreek's storm water management plan and storm sewer project are relevant to the channel project, which is before us on appeal, we may certainly consider evidence relating to those matters. We cannot, however, grant any relief to the Trust regarding the storm sewer

project or the Township's overall storm water management plan. We cannot use this appeal as an opportunity to address the legality or effectiveness of the Township's entire storm water management plan.

We now turn to the Trust's objections that are within the scope of this appeal:

"Owner" of the Site

The Trust points out that the permit application incorrectly lists Millcreek Township as the owner of the site on which the work is to be done. In fact, the Trust is the owner of at least a portion of the property. Witnesses for Millcreek explained that Millcreek was listed as "owner" because they believed the Department's application form to be asking for the owner of the "project." Timothy Wells of Hill Engineering testified that this is always the way he has completed application forms for water obstruction permits, i.e. by listing the owner of the project.

Based on the wording of the application form itself, we find that Millcreek did, in fact, incorrectly identify itself as the owner of the property. Section B of the permit application asks for "Applicant to *Site* Relationship." (emphasis added) Regardless of whether it has been the practice of Millcreek Township or Hill Engineering to use that space to identify the owner of the *project*, the form asks for the relationship of the applicant to the *site*. If the Department intended that space to name the owner of the project, we believe the form would be so worded. In any case, in order to avoid any confusion, Millcreek should have been clear that while it was the project owner, the project was to be performed on property owned by another entity, that is, the Trust.

As discussed earlier, the failure to identify the Trust as the owner of the property in the permit application may have resulted in the Trust not being aware of the permit issuance or its

opportunity to appeal. While this goes to the question of whether the Trust was provided adequate notice of the permit application and the scope of the Trust's appeal, we do not find this error to be grounds for overturning the permit extension. Clearly at the time the extension was requested, the Department was well aware that the property owner was not the Township. The very reason the extensions were needed was because the Township was unable to get an easement from all of the property owners. The Trust did not demonstrate that the Department would have acted differently regarding the extension request had the permit application form identified the Trust and others as the property owners, rather than Millcreek Township. *See, Foundation Coal Resources Corp. v. DEP*, EHB Docket No. 2006-067-R (Consolidated), (Adjudication issued March 9, 2009), at p. 4 (Where the appellant cannot demonstrate that the Department would have acted any differently, it is not grounds for overturning the permit.)

Volume and Peak Rate of Flow

The Trust asserts that the Township did not take into consideration the increased volume of storm water that would be flowing through the permitted portion of the channel following completion of the project. Representatives of Hill Engineering testified that they did not consider volume of flow when assessing the project, but only considered peak flow. (T. 426) Millcreek Township argues that neither Pennsylvania's Storm Water Management Act nor Erie County's Act 167 Plan require it to regulate the volume of storm water. Millcreek points specifically to Section 13 of the Storm Water Management Act, which states:

Any landowner and any person engaged in the alteration or development of land which may affect storm water runoff characteristics shall implement such measures consistent with the provisions of the applicable watershed storm water plan as are reasonably necessary to prevent injury to health, safety or other property. Such measures shall include such actions as are required:

- (1) to assure that the maximum rate of storm water runoff is no greater after development than prior to development activities; *or*
- (2) to manage the quantity, velocity and direction of resulting storm water runoff in a manner which otherwise adequately protects health and property from possible injury.

32 P.S. § 680.13 (emphasis added). Millcreek argues that this section requires management of *either* peak flow (subsection 1) *or* volume (subsection 2) and that the Erie County Act 167 Plan and Millcreek's Storm Water Ordinance require compliance with only subsection (1). Under Millcreek's Storm Water Ordinance, developers must ensure that peak flow rates of storm water following development are 70 or 80% of what they were prior to development. Thus, argues Millcreek, the maximum rate of storm water following development is no greater, and in fact is lower, than pre-development, consistent with subsection (1) above.

We commend the Township for adopting best management practices aimed at lowering the rate of storm water flow. However, reliance on 32 P.S. § 680.13 is only half the issue. We agree with the Township that the project itself is not increasing the volume of storm water in the area. As witnesses for all parties testified, storm water flows in the direction of the channel under current conditions. Some of it ends up in the channel and, during times of heavy flow, some of it ends up on Heidler Road or on neighboring properties. However, by widening and deepening the portion of the channel that runs from Heidler Road to the Trust driveway, the Township is ensuring that more of that water will end up in the stream channel. That is the point of the project. Hill Engineering's Mr. Wells agreed that widening and deepening the 800 foot section of the channel will result in more water discharging to the portion of the channel that is not covered by the project. (T. 445) Unfortunately, this also means that an increased amount of pollutants and sediment will also end up in the stream channel. We accept the testimony of the

Township's witnesses that no new pollutants will end up in the stream as a result of widening and deepening the channel; however, an increased volume of storm water flow necessarily means an increased volume of the pollutants and sediment that the storm water flow carries. As the Board has stated in previous opinions, "this excess sedimentation has a deleterious effect on Pennsylvania's streams." *O'Reilly v. DEP*, 2001 EHB 19, 33. In the event of flooding, the increased sedimentation and other pollutants may have a deleterious effect on the fish hatchery located just below the project. Mr. Carl Guerin, who has spent a considerable amount of time in the area of the fish hatchery, testified that he has witnessed sanitary waste flowing in the channel just west of the fish hatchery during periods of increased flow following a significant rain event. (T. 171, 173) For these reasons, the increased volume of storm water that will flow through the channel if the project is constructed must be considered.

Moreover, the Trust disputes the Township's claims that the channel project manages peak flows. The Trust points to computer modeling conducted by the Township's expert, Hill Engineering, which shows that areas downstream of the project will not be able to contain a 25 year storm event. Both the Department and Millcreek acknowledge that flooding *will* occur downstream of the channel project. This was testified to by representatives of Hill Engineering, by Millcreek Township engineer Rick Morris, and by the Department's Karl Gross. Millcreek acknowledged that the 25 year storm event was only conveyed to the end of the project and that properties downstream of the project will flood. (T. 223) However, Millcreek argues that flooding already occurs downstream of where the project is to be constructed, e.g., in the area of the fish hatchery and on the Parker property and, therefore, the project is not adding any new flooding that does not already occur. The Township relies on computer modeling done by its expert, Hill Engineering, showing that flooding occurs in those areas under current conditions. It

is Millcreek's contention that only those portions of the channel covered by the permit must comply with the 25 year flood requirement; areas downstream of the permitted activity which already flood need not be addressed. The Department acknowledges that the project is not designed to eliminate all existing flooding in the area, but rather to relieve flooding along Heidler Road in a safe and effective manner. (Department's Post Hearing Brief, p. 12)

The Trust disputes that flooding already occurs in those areas downstream of the project, and states that Hill Engineering's computer modeling is contradicted by the eyewitness testimony of individuals living in the area. According to Mr. Jim Parker, who has lived in the area for 35 years, neither his property nor the fish hatchery has flooded under pre-project conditions.⁴ Mr. Carl Guerin, who has frequented the fish hatchery for many years, also testified that he had never witnessed flooding in the area. Finally, photographs taken by Ms. Laurel Hirt showing water overtopping the banks of the channel in the area of the fish hatchery were taken in July 2004 and March 2006, after the Township had completed the storm sewer project, and at the same time as flooding intensified on Mr. Fitzgerald's property. The summary of the testimony of Mr. Parker, Ms. Hirt and Mr. Guerin is that flooding never occurred in the area of the fish hatchery until after the completion of the Township's storm sewer project. When faced with conflicting evidence of flooding – one being a computer model showing where flooding is likely to have occurred, and the other being the eyewitness testimony of residents living in the area who have witnessed the conditions of the area firsthand – we must give more credibility to the latter.

Moreover, even if we accept the results of Hill Engineering's computer modeling and assume that flooding does occur in the areas of the fish hatchery and Parker property under pre-

⁴ Mr. Parker did testify that flooding occurred on his property when a picnic table was thrown

project conditions, any widening and deepening of the channel upstream of these areas will allow even more water to discharge to areas that, by Millcreek's admission, already cannot handle a 25 year storm event. The fish hatchery is located only several feet downstream of the area where the channel is to be widened and deepened. If, as Hill's computer modeling shows, the fish hatchery already floods when receiving flow from the upstream portion of the channel as it currently exists, any widening or deepening of the channel immediately upstream of the fish hatchery will result in even more water flowing to this area. Although Hill Engineering's Mr. Fails stated that the fish hatchery was not the outlet for the project, in effect it is because of its location. All parties agree that after the channel project is completed, the fish hatchery will flood, at least in the case of a 25 year or greater storm event. It may do so in lesser rain events. Such downstream effects must be given consideration when authorizing activity under the Dam Safety and Encroachments. 25 Pa. Code § 105.14(b). Even though what was at issue was the extension of the permit and not the issuance of a new permit in 2005 and 2006, nonetheless, it was necessary to take into consideration the effect of the construction project on downstream uses, since the review of the extension consisted of new hydrologic and hydraulic information that was not submitted with the permit application. *See Tinicum Township, supra.*

We sympathize with Millcreek Township and the Department, whom we believe have worked diligently to try to come up with a solution to flooding along Heidler Road and neighboring properties. We applaud the efforts of the Township's engineer, Rick Morris, who has worked tirelessly on this project, and the Department staff who reviewed the project. We also sympathize with the neighboring landowners, such as Mr. Fitzgerald, who has endured more than 30 years worth of flooding on his property, as well as Ms. Hirt, who is concerned about

into the channel causing the water to overtop the banks.

future flooding on her property. However, we are hesitant to allow the further extension of a project that admittedly will allow flooding to occur downstream, and particularly in the area of the fish hatchery and the Parker property. We understand Millcreek's argument that when applying for a permit to conduct work on one section of a stream channel it cannot be expected to correct every problem that exists downstream of the project area. Here, however, the fish hatchery is located immediately below the project area, and to make a determination to widen and deepen the channel up to the point of the fish hatchery seems to us to place the fish hatchery in a particularly vulnerable state. While we do not find that the Department erred in extending the permit in order to allow an opportunity for the public to be heard and to fully consider the public's comments and to allow the Township an opportunity to resolve the property dispute issue, based on the evidence before us we are hesitant to allow the permit to continue to be extended indefinitely.⁵ Therefore, we remand the matter to the Department to consider the evidence presented in this hearing regarding flooding and make a determination as to whether this project can be completed without flooding occurring downstream in the area of the fish hatchery and Parker property as discussed within this adjudication. In the interim, any activity authorized by the permit is suspended, pending further order of this Board.

CONCLUSIONS OF LAW

1. The Trust's appeals are not barred by administrative finality. However, our examination is limited to determining whether the permit should be extended and not whether it should have been issued in the first instance. *Tinicum Township, supra*.

2. The Board's jurisdiction is limited to reviewing actions of the Department of Environmental Protection. 35 P.S. § 7514. Therefore, objections pertaining to Millcreek

⁵ An additional extension of the permit was granted after this appeal was filed.

Township's storm water management plan are outside the scope of the appeal.

3. Whether a permit was required for the Township's storm sewer project is a matter within the Department's prosecutorial discretion. *Law, supra.*

4. The Department complied with its guidance manual by opening up the 2005 extension for public comment and publication in the Pennsylvania Bulletin.

5. Where the Department's permit application for a water obstruction and encroachment permit issued under the Dam Safety and Encroachments Act asks for the "owner of the site," the Township's application incorrectly identified the Township as the owner of the site, as opposed to the owner of the project. The Trust should have been listed as an owner of the site. However, we do not find this to be a basis for overturning the Department's extension of the permit since the Department was well aware that the Township was not the owner of the site where the project was to take place.

6. Where witnesses for all parties agree that flooding will occur downstream of the project at a fish hatchery and potentially on property owned by Mr. Parker, it is proper to suspend the activity authorized by the permit and to remand the matter to the Department to determine whether the project can be completed without resulting in flooding of downstream properties as set forth in this adjudication.

We enter the following order:

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

ANGELA CRES TRUST OF JUNE 25, 1998 :
 :
 :
 v. : **EHB Docket No. 2006-086-R**
 : **(Consolidated with 2006-006-R)**
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION and MILLCREEK :
 TOWNSHIP, Permittee :

ORDER

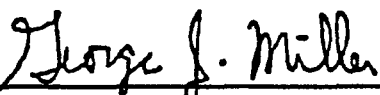
AND NOW, this 25th day of June, 2009, this matter is remanded to the Department as set forth in this adjudication. The activity authorized by the permit is suspended pending further order of this Board. The parties shall file joint status reports on a schedule to be determined by a separate order of the Board.

Jurisdiction is retained.


ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge


MICHELLE A. COLEMAN
Judge

Judge Labuskes filed a dissenting opinion, which is attached.

DATED: June 25, 2009

c: DEP Bureau of Litigation
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<p>ANGELA CRES TRUST OF JUNE 25, 1998</p> <p style="text-align: center;">v.</p> <p>COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILLCREEK TOWNSHIP, Permittee</p>	<p>: : : : : : : : : : :</p>	<p>EHB Docket No. 2006-086-R (Consolidated with 2006-006-R)</p>
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**DISSENTING OPINION OF
BERNARD A. LABUSKES, JR.**

Ideally this Board would have had an opportunity to perform a comprehensive review of the permit for the channel project when it was appropriate to do so because of the legitimate concerns raised by the Trust that have been adopted in part by my colleagues. Unfortunately, this appeal is only from the Department’s extension of the construction deadline in the permit, which does not allow us to engage in such a far-ranging inquiry. *Inquiring Voices Unlimited v. DER*, 1990 EHB 798, is directly on point. In that case, DER issued a dam permit under the DSEA. The Appellants - - exactly like the Trust - - did not appeal the permit, but they did appeal subsequent extensions of the permit. We ruled as follows:

The standard which DER must follow in granting an extension of a dam construction permit, such as that involved in this case, is “good cause.” *Del-AWARE Unlimited v. DER*, 1986 EHB 919, 939-940. *See also Del-AWARE Unlimited v. DER*, 1988 EHB 1097, 1105. In making this determination, DER should consider whether failure to complete the construction project within the originally permitted time period is due to the fault of the permittee, for such reasons as lack of diligence, lack of proper planning, etc. *Del-AWARE*, 1986 EHB at 939-940.

Therefore, the sole issue on the merits is whether DER did not have good cause to grant the November 25, 1985 extension of the Permittee’s dam construction permit. However, the Appellants have failed to raise this issue. Instead, their allegations center around the 1983 issuance of the permit, contending that issuance of the permit was contrary to state and local law and that

the proposed dam will result in environmental harm. Clearly, Appellants are attempting to litigate issues pertaining not to the November 1985 extension, but to the original issuance of the permit, which issues are beyond the scope of the appeal.

The 1988 *Del-AWARE* case is similar in that it involved an appeal from DER's issuance of permits extending various construction completion dates. In that case, the appellants were attempting to litigate a number of issues which had been decided in earlier appeals. The Board held that the appellants were precluded from raising these issues and that the only issue potentially involved in the appeal was whether DER had good cause to extend the construction completion date of the permit in question. Since the appellants had not raised this issue, the Board ruled there were no further issues to be litigated. In the present case, the Appellants have not alleged that DER did not have good cause to extend the Permittee's construction completion date, and as a result, there are no issues to be litigated.

1990 EHB at 800-01. *See also Barshinger v. DEP*, 1996 EHB 849, 861-863. These cases simply manifest the cardinal principle that the Board's review of Department actions must relate directly to the Department action under appeal, not previous Department actions. *Winegardner v. DEP*, 2002 EHB 790-793. Clearly, the Trust and my colleagues have seized upon the deadline extension as a basis for addressing issues pertaining not to that extension but to the original issuance of the permit. The Trust candidly admits that its purpose in pursuing this appeal was to prove "why the Permit should not have been issued in the first instance." (Reply Brief at 23-24.) In my view, these issues are beyond the proper scope of our review in this case.

Since our task is limited to reviewing the deadline extension, issues unrelated to the extension are irrelevant. *Winegardner, supra*. Indeed, unless the extension itself will cause harm, it is unlikely that third parties should even have standing to challenge it. *Wheatland Tube Co. v. DEP*, 2004 EHB 131, 135; *Wurth v. DEP*, 2000 EHB 155, 183-84 (Labuskes concurring). To the limited extent that a party potentially harmed by the extension (as distinct from the original permit issuance) is able to raise objections related to the extension (and not the permit itself), it follows that the relief available from this Board is limited to allowing, disallowing, or

modifying the extension.

Here, the Trust is not potentially harmed by the deadline extension, as a distinct Departmental action, the Trust conceded that all of its objections go to the permit itself, not the extension per se, and the only relief that it has requested is rescission of the entire permit. Based on the irrelevant objections of a party with dubious standing, the Board has gone far beyond modifying the deadline extension by remanding the permit with instructions “to determine whether the project can be completed without resulting in flooding of downstream properties.”⁶

In this case, the Trust points to the fact that the Department itself opened the permit up for public comment and consideration of changed circumstances in response to the extension request. Such a broad reassessment would have been perfectly appropriate for an NPDES permit renewal. *Wheatland Tube, supra*. Whether it was appropriate in the context of an application to extend a deadline in a DSEA permit is an issue that has not been raised in this appeal. But regardless of what the Department did or did not do, this Board must follow applicable law and our own precedent. Our review must be based not necessarily on what the Department did consider, but what the Department should consider. The fact that the Department goes too far does not provide us with an excuse to do the same.

It is true that, independent of a request for a deadline extension, the Department has an ongoing duty to monitor permitted activities, and if it learns at any time that a permitted activity is causing unanticipated harm, it has the authority to modify or even terminate a permit. 32 P.S. § 693.14(b).⁷ Previously unavailable information or materially changed circumstances may be

⁶ Putting aside the difficulty that no party has advocated either further study or permit modification, I really have no idea what more the parties can be expected to do in this case. The project has already been studied and litigated *ad nauseum*. Meanwhile, nearly ten years after the permit was issued, all of the parties (and their taxpayers) will continue to incur costs with no end in sight.

⁷ Frankly, I am not convinced that dire consequences will flow from the channel project, but even if they do, the Township is now the permittee of the project. If the project turns out to be unsafe or adversely


brought to the Department's attention in any number of ways, including perhaps a permittee's request for a deadline extension. The Department should never turn a blind eye to potential environmental harm. However, in order to give due respect to the finality of its administrative actions, it would be best if the Department maintained a distinction between a permit modification necessitated by newly discovered information or changed circumstances and a permit modification necessitated by a request for deadline extension. *See, e.g., UMCO v. DEP*, 2006 EHB 489, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007) (*en banc*) (compliance order issued in response to request to modify permit). In this case the Trust has not shown that changes in the watershed after the permit was issued in 2000 or information not previously available when the permit was issued justify a return to the drawing board.

It is interesting that all of the parties rely upon *Wheatland Tube Company v. DEP*, 2004 EHB 131, where we dealt with the Board's review of an NPDES permit renewal. (*See also Tinicum Township v. DEP*, 2002 EHB 822.) Fundamentally, *Wheatland Tube* is instructive and supports my view that we should have focused on the construction deadline extension in this appeal and nothing more. However, it is also important to note that *Wheatland Tube* only goes so far. There is a legislative mandate for periodic reconsideration of NPDES permits. Permitted discharges must be reviewed every few years to make sure that it still makes sense to allow them to continue. Obviously, no such regular, periodic reconsideration applies to construction deadlines under a DSEA permit. *See instead*, 25 Pa. Code § 105.43 (time limits for completion of work). Among other differences, DSEA permits tend to be issued for relatively permanent structures. It is understandable that the Legislative did not task DEP with revisiting those

affects property or the environment, Section 14(b) of the DSEA gives the Department the authority to order the Township to repair, alter, or remove the project or take such other action as is necessary to carry out the purposes of the DSEA. 32 P.S. § 693.14(b).

structures every five years to see if they should be torn down. The holding in *Wheatland Tube* should not be relied upon as the basis for using the extension of a construction deadline in a DSEA permit as an excuse for reassessing, e.g., whether the permit as originally issued identified the improper “owner,” whether the permit was sufficiently inclusive in evaluating the local storm water management system within the context of the drainage basin as a whole, or whether the project’s unchanged design will result in untoward environmental harm.

In an appeal from a Department action concerning a DSEA permit, an applicant has the burden of proving that there is *no reasonable basis* for the Department’s action. 25 Pa. Code § 105.21(e). The burden is certainly no less stringent for a third-party appellant such as the Trust. In an appeal from the grant or denial of construction deadline extension, our inquiry is limited to determining whether the Department had “good cause” to grant or deny that request. *Barshinger*, 1996 EHB at 863; *Inquiring Voices*, 1996 EHB at 800; *Del-AWARE*, 1986 EHB at 939-40. In my view, the Trust has fallen far short of such a showing. Accordingly, I would have dismissed its appeal.



BERNARD A. LABUSKES, JR.
Judge

DATED: June 25, 2009



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**LOWER SALFORD TOWNSHIP AUTHORITY:
 AND UPPER GWYNEDD-TOWAMENCIN
 MUNICIPAL AUTHORITY**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2005-100-MG

Issued: June 26, 2009

**OPINION AND ORDER ON
 MOTION TO EXCLUDE EVIDENCE**

By George J. Miller, Judge

Synopsis:

The Board denies the appellants' motion to exclude from evidence early offers of settlement made by the Department in the underlying appeals from the Board's consideration of appellants' later petitions for an award of counsel fees. That evidence is offered only to prove that some of the requested award should be denied under "other purpose" exception of Rule 408 of the Pennsylvania Rules of Evidence.

BACKGROUND

The Appellants seek counsel fees as prevailing parties pursuant to the provisions of section 307(b) of the Clean Streams Law,¹ in connection with the EPA's withdrawal of a TMDL

¹Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.307(b).

for the Skippack Creek in southeastern Pennsylvania and subsequent settlement of their appeal challenging that TMDL before the Board. Our Supreme Court and the Board have previously held that Board has discretion to order the payment of costs and attorney's fees determined to be reasonably incurred in proceedings pursuant to the Clean Streams Law.² The Department's response to the fee petition claims in part that the Appellants are not entitled to an award of fees and costs because the time charges and costs incurred after the Department proposed a settlement of the appeals were not "reasonably incurred" within the meaning of section 307(b) of the Clean Streams Law.

Appellant Upper Gwynedd-Towamencin Municipal Authority has filed a Motion *In Limine* To Exclude Evidence of Settlement Negotiations and to Strike Discussions of Settlement Negotiations from PaDEP's Memorandum of Law on the theory that evidence of settlement discussions are inadmissible under Rule 408 of the Pennsylvania Rules of Evidence.

OPINION

We will deny the motion because the evidence of settlement discussions is offered by the Department for the sole purpose of determining whether or not the costs and fees were reasonably incurred and not for the purpose of proving that these appellants were not entitled to relief on the merits of their appeals from the issuance of the TMDL.

Rule 408 of the Pennsylvania Rules of Evidence³ provides:

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

²*Solebury Township v. Department of Environmental Protection*, 928 A.2d 990 (Pa. 2007); *Solebury Township v. DEP*, 2008 EHB 658; *Pine Creek Watershed Association, Inc. v. DEP*, 2008 EHB 705; *Lipton v. DEP*, 2008 EHB 691.

³P.R.E. 408.

negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in compromise negotiations. This rule also does not require exclusion when the evidence is presented for another purpose, such as bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

This last sentence of the rule, commonly referred to as the “other purpose exception”, is controlling here. The evidence of compromise discussions is offered only in support of the Department’s contention that some of the counsel fees and costs were not reasonably incurred because continued litigation after that settlement offer was unreasonable. It clearly was not offered to prove the invalidity of the Appellants’ claims on the merits because that phase of the case has been resolved in a settlement.

There is little case law interpreting this rule. Appellants’ brief acknowledges that the Superior Court has held that a court properly considered the lack of settlement efforts in assessing the reasonableness of legal fees.⁴ We think it inconsequential that prior to the adoption of Rule 408, the Superior Court had rejected the contention that offers of settlement could be considered in assessing the reasonableness of attorney’s fees.⁵ We reject this older decision as not controlling because of the “other purpose exception” in Rule 408 and the language of the Clean Streams Law that authorizes an award only if the fees and costs have been “reasonably incurred.” Continued litigation after an appropriate settlement offer has been made may well mean that the fees and costs incurred after rejection of that offer were not “reasonably incurred.”

Accordingly, we deny appellants’ motion and enter the following:

⁴*McMullin v. Kutz*, 925 A.2d 832 (Pa. Super. 2007).

⁵*Danks v. Government Employees Insurance Company*, 453 A.2d 655 (Pa. Super. 1982).

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**LOWER SALFORD TOWNSHIP AUTHORITY:
AND UPPER GWYNEDD-TOWAMENCIN
MUNICIPAL AUTHORITY**

v.

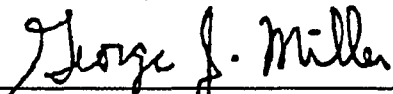
EHB Docket No. 2005-100-MG

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

ORDER

AND NOW, this 26th day of June, 2009, the motion of Appellants to exclude evidence of settlement negotiations and to strike reference to those discussions in the Department's memorandum of law is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge

DATED: June 26, 2009

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

LOWER SALFORD TOWNSHIP	:	
AUTHORITY, et al.	:	
	:	EHB Docket No. 2008-238-MG
v.	:	EHB Docket No. 2008-265-MG
	:	EHB Docket No. 2008-272-MG
COMMONWEALTH OF PENNSYLVANIA,	:	EHB Docket No. 2008-273-MG
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	Issued: July 2, 2009

**OPINION AND ORDER ON
MOTION IN LIMINE**

By George J. Miller, Judge

Synopsis

The Board denies a motion *in limine* to exclude the testimony of an EPA witness at a hearing on the Board's jurisdiction over appeals arising from EPA's issuance of total maximum daily load (TMDL) limits for specified Pennsylvania streams. The EPA refused the appellants' request to make the witness available for a deposition prior to the hearing. The witness' testimony is potentially highly relevant to the Department's argument that the issuance of the TMDL was an action of EPA and the Board has no jurisdiction. Any prejudice that may be suffered by the appellants by permitting this witness to testify is speculative at this time.

BACKGROUND

The Appellants¹ seek to challenge total maximum discharge limitations (TMDL) issued

¹The Appellants are largely sewer authorities and include the Lower Salford Township

by the federal Environmental Protection Agency (EPA) for several streams in Pennsylvania² which are designed to limit the development of phosphorus in those streams. The TMDL was not a regulatory tool when the modern version of the Clean Streams Law³ was enacted in 1970. However, the Federal Water Pollution Control Act (FWPCA or Clean Water Act), originally enacted in 1972, authorized the promulgation of TMDL limitations where existing discharge limits are not stringent enough to attain water quality standards for a particular stream or stream segment. These limitations may be established by either EPA or the state having jurisdiction over the stream. EPA is directed by section 302 of the FWPCA to establish TMDLs for particular streams where the application of effluent limits established under section 301 of that act are not sufficient to meet the water quality standard set forth in section 302 as necessary to assure "...protection of public health, public water supplies, agricultural and industrial uses, and the propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and out of the water..."⁴ Normally, however, TMDLs are established by state authorities under section 303 of the Act, subject to EPA approval. Section 303 of FWPCA requires states to identify those waters within its boundaries for which federal effluent limitations are not stringent enough to implement any water quality standard applicable to such waters.⁵ Each state was required to establish a TMDL for pollutants identified by EPA as suitable for this calculation at a level necessary to implement the applicable water quality standards "with

Authority, Lower Salford Township, Franconia Township, Franconia Township Sewer Authority, Telford Borough, Lower Paxton Township, the Homebuilders Association of Harrisburg, the Borough of West Chester and the West Goshen Sewer Authority.

²The streams involved are Southampton Creek, Indian Creek, Goose Creek, Paxton Creek and Sawmill Run.

³Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law).

⁴FWPCA § 302, 33 U.S.C. § 1312(a).

⁵FWPCA § 303, 33 U.S.C. § 1313(d)(A).

seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” The EPA must either approve such a load limitation, or if it disapproves the load limitation submitted by the state, establish its own limitation necessary to implement the water quality limitation applied to those waters.⁶

Current Appeals

The Appellants are largely owners or operators of publicly owned sewage treatment works whose discharges will likely be regulated pursuant to these TMDLs incorporated into an NPDES permit. They contend that the Department was largely responsible for the development of the fundamental science supporting these proposed limits. They also claim that Department personnel advised EPA that EPA’s proposed criterion relating to nutrient contamination was consistent with Pennsylvania water quality standards. Appellants therefore contend that the adoption of these TMDL limits was a final action of the Department reviewable by this Board.

The likely purpose of this attempt to review what appears to be the action of a federal agency before the state Environmental Hearing Board lies in the Board’s duty to conduct a *de novo* review, including taking the testimony of experts whose testimony was not part of the record before either EPA or the Department.⁷ The Board’s judges may also have great interest in such a technical matter of environmental protection. These considerations tend to be more favorable to Appellants than a review of EPA’s action in the United States District Court under the federal Administrative Procedure Act. That review could be based solely on the record before EPA by judges with a limited scope of review who may have less interest in the technical

⁶FWPCA § 303, 33 U.S.C. § 1313 (d)(1)(D)(2).

⁷*Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Warren Sand & Gravel v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

issues involved.

At the Department's request, the Board scheduled a hearing on the Board's jurisdiction over these appeals and designated several issues to be addressed by the parties in addition to "any issues they may choose to bring before the Board..."⁸ The specified issues relate to the powers of EPA and the Department to issue a TMDL, whether the Department's concurrence with EPA is a final action within the Board's powers of review, whether TMDL limits in a permit may be reviewed by the Board and whether the limits set forth in these TMDLs or the Department's approval or adoption of EPA's approach to the TMDLs is justiciable or ripe for review prior to the issuance of a discharge permit to an Appellant.⁹

Typically, the EPA and other federal agencies, do not permit their employees to testify in proceedings before the Board.¹⁰ Yet, the Department did arrange for the testimony of an EPA witness, Jon Capacasa, on limited issues in the hearing on the Board's jurisdiction to entertain the Appellants' challenges to the TMDLs. Specifically, at the request of the Department's Chief Counsel, EPA has agreed to permit Mr. Capacasa to testify at the hearing on the issues "that EPA established these TMDLs; and that EPA prepared administrative records in connection with the establishment of these TMDLs (which records may be introduced as exhibits)."¹¹ However, EPA has refused the Appellants' request to permit a deposition of the witness in advance of the hearing because that would interfere with his duties as Director, Water Protection Division, EPA Region III without serving any clear interest of EPA and because he will be subject to cross-

⁸The hearing is now scheduled to take place on August 17 to 21, 2009, with the testimony of EPA witness Jon Capacasa to be taken on September 3, 2009.

⁹Orders dated March 20 and May 22, 2009.

¹⁰For a thorough treatment of the legal background of this position and the Board's frustration with federal refusal to provide often important witnesses, see *Groce v. DEP*, 2006 EHB 856, 950-963.

¹¹Letter from EPA Regional Counsel, William C. Early dated 2/26/09.

examination at the hearing.¹²

In response, the Appellants have filed a motion *in limine* seeking an order from the Board to preclude the testimony of Jon Capacasa unless the Appellants are provided an opportunity to depose Mr. Capacasa, Mr. Capacasa agrees to testify to all matters relevant to the Board's jurisdiction and Mr. Capacasa produces to the Appellants documents on the list of documents attached to the motion.¹³

The Department responds that the motion should be dismissed because the request will only lead to examination of irrelevant matters. The Department says that prehearing discovery is not a due process right and the Board can deviate from the rules on discovery provided in the Pennsylvania Rules of Civil Procedure when it believes the circumstances warrant such a deviation,¹⁴ the testimony of the witness is essential to the determination of the jurisdictional issue, and the Department has acted in good faith in securing Mr. Capacasa's testimony since the Board could not compel him to testify. It also argues that the Appellants will not be prejudiced when they have full rights of cross-examination and that, in any event, the Appellants should appeal the TMDLs to the United States District Court.

OPINION

We will deny the motion at this time because it is at best premature. EPA counsel may

¹²Letter from EPA Assistant Regional Counsel, Russell Swan dated May 21, 2009.

¹³The subpoena seeks: (A.) any EPA documents regarding DEP's request for EPA to develop the nutrient TMDLs for Goose (Chester) Creek and Indian Creek; (B.) any EPA documents discussing the need for DEP to clarify its April 18 comment letter on the TMDLs, the letter from Robert Koroncai to John Hines dated June 3, 2008, or Mr. Hines June 27, 2008 response to the Koroncai letter; (C.) any agency records indicating which TMDLs were not required to be issued pursuant to the American Littoral Society Consent Decree; (D.) any EPA records discussing DEP's approval or endorsement of the new nutrient criteria development methods used in the three TMDLs, and any documents discussing whether the TMDLs should be issued by DEP rather than EPA.

¹⁴25 Pa. Code §1021.102. The Department also says that discovery is not allowed in many administrative proceedings.

allow extensive cross-examination at the hearing and may even produce some of the documents requested by the Appellants' subpoena. Until the hearing is held, it is impossible to determine whether the Appellants have been prejudiced by EPA's refusal to produce Mr. Capacasa for a deposition or to produce the extensive documentation requested by the Appellants' letter and subpoena. Some of the documents requested appear to be irrelevant to the jurisdictional issue and other requests indicate that the Appellants now have the needed documentation. Accordingly, we decline to make a determination of constitutional right to discovery in advance of Mr. Capacasa's testimony.

By contrast, granting the motion might well prejudice the Department without just cause. As the Department points out, Mr. Capacasa's testimony is critical to the jurisdictional question. The Appellants have many sources of information that they have developed in discovery of Department personnel that may make Mr. Capacasa's testimony on the issues outlined by the Appellants merely cumulative. At least, Mr. Capacasa's limited testimony will provide an evidentiary basis for the Department's contention that the Appellants have an adequate remedy on their claims related to the TMDLs in the United States District Court.

In sum, we find that any prejudice that the Appellants might suffer by not taking the deposition of Mr. Capacasa is speculative at this time and we deny the Appellants' motion. However, the Appellants are free to make an appropriate motion or argument in their post-hearing briefs after the jurisdictional hearing in the context of all of the evidence admitted into the record by the Board, and re-raise the issues raised by this motion in its final jurisdictional ruling if that appears necessary.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER SALFORD TOWNSHIP :
AUTHORITY, et al. :
 :
 v. : EHB Docket No. 2008-238-MG
 : EHB Docket No. 2008-265-MG
 : EHB Docket No. 2008-272-MG
 COMMONWEALTH OF PENNSYLVANIA, : EHB Docket No. 2008-273-MG
 DEPARTMENT OF ENVIRONMENTAL :
 PROTECTION :

ORDER

AND NOW, this 2nd day of July, 2009, the Appellants' motion *in limine* to preclude the testimony of Jon Capacasa in the above-captioned appeals is hereby **DENIED** without prejudice to re-raise the issues raised by this motion in post-hearing briefs.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge

DATED: July 2, 2009

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

CONSOL PENNSYLVANIA COAL :
COMPANY and CONSOL :
PENNSYLVANIA COAL COMPANY, LLC :

v.

COMMONWEALTH OF PENNSYLVANIA; :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and CHARLES and :
PATRICIA WHITLATCH :

EHB Docket No. 2006-273-R
(Consolidated with 2007-001-R;
2008-052-R; and 2008-212-R)

Issued: July 10, 2009

OPINION AND ORDER ON
MOTION IN LIMINE

By: Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

Parole evidence may not be used to construe, change or interpret the Damage Settlement Agreement entered into between Mr. and Mrs. Whitlatch and Consol Pennsylvania Coal Company as by its terms it was intended to be a complete agreement.

OPINION

Background

Presently before the Pennsylvania Environmental Hearing Board is a Motion in Limine (Motion) filed by the Intervenors, Charles and Patricia Whitlatch (Mr. and Mrs.



Whitlatch). The Motion seeks to bar Appellants Consol Pennsylvania Coal Company and Consol Pennsylvania Coal Company, LLC (collectively, Consol Pennsylvania Coal Company) from introducing parole evidence to construe, change, or interpret a written agreement between Consol Pennsylvania Coal Company and Mr. and Mrs. Whitlatch. Consol Pennsylvania Coal Company strongly opposes the Motion while the Pennsylvania Department of Environmental Protection supports it. On July 8, 2009, we entered an Order granting the Motion. This Opinion is in support of that Order.

On or about June 24, 2003 Mr. and Mrs. Whitlatch and Consol Pennsylvania Coal Company entered into an agreement entitled Damage Settlement whereby Consol Pennsylvania Coal Company in consideration for the release paid Mr. and Mrs. Whitlatch \$407,243.61 and also deeded two parcels of land to them. Exhibit 1 to Motion in Limine, Exhibit 3 to Consol Pennsylvania Coal Company's Memorandum in Opposition. The Damage Settlement indicates that the property involves five parcels which are set forth in detail in the agreement.

The Damage Settlement further indicates that "an adequate or replacement water supply cannot be provided relative to the property" and provides that it encompasses all rights and remedies provided to Mr. and Mrs. Whitlatch under Pennsylvania Mining Statutes and Regulations. *See* Paragraph 4, page 6, Exhibit 1 to the Motion in Limine. As of June 24, 2003 longwall mining had not yet undermined most of the property owned by Mr. and Mrs. Whitlatch, including the property where their house was located. In August 2003,

approximately two months after the execution of the Damage Settlement Agreement, Consol Pennsylvania Coal Company undermined the Whitlatch property including their home.

Discussion

The Damage Settlement contains a clause which states that “[t]his Damage Settlement does not include or encompass any liability and/or obligations hereafter lawfully imposed on Releasee (Consol Pennsylvania Coal Company) arising out of any coal extraction performed by Releasee after June 24, 2003 beneath the Property.” Paragraph 9, page 9, Exhibit 1 to the Motion in Limine.

Most importantly, as pointed out by the Department, the Damage Settlement contains several paragraphs that clearly state that the contract is the complete agreement of the parties and that they are bound by its terms. Paragraphs 16, 17 and 18 of the Damage Settlement read as follows:

16. **Integration:** This Damage Settlement contains the entire settlement and agreement of the parties and there are no other understandings, representations or warranties, oral or written, pertaining to the subject matter hereof. This Damage Settlement may not be changed, modified or amended, in whole or in part, except in writing signed by the parties.
17. **Successors and Assigns:** This Damage Settlement and all of its terms and conditions, shall be binding upon and shall inure to the benefit of the parties hereto, their heirs, successors, and assigns.
18. **Reliance:** Neither party executes this document in reliance upon any statements or representations of the other party, other than those representations set forth in this document.

Each party enters into this document voluntarily after having receiving [sic] legal advice or the opportunity of seeking legal advice from competent legal counsel.

Exhibit 1 to Motion in Limine (Damage Settlement at pages 12-13).

Consol Pennsylvania Coal Company labors unsuccessfully to attack these clauses and persuade us that we should ignore this plain language. However, none of their arguments raise an ambiguity nor do they establish that there was a mutual mistake by the parties. Indeed, Consol Pennsylvania Coal Company even had the parties specifically initial the language which states that “this Damage Settlement does not include or encompass any liabilities and/or obligations hereafter lawfully imposed on [Consol Pennsylvania Coal Company] arising out of any coal extraction performed by [Consol Pennsylvania Coal Company] after June 24, 2003 beneath the Property.” In addition, Consol Pennsylvania Coal Company included language that Mr. and Mrs. Whitlatch have “knowingly opted not to seek an advisory opinion from PADEP under Section 5.2(h) of Act 54 of 1994, 52 P.S. Section 1406.5b(h).” Exhibit 1 to Motion in Limine, paragraph 4, page 7.¹

These paragraphs conclusively establish that the Damage Settlement is the entire integrated settlement and agreement of the parties and that no other “underlying, representation or warranties” except those set forth in the Damage Settlement exist or were relied upon by Mr. and Mrs. Whitlatch and Consol Pennsylvania Coal Company. Therefore, we have no choice but to apply longstanding and well-settled Pennsylvania law, and find that

¹ Such clauses which strip members of the public of the guidance and protection of the Department of Environmental Protection should be unenforceable and void as a matter of public policy. Ironically, a review of the Damage

parole evidence may not be employed to change, construe or interpret the unambiguous provisions of the Damage Settlement agreement. *Gianni v. R. Russell and Co.* 124 A.2d 191, 192 (Pa. 1924); *HCB Contractors. Liberty Palace Hotel Association*, 652 A.2d 1278, 1280 (Pa. 1995); *Green Valley Dry Cleaners v. Westmoreland Industrial Development Corporation*, 832 A.2d 1143, 1154-1155 (Pa. Cmwlth. 2003).

Although parole evidence is not admissible to change, construe or interpret unambiguous provisions of the Damage Settlement that does not end the discussion of the proper measure of damages recoverable by Mr. and Mrs. Whitlatch for property damage caused by mine subsidence. It also does not prevent the introduction of the Damage Settlement as an exhibit in this case. Issues regarding the proper measurement of damages, including set-offs, possible failure of consideration, mitigation, unjust enrichment and other related concepts may need to be explored by the parties at the hearing and in the post hearing briefs. There has been minimal discussion so far by any of the parties of the impact, if any, of the \$407,000 paid by Consol Pennsylvania Coal Company to Mr. and Mrs. Whitlatch on the calculation of subsidence damages in these consolidated appeals. Is it a coincidence that the mine subsidence damage figure calculated by the Department of \$403,000 closely approximates the amount set forth in the Damage Settlement? And if so is it relevant? What language, if any, was on the check for \$407,000 tendered to the Whitlatches by the coal company and does this have any relevance in the case? Can a homeowner recover

substantially identical amounts for mine subsidence damages for which the coal company earlier paid the homeowner prior to mining? None of these issues have been briefed by the parties and we express no judgment on them at this stage of the proceeding. We simply raise these issues to emphasize that under Act 54, which encourages parties to enter into settlement agreements, many issues remain to be considered.

Our Order of July 8, 2009 is attached.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**CONSOL PENNSYLVANIA COAL
COMPANY and CONSOL
PENNSYLVANIA COAL COMPANY, LLC :**

v.

**EHB Docket No. 2006-273-R
(Consolidated with 2007-001-R;
2008-052-R; and 2008-212-R)**

**COMMONWEALTH OF PENNSYLVANIA,;
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CHARLES and
PATRICIA WHITLATCH :**

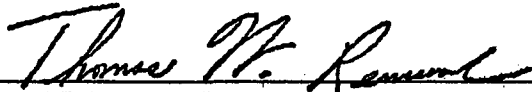
ORDER

AND NOW, this 8th day of July, 2009, following review of Charles and Patricia Whitlatch's Motion in Limine together with the Answer and Memorandum in Opposition filed by Consol Pennsylvania Coal Company and the Response of the Pennsylvania Department of Environmental Protection, it is ordered as follows:

1. The Whitlatch's Motion in Limine is *granted*.
2. Consol Pennsylvania Coal Company is precluded from offering parole evidence to construe or interpret the provisions of the Damage Settlement Agreement entered into between the Whitlatches and Consol Pennsylvania Coal

Company.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATED: July 8, 2009

**c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library**

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

CARROLL TOWNSHIP

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2008-173-L

Issued: July 16, 2009

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Department bears the burden of proving that its order to a municipality to revise its Official Plan in response to a private request is supported by the facts and is lawful and reasonable. The Department has satisfied that burden in this case, even though the revision being ordered is inconsistent with the municipality's goal of limiting small flow treatment facilities to previously developed properties, because a small flow system is the only viable method for meeting the affected resident's needs.

FINDINGS OF FACT

Stipulated Facts¹

1. Carroll Township (the "Township") is a municipality in Perry County. (Stipulation No. (hereinafter "Stip.") 1.)

¹ The following facts are taken from the parties' joint stipulation of facts filed on March 18, 2009.



2. The Department of Environmental Protection (the "Department") administers and enforces the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1 *et seq.* ("Sewage Facilities Act"), Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Stip. 3.)

3. David and Meagan Jones are the owners of 1.4 acres of property located on the west side of Sloop Road (T-390) approximately 900 feet south of the intersection of Sloop Road and Pisgah State Road in Carroll Township. (Stip. 4.)

4. The property owned by the Joneses is shown as an existing lot in the Official Plan. (Stip. 5.)

5. The current Official Act 537 Sewage Facilities Plan for the Township was adopted by the Township on February 7, 1989 and approved by the Department on March 27, 1989. (Stip. 6.)

6. The Township's Official Plan provides for the use of an on-lot system to address the Joneses' sewage disposal needs. (Stip. 8.)

7. A site investigation conducted by the Township's sewage enforcement officer indicated that the Jones property was unsuitable for an on-lot sewage disposal system due to slopes exceeding 25 percent and the inability to meet the required isolation distance to nearby streams. (Stip. 9.)

8. A planning module for a new land development was submitted to the Township for a proposal to construct and utilize a small flow treatment facility ("SFTF") to treat sewage from a house to be built on the Joneses' lot due to the absence of suitable soil on the property to support an on-lot sewage disposal system. (Stip. 10.)

9. The proposed SFTF will discharge to an unnamed tributary to Shermans Creek, which flows into the Susquehanna River. (Stip. 11.)

10. At its public meeting on August 7, 2007, the Township refused to adopt the Joneses planning module proposal as a revision to its Official Plan. This decision and the reasons therefor were stated in a letter dated August 14, 2007. (Stip. 12.)

11. In its August 14, 2007 letter to the Joneses, the Township stated it refused to adopt the planning module because (1) the proposal is not consistent with established municipal goals and capabilities, and (2) the proposal is not administratively able to be implemented. (Stip. 13.)

12. On November 8, 2007, the Department received a private request from the Joneses to revise the Township's Official Plan pursuant to the Sewage Facilities Act, 35 P.S. § 750.5, and 25 Pa. Code § 71.14. (Stip. 14.)

13. The Joneses proposed to construct and utilize a small flow treatment facility to address their sewage disposal needs due to the absence of suitable soil on their property to support an on-lot sewage disposal system. (Stip. 15.)

14. Following receipt of additional information on December 4, 2007, the Department solicited comments by letter dated December 5, 2007 from the Township, the Township Planning Commission, and the Perry County Planning Commission. (Stip. 16.)

15. On January 16, 2008, the Township and the Township Planning Commission submitted comments, by letter from the Township's solicitor William C. Dissinger, requesting that the Department deny the private request proposal. (Stip. 17.)

16. The Department evaluated the private request by considering the reasons advanced by the Joneses, the reasons for denial advanced by the Township, the comments submitted, whether the proposed sewage facilities and documentation supporting the proposed sewage

facilities are consistent with the Department's rules and regulations, and Carroll Township's existing Official Plan. (Stip. 18.)

17. On March 26, 2008, the Department conducted a site visit to verify the conditions described by Township's sewage enforcement officer. Those conditions were confirmed. (Stip. 19.)

18. On April 21, 2009, the Department approved the Joneses' private request, which resulted in the issuance of the order that is subject of this appeal to the Township directing it to adopt the module proposed by Joneses in their private request. (Stip. 20, 21.)

Additional Findings of Fact

19. Carroll Township's Official Plan is inadequate to meet the Joneses' sewage disposal needs because the Plan only allows the use of an on-lot system and it is undisputed that the Joneses' property is unsuitable for such an on-lot system. (Stip. 6, 9, 10; Joint Exhibit ("J. Ex.") 1, 3, 9; Transcript of Proceedings pages ("T.") 14-15, 85.)

20. The use of a small flow treatment facility on the Jones property is inconsistent with the Township's existing Official Plan and its goal of limiting the use of small flow systems to existing developed sites with malfunctioning on-lot systems. (T. 54-60, 68-70; J. Ex. 5, 11.)

21. There are no viable sewage disposal options for the Jones site other than a small flow treatment facility. (T. 17, 85; J. Ex. 3, 4, 7.)

22. There is no evidence that it is inappropriate to plan for the use of a small flow treatment facility on the Jones property. (T. 17, 28, 80-83; J. Ex. 3, 4, 9.)

23. To comply with the order, the Township must adopt and submit to the Department for approval a planning module for sewage treatment on the Jones property that addresses, by

agreement or otherwise, responsibility and surety for the operation and maintenance of the small flow treatment facility. (T. 26, 31 86-93; J. Ex. 7.)

24. The final O&M agreement between the Joneses and Township, if there is one, need not be the same as the draft agreement attached to the private request. (T. 88.)

25. The Joneses must obtain an NPDES permit from the Department before installing and operating a small flow treatment facility. (T. 92.)

26. Although the Township has a small population, limited staff, and limited resources, its responsibilities *vis-à-vis* a small flow system on the Jones property are also limited. The proposed plan revision is administratively able to be implemented. (T. 26-27, 43-47, 51-52, 64-67, 79-81.)

27. The Department did not abuse its discretion by approving the Joneses' private request and ordering the Township to revise its Official Plan accordingly. (Findings of Fact (FOF") 1-26.)

DISCUSSION

The Township filed this appeal from the Department's order directing it to revise its Official Plan. Before turning to the merits, we must address the parties' disagreement about who bears the burden of proof. Each party argues that the other bears the burden. It is clear that a disappointed private requestor bears the burden of proof when its private request is denied. *Toll Brothers v. DEP*, 2008 EHB 551, 556; *Krushinski v. DEP*, 2008 EHB 579, 584 and 585, *aff'd*, Docket No. 2207 C.D. 2008 (July 8, 2009); *Heritage Building Group v. DEP*, 2007 EHB 302, 316. Where, however, the Department issues an order to a municipality to revise the municipality's previously approved Official Plan in response to a private request and the municipality/recipient of the order appeals the order, we have inconsistent case law. *Compare*

Borough of Edinboro v. DEP, 2003 EHB 725, 743 (DEP bears burden of proof) with *Oley Township v. DEP*, 1997 EHB 660, 681 (municipality bears the burden of proof). We now conclude that the burden of proof rests with the Department when it orders a municipality to revise its Official Plan, regardless of the circumstances that led to the issuance of the order.

In this as in other contexts, it is important to be precise in defining exactly what Department action is being appealed. See *Winegardner v. DEP*, 2002 EHB 790; *Yoskowitz v. DEP*, 2005 EHB 401, 403-04. Here, the Township has appealed an order. It has not filed an appeal from an “approval of a private request.” In fact, there really is no such thing. Under the Sewage Facilities Act, the Department’s action when presented with a private request is limited to either denying the request or issuing an order to the municipality to revise its Official Plan. 35 P.S. § 750.5(b). In *Middle Paxton Township v. DEP*, 2002 EHB 117, we emphasized the distinction between the underlying private request and the resulting order to the municipality and explained that it is the order itself that is the meaningful action that demands our attention.

Our Rule on the burden of proof is quite clear: the Department bears the burden of proof “[w]hen it issues an order.” 25 Pa. Code § 1021.122(b). Our Rules do not say that we should consider what triggered an order when we assign the burden of proof. The Rule is straightforward and easy to apply. Pretending that this appeal is something that it is not unnecessarily complicates matters and needlessly puts us on the slippery slope of creating judge-made exceptions.

There is nothing in our Rules to suggest that the recipient of an order should bear the burden of proof in some cases. In fact, our Rules define when an appellant bears the burden of proof, but none of those defined instances apply here. For example, the Department has not denied a license, permit, approval, or certification, 25 Pa. Code § 1021.122(c)(1), and this is not

the case where “a party *who is not the recipient of an action by the Department* protests the action,” 25 Pa. Code § 1021.122(c)(2)(emphasis added). Carroll Township obviously was the recipient of the Department’s order.² Section 1021.122(c)(2) was clearly intended to apply to third-party appeals. To characterize this appeal as a third-party appeal when the appellant is the actual recipient of the action is simply not accurate.

It is not necessary to draw analogies from our Rules because Section 1021.122(b)(1) unambiguously assigns the burden of proof to the Department when it issues an order. Even if it were necessary to do so, however, we would not conclude that a municipality that is being ordered to revise its Official Plan should bear the burden of proof. If we assume Section 1021.122(b)(1) did not exist, an order to modify a previously approved Official Plan is actually more akin to *revocation* of a prior approval, wherein the Department bears the burden of proof, § 1021.122(b)(3), than the *denial* of an approval, wherein the applicant who suffered the denial bears the burden, § 1021.122(c)(1).

The impact of the Department’s order falls squarely upon the municipality. The private requestor is essentially the third-party beneficiary of the action. The Department has intervened in what is primarily a local matter. *See Gilmore v. DEP*, 2006 EHB 679, 690; *Young v. DER*, 1993 EHB 380, 407, *aff’d*, 1032 C.D. 1993 (Pa. Cmwlth. 1994). Municipalities at their great expense are charged with developing, updating, and implementing Official Plans. 35 P.S. § 750.5. The Department, of course, must approve those Plans, but once approved, the Plans establish and embody the lawful status quo as it relates to sewerage in the municipality. Municipalities are not only entitled to rely on their Plans, they are required to enforce them. When the Department orders the municipality to change its Plan, it is mandating a change to the

² Indeed, although technically not applicable to our immediate discussion, it is interesting to note that another section of our Rules specifically defines “the affected municipality” as “recipient of the action” in most appeals involving the Sewerage Facilities Act. 25 Pa. Code § 1021.51(h).

lawful status quo. It is telling the municipality that, even though it previously granted its imprimatur to the Plan, now the municipality must change the Plan. The municipality was told to do one thing or face the consequences and now it is being *forced* against its will and its best judgment as the lead planner to do something else. It is only fair that the party who seeks to disrupt the lawful status quo – here, the Department – should bear the burden of proof. It would only make sense to impose the burden of proof on the Township if we disregarded the fact that it already has an approved Official Plan in place.

It can be difficult or impossible to prove a negative. That is why our Rules and the common law normally place the burden of proof on the party asserting the affirmative of the issue. 25 Pa. Code § 1021.122(a); *Barrett v. Otis Elevator Co.*, 246 A.2d 668, (Pa. 1968); *In re Property Along Pine Road*, 743 A.2d 990 (Pa. Cmwlth. 1999). Placing the burden on the Department in this case requires it to prove that the Township's Plan should be changed. Placing it on the Township would require it to prove a negative; namely, that its Plan should not be changed.

Placing the burden of proof on the Department presents no particular hardship to the Department. The Department is not being asked to prove facts to which the municipality has greater access. To the contrary, Department witnesses are presumably in the best position to explain why they took the action under appeal. Placing the burden of proof on the Department is entirely consistent with the traditional, common law notion that the party with the best access to the facts should bear the burden of proving them. *Locust Lake Village Property Owners Ass'n v. Monroe Cy. Bd. Of Assessment Appeals*, 940 A.2d 591 (Pa. Cmwlth. 2008); *Mahon v. WCAB*, 835 A.2d 420 (Pa. Cmwlth. 2003), *appeal denied*, 849 A.2d 1206 (Pa. 2004). In contrast, placing

the burden on the municipality puts it in the awkward position of being required to prove much of its case by eliciting the testimony of adverse Department witnesses.³

Turning to the merits, curiously, and we believe quite incorrectly, the Department repeatedly says that it has a *mandatory* obligation to approve a private request and issue an order once a resident shows that the municipality's Plan is inadequate. Taking this position to its logical conclusion, the Department would be required to approve a private request to discharge raw sewage so long as the resident shows that the municipality's Plan is inadequate. The Department's statements are obviously incorrect. Whether to issue an order in response to a private request is discretionary. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998); *Gilmore v. DEP*, 2006 EHB 679, 685. The Department retains discretion to deny a request because, for example, the proposed alternative is not viable or environmentally acceptable.⁴ Therefore, we review the Department's action to determine whether it exercised its discretion lawfully and reasonably and in accordance with the facts, not whether it failed to take a mandatory action that it was required to take. *Pequea Township*, 716 A.2d at 686-87; *Gilmore v. DEP*, 2006 EHB at 685.

Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), reads as follows:

Any person who is a resident or legal or equitable 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 resident or property owner can show that the Official Plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs.

See also 25 Pa. Code § 71.14. This case relates to the inadequacy of the Township's Plan with respect to the Joneses' needs. It happens that the Township has never denied that its Plan is

³ Our discussion regarding the burden of proof relates to the Department's need to prove its case in chief to the extent necessary to address the appellant's objections in its notice of appeal. An appellant has the burden of proving any affirmative defenses.

⁴ It is not necessary to define the limits of the Department's discretion in this case.

inadequate to meet the Joneses' needs. It is undisputed that the Plan allows for on-lot systems and nothing else at the Joneses' location. It is undisputed that the Joneses' location is unsuitable for an on-lot system. Still further, it is undisputed that there is nothing conceptually wrong with the small flow treatment facility option proposed by the Joneses and that it is the only viable option for the site. One might reasonably ask, then, what's left?

The Township's case essentially boils down to a contention that the Joneses should not be allowed to build a home on their site because using the only viable means for sewage treatment on the site would be inconsistent with established goals and the municipality's capabilities.⁵ With regard to the municipality's goals, the Township says that it wishes to limit the proliferation of small flow systems. We have no reason to question, and indeed we sympathize with, this goal. Nevertheless, if the Joneses' proposal was consistent with the municipality's goal as set forth in its Plan, there would have been no need for a private request and we would not be hearing this appeal. A private request of the type presented here by definition involves a planning module that is inconsistent with a municipality's Plan. If plan inconsistency could support denial of a private request, the statutory availability of that alternative would be illusory. We obviously cannot read the statute in that way. Under these circumstances, the Plan's inadequacy with respect to one resident trumps its general goals. *Pequea Township*, 716 A.2d at 687. *See also Middletown Township v. Benham*, 523 A.2d 311, 317 (Pa. 1987) (municipality may not deprive residents of any sewage disposal alternatives).

With regard to the Township's claim that it is incapable of implementing the Plan revision, assuming for purposes of discussion only that such an affirmative defense is legally viable, the Township has not as a factual matter proven its claim. (FOF 26.) The Department

⁵ The Township does not contend that the Joneses' development violates any subdivision or zoning requirements.

has explained that the Township's oversight of the Joneses' system will involve very limited administrative requirements unless the Township voluntarily decides otherwise and imposes significant burdens upon itself in an operation and maintenance agreement with the homeowners. (T. 26-27). Indeed, the Department says that the Township retains considerable flexibility (within reason) in defining the terms and conditions pursuant to which the plant may be installed and operated, including what financial assurances will be required. *See Middle Paxton Township*, 2002 EHB at 124-26 (describing municipality's rights regarding O&M agreements). The Township has a qualified sewage enforcement officer and engineer. (T. 44, 47.) Finally, with respect to environmental concerns, the Department notes that a plant will be subject to NPDES permitting. (T. 92.)

CONCLUSIONS OF LAW

1. The Department bears the burden of proving that its order to a municipality to revise its Official Plan in response to a private request is supported by the facts and is lawful and reasonable.
2. The Department may order a municipality to revise its Plan that is inadequate to meet a resident's sewage disposal needs even if the only viable option for meeting the resident's needs is inconsistent with the existing Plan and the municipality's goals.
3. The Department's decision to order a Plan revision pursuant to a private request is a matter of discretion.
4. The Department satisfied its burden of proof in this case.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARROLL TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

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EHB Docket No. 2008-173-L

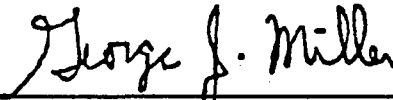
ORDER

AND NOW, this 16th day of July, 2009, it is hereby ordered that Carroll Township's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD



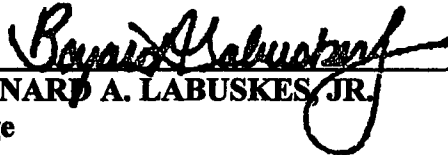
THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: July 16, 2009

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**HOUSEINSPECT, PARRIS BRADLEY,
 PETER BRADLEY AND BLAINE
 ILLINGWORTH**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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**EHB Docket No. 2007-261-MG
 (Consolidated with 2008-157-MG)**

Issued: July 20, 2009

ADJUDICATION

By George J. Miller, Judge

Synopsis

The Board dismisses an appeal filed by radon testers from a letter from the Department which notified the appellants that their radon testing certification had expired. Not only did the appellants fail to preserve the challenge to this letter by failing to discuss it in their post-hearing brief, but the letter is clearly not an appealable action of the Department.

The Board also dismisses the appellants' challenge to the Department's denial of their recertification application. The appellants failed to demonstrate that they had been complying with the radon certification regulations and failed to show that they had an intention and ability to comply in the future.



BACKGROUND

Before the Board, are two consolidated appeals filed by HouseInspect, Parris Bradley, Peter Bradley and Blaine Illingworth (collectively, HouseInspect). The first appeal challenges an October 29, 2007 letter from the Department which informs HouseInspect that its firm and individual certifications to conduct radon testing had expired. The second appeal challenges the Department's denial of the application to renew the radon certificates for the firm and the individuals dated March 27, 2008. HouseInspect filed timely appeals. A hearing was held before the Honorable George J. Miller on April 2, 2009. The record consists of a transcript and 21 exhibits. The parties have filed post-hearing memoranda. After full consideration of these materials we make the following:

FINDINGS OF FACT¹

1. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Radon Certification Act, Act of July 9, 1997, P.L. 238, 63 P.S. § 2001-2014, the Radiation Protection Act, Act of July 10, 1984, P.L. 688, as amended, 35 P.S. §§ 7110.101-7110.703; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder.

2. Parris Bradley is the point of contact for HouseInspect, Inc. He is listed on the renewal radon certification application as the "certified individual applicant." He works as a home inspector for HouseInspect. (Ex. D-1; N.T. 12)

3. In addition to his duties with HouseInspect, he also divides his time as a technical director in the theater department of Villanova University. (N.T. 39).

Radon Testing and Tracking

¹ The Department's exhibits are designated as "Ex.D-_" and the Appellant's as "Ex. A-_" . The transcript is noted as "N.T. _".

4. Blaine Illingworth is a certified home inspector and an employee of HouseInspect.
(N.T. 55-56)

5. He testified that he generally places two or three radon test canisters when performing a radon test. Ten canisters come in a sleeve and nine would be unmarked. The tenth would have a red dot on it. The tenth canister would be left as a “blank.” When performing a radon test, he would record the inspection data on the top of the canister which would include the address for the location and the start time for the set. He would also record the canister number. If he placed a blank on a particular test, that information would also be noted on his inspection sheet.
(N.T. 58-59)

6. Duplicate sampling is the placement of two test devices. Test results from each device are then placed into a calculation known as the relative percent difference. The relative percent difference is calculated from the difference between two test devices that are placed side-by-side. Generally, the relative percent differences are relatively flat. However, the numbers might spike due to a bad lot of test canisters or it could indicate that the test canisters are otherwise compromised. The best way to track this data is with a chart or graph. (Hoffman, N.T. 139-40)

7. Spike sample analysis is part of the quality assurance process to insure the quality of test results. (Hoffman, N.T. 143)

Compliance History

8. In October 2005, the Central Office of the Department’s Bureau of Radiation Protection asked inspector Kenneth Hoffman² to conduct an inspection of HouseInspect. This

² Kenneth Hoffman is an inspector and health physicist in the Department’s radon program. He has worked for the Department since 2001. Before working for the Department he

was a follow-up inspection to a 1998 inspection which noted that there had been violations related to the documentation of “spike sampling” and failure to document calculations of the relative percent difference between duplicate sample results for radon testing. (Hoffman, N.T. 126; Ex. D-3).

9. He tried to contact Parris Bradley at HouseInspect to make an appointment for the inspection, but Mr. Bradley never returned his call. He was referred to Cindy Lawn and made arrangements to visit the office. (Hoffman, N.T. 128)

10. On November 16, 2005, Mr. Hoffman and two other Department inspectors arrived at the offices of HouseInspect. Mr. Bradley was again not available, but they met with Cindy Lawn who represented HouseInspect at the inspection. (Hoffman, N.T. 128-29)

11. Mr. Hoffman asked Ms. Lawn to produce certain documentation that radon inspectors are required to maintain:

- a. Mr. Hoffman asked Ms. Lawn to produce a quality assurance plan. He testified that the plan she produced was an “out-of-date” plan. (N.T. 131, 134)
- b. Mr. Hoffman asked Ms. Lawn to produce “reports to clients”. She was able to produce some reports, but certain information was missing such as the name and ID number of the testing company; the name and tester ID number of the person, placing and/or retrieving the test device; the location of the test device; information pertaining to health effects; the Pennsylvania notice to clients; and the recommendations for test results greater than four picocuries. (N.T. 137-38)
- c. Ms. Lawn was not able to produce exposure tracking records for employees;
- d. Ms. Lawn was not able to produce records for spike sample analysis. (N.T. 141)

was responsible for environmental audits with Johnson-Matthey, an international precious metals company. (N.T. 124-25; 161)

e. Ms. Lawn was not able to produce records for the calculation of the relative percent difference for duplicate samples.

(N.T. 137-38.)

12. The failure to produce spike sample analysis and relative percent difference calculations were violations that were also noted in the report of an inspection performed in 1998. (Hoffman, N.T. 145; Ex. D-3)

13. After the inspection, HouseInspect submitted some blank sampling data; data from the first half of 2005 has never been produced. Accordingly, the Department concluded that it was not being done in early 2005. (Hoffman, N.T. 142)

14. Mr. Hoffman also received a corrective action plan from HouseInspect at the end of 2005. It was adequate "on paper," but he wanted to confirm that the plan was being implemented. Therefore in September 2006 he arrived at the offices of HouseInspect for an unannounced inspection. However, neither Parris Bradley, nor Cindy Lawn was available. Mr. Hoffman left a message and contacted HouseInspect the next day to schedule another date. (Hoffman, N.T. 145-47)

15. The follow-up inspection was scheduled for September 14, 2006. Although Mr. Hoffman asked for Parris Bradley, he was not available. So he again met with Cindy Lawn. Ms. Lawn was not able to produce any of the documentation to show compliance with the corrective action plan. Mr. Hoffman informed Ms. Lawn that HouseInspect may receive a notice of violation. (Hoffman, N.T. 148; 164)

16. Mr. Hoffman referred the matter to Bureau of Regional Compliance specialist Bridget Craig for possible enforcement action. (Hoffman, N.T. 151)

17. The Department sent HouseInspect a “20-day letter” requesting that HouseInspect address the issues that Mr. Hoffman had raised during his September inspection and as well as outstanding blank sampling. Although HouseInspect did respond to the 20-day letter, Ms. Craig testified that the response was insufficient. (Craig, N.T. 110-11)

18. Therefore, a notice of violation dated February 6, 2007, was issued to HouseInspect. Specifically, the Department informed HouseInspect that Mr. Hoffman had observed the following violations during his September inspection:

- a. Failure to produce a health and safety program;
- b. Incomplete reports to client;
- c. Failure to record spiked sampling analysis; and
- d. Failure to record duplicate analysis.

(Ex. A-1)

19. HouseInspect responded to the NOV by letter dated February 17, 2007. The letter described a corrective action plan. (Ex. A-2)

20. HouseInspect did submit spike sampling data to the Department for 2006 and 2007. The reports revealed that HouseInspect did not spike 3% of the canisters deployed as required. (Hoffman, N.T. 154-155; Exs. A-10; A-16)

21. No blank sample records were submitted to the Department for the first half of 2005. (Hoffman, N.T. 155)

22. No worker exposure records prior to 2006 have been submitted to the Department. (Hoffman, N.T. 155)

23. HouseInspect has also not provided records of spike sample analysis for 2003, 2004 or 2005. (Hoffman, N.T. 156)

24. In July 2007 the Department met with representatives of HouseInspect to discuss the ongoing failure of HouseInspect to demonstrate that it had been keeping records in accordance with the Department's regulations. In addition to Ms. Craig, her supervisor, Department counsel, HouseInspect counsel, and Parris Bradley attended the meeting. (Craig, N.T. 116-17)

25. In the Department's view, it was an opportunity to bring the outstanding documentation and demonstrate that the business was in compliance with the regulations. However, HouseInspect failed to do so. (Craig, N.T. 117-18)

26. Although HouseInspect did not submit any documentation at the July meeting, some documentation was submitted to the Department by letter dated August 31, 2007. None of the documents submitted to the Department demonstrated that HouseInspect was in compliance with recordkeeping requirements before 2006. (N.T. 117-18; Ex. A-5; see also Hoffman, N.T. 154-55)

27. For example, HouseInspect submitted relative percent difference calculations for the period of January 2003 through October 2007. However, Mr. Hoffman testified that his data does not prove that HouseInspect had been making the calculations on a regular basis because there is no way to tell when the duplicate test data was analyzed. (N.T. 177; Ex. A-16)

Renewal Certification

28. Ms. Craig notified the Department's Chief of the Radon Division Certification Section, Kelly Oberdick, that HouseInspect was having compliance problems. (Oberdick, N.T. 67, 71-72).

29. Compliance history and status are factors that the Radon Division takes into account during the process of reviewing recertification applications. The Department will not renew a

radon certification if there is an outstanding notice of violation. (Oberdick, N.T. 75, 82; see 25 Pa. Code § 240.201)

30. HouseInspect's certifications expired in October 2007. Parris Bradley contacted the Department to find out the status of HouseInspect's renewal application. He was informed that the Department would not renew the certifications until the outstanding notice of violation was resolved. (Bradley, N.T. 34)

31. At Mr. Bradley's request, the Department sent him a letter dated October 29, 2007, which informed him that the individual and firm certifications had expired on October 18, 2007, and they could no longer engage in radon testing activities in Pennsylvania. (Ex. A-12)

32. HouseInspect filed an appeal from this letter which was docketed at EHB Docket No. 2007-261-MG.

33. The Department did not act upon the recertification application right away in order to give HouseInspect an opportunity to resolve the notice of violation to the Department's satisfaction. (Oberdick, N.T. 182)

34. By letter dated March 27, 2008, the Department denied HouseInspect's application for certificate renewal. The denial included both the firm's certification and the individual certifications for Parris Bradley, Peter Bradley and Blaine Illingworth. The sole reason for the denial was the unresolved notice of violation. (Oberdick, N.T. 76; Ex. A-13)

35. Kelly Oberdick and her supervisor, Michael Pyles, testified that they rely on the Department's inspectors when reviewing the compliance history of an applicant. They do not perform any independent review of violations. (Oberdick, N.T. 78-79; Pyles, N.T. 84-89)

DISCUSSION

The Appellants, HouseInspect, Parris Bradley, Peter Bradley and Blaine Illingworth (collectively, HouseInspect) have appealed the Department's October 29, 2007 letter informing them that their firm and individual radon testing certifications had expired, and also the Department's denial of their recertification application. Where the Department denies an approval or certification, the party appealing the action bears the burden of proof.³ Accordingly, HouseInspect must prove by the preponderance of the evidence that the Department's denial of the recertification application was unreasonable or not in accordance with the law.⁴ The Board conducts hearings *de novo* to determine whether the departmental action in dispute is supported by the evidence, and a proper exercise of authority.⁵

We first turn to HouseInspect's challenge to the Department's October 29, 2007 letter informing HouseInspect that its radon testing certifications had expired. The Department argues that any challenge to this letter has been waived by HouseInspect. We agree. The sole mention of this challenge is proposed Finding of Fact No. 17 in HouseInspect's post-hearing brief which only states that: "On November 19, 2007, an Appeal was filed concerning the inaction of the

³ 25 Pa. Code § 1021.122(c)(1).

⁴ See *Gromicko v. DEP*, 2000 EHB 539. Although HouseInspect objected to the burden of proof in opening argument at the hearing, they failed to raise the issue and provide legal analysis in their post-hearing brief. They were also given an opportunity to file an appropriate memorandum on the issue in advance of the hearing, but failed to do so. Accordingly, any objection to the burden of proof has been waived. 25 Pa. Code § 1021.131. Even so, our analysis would not be changed even if the burden of proof were reversed.

⁵ *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Browning-Ferris Industries, Inc. v. DEP*, 819 A.2d 148 (Pa. Cmwlth. 2003); *Leatherwood, Inc. v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003); *Borough of Edinboro v. DEP*, 2003 EHB 725, aff'd, 2696 C.D. 2003 (Pa. Cmwlth. filed June 23, 2004); *Smedley v. DEP*, 2001 EHB 131; *Leeward Construction, Inc. v. DEP*, 2000 EHB 742, aff'd, 821 A.2d 145 (Pa. Cmwlth. 2003); see *O'Reilly v. DEP*, 2001 EHB 19.

DEP in recertifying the Appellants under #2007-261.”⁶ There is nothing in the brief that might be considered an “argument with citation to supporting legal authority” as required by the Board’s rules.⁷ Nor does HouseInspect offer any discussion of the substance of this letter in either its post-hearing brief, or its reply brief. Accordingly, we find that HouseInspect has waived any challenge to the Department’s letter and dismiss the appeal of that letter.⁸

Even if HouseInspect had not waived the issue, we would find that the Department’s action does nothing more than inform HouseInspect of the status of its certifications. The letter is clearly not an appealable action of the Department. It does not mandate any action on the part HouseInspect but simply reports the expiration of its certifications and the potential consequence of radon testing without a current certification.⁹

We next turn to HouseInspect’s challenge to the Department’s denial of its application for recertification. As we explain more fully below, we agree that the totality of HouseInspect’s behavior between 1998 and 2008 clearly demonstrates that HouseInspect lacks the ability or intent to comply with the Department’s regulations. Nor did HouseInspect demonstrate that it was in compliance with those regulations at the time it applied for recertification, which is a prerequisite for re-certification.¹⁰

The Department is vested with the authority to certify qualified individuals and firms to perform radon testing by Section 4 of the Radon Certification Act,¹¹ in order to “protect property

⁶ HouseInspect Post-hearing Brief at Finding of Fact No. 17.

⁷ 25 Pa. Code § 1021.131(a).

⁸ 25 Pa. Code § 1021.131(c); *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff’d*, 971 C.D. 2004 (Pa. Cmwlth., filed October 28, 2004).

⁹ *See e.g. Gordon-Watson v. DEP*, 2005 EHB 812.

¹⁰ 25 Pa. Code § 240.201.

¹¹ Act of July 9, 1997, P.L. 238, 63 P.S. § 2004.

owners from unqualified or unscrupulous consultants and firms”¹² Accordingly, Chapter 240 of the Department’s regulations details the certification requirements which must be met in order for a firm or an individual to perform radon testing. Those regulations provide that a certification or recertification can only be approved if the application is accurate and complete and the applicant and those identified in the application have met the qualifications set forth in the regulations and are not in violation of any of the regulations.¹³ The regulations further provide that the “Department may deny certification to a person who has shown a lack of ability or intention to comply with the acts or this chapter, as indicated by past or continuous conduct.”¹⁴

We find that HouseInspect failed to prove that the Department’s denial of its radon recertification application was improper. HouseInspect did not demonstrate to the Department between 1998 and 2008, or to the Board at the hearing, that its operation was in compliance with regulations. Nor did HouseInspect demonstrate that it had any real commitment or plan to come into conformance with the regulations in the future. The Department has provided HouseInspect with numerous opportunities to demonstrate its commitment to proper recordkeeping and radon tracking requirements embodied in the regulations and HouseInspect has repeatedly failed to do so. HouseInspect has yet to produce a complete set of appropriate health and safety records, exposure reports or various testing reports for the time period requested by the Department. These records are not only required by the Department’s regulations, but are required by the

¹² 63 P.S. § 2002(b).

¹³ 25 Pa. Code § 240.201(a).

¹⁴ 25 Pa. Code § 240.201(b).

implementation of HouseInspect's own Quality Assurance Plan (QAP) which the regulations provide must be maintained and implemented.¹⁵

Although some records have been produced piecemeal over a period of years, this does not demonstrate HouseInspect's commitment to comply with the regulations. First, HouseInspect's QAP states that all records will be maintained at its offices in Media. Yet Cindy Lawn could not produce a complete set of records requested at either the November 2005 inspection or the September 2006 inspection, even though HouseInspect was on notice that the Department would be examining their files. Although HouseInspect maintains that the lab that analyzes the radon canisters and generates the results of the radon testing has the ability to track certain types of data for HouseInspect, clearly no "responsible" person at HouseInspect is familiar with this data, nor is there any indication that the data is reviewed if it is not even maintained on the premises. For example, the relative percent difference analysis for the duplicate canisters which was submitted to the Department was apparently generated by a company known as Radiation Data in New Jersey.¹⁶ None of this data was produced at Department inspections and there is no testimony that Parris Bradley, the quality assurance officer, ever reviewed this data on any kind of a regular basis. Indeed, Mr. Hoffman testified that although it appeared that HouseInspect was testing duplicates, there was no indication that the results were being tracked in any consistent way.¹⁷

Nor did Parris Bradley himself inspire any confidence that he understood the importance of his responsibilities or took them seriously. Section 240.102 of the regulations requires that a firm certified for radon testing "shall employ at least one individual who is certified to test and

¹⁵ 25 Pa. Code § 240.304.

¹⁶ Ex. A-10.

¹⁷ N.T. 158.

who is in responsible charge of the firms' testing activities."¹⁸ Parris Bradley identified himself as the "responsible person" for HouseInspect.¹⁹ Further, Parris Bradley is listed in the firm's QAP as the "QA Officer." His responsibilities under the plan include interpretation of laboratory analyses, dissemination of results to clients, providing for the required number of duplicate tests, blanks and spiked samples, and identifying "questionable results."²⁰ He is also "responsible for personally reviewing all radon test reports to ensure that there are no discoverable errors." Yet, twice since 1998 the Department visited HouseInspect and twice HouseInspect was unable to produce appropriate reports and data which would tend to demonstrate that Parris Bradley was actually reviewing the results of the duplicate tests, blanks and spiked samples, and customer reports. Not only was Mr. Bradley not present during any of the Department inspections to demonstrate that he was implementing his own QAP, but he did not appear to have made any arrangements with Cindy Lawn to prepare her for the Department's visits. As the QA officer and responsible person of the firm, it was his responsibility, not Cindy Lawn's, to make sure that HouseInspect demonstrated compliance with the Department's regulations when asked to do so. It is therefore not unreasonable to conclude that he either does not understand the requirements of the radon testing regulations or he is not committed to compliance with the regulations.

HouseInspect contends that many of the test data tracking requirements are derived from an EPA protocol which is no longer enforced by the EPA, therefore it was inappropriate for the Department to find that it had violated the Department regulation which purports to incorporate this protocol. The Department argues that the EPA protocol is properly incorporated into the Department's regulations:

¹⁸ 25 Pa. Code § 240.102(b).

¹⁹ Ex. D-1.

²⁰ Ex. A-6.

A person conducting radon testing or mitigation for radon contamination shall conduct the testing and mitigation in accordance with EPA- or DEP-approved protocols and shall comply with applicable statutes, regulations, ordinances and building codes. The following protocols, “Interim Protocols for Screening and Follow-up Radon and Radon Decay Product Measurements,” “Indoor Radon and Radon Decay Product Measurement Protocols” and “Guidelines for Radon Mitigation of Residential Dwellings are available upon request”²¹

HouseInspect contends that “Indoor Radon and Radon Decay Product Measurement Device Protocols” includes a disclaimer by EPA that EPA “no longer updates this information” and “The material and descriptions compiled for these pages are not to be considered Agency guidance, policy, or any part of any rulemaking effort but are provided for informational and discussion purposes only.”²² HouseInspect argues that this publication therefore can not be considered an “EPA-approved protocol,” therefore HouseInspect can not be in violation of Section 308 of the Department’s regulations by failing to maintain the records relating to spike samples, duplicate samples and blank samples as described in the protocol.

The Board has held that the Department can not impose civil penalties for a violation of a requirement that is only set forth in a guidance document even when that guidance document is incorporated into a regulation. In *United Refining Co. v. DEP*,²³ the Department had assessed a civil penalty against United Refining for failing to submit certain air quality reports within 30 days of the end of a quarterly reporting period. The 30-day reporting requirement was found in a Department manual which included a disclaimer that the manual was solely for guidance purposes. Similar to the radon protection regulations, the air quality regulations required air sources to maintain records in accordance with the manual. The Board invalidated the civil penalty based upon the violation of the provision in the manual because the

²¹ 25 Pa. Code § 240.308.

²² Ex. A-18.

²³ 2006 EHB 846.

requirement does not have the force of law because it is not binding on the Department. If it is not binding on the Department, it should not be binding on United. Because the requirement does not have the force of law, it cannot be considered to be a regulation promulgated under the Air Act. Because it is not a regulation, it can not form the basis for an assessment of civil penalties.

It is clear that the Department need not follow the Manual. The truth of the matter is that it is also not clear that United needs to follow the Manual or face civil penalties. Intolerable mixed signals are sent when a mere policy is incorporated into a regulation. . . . The regulated community should be able to clearly understand that certain conduct is prohibited and can result in sanctions. If the Department considers the 30-day requirement to be so important that violating it can result in civil penalties, it should ask the Environmental Quality Board (“EQB”) to clearly spell the requirement out in a regulation. If it wants to retain unlimited flexibility, it should keep it in a guidance document. Trying to create the best of both worlds for itself is the worst of both worlds for regulated parties is simply not acceptable.²⁴

Section 240.308 is even more problematic than the regulation in *United Refining* because it purports to incorporate a policy document of another agency. Indeed, it is a policy document of another agency that is no longer even in use by that agency and not enforceable against that agency. Following the logic of the *United Refining* decision, the Department could not base a civil penalty upon a violation of EPA protocols.

However, the question before the Board in this matter is not whether or not the Department could base a civil penalty assessment or take other enforcement action against HouseInspect predicated on a violation of EPAs protocols. The issue before the Board is whether HouseInspect has demonstrated a commitment to compliance with the Radiation Certification Act and regulations. Even if the EPA protocol is not properly incorporated as a requirement of the Department’s regulations, HouseInspect explicitly adopted it as the testing protocol in its Quality Assurance Plan submitted to the Department. An important element of the Department’s radon testing program is embodied by Section 240.304 which requires that a radon tester maintain a quality assurance program “to assure that measurements are accurate and errors

²⁴ 2006 EHB 846, 850-51 (citation omitted).

are controlled. The program shall insure that testing devices are routinely and properly calibrated.”²⁵ HouseInspect’s Quality Assurance Plan, submitted to the Department by letter dated August 31, 2007,²⁶ provides that

[a]ll sampling will be done in accordance with EPA 402-R-92-004, “Indoor Radon and Radon Decay Product Measurement Device Protocols, and with EPA-R-92-003, Protocols for Radon and Radon Decay Product Measurements in Homes.”²⁷

Mr. Hoffman testified that duplicate testing and the calculation of ‘relative percent difference’ were elements of a quality assurance plan. Since HouseInspect’s Quality Assurance Plan provided for the use EPA protocols to track its sampling data, and it failed to produce the data for the time period requested by the Department, then HouseInspect failed to demonstrate that it was implementing the plan or “assuring that radon measurements were accurate and errors are controlled” on any kind of a consistent basis.²⁸ By failing to continuously maintain records in accordance with its own QAP, or otherwise demonstrating any institutionalized interest in implementing this plan, we fail to see any reason why HouseInspect’s certification should be renewed. Clearly the QAP is a critical element in effectuating the legislature’s purpose to protect the public from “unqualified or unscrupulous consultants and firms” and HouseInspect has consistently failed to comply with this basic requirement of the regulations. Accordingly, we find no error in the Department’s decision to deny the individual and firm recertification application. We make the following:

²⁵ 25 Pa. Code § 240.304.

²⁶ Ex. A-5.

²⁷ Ex. A-6 at “Sampling Procedures”.

²⁸ Parris Bradley testified that this plan had been in place at HouseInspect since 2004. Although it was revised in 2006, there is no testimony in the record which explains what those revisions entailed.

CONCLUSIONS OF LAW

1. The burden of proof in an appeal of the Department's denial of an application for radon testing recertification rests with HouseInspect. 25 Pa. Code § 1021.122 (c)(1).

2. A radon certification application will not be approved unless the applicant affirmatively demonstrates to the Department's satisfaction that the applicant is not in violation of the Radon Certification Act or Chapter 240 of the regulations. 25 Pa. Code § 240.201(a)(1).

3. The Department is also authorized to deny an application where the applicant has shown a lack of ability or intention to comply with the statute or regulations as indicated by past or continuous conduct. 25 Pa. Code § 240.201(b).

4. The Department's regulations require a radon tester to maintain a quality assurance program to assure that radon measurements are accurate and errors are controlled. 25 Pa. Code § 240.304.

5. The Department's regulations require a radon tester to maintain a radon health and safety program for employees. 25 Pa. Code § 240.305.

6. By failing to demonstrate maintenance of a quality assurance program or maintain proper records of an employee health and safety program, HouseInspect did not demonstrate compliance with the Department's regulations.

7. By failing to demonstrate maintenance of a quality assurance program or maintain proper records of an employee health and safety program HouseInspect failed to demonstrate an ability or intent to comply with the Radon Certification Act and regulations.

8. The Department properly denied HouseInspect's application for individual and firm radon testing recertification. 25 Pa. Code § 240.201.

9. HouseInspect waived any challenge to its appeal of the Department's October 29, 2007 letter by failing to raise an argument with citation to supporting legal authority in its post-hearing brief. 25 Pa. Code § 1021.131.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HOUSEINSPECT, PARRIS BRADLEY,
PETER BRADLEY AND BLAINE
ILLINGWORTH

v.

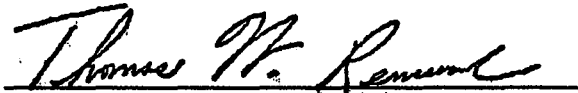
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

EHB Docket No. 2007-261-MG
(Consolidated with 2008-157-MG)

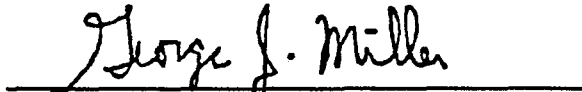
ORDER

AND NOW, this 20th day of July, 2009, it is hereby **ORDERED** that appeals at the above-captioned dockets are **DISMISSED**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: July 20, 2009

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

TELFORD BOROUGH AUTHORITY, et al.	:	
	:	EHB Docket No. 2008-265-MG
	:	
v.	:	EHB Docket No. 2008-272-MG
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	EHB Docket No. 2008-273-MG
	:	
	:	Issued: July 22, 2009

**OPINION AND ORDER ON
DISCOVERY MOTIONS**

By George J. Miller, Judge

Synopsis

The Board denies in part and grants in part a motion to compel the production of documents and also grants a motion for a protective order and relieves the Department from answering the appellants' request for admissions. The discovery requested by the appellants is in large part beyond the Board's order limiting discovery to the issue of the Board's jurisdiction to consider appeals from TMDLs that are issued by EPA.

OPINION

These appeals challenge the procedural uncertainties created by ongoing efforts by the Department and EPA to impose acceptable daily load limits for phosphorus and other nutrients on discharges from sewage treatment facilities which discharge to allegedly impaired waterways within the Commonwealth. A central issue in these appeals is whether the Board has jurisdiction



to review TMDLs issued by EPA through announcements on its website. The Board has scheduled a hearing on this issue to commence on August 17, 2009. Appellants¹ contend that the Board has jurisdiction because the Department has been so involved in EPA's development of these TMDLs that they are really an action of the Department. The Department says that these TMDLs are issued by EPA under authority given it by federal law, were developed by EPA, and are only reviewable by the United States District Court.

The Board has attempted to limit discovery in preparation for this hearing to the jurisdictional issue. By orders issued on March 20 and March 22, 2009, and by oral direction in conference calls, the Board has authorized discovery limited to the jurisdictional issue and has specifically designated issues on which discovery may not be conducted such as issues relating to the technical merits of the TMDLs, the scope or basis of impairment listings, consistency with prior standards, and Department concerns about the EPA's approach in developing the TMDLs.

Since that time the Appellants have proceeded with discovery as if the limitations contained in those orders did not exist. As a result, the Department has declined to produce certain documents based on the limitations in the Board's orders. Appellants in response have filed a motion to compel production of all documents requested in their second request for production of documents and have requested sanctions against the Department for its failure to comply with these discovery requests. To resolve this motion the Board directed an *in camera* review of the documents that the Department declined to produce on July 15, 2009. As described below, the Board found that nearly all of the documents withheld from discovery were

¹ The Appellants are largely sewer authorities and include the Telford Borough, Lower Paxton Township, the Homebuilders Association of Harrisburg, the Borough of West Chester and the West Goshen Sewer Authority. Other appellants in a companion docket are Lower Salford Township Authority, Lower Salford Township, Franconia Township, Franconia Township Sewer Authority, but these latter parties are not involved in the current discovery dispute.

properly withheld under the terms of the Board's orders limiting discovery to the jurisdictional issues. Accordingly, this motion will be denied except for the production of three documents that might be material to the jurisdictional issue under appellants' theory of the case. The Department has also filed a motion for a protective order concerning Appellants' requests for admissions which we will grant for similar reasons.

In Camera Review.

On July 15, 2009 the presiding judge reviewed several packages of documents presented to him by Department counsel as representing all of the documents withheld from production based on their view that the requests were not within the scope of discovery authorized by the Board's prior orders. With the exception of the following communications, the Board finds that the documents were properly withheld from production. The Board will order the production of the following documents that are at least potentially material to the jurisdictional issue under the Appellants' theory of the case:

Email dated September 10, 2007 from Rider to Henry at EPA rejecting request for support on TMDL endpoints based on Department policy.

Communications from Henry at EPA to Brown of the Department dated August 9 and August 16, 2007 seeking support for proposed limits for nitrogen and phosphorus.

Requests for Admissions.

Appellants have also filed 51 requests for admissions just before the close of discovery under the Board's orders. The Department has filed a motion for a protective order on the ground that they should not have to respond to these requests because they are too late and because none of the requests are germane to the jurisdictional issue under the Board's previous orders. While such a late filing of requests was authorized by the Board, virtually all of these requests relate to issues precluded from discovery at this time because they address largely

scientific and technical issues which are beyond the scope of the Board's orders limiting discovery to jurisdiction. For example, many of the requests attempt to attack the merits of EPA's TMDLs based on matters relating to previous impairment listings, technical nutrient impairment assessment and impairment protocols, a federal court consent decree, the effect of the TMDL on holders of MS4 permits, and the necessity to upgrade facilities required by the limits set by the TMDLs.

Requests for Admissions 33-41 seek admissions with respect to a letter from the Department to EPA dated June 27, 2008. In that letter, John T. Hines of the Department advised Robert Koroncai of EPA that EPA's approach to the TMDLs in issue "that the chosen approach and endpoint adequately protect all beneficial water uses in those watersheds." The requests do not seek an admission as to the authenticity of the document. Instead, they request admissions as to what the letter said or did not say. Appellants may present arguments on this letter at the hearing, but the letter speaks for itself and requests for admissions as to its content are improper.

Requests for admissions 49-51 seek admissions on jurisdictional issues that might arise in the future but are not now before the Board, such as whether the Department might amend a TMDL issued by EPA. The Department's motion for a protective order will be granted because the requests exceed the bounds of permissible discovery under the Board's previous orders.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

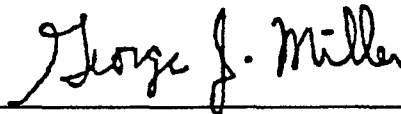
TELFORD BOROUGH AUTHORITY, et al. :
: EHB Docket No. 2008-265-MG
:
:
v. : EHB Docket No. 2008-272-MG
:
:
: EHB Docket No. 2008-273-MG
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

ORDER

AND NOW, this 22nd day of July, 2009, it is hereby ordered as follows:

1. Appellants' Motion to Compel Appellants' Discovery Requests and Request for Sanctions is hereby **DENIED** except that the Department shall produce the following documents:
 - a. Email dated September 10, 2007 from Rider to Henry at EPA rejecting request for support on TMDL endpoints based on Department policy.
 - b. Communications from Henry at EPA to Brown of the Department dated August 9 and August 16, 2007 seeking support for proposed limits for nitrogen and phosphorus.
2. The Department's motion for a protective order with respect to Appellants' June 26, 2009 requests for admissions is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER

Judge

DATED: July 22, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

c: For the Commonwealth of PA, DEP:
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Intervenors for Appellants, Lower Paxton, *et al.*, 2008-273:

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For Borough of Warminster, *Amicus Curiae*:

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Kelly A. Gable, Esquire
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One Logan Square, 27th Floor
18th & Cherry Streets
Philadelphia, PA 19103

The Department moved to dismiss the appeal on the basis that Allegheny Milestone had not prepaid the civil penalty assessment in accordance with Section 18.4 of the Surface Mining Act, 52 P.S. § 1396.186, and Section 605(b) of the Clean Streams Law, 35 P.S. § 691.605(b), both of which state that any person wishing to challenge a penalty assessment must, within 30 days, either post an appeal bond in the amount of the penalty or forward the amount of the penalty to the Department to be placed in an escrow account, or provide a statement of inability to prepay.

Allegheny Milestone failed to file a response to the Department's motion and, therefore, we may deem all properly pleaded facts in the motion admitted. 25 Pa. Code § 1021.91(f); *Tanner v. DEP*, 2006 EHB 468, 469.

According to the Department's motion, as of the date of its filing more than two months after the notice of appeal, no prepayment or bond had been submitted to the escrow agent for the Department in accordance with Section 18.4 of the Surface Mining Act and Section 605(b) of the Clean Streams Law. The motion is supported by both an affidavit signed by the Department's paralegal who is assigned the responsibility of collecting prepayments of civil penalties and a certification signed by the Secretary to the Environmental Hearing Board stating that Allegheny Milestone provided neither a prepayment nor a verified statement of inability to prepay. Pursuant to both Section 18.4 of the Surface Mining Act and Section 605(b) of the Clean Streams Law, a failure to forward the prepayment or appeal bond to the Department within the thirty-day timeframe results in a waiver of the right to contest the violation or the amount of the penalty. 52 P.S. § 1396.18d and 35 P.S. § 691.605(b).

Because Allegheny Milestone has waived its right to contest the amount of the penalty,

the Department's motion to dismiss the appeal of the civil penalty assessment is granted.¹

¹ A related appeal at EHB Docket No. 2008-136-C was dismissed on March 27, 2009 for failure to comply with orders of the Environmental Hearing Board, indicating a lack of intent to pursue the appeal: *Sidney L. and Debra A. Miles v. DEP*, EHB Docket No. 2008-136-C (Opinion Dismissing Appeal issued March 27, 2009).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALLEGHENY MILESTONE, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

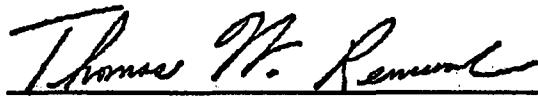
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EHB Docket No. 2008-336-R

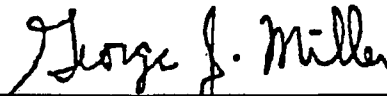
ORDER

AND NOW, this 27th day of July 2009, the Department of Environmental Protection's Motion to Dismiss is **granted** and the appeal docketed at EHB Docket No. 2008-336-R is *dismissed*.

ENVIRONMENTAL HEARING BOARD



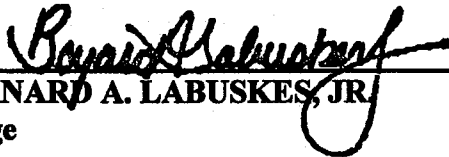
THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge


BERNARD A. LABUSKES, JR.
Judge

DATE: July 27, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and MILLCREEK
 TOWNSHIP, Permittee**

**EHB Docket No. 2006-086-R
 (Consolidated with 2006-006-R)**

Issued: July 27, 2009

**OPINION AND ORDER ON
 PETITION TO REOPEN RECORD**

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

A Petition to Reopen Record is denied because the evidence sought to be introduced does not meet the criteria of 25 Pa. Code § 1021.133.

OPINION

This matter involves two consolidated appeals filed by the Angela Cres Trust of June 25, 1998 challenging a permit extension granted by the Department of Environmental Protection to Millcreek Township. The permit authorized Millcreek Township to widen and deepen a channel that runs on property owned by the Trust and to conduct work on driveway culverts on the Trust's property. On June 25, 2009, the Board issued an Adjudication providing the Department and Millcreek Township with an opportunity to review whether the work could be done without

causing flooding to a fish hatchery located at the outlet of the work area and to a neighboring property. See *Angela Cres Trust of June 25, 1998 v. DEP and Millcreek Township*, EHB Docket No. 2006-086-R (Consolidated) (Adjudication issued June 25, 2009). Prior to the Adjudication, Millcreek Township filed a Petition to Reopen Record, seeking to introduce a copy of the Trust Agreement in this matter. This Opinion addresses the petition.

Board Rule 1021.133 allows reopening of the record upon the following grounds:

§ 1021.133. Reopening of record prior to adjudication.

* * * * *

(b) The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:

(1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.

(2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.

(3) The evidence is not cumulative.

(c) The record may also be reopened to consider evidence which as become material as a result of a change in legal authority occurring after the close of the record. A petition to reopen the record on this basis shall specify the change in legal authority and demonstrate that it applies to the matter pending before the Board....

25 Pa. Code § 1021.133 (b) and (c).

Millcreek Township's Petition states that it first sought a copy of the Trust Agreement on June 9, 2006 when it submitted its First Set of Interrogatories and Requests for Production of Documents. The Trust responded that the information was subject to attorney – client privilege. Millcreek Township continued to seek information regarding the Trust Agreement both in this

appeal and in a related, subsequent appeal at EHB Docket No. 2008-092-R. The Appellant declined to produce the document on the basis of relevancy. Finally, on April 14, 2009, the Department of Environmental Protection filed a motion to compel in the appeal at Docket No. 2008-092 seeking production of the Trust Agreement. The Appellant responded by producing a redacted version of the Trust Agreement.

At no time prior to April 2009 did Millcreek Township seek to compel the production of the Trust Agreement. It did not seek to make the Trust Agreement a part of the record until the filing of its petition on June 15, 2009, more than one and a half years after the hearing in this matter, more than a year after the filing of its post hearing brief, and only 10 days prior to the issuance of the Board's adjudication in this matter. The parties have been aware of the Trust Agreement since the early stages of this proceeding and could have sought to compel its production prior to the close of the record in this matter. It does not constitute newly discovered evidence or evidence which could not have been discovered prior to the close of proceedings. Moreover, the testimony of Laurel Hirt at the hearing clearly established that she had authority to act on behalf of the Trust. Therefore, the criteria of 25 Pa. Code § 1021.133(b) have not been met.

Millcreek Township points to the Board's June 12, 2008 decision in *Hanoverian, Inc. v. DEP* as raising a question as to whether the Trust was a proper party to the proceeding. Again, the parties could have raised this issue much earlier. Millcreek's Petition to Reopen Record was not filed until one year after the *Hanoverian* decision.

Moreover, the *Hanoverian* case does not set forth a change in legal authority. The Board simply found that the trust in question in the *Hanoverian* case was not an entity, but more akin to a contract merely setting forth an agreement between the trustee and the beneficiary wherein the

property subject to the Department order was held by the trustee for the benefit of the beneficiary. *Hanoverian*, 2008 EHB at 302. The Board specifically noted that there was *no* “Pennsylvania case law directly on point to support the proposition that the Trust is *not* a person for the purposes of instituting a legal proceeding.” *Id.* (Emphasis added) Rather, it relied on cases in other jurisdictions that supported the Board’s “view that *this particular trust* is not a legal ‘person’ within the meaning of the Environmental Hearing Board Act.” *Id.* (Emphasis added) In reaching that conclusion, the Board also took into consideration that the Department’s order was not directed in any way to the trust, but rather, it was directed solely to the trustee and the beneficiary. The Board did not hold that a trust can never be an appellant in an appeal before the Board, but simply that the trust involved in the *Hanoverian* case did not meet the requisite criteria. Moreover, it is important to note that the appellants in *Hanoverian* filed no response disputing the Department’s motion and the entire case was settled shortly thereafter.

In contrast, in the present case the Angela Cres Trust does appear to be the proper party to this proceeding. According to documents filed in the related appeal at EHB Docket No. 2008-092-R, the Trust is the sole owner of the property that is affected by the permit on appeal. The land was deeded to the Trust by the property’s former owner, Esther Pomeroy, in 1998. (Exhibit C to Trust Reply in 2008-092-R) Millcreek Township’s tax records list the Trust as the payor of taxes on the property. (Exhibit B to Trust Reply in 2008-092-R) Millcreek Township itself instituted an eminent domain action in the Court of Common Pleas of Erie County naming only the Trust as the opposing party. Therefore, we find that the criteria for reopening the record set forth in 25 Pa. Code § 1021.133(c) have not been met.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998 :
v. : EHB Docket No. 2006-086-R
: (Consolidated with 2006-006-R)
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

ORDER

AND NOW, this 27th day of July 2009, the Petition to Reopen Record is **denied**.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: July 27, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

TILDEN TOWNSHIP and FRANK T. PERANO :

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and TILDEN TOWNSHIP,
 Permittee**

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**EHB Docket No. 2009-066-L
 (Consolidated with 2009-067-L)**

Issued: August 11, 1009

**OPINION AND ORDER
 ON MOTION TO DISMISS**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Department issues an order to a municipality directing the municipality to revise its official plan to address the future sewage disposal needs of a mobile home park because the Department has informed the park that its NPDES permit for its sewage treatment plant will not be renewed. The Board finds that the owner of the mobile home park has standing to appeal and his appeal is ripe for review.

OPINION

On February 5, 2008, the Department of Environmental Protection (the "Department") informed Frank T. Perano by letter that it will not renew the NPDES permit authorizing him to operate a waste water treatment plant serving the Pleasant Hills Mobile Home Park located in Tilden Township, Berks County. The permit is due to expire on August 31, 2010. As a result of the Department's decision not to renew Perano's permit, the Department issued an order to

Tilden Township on March 27, 2008 directing the Township to provide sewer service to Pleasant Hills. The Township appealed that order to this Board (EHB Docket No. 2008-140-MG). Perano moved to intervene. After argument, Judge Miller permitted Perano to intervene. The order, however, was thereafter rescinded and we subsequently closed the appeal.

The Department issued a new order to the Township on April 15, 2009. Unlike the first order, the new order does not specify how the Township must address the disposal needs of the mobile home park once Perano's NPDES permit expires. Instead, it leaves it to the Township to decide in the first instance how the mobile home park's future needs will be met. Both the Township and Perano appealed the April 15, 2009 order, which we combined into this consolidated appeal.

The Department has filed a motion asking us to dismiss Perano's appeal from the order issued to the Township.¹ The Department argues that Perano lacks standing because he is not aggrieved by the order. It also argues that all of the issues raised in Perano's appeal are not ripe for review. The Department's arguments essentially boil down to a claim that Perano's appeal should not be heard because it is not yet clear how the Township will respond to the Department's order. Perano, of course, opposes the motion. Tilden Township filed a letter indicating that it supports Perano's continued participation: "Because the sewage treatment system operated by Mr. Perano for the Pleasant Hills Mobile Home Park is directly relevant to the issues raised by the Tilden appeal, Tilden believes the Department's Motion to Dismiss should not be granted and that Mr. Perano should remain a party to this consolidated appeal."

We detect no merit in the Department's motion. First, if, as Judge Miller found, Perano had standing to intervene in the appeal from the earlier, nearly identical order, it follows that he

¹ Perano's appeal is docketed at 2009-067-L. The Department's motion does not concern the Township's appeal docketed at 2009-066-L.

has standing to file this appeal from the second order. We are not sure why we are asked to address essentially the same issue twice.

Secondly, the Township has been ordered to revise its Plan immediately to address Perano's future needs. This case is all about Perano's mobile home park. The Department claims that the Township has any number of potentially acceptable planning options, but no matter which of these supposedly myriad options the Township selects, the selection will have a substantial, direct, and immediate impact on Perano. Perano can operate his plant now. In the future, he will not be allowed to do so. Although it may not be clear exactly *how* Perano will be impacted, there is no doubt that he will be affected in some way. The Department has not identified and we cannot imagine how any option that the Township chooses would not affect Perano since the new official Plan will no longer provide for Perano's operation of a treatment plant. Perano has an obvious interest in how his mobile home park's future needs will be met. That interest unquestionably gives him standing to appeal the order.

Turning to the Department's argument that the issues raised by Perano are not ripe, we note that ripeness is a prudential limitation related to justiciability, not jurisdiction. It relates to the proper *timing* of litigation:

Ripeness and mootness easily could be seen as the time dimensions of standing. Each assumes that an asserted injury would be adequate; ripeness then asks whether an injury that has not yet happened is sufficiently likely to happen, and mootness asks whether an injury that has happened is too far beyond a useful remedy.

McCandless v. McCandless Police Officers Ass'n, 901 A.2d 991, 1002-03 (Pa. 2006) (quoting WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 3531.12 (1984)). Ripeness refers to the preference of courts to avoid getting involved in hypoplastic disagreements where important issues (often involving constitutional questions) have not been "adequately developed"

for judicial review and the parties will suffer little or no hardship if review is delayed. *See, Borough of Bedford v. DEP*, 972 A.2d 53, 58-59 (Pa. Cmwlth. 2009); *Gardner v. DER*, 658 A.2d 440, 444 (Pa. Cmwlth. 1995). The doctrine assumes that review at some future time will be available and it would be better to review it then than now.

For the concept of ripeness to have any applicability in a Board appeal, we would need to conclude that there are instances where we will not hear an appeal even though it is brought by an aggrieved party who has clearly filed a timely appeal from what is clearly a final, appealable Departmental action. In other words, we have jurisdiction but we decline to exercise it. Frankly, it is difficult to imagine such an instance. Indeed, declining to hear such an appeal would arguably abrogate our statutory *duty* to review final agency actions. 35 P.S. § 7514(a). The Legislature has defined the proper timing of litigation before the Environmental Hearing Board. The operative question in Board cases is not whether an appeal is “ripe;” it is whether the agency has taken a final action and how much time has passed since the Department took that final action. 35 P.S. § 7514; 25 Pa. Code § 1021.52. We see no reason to conduct a secondary analysis of whether a timely appeal from a final agency action is also “ripe.”

In any event, to the extent that the limitation of ripeness can ever be said to apply in a Board case, we certainly see no basis for accepting the Department’s invitation to dismiss Perano’s appeal on that basis. Planning is presumably underway *now* on how to deal with Perano’s future needs. This appeal relates to that ongoing planning effort. That planning will have a direct and immediate impact on Perano. Relief is immediately available in the form of overturning or modifying the order.²

² Of course, the timing and context of a final agency action may have an impact on the relevance of certain issues.

The Department's primary basis for characterizing the dispute regarding the Township's duty to immediately revise its Official Plan as something less than ripe is that the Township has not selected and the Department has not approved a particular sewage disposal option to address the mobile home park's needs. Under this reasoning, if the Department finds that a party has contaminated a site and issues an order to the party to submit a clean-up plan, the matter is not ripe for review until a particular plan is submitted and approved by the Department. The Department's argument misses the fundamental point that the Department has made important factual and legal findings that are having immediate consequences. Here, the Department has not only made the "decision" not to renew Perano's permit, it has also "found and determined" that the Township's Plan is "inadequate," and it has ordered the Township--subject to potential civil and criminal penalties and other repercussions--to do something about it within 120 days. The fact that the Township's effort to come into compliance is not yet defined may affect what issues are relevant, but it in no way prevents the order from being anything other than a final agency action ripe for our immediate review.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

TILDEN TOWNSHIP and FRANK T. PERANO:

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and TILDEN TOWNSHIP,
Permittee**

**EHB Docket No. 2009-066-L
(Consolidated with 2009-067-L)**

ORDER

AND NOW, this 11th day of August, 2009, it is hereby ordered that the Department's motion to dismiss Perano's appeal is denied.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: August 11, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

v. :

MR. KIRK E. DANFELT and MRS. EVA :
JOY GIORDANO :

EHB Docket No. 2008-051-CP-C

Issued: August 20, 2009

OPINION AND ORDER
ON MOTION FOR DEFAULT JUDGMENT

By Michelle A. Coleman, Judge

Synopsis:

The Board grants in part and denies in part the Department’s motion for default judgment. The Board grants the Department’s unopposed motion with respect to Defendant, Danfelt. The circumstances show Danfelt’s lack of interest in defending himself in this matter. As a sanction, the relevant facts in the complaint are deemed admitted and liability on the part of Danfelt is established. We deny the motion with respect to Giordano who filed a response to the motion and grant her leave to file an answer and dispute her liability with respect to the alleged violations.

Opinion

This matter began with the Department of Environmental Protection (“Department”) filing a complaint for the assessment of civil penalties (“Complaint”) against both Defendants, Kirk E. Danfelt and Eva Joy Giordano, for alleged violations of the Clean Streams Law, 35 P.S. §§ 691.401; 691.611, and the regulations thereto. The Complaint was filed with the Board on



February 26, 2008 and personal service on the Defendants occurred on July 30, 2008. The Board's Rules require that "[a]nswers to complaints shall be filed with the Board within 30 days after the date of service of the complaint" 25 Pa. Code § 1021.74(a). Neither of the Defendants filed an answer to the Department's Complaint.

The Department filed a Notice of Praecipe for Entry of Default Judgment ("Notice") and mailed it to the Defendants on January 8, 2009. The Notice provided that the Defendants had 10 days to defend against the Complaint. The Defendants never took any action.

Now before the Board is the Department's Motion for Default Judgment ("Motion") filed on April 15, 2009. This Motion requests the Board to enter judgment against the Defendants for failure to abide by the Board's Rules. After the Department filed this Motion the Board received an entry of appearance on behalf of Defendant, Eva Joy Giordano ("Giordano"). Counsel for Giordano filed a response to the Motion on May 15, 2009 admitting that Giordano has not responded to the Department's Complaint, but that she has spoken with the Department regarding her lack of involvement with the alleged violations of the Clean Streams Law. Giordano requests that we deny the Department's Motion and grant her leave to file an answer to the Department's Complaint.

After receiving Giordano's response the Department filed a Renewed Motion for Default Judgment ("Renewed Motion") on May 19, 2009. This Renewed Motion alleges that the Department has in fact spoken with Giordano regarding her involvement with the alleged violations, whereupon the Department suggested she obtain counsel to represent her in this matter, as well as file an answer to the Complaint.

The Renewed Motion requests the Board to deny Giordano's response and enter judgment in favor the Department. The Department argues that Giordano is attempting to

circumvent the Rules by filing a late response to the Motion. Our Rules require that “[a] response to a dispositive motion may be filed within 30 days of the *date of service* of the motion.” 25 Pa. Code 1021.94(b) (emphasis added). The Department’s Motion is dated April 14, 2009, however the Motion was not filed with the Board until the April 15, 2009. Assuming Giordano was served the same day the Motion was filed with the Board her response was timely as it was filed with the Board on May 15, 2009.

We have in the past granted the Department’s request for default judgment when a defendant fails to file an answer pursuant to the Board’s Rules. According to section 1021.74(d),

“[a] defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.61 (relating to sanctions).”

25 Pa. Code § 1012.74(d). Pursuant to section 1021.161, “[t]he Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal” 25 Pa. Code § 1021.161. The Board, upon entering default judgment against a defendant, deems the facts in the complaint admitted and establishes liability. With respect to the assessment of the penalties a hearing will be scheduled.

Although Giordano has not filed an answer to the Department’s Complaint, she has filed a response to the Motion requesting leave to file a late answer. In *DEP v. Richard and Vera Barefoot*, 2003 EHB 667, the Defendants did not file a timely answer to the Department’s complaint, but did file a timely response to the motion. *Id.* at 669. In that case the Board stated that the Defendants “did not fail entirely to defend against this action by not responding in any way to the complaint or motion.” *Id.* at 671. Similarly here we do not find that Giordano has completely failed to defend herself. As stated in her response and confirmed by the

Department's Renewed Motion, Giordano contacted the Department's counsel regarding her involvement in the alleged violations. As well, Giordano has filed a timely response to the Motion alleging she is not a liable party. Although we do not condone late filings of answers there appear to be questions regarding Giordano's involvement with the alleged violations. Under these circumstances we do not find it appropriate to grant the Department's Motion with respect to Giordano.

On the other side of the coin is Danfelt who has not followed any Board Rules. In fact, he has not filed an answer to the Department's Complaint, nor has he filed a response to the Department's pending Motion. He has lacked any involvement in defending himself in this matter and seems to lack interest proceeding with the case. In these cases the Board has entered default judgment. Most recently, the Board granted default judgment in *DEP v. Wesley A. Tate* because the Defendant failed to file an answer to the complaint and failed to respond to the motion for default judgment. EHB Docket No. 2008-332-CP-C (Opinion & Order issued June 11, 2009), *see also DEP v. Dennis S. Sabot*, 2007 EHB 255; *DEP v. John P. Pecora et al*, 2007 EHB 125; *DER v. Allegro Oil and Gas Co.*, 1991 EHB 34; *DER v. Marileno, Corp.*, 1989 EHB 206; *DER v. Canada-PA, Ltd.*, 1987 EHB 177. Danfelt's complete lack of involvement leads the Board to grant the Department's unopposed motion with respect to Danfelt.

At the hearing in this matter Danfelt may only present evidence with respect to the reasonableness of the amount of civil penalties. We will grant Giordano's request for leave to file an answer to the Complaint, at which time discovery deadlines will be set. Giordano will be given the opportunity to dispute her liability and the amount of civil penalties against her at the hearing.

We enter the following order.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

v.

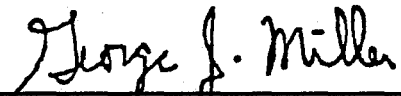
**MR. KIRK E. DANFELT and MRS. EVA
JOY GIORDANO**

EHB Docket No. 2008-051-CP-C

ORDER

AND NOW, this 20th day of August, 2009, it is HEREBY ORDERED that the Department's motion for default judgment is **granted in part and denied in part**. The relevant facts in the complaint are deemed admitted and liability is established on the part of Kirk E. Danfelt. The motion is denied with respect to Eva Joy Giordano and her request for leave to file an answer to the Complaint is granted. An answer shall be filed within 15 days of the date of this Order at which time the Board will issue a Pre-Hearing Order.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge


BERNARD A. LABUSKES JR.
Judge

DATED: August 20, 2009

Acting Chairman and Chief Judge Thomas W. Renwand concurs with the result; concurring Opinion is attached.

c: DEP, Bureau of Litigation
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
Susana Cortina de Cardenas, Esquire
Office of Chief Counsel
Southcentral Regional Counsel

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Mapleton Depot, PA 17052

For Defendant Eva Joy Giordano:
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Huntingdon, PA 16652

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

v.

**MR. KIRK E. DANFELT and MRS. EVA
JOY GIORDANO**

EHB Docket No. 2008-051-CP-C

**CONCURRING OPINION OF
ACTING CHAIRMAN AND CHIEF JUDGE
THOMAS W. RENWAND**

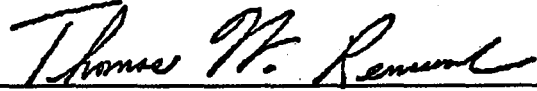
I concur completely in the majority decision granting the Pennsylvania Department of Environmental Protection’s Motion for Default Judgment against Defendant Mr. Kirk E. Danfelt. I also concur in the majority decision to allow Defendant Mrs. Eva Joy Giordano leave to file an Answer to the Complaint. I write separately because of the specific facts surrounding this issue.

Defendant Giordano did not file an Answer to the Complaint. Moreover, she ignored the Department’s Notice of Praecipe for Entry of Default Judgment which afforded Giordano 10 days to file an Answer to the Complaint. She did file an Answer to the Department’s Motion for Default Judgment arguing that she spoke with the Department regarding her lack of involvement with the alleged violations of the Clean Streams Law.

If a party fails to file an Answer to the Complaint even after a ten day notice is given normally it will be too late for her to contest liability. However, here the only allegation alleged against Mrs. Giordano in the complaint is that she is married to Mr. Danfelt. The Complaint then alleges that Mr. Danfelt violated the Clean Streams Law by his actions on three different properties. It is not alleged that either Mr. Danfelt or Mrs. Giordano owned these properties or that Mrs. Giordano had any involvement with the activities causing environmental harm. Therefore, in order to prevent what might be manifest injustice and under the unique facts of this

case, I agree with the majority opinion that Mrs. Giordano should be granted leave to file an Answer to the Complaint.

ENVIRONMENTAL HEARING BOARD

A handwritten signature in black ink, appearing to read "Thomas W. Renwand", written over a horizontal line.

THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATED: August 20, 2009



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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

v.

**D.B. ENTERPRISE DEVELOPERS
 AND BUILDERS, INC.**

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EHB Docket No. 2008-223-CP-MG

Issued: September 1, 2009

**OPINION AND ORDER
 ON MOTION FOR SANCTIONS**

By George J. Miller, Judge

Synopsis

The Board enters judgment on liability against a defendant as a sanction for its repeated failure to comply with orders of the Board which required it to answer the Department's interrogatories and requests for production of documents. A hearing will be scheduled on the proper amount of the judgment.

OPINION

Before the Board is a motion for sanctions by the Department of Environmental Protection which seeks judgment on liability against D.B. Enterprise Developers and Builders, Inc., (Defendant), as a sanction for failing to answer the Department's discovery as required by orders of the Board. We grant the Department's motion.

The genesis of this matter is a complaint for civil penalties filed by the Department which alleged various violations of the Clean Streams Law resulting from the Defendant's construction activities at the Springhill Knoll Subdivision, Springfield Township, Delaware County. The Department seeks penalties in the amount of \$28,368.20. In addition to the penalty amount, the complaint seeks recovery of costs incurred by the Delaware County Conservation District in the amount of \$368.20.

The Department has filed four motions in order to compel the Defendant to serve responses to the Department's discovery requests. By orders dated December 15, 2008, January 23, 2009, and June 4, 2009, the Board has ordered the Defendant to answer the Department's discovery requests. The Board's June 4, 2009 order required the Defendant to serve amended answers to admissions by June 15, 2009. The Defendant failed to do so. Accordingly, on July 9, 2009, the Department filed a motion for sanctions seeking judgment on liability against the Defendant, for its failure to serve responses to the Department's discovery requests. The Defendant has filed no answer to this motion.

Section 1021.161 of the Board's Rules of Practice and Procedure authorize the imposition of sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure, including an adjudication against the offending party, or other appropriate discovery sanctions including those permitted under Rule 4019 of the Pennsylvania Rules of Civil Procedure. Sections 4019(a)(1) and (c)(3) of the Pennsylvania Rules of Civil Procedure authorize the entry of judgment against a party failing to make discovery or to obey an order respecting discovery. The Board has exercised this authority to dismiss an appeal when a

party fails to comply with discovery obligations under the Board's Rules of Practice and Procedure.¹

We think it is appropriate in this case to enter judgment on liability against the Defendant for its failure to comply with the Department's discovery requests and numerous orders of the Board. This failure amounts to a studied refusal to provide the Department with information directly relevant to the Defendant's ability to pay the claimed penalty and the extent to which Defendant has profited from its violations of the Clean Streams Law and the Department's regulations. Our view is bolstered by the fact that the Defendant has failed to answer the Department's motion for sanctions nor otherwise offered any explanation for its refusal to abide by the orders of the Board.

Accordingly we will enter judgment against the Defendant on liability and will schedule a hearing on the appropriate amount of the penalty and the amount of economic benefit gained by the Defendant's violations which should be disgorged, if any.²

Accordingly, we enter the following:

¹*Swistock v. DEP*, 2006 EHB 398; *Kennedy v. DEP*, 2006 EHB 477 (also ordered Defendant to reimburse the Department for the costs of the court reporter); *Potts Contracting v. DEP*, 1999 EHB 958; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697; *Shaulis v. DEP*, 1998 EHB 503.

²*DEP v. Quaker Homes, Inc.*, EHB Docket No. 2008-244-CP-MG (Opinion issued June 5, 2009); *Schieberl v. DEP*, EHB Docket No. 2008-275-L (Opinion issued March 6, 2009); *DEP v. Pecora*, 2007 EHB 533.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :**

v. :

EHB Docket No. 2008-223-CP-MG


**D.B. ENTERPRISE DEVELOPERS :
AND BUILDERS, INC. :**


ORDER

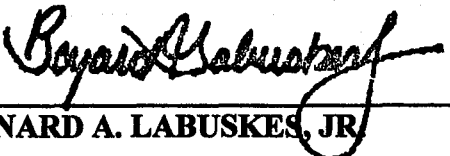
AND NOW, this 1st day of September, 2009, it is **HEREBY ORDERED** that the Board enters judgment on the issue of liability against D.B. Enterprise Developers and Builders, Inc., (Defendant), as a sanction for the Defendant's failure to comply with orders of the Board to answer the Department's discovery requests. The relevant facts in the complaint are deemed admitted and liability is established. A hearing will be scheduled to receive evidence limited to the amount of the civil penalty to be assessed and the amount of Defendant's profit from its noncompliance to be disgorged, if any.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Chief Judge


GEORGE J. MILLER
Judge


MICHELLE A. COLEMAN
Judge


BERNARD A. LABUSKES, JR.
Judge

DATED: September 1, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
William H. Gelles, Esquire
Office of Chief Counsel – Southeast Region

For Appellant:
Thomas D. Schneider, Esquire
55 Green Valley Road
Wallingford, PA 19086

The Appellants have listed Randal Weiss, a Department employee, as a witness in their pre-hearing memorandum. The Department has filed a motion in limine asking us to preclude Weiss from testifying. According to the Department, Weiss was not involved in and has no direct knowledge relating to the Department's review and approval of the RI/CP. Rather, his involvement at the site began after the RI/CP was approved. In his affidavit submitted in support of the Department's motion, Weiss states as follows:

My first involvement regarding any matter related to the Site at issue in this appeal resulted from a routine inspection I conducted at the Frey Farm Landfill ("Landfill") in Lancaster County on May 15, 2009. At that time I became concerned that the Landfill may have been improperly using material from the Site as alternative daily cover. I subsequently became concerned that overweight trucks may have been transporting solid waste from the Site to the Landfill.

I visited the Site on May 18, June 2 and 9, and July 15, 2009 to investigate my concerns. These inspections were limited to addressing my concerns regarding alternative daily cover and overweight trucks. These are the only times I visited the Site.

At this time, the Department has not taken any enforcement actions regarding the issues of concern.

The Department's argument in support of its motion is that *all* evidence regarding events that occurred after the Department took the action being appealed is necessarily irrelevant. All such evidence is irrelevant in the Department's view because it cannot possibly shed any light on whether the Department acted reasonably and lawfully. Therefore, because Weiss only became involved with the Site after the Department approved the RI/CP, he cannot possibly provide any relevant information and he should be excused from the "significant burden" of testifying. TRRAAC opposes the motion, arguing that Weiss has relevant information and that requiring him to testify will not impose an untoward burden.

The Department's argument is much too broad. As a matter of both the rules of evidence and administrative law, the Department's argument overstates the significance of the date when the Department took the action being appealed, at least as that date relates to assessing the relevance of otherwise probative evidence.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. Pa.R.Ev. 401. Whether evidence has a tendency to make a given fact more or less probable is determined by this Board in the light of reason, experience, scientific principles, and other testimony offered in the appeal. Pa.R.Ev. 401, *Official Comment*. We must decide whether the evidence sought to be admitted might change a reasonable person's assessment of the probabilities of a fact. OHLBAUM ON THE PENNSYLVANIA RULES OF EVIDENCE (2008-09 ed.).

Evidence of events that occurred after the supposedly critical incident often has undeniable relevance. The most obvious example is evidence of subsequent remedial measures, which is excluded in certain cases as proof of negligence or culpability not because it is irrelevant, but for the public policy reason of encouraging responsible parties to take added safety measures. See Pa.R.Ev. 407 and its *Official Comment*. Evidence of subsequent accidents can be admissible to demonstrate the existence of a hazardous condition. *Fernandez v. City of Pittsburgh*, 643 A.2d 1176 (Pa. Cmwlth. 1994). Flight, changing one's appearance, failing to appear at obligatory legal proceedings, threatening witnesses, concealing one's identity, and destroying evidence are all events that occur after a crime, accident, or event that may in certain circumstances be relevant. OHLBAUM § 401.08. Evidence regarding offers to compromise or to pay expenses can be relevant and admissible for any number of purposes other than proving

liability. Pa.R.Ev. 408 and 409. The Department is simply incorrect in postulating a categorical exclusion for all evidence regarding all events occurring after the primary incident in question.

Evidence regarding subsequent events can easily change a reasonable person's assessment of the probabilities of a fact. For example, suppose the Department issues a permit for the construction of a dam. While an appeal from the permit issuance is pending, the dam is built to specification but then fails, causing catastrophic loss of life and property downstream. Under the Department's view, the failure of the dam is not relevant for the simple reason that it concerns an event that occurred after the Department issued the permit. The Board must close its eyes to the dam failure and the catastrophe that it caused because the dam failed after the Department issued the permit. Or suppose that during excavation in preparation for construction it is revealed for the first time that the surrounding geology cannot support a dam. Or that the Department's experts or other party's experts conduct further study after the permit is issued that reveals the hazardous nature of the dam site. Or that the stream being dammed changes course as a result of, e.g., flooding or other acts of nature or mine subsidence, after the permit is issued. All of this evidence can in no way be said to be irrelevant simply because it relates to events that occurred after permit issuance. It clearly also relates to the propriety of the issuance of the permit in the first place. All of the evidence is probative on whether the Department's issuance of a dam permit should be sustained.

For the Department to disregard or ignore evidence of subsequent events suggesting that it may have made a mistake would be a dereliction of its duty to protect the Commonwealth's environment. It would be equally inappropriate for this Board to ignore such evidence. In fact, we can imagine no good reason why we would disregard such important information out of blind deference to an overly rigid interpretation of the rules of evidence.

The Department's argument that all evidence of subsequent events is by definition irrelevant is also incorrect as a matter of administrative law. To be precise, the events of which the Department speaks are not really "subsequent" at all. No action of the Department adversely affecting a person is final as to that person once that person perfects an appeal from the action with this Board. 35 P.S. § 7514(c); *Fiore v. DER*, 665 A.2d 1081, 1086 (Pa. Cmwlth. 1995). Although it is enforceable, absent a supersedeas, the Department's action does not become final in the legal sense until this Board decides that it is final. Since the Department's action is provisional with respect to an appellant once an appeal is filed, the date of the provisional action becomes largely insignificant. The pertinent inquiry in a Board appeal is not whether the Department made the correct decision when it made it. There is no reason to consider whether a nonfinal action was correct at the time. Rather, the pertinent question is whether we should approve the nonfinal action *now* and convert it into a final action *now*. Therefore, any evidence generated up until *now* is potentially relevant.

Admittedly, the phrasing of our standard of review (as distinct from our *scope* of review) can be misleading. Although we consider whether the Department violated the law or acted unreasonably, our appeals should not be thought of as tort cases. We are charged with reviewing the Department's decision, not its conduct. Our focus is on the action itself. That is why going through the record to pick at errors the Department may have made along the way in reaching a decision is usually an unnecessary and unproductive distraction. *O'Reilly v. DEP*, 2001 EHB 19, 51. What really matters is whether the Department made the right call in the end.

As has often been said, the Board's responsibility is to make a *de novo* determination of whether the Department's action should be sustained. *Leatherwood v. DEP*, 819 A.2d 604, 611 (Pa. Cmwlth. 2003); *Warren Sand & Gravel v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

“*De novo* review involves full consideration of the case anew. The [EHB] ... is substituted for the prior decision maker, DER, and redecides the case.” *O’Reilly*, 2001 EHB at 32 (quoting *Young v. DER*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991)). Unlike many other administrative tribunals, we do not conduct a record review. Instead, we are required to create our own record, and that record may and almost always does include evidence not previously considered by the Department. *Pennsylvania Trout v. DEP*, 863 A.2d 93, 106 (Pa. Cmwlth. 2004); *Lower Salford Township Authority v. DEP*, EHB Docket No. 2008-238-MG slip of at 3 (Opinion and Order issued July 2, 2009). It would violate our responsibility to conduct a *de novo* review if we were to defer in even the slightest way to the Department’s *factual* findings. If we are not limited to evidence considered by the Department, we are at a loss to understand why we would only consider evidence relating to events that occurred before the Department took its action. Creating such a barrier in time is completely arbitrary. If evidence otherwise admissible regarding an event makes it more or less probable that the Department’s action is valid and should be sustained, we will consider it, regardless of when the event occurred.

The Commonwealth Court’s opinion in *CRY v. DER*, 639 A.2d 1265 (Pa. Cmwlth. 1994), is often incorrectly cited for the proposition that all evidence regarding events that occurred after the Department’s action can never be relevant. In *CRY*, a citizens’ group challenged the Department’s issuance of a permit for a residual waste impoundment. In its attack on the Department’s decision to issue a permit, *CRY* unsuccessfully attempted to introduce evidence that the impoundment’s liner was torn during installation. The Court upheld the Board’s exclusion of this evidence as irrelevant because the fact that a party allegedly did not act with due care or in accordance with the requirements of the law and the terms of its permit did not in that case suggest that the permit was improvidently issued in the first place. *CRY*, 639 A.2d at

1274. The Court found that improper operation under a properly issued permit raises issues of implementation and enforcement, not, in that case, permitting. As the *CRY* holding was later explained by the Court in *Leatherwood v. DEP*, 819 A.2d 604, 610 (Pa. Cmwlth. 2003), “whether an approved liner is subsequently damaged does not necessarily shed light on whether the liner *as specified* was appropriately approved.” In any event, TRRAAC concedes in its response to the Department’s motion that it does not intend to elicit testimony regarding implementation *per se* from Weiss.

Finally, evidentiary rulings regarding relevance are highly case-specific. Any attempt to create rigid rules or paint bright, impenetrable lines is doomed to failure. We see no basis for adopting the categorical exclusion advocated by the Department in this case.

In its response, TRRAAC describes what it believes to be the relevant testimony to be provided by Weiss. The Department’s motion, however, only related to timing. Accordingly, we will not use this occasion to decide one way or the other whether Weiss’s testimony is otherwise relevant.

Accordingly, we issue the Order that follows.

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

v.

GEORGE AND SHIRLEY STAMBAUGH

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EHB Docket No. 2008-146-CP-C

Issued: September 17, 2009

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board assesses a civil penalty in the amount of \$18,197 for violations of the Clean Streams Law. The Defendants' conduct was reckless rendering two private water drinking wells unpotable.

FINDINGS OF FACT

1. The Department is the agency with the authority to administer and enforce the Clean Streams Law, The Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1, et. seq. ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 1977 ("Administrative Code"); and the rules and regulations promulgated thereunder.

2. George and Shirley Stambaugh ("Defendants" or "Stambaughs") own and operate a dairy farm ("Farm") located at West Pennsboro Township, Cumberland County, Pennsylvania.



N.T. 101.¹

3. In September, 2005 the Defendants constructed an in-ground earthen trench silo on the Farm and filled the trench with corn silage. The trench was unlined and covered with a plastic tarp and secured by tires. N.T. 103; Admitted.²

4. The Finkey family lives at 18 Fickes Road and the Hammar family lives at 22 Fickes Road. N.T. 40.

5. The Finkey and Hammar families own private drinking water wells that were contaminated by the silage leachate coming from the trench silo on the Stambaugh Farm. N.T. 11-12, 40-41, 43-45, 67-68; Admitted.

6. The private drinking water wells were approximately 90 to 100 feet in proximity to the silage trench. N.T. 40, 57, 63.

7. The Finkey and Hammar families began complaining about malodorous water coming out of their water taps in October of 2005. N.T. 40-41.

8. A Department employee investigated the contamination and took water samples of the tap water on or about October 19, 2005. N.T. 5, 11, 41.

9. The Department estimated the amount of pollution discharged into the water to be 500 to 1,000 gallons. N.T. 30, 60.

10. The Finkey and Hammar wells were unpotable for over six months necessitating replacement of a potable water supply. N.T. 13-14, 29, 45, 75-76.

11. The contaminated water never tested potable and was unfit for bathing for over six months. N.T. 43, 56.

¹ References to the hearing transcript will be cited as "N.T.".

² On February 12, 2009 the Board issued an Order granting the Department's Motion to Deem Admitted Matters Set Forth in the Department's Request for Admissions. The matters deemed admitted will be cited as "Admitted".

12. It was more than six months before the water could be treated to be made potable.
N.T. 56.

13. The Stambaughs admitted placing the silage in the trench and agreeing to remove it, however they failed to do so. N.T. 31-32, 68-69, 72-72, 107-08; Admitted.

14. The Department issued an Order on November 4, 2005 after the Stambaughs failed to remove the silage. Department Exhibit ("DEP Ex.") 3; N.T. 31, 34, 71, 136.

15. The Order required the Stambaughs to remove the silage and provide a replacement water supply to the two families whose wells had been contaminated. N.T. 34-35, 47, 140.

16. The Stambaughs never provided a replacement water supply for the Hammar and Finkey families. N.T. 47; Admitted.

17. Treatment devices had to be installed for the affected wells to become potable.
N.T. 45-47.

18. The two families paid for the treatment of the water supply themselves. N.T. 47.

19. The Department ordered the Stambaughs to reimburse the families for the treatment of the water supplies. N.T. 47.

20. The Stambaughs did eventually reimburse the families for the treatment of their wells. N.T. 48.

21. The Order required the Stambaughs to provide a plan and implementation schedule for the temporary and permanent storage facilities to relocate the silage. DEP Ex. 3.

22. The Order required the Stambaughs to submit a nutrient management plan within thirty days of the date of the Order. N.T. 36-37; DEP Ex. 3.

23. The Order also required an erosion and sedimentation plan to be provided within

30 days of the date of the Order. N.T. 37; DEP Ex. 3.

24. The Department issued a Notice of Violation (“NOV”) to the Stambaughs on February 1, 2006 for inadequate sampling, failure to prepare an erosion and sedimentation plan and failure to provide a nutrient management plan. N.T. 109, 138.

25. Stambaughs never responded to the February 1, 2006 NOV. Admitted.

26. On February 27, 2006 the Department issued a second NOV. Admitted.

27. The Stambaughs never responded to the second NOV. Admitted.

28. The Stambaughs have not submitted a plan and implementation schedule for temporary and permanent storage facilities for the relocation of the silage. Admitted.

29. The Stambaughs did not submit a nutrient management plan until July 23, 2007, approximately three years after the Department’s Order. N. T. 166-67.

30. After several revisions, the nutrient management plan was approved in January, 2009, however, the plan has not yet been implemented at the Farm. N.T. 12, 37, 123, 132; 25 Pa. Code, Chapter 83.

31. The erosion and sedimentation plan was not submitted until approximately three years later. N.T. 12, 37, 146-47; Admitted.

32. The Stambaughs did not comply with many of the deadlines set forth in the Department’s Order for approximately three years. N.T. 12, 35-36, 136.

Civil Penalty

33. A discharge of silage leachate into the waters of the Commonwealth is a violation of Section 401, 316 and 611 of the Clean Streams Law. 35 P.S. § 691.401, 691.611, 691.316; N.T. 18-21, 32-33; DEP Exs. 18, 19.

34. Failure to comply with an order issued by the Department for discharge of silage

leachate into the groundwater constitutes a violation of the Clean Streams Law, 35 P.S. §§ 691.402691.611; N.T. 18-21, 32-33; DEP Exs. 18, 19.

35. The violations of the Clean Streams Law subject the Stambaughs to civil penalties under 35 P.S. § 691.605. Complaint, ¶¶ 24, 27.

36. The Department used a penalty matrix, derived from the Clean Streams Law and Department regulations, to determine the amount of the civil penalties assessed when there is a discharge to the waters of the Commonwealth. N.T. 15-17, 18-23, 25-78; DEP Ex. 18.

37. For the Stambaughs' violations under the Clean Streams Law, the Department assessed a civil penalty in the amount of \$15,575 for each well affected by the silage leachate contamination from the Stambaugh Farm, totaling \$31,150. N.T. 29-35; DEP Ex. 18.

38. For the Stambaughs' failure to meet the deadlines set forth in the Department's Order, the Department assessed a civil penalty in the amount of \$2,622, which was a reduction on the matrix from \$5 to \$1 per day, per violation. N.T. 36-38; DEP Ex. 19.

39. For the above violations the Department assessed a total civil penalty in the amount of \$33,772. N.T. 38; DEP Exs. 3, 18, 19.

40. A one day hearing was held in this matter on March 9, 2009 in front of the Honorable Michelle A. Coleman of the Environmental Hearing Board.

DISCUSSION

The issue before the Board is whether or not the Department's assessment of penalty in the amount of \$33,772 is justified for the Stambaughs' violations under the Clean Streams Law. The record is clear that the Stambaughs are in violation of the Clean Streams Law and are subject to civil penalties for their violations. They constructed a trench that discharged leachate into neighboring private water wells rendering them unpotable for over 6 months. Under the

Clean Streams Law, the discharge of a polluting substance into the waters of the Commonwealth constitutes a violation of Sections 316, 401 and 611. 35 P.S. §§ 691.316, 691.401, 691.611.

The Department issued an Order on November 4, 2005 directing the Stambaughs, among other things, to remove the silage that was polluting the wells and provide potable water to the Hammar and Finkey families. The Stambaughs did not comply with the terms of the Order. Failing to comply with an order from the Department is a violation of Sections 402 and 611 of the Clean Streams Law. 35 P.S. §§ 691.402, 691.611. Even after conversations with the Department, concerning the Department's Order and the Department's NOV's, the Stambaughs continued to be in violation of the Clean Streams Law. These violations subject the Stambaughs to civil penalties under Section 605. 35 P.S. § 691.605.

The Board's role in a civil penalty complaint under the Clean Streams Law is to make an independent determination of the appropriate penalty amount. The amount of the civil penalty determined by the Department in its Complaint is purely advisory. *Westinghouse v. DEP*, 705 A.2d 1349 (Pa. Cmwlth. 1998). It is the Board who has the authority to assess the civil penalty amount under the Clean Streams Law. *DEP v. Pecora*, 2008 EHB 14; *DEP v. Kennedy*, 2007 EHB 15; *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, aff'd 821 A.2d 145 (Pa. Cmwlth), *app. denied*, 827 A.2d 431 (Pa. 2003).

In determining the penalty amount the Board considers the willfulness of the violations, damage or injury to the waters of the Commonwealth, costs of restoration and other relevant factors. 35 P.S. § 691.605(a); *DEP v. Hostetler*, 2006 EHB 359; *DEP v. Leeward Construction, Co.* 2001 EHB 870, 886. The Board may assess a civil penalty under the Clean Streams Law for up to \$10,000 per day for each violation. 35 P.S. § 691.605; *DEP v. Carbon Construction Corp.*, 1997 EHB 1204, 1227.

The Department relied on its penalty matrix, an internal guidance document, to determine the civil penalty for the Stambaughs' violations. DEP Exs. 18, 19. This document does provide a rational and standardized procedure for a Department compliance specialist to determine the amount of penalty. However, this document is not binding on the Department, nor on the Board. *United Refining Co. v. DEP*, 2006 EHB 846.

The discharge of a polluting substance into the waters of the Commonwealth is a violation of Section 401. The Department considered five factors listed in its penalty matrix. These factors included the willfulness of the violation, damage to the water, the amount of the pollutant, type of pollutant and history of prior incidents. Department's compliance specialist, Victor Landis, explained how he used the penalty matrix to determine the appropriate penalty amount. The Department assessed the willfulness of the violation and determined that the Stambaughs' behavior was reckless. Mr. Landis testified that,

"Mr. Stambaugh was aware he was piling a large amount of corn silage and there is potential to pollute and he placed it in close proximity, within 90 feet of the private drinking wells, so we went the low end of reckless because he should have been aware that this could occur and he chose to do it anyway."

N.T. 30.

We must agree with the Department that the Stambaughs' behavior is reckless. We have stated in the past that, "recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law". *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB at 349. The Stambaughs have been involved in farming since 1958 and certainly should be aware of the impact of piling silage near private drinking wells.

Mr. Landis testified that the damage to the water was high since it rendered the wells

unpotable for more than six months. N.T. 29. The Department determined that the amount of pollution was high because it was approximately 500 to 1000 gallons of pollution discharged. N.T. 30. The pollutant from the corn silage is considered nonhazardous, but should be viewed as a heightened concern because it rendered the wells unpotable. N.T. 30-31. And lastly, there are no prior violations by the Stambaughs, so there was no value attached to this factor. N.T. 30. For the violations of Section 401 the Department assessed a total penalty in the amount of \$5,750.

The Department reported the pollution to the Stambaughs on or about October 19, 2005. At that time Mr. Stambaugh agreed to remove the silage within two weeks. When the Stambaughs took no action to remove the silage or prevent the pollution, the Department issued the Order on November 4, 2005. Even after issuing the Order the Stambaughs failed to prevent any further pollution from occurring and the silage was not relocated. For that reason the Department assessed a penalty under Section 402 of the Clean Streams Law for their inaction to prevent pollution. The Department again used its penalty matrix, looking at these factors: damage, willfulness, history and pollutant. DEP Ex. 18. The Department assessed the damage as moderate. It reasoned that “[t]he bulk of [the] pollutant probably got on there when the initial pile was sitting there . . . having the pile sitting there it was still contributing but not to such a large amount as the initial violation.” N.T. 31-32. As for willfulness, the Department assessed a higher penalty because even though the Stambaughs agreed to clean up the silage an Order had to be issued to get compliance from the Stambaughs. They still failed to comply with the Order. N.T. 32. Then the Department assessed the pollutant as nonhazardous and found that there was no history of prior pollution. N.T. 32. The Department assessed a total penalty under Section 402 of \$3,500.

The Department also assessed a penalty for the failure to report a polluting event. Under

Section 91.33 a person responsible for an incident that is causing or threatening to cause pollution must notify the Department and downstream users, as well as take necessary actions. 25 Pa. Code § 91.33. The Stambaughs never notified the Finkey and Hammar families of the pollution they caused to the wells. The Department did not believe that the Stambaughs' failure to inform the families created a graver situation. The placement of the silage pile on the Stambaugh Farm caused the bulk of the pollution to occur at that time. N.T. 33-34. The Department used 20% of the civil penalty under Section 401 (the discharge of pollution) and assessed a penalty of \$1,150 under Section 91.33.

The last thing the Department looked at on the penalty matrix was the failure to take action as required under 25 Pa. Code § 91.34. Under Section 91.34 a person is to take the necessary measures to prevent pollution from entering the waterways. After the Department was made aware of the pollution it issued an Order to the Stambaughs to take action and prevent the pollution from entering the private drinking wells. The Stambaughs never took any action to further prevent the pollution and failed to comply with the Order in doing so. The Department assessed a high penalty for this violation, in the amount of \$5,175, for the delayed response to take action under Section 91.34.

For the above violations of the Clean Streams Law the Department asks the Board to assess a civil penalty in the amount of \$15,575 for each well, totaling \$31,150 for the discharge of silage leachate that polluted the two private water wells. We find the factors the Department used in determining the civil penalty amounts mentioned above appear to be appropriate, and will use these factors in our own assessment of the penalty. The Stambaughs have been farmers for many years and should be aware of actions that may result in pollution. Mr. Stambaugh's testimony that he did not know pollution would result is not an excuse. We would certainly hope

any farmer would know which actions may lead to adverse affects on the waterways of the Commonwealth, especially one involved in farming since 1958. Ignorance of the law is not excusable. What is even more concerning is that once the Stambaughs were aware that they caused two neighbors' wells to become unpotable, very little action was taken to comply with the Department's Order. If a person renders a neighbor's well unpotable, immediate action should be taken to remedy the situation. Under these circumstances, where the Stambaughs delayed taking action, we find the Department's penalty to be appropriate. Therefore, we asses a penalty in the amount of \$15,575 for the discharge of pollution from the silage trench. We find however that this was one polluting event that caused the two wells to be contaminated and will not assess each well separately.

In addition to the Clean Streams Law violations, the Department assessed a penalty for failure to comply with a Department order. The Department routinely assesses a civil penalty of \$5 per day, per violation. In this matter, the Department chose to use \$1 per day, per violation. First, the Order required the Stambaughs to submit a plan and schedule for the temporary and permanent storage of silage. The plan and schedule were due by November 19, 2005. The Department assessed the civil penalty on April 22, 2008, 884 days after the plan and schedule submission were due to the Department. For that violation the Department assessed a penalty of \$884.

The second requirement under the Order required the Stambaughs to submit a nutrient management plan on December 4, 2005, however, they never did. The Department assessed the penalty on April 22, 2008 at which time the plan was 869 days late. The Department's assessment is \$869.

Lastly, the Stambaughs were to submit an agricultural erosion and sedimentation plan for

all plowing and tilling. This plan was due on December 4, 2005. The Department assessed the penalty of \$869 on April 22, 2008 which was 869 days after the deadline.

In total the Department assessed a civil penalty for noncompliance with the Department's Order in the amount of \$2,622. If the Department used the \$5 per day, per violation amount that is part of the matrix it would have assessed a penalty in the amount of \$13,110. We do not find the Department's assessment of \$2,622 unreasonable given that the submissions were more than 800 days late. Therefore, we assess the penalty in the amount of \$2,622 for failing to comply with the Department's Order.

The total penalty to be assessed against the Stambaughs is \$18,197.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. See 35 P.S. § 691.605; 35 P.S. § 7514.
2. The Stambaughs' construction of a silage trench that resulted in the discharge of leachate into two nearby drinking water wells rendering them unpotable is a violation of the Clean Streams Law. 35 P.S. §§ 691.401, 691.611.
3. The Stambaughs failed to report the pollution to the neighboring families whose wells were contaminated, violating Section 91.33. 25 Pa. Code § 91.33.
4. The Stambaughs failed to take action to prevent pollution from entering the waterways of the Commonwealth in violation of 25 Pa. Code § 91.34.
5. The Stambaughs did not comply with the terms of the Department's November 4, 2005 Order in violation of the Clean Streams Law. 35 P.S. §§ 691.402, 691.611.
6. The Stambaughs failed to submit a plan and schedule for the temporary and permanent storage of silage, a nutrient management plan, and an erosion and sedimentation plan

in accordance with the Department's Order.

7. The above violations constitute unlawful conduct under Section 611 of the Clean Streams Law 35 P.S. § 691.611.

8. The Stambaughs' unlawful conduct subjects them to civil penalties under Section 605 of the Clean Streams Law. 35 P.S. § 691.605.

9. The Board assesses a civil penalty in the amount of \$18,197 for the disregard of the Clean Streams Law and damage caused by the Stambaughs.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

**COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :**

EHB Docket No. 2008-146-CP-C


v. :

GEORGE AND SHIRLEY STAMBAUGH :

ORDER

AND NOW, this 17th day of September, 2009, it is hereby ORDERED that civil penalties are assessed against George and Shirley Stambaugh in the total amount of \$18,197.

ENVIRONMENTAL HEARING BOARD



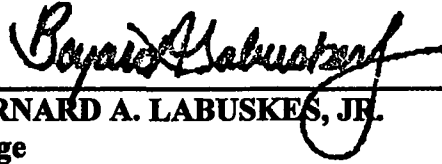
**THOMAS W. RENWAND
Acting Chairman and Judge**



**GEORGE J. MILLER
Judge**



**MICHELLE A. COLEMAN
Judge**


BERNARD A. LABUSKES, JR.
Judge

DATED: September 17, 2009

c: DEP Bureau of Litigation
Attention: Brenda K. Morris, Library

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M&M's operation, including a well owned by the Telford Borough Authority ("TBA") known as TBA#4. Accordingly, we upheld the Department's order requiring replacement of TBA#4.

Before the Board at this time is a separate appeal by M&M from the Department's rescission of a temporary discharge approval ("TDA") which was originally issued in December of 2006 in connection with M&M's attempts to develop a rehabilitation plan for TBA#4. This appeal was originally consolidated with the appeals of the administrative and permit suspension orders, but M&M urged us to unconsolidate this appeal and allow the parties to proceed with discovery. We granted that request, after which we held a hearing on the merits. The parties have now filed their post-hearing briefs, and after full consideration of this record, we make the following:

FINDINGS OF FACT³

1. The Department is the executive agency with the duty and authority to administer the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law), Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17, and the regulations promulgated thereunder.

2. M&M is a Pennsylvania corporation whose business includes the mining of noncoal minerals.

3. The Department issued a temporary discharge approval ("TDA") to M&M on December 11, 2006. The TDA authorized M&M to discharge pumping test water from TBA#4 if it obtained approval from TBA to access the well. Condition No. 8 of the approval provided that "[t]his temporary approval shall expire 180 days from the date of this letter." (DEP Ex. 2)

³ The transcript is denoted as "N.T. ___". The only exhibits which were admitted into the record are those of the Department. They are denoted as "DEP Ex. ___."

4. The Department rescinded the temporary approval on March 8, 2007. (DEP Ex. 1; N.T. 13-14)

5. Absent the Department's rescission, the approval would have expired in June of 2007. (DEP Ex. 2)

6. Temporary discharge approvals were used by the Department for short-term projects where the applicant would be providing on-site treatment and discharge. A typical situation where such an approval would be used is for gas station groundwater clean-ups where they need to do a pumping test. (N.T. 8)

7. These approvals are simply a technical analysis of nine or ten factors and were often processed in less than two weeks. (N.T. 12-13)

8. Although there was no specific authority for the Department to issue TDAs in lieu of permits, the Department's Water Program Manager viewed them as a discretionary action of the Department. (N.T. 8; 20)

9. Currently, the Department rarely uses temporary discharge approvals and instead employs a general permit. (N.T. 9-10) The Department was not aware of any technical problems with the proposed discharge of pumping test water or technical reason why coverage under a general permit could not be obtained if M&M obtains access to the well. (N.T. 26.)

DISCUSSION

The Department contends that we should hold that M&M's appeal is moot because the TDA has expired by its own terms. (Brief at 14.) Alternatively, it argues that the appeal is moot because of our conclusion in our earlier adjudication that TBA#4 is not "fouled," and therefore, the rehabilitation proposal for TBA#4 is unnecessary, and any relief that the Board

may offer is meaningless.⁴ The Department further contends that the rescission of the approval was an appropriate exercise of discretion in view of the Telford Borough's Authority's refusal to grant access to M&M to rehabilitate the well and the failure of the Department and M&M to reach a negotiated settlement of other appeals related to M&M's quarrying operations. *See M&M Stone Co. v. DEP*, 2008 EHB 24, *affirmed*, 383 C.D. 2008 (Pa. Cmwlth Ct. filed October 17, 2008).

M&M contends that the appeal is not moot because it has or may secure access to the site, and if the Department's rescission stands, it will be required to go through the approval process again. Moreover, M&M argues that the stated basis for the rescission of the approval – Telford's refusal to grant access – is not a proper basis for rescission. M&M also argues that the presiding Judge made several incorrect evidentiary rulings. Curiously, what M&M has failed to address is the Department's argument that the expiration of the TDA years ago rendered this appeal moot. M&M stated in its opening statement at the hearing that the TDA should be reinstated for 93 days, which it cited as "the time remaining on it when it was improperly rescinded." (N.T. 5.) M&M, however, did not carry this interesting argument forward into its post-hearing brief despite being expressly encouraged at the hearing to explain why this appeal is not moot in its brief. (N.T. 89-90.)

We find that we need not reach the issue of whether or not the Department appropriately rescinded the approval of the temporary discharge approval on the merits because M&M's appeal of that action is clearly moot. By the explicit terms of the approval, it expired 180 days from the date of issuance, or in June of 2007. Therefore, even if we were to find that the

⁴ The Board's review is *de novo*. *Warren Sand & Gravel Co. Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975). Where the Department revokes or rescinds an approval, it is the Department which bears the burden of proof. 25 Pa. Code § 1021.122(b)(3).

Department's rescission was inappropriate, there is no meaningful relief that the Board can offer at this time.

If an event occurs during the appeal process which deprives the Board of the ability to provide effective relief or deprives an appellant of an actual stake in the outcome of a controversy, the appeal should be dismissed as moot. *Horsehead Resource Development v. Department of Environmental Protection*, 780 A.2d 856 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 796 A.2d 987 (Pa. 2002); *see also Morris Township v. DEP*, 2006 EHB 55. The Board has held that the expiration of a permit deprives the Board of the ability to grant relief based on that permit. *E.g., Kutsey v. DEP*, 1997 EHB 129, 133; *CPM Energy Systems, Inc. v. DEP*, 1996 EHB 689, 693.

M&M raises several arguments in this appeal, but we are unable to get past the simple fact that the short-term approval that is subject of its appeal expired more than two years ago. The Department contends, correctly, that even if we were to grant M&M's appeal, there is no viable authorization to be reinstated. We have no authority to retroactively reinstate an approval that by its own terms expired in June 2007, which is the relief sought by M&M. *Silver Spring Township v. Department of Environmental Resources*, 368 A.2d 866, 868 (Pa. Cmwlth. 1977) (where a temporary variance was expired, the Board had no authority to retroactively alter or abolish it).

After filing this appeal, M&M neither applied for nor obtained a supersedeas from the Department's rescission. It is axiomatic that the mere pendency of litigation before the Board, absent a supersedeas, has no effect on the validity or viability of the Department action being appealed. 35 P.S. § 7514(d); 35 P.S. § 691.610. *Eagle Environmental v. DEP*, 833 A.2d 805, 809-11 (Pa. Cmwlth. 2003), *app. denied*, 854 A.2d 968 (Pa. 2004); *Tri-State Transfer Co. v.*

DEP, 722 A.2d 1129, 1134 (Pa. Cmwlth. 1999); *Goetz v. DEP*, 2000 EHB 840, 865, and 870; *Solomon Industries v. DEP*, 2000 EHB 227, 240-41. An appeal to the Board does not operate as a stay unless and until an appellant obtains a supersedeas. *Silver Spring Township, supra*. This principle is based on the public policy that parties should not be able to elude the consequences of Departmental actions simply by filing an appeal before this Board.

To be sure, mootness is a prudential limitation related to justiciability, not jurisdiction: “If this Board lacks jurisdiction, it *must* dismiss an appeal. In contrast, where an appeal is moot, the Board has the authority based upon its own measure of prudence to proceed.” *Ehmann v. DEP*, 2008 EHB 386, 388. Absent exceptional circumstances, however, we will ordinarily dismiss an appeal when the permit being appealed is no long viable. *Id.*, 2008 EHB at 389; *Gardner v. DEP*, 2008 EHB 110, 111. Nonexclusive examples of exceptional circumstances include cases where the disputed conduct is of a recurring nature yet likely repeatedly to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Ehmann* 2008 EHB at 389; *Sierra Club v. Pa. Public Utility Commission*, 702 A.2s 1131, 1134 (Pa. Cmwlth. 1997), *aff’d*, 731 A.2d 1133, 1134 (Pa. 1999); *Tinicum Township v. DEP*, 2003 EHB 493, 495-96.

M&M has not argued that any exceptions to the mootness doctrine apply here. Even if it had, we suspect the argument would have been unsuccessful. Since the time that the TDA was issued, nearly three years have passed and the Department now uses a general permit process.⁵ In this context, we do not see how it is appropriate to reinstate an out-dated and obsolete approval. *Cf. Tri-State Transfer Co. v. Department of Environmental Protection*, 722 A.2d 1129 (Pa. Cmwlth. 1999) (regulation voiding solid waste permits was intended to discourage

⁵ No Department witness was able to cite to any legal authority for issuing TDAs in lieu of permits. We need not address the legality of the practice in this appeal.

building new facilities under outdated technological and environmental conditions). A significant amount of time has passed and the TDA on its face was designed to be of a very limited duration. Circumstances have evolved. Reinstating the expired TDA, even if we had the authority to do so, would effectively convert what was intended to be a short-lived end-run around permit requirements into a three-year permit. Furthermore, the Department has repeatedly indicated that there is no reason why M&M cannot apply for coverage under the existing general permit. This Adjudication certainly does not in any way restrict M&M's right to pursue coverage under a general permit. Finally, we detect no issue of great public importance. In short, there is no obvious reason to depart from our normal practice of declining review of nonviable permits.

Accordingly, we make the following:

CONCLUSIONS OF LAW

1. Proceedings before the Board are *de novo*. *Warren Sand & Gravel Co. Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975).
2. Where the Department revokes or rescinds an approval, it is the Department which bears the burden of proof. 25 Pa. Code § 1021.122(b)(3).
3. The Appellant's appeal from the Department's rescission of a temporary discharge approval is moot because the TDA expired by its own terms more than two years ago. M&M has not argued that any exception to the mootness doctrine applies here.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M & M STONE CO.

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and TELFORD BOROUGH
AUTHORITY, Intervenor

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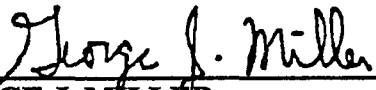
EHB Docket No. 2007-098-L

ORDER

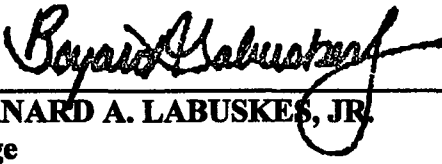
AND NOW, this 17th day of September, 2009, the appeal of M & M Stone Co. is
DISMISSED.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Chief Judge


GEORGE J. MILLER
Judge


MICHELLE A. COLEMAN
Judge


BERNARD A. LABUSKES, JR.
Judge

DATED: September 17, 2009

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**MICHAEL D. RHODES and VALLEY RUN
 WATER COMPANY, LLC**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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**EHB Docket No. 2008-156-L
 (Consolidated with 2008-258-L,
 and 2008-260-L)**

Issued: October 5, 2009

**OPINION AND ORDER ON
 MOTION TO FILE SUR-REPLY BRIEF**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the appellants' request to file a sur-reply brief. The issues presented in this appeal have been fully briefed and the proposed sur-reply would not aid the Board in the resolution of the matters raised by this appeal.

OPINION

Before the Board are consolidated appeals from the assessment of a \$48,340 penalty against Michael D. Rhodes and Valley Run Water Company (collectively, "Appellants") for alleged violations of the Safe Drinking Water Act. We held a two-day hearing. The Department filed an initial 62-page post-hearing brief, to which the Appellants filed a responsive 64-page post-hearing brief. These briefs each included extensive and thorough proposed findings of fact, conclusions of law, and legal discussion. The Department also filed a 25-page reply brief which



argued, in part, that some of the Appellants' proposed findings mischaracterized the testimony in the record or did not include proper citations to the record. The Appellants take exception to the Department's view and want to file a sur-reply to "address the improper statements to the trial record" by the Department.

We will deny the Appellants' request to file a sur-reply. Our rules, of course, do not contemplate sur-reply briefs. Parties should understand that sur-replies will rarely be permitted. There is an element of unfairness in telling the parties one thing, having them prepare their briefs on that basis, and then changing the rules after all of the prescribed briefs have been submitted. Although there is a strong, understandable human desire to have the last word, the truth of the matter is that briefs tend to get repetitive after awhile. We rarely see helpful new information in sur-replies. If a reply brief adds the sort of entirely new argument that would ordinarily call for reply, the preferred approach is to move to strike that portion of the reply brief.

In this case, the Appellants seek to file a sur-reply based upon the parties' differing interpretations of the factual record. The proposed findings of fact offered by the parties in their post-hearing briefs, however, are just that: proposals. The Board reviews these proposals and also reads the transcripts and reviews the exhibits admitted into the record by the presiding judge, and we will make our own conclusions about the substance, weight, and credibility of the witnesses' testimony. The legal issues raised in these appeals, while deserving of close review, are not so complex that additional argument regarding the factual record is necessary. The proposed subject matter that the Appellants wish to present in a sur-reply brief will not add anything new that will aid the Board in its review of the record in this appeal. *County of Berks v. DEP*, 2003 EHB 77, 81 n. 3. *See also Medusa Aggregates Co. v. DER*, 1995 EHB 414 (denying

a request to file a reply to a response to a petition for attorney fees because it is duplicative and unnecessary).

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL D. RHODES and VALLEY RUN :
WATER COMPANY, LLC :

v. :

COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

EHB Docket No. 2008-156-L
(Consolidated with 2008-258-L,
and 2008-260-L)

ORDER

AND NOW, this 5th day of October, 2009, the Appellants' request to file a sur-reply brief in the above-captioned matter is **denied**.

ENVIRONMENTAL HEARING BOARD


BERNARD A. LABUSKES, JR.
Judge

DATED: October 5, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
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WILLIAM T. PHILLIPY IV
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KENNETH AND KIM JONES

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and CONSOL
 PENNSYLVANIA COAL COMPANY**

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EHB Docket No. 2007-281-R

Issued: October 6, 2009

ADJUDICATION

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis

The landowners' appeal of the Department's investigation of their water loss complaint is granted in part. The investigation should have included two springs located on the landowners' property and used in the landowners' farming activities. The matter is remanded to the Department to determine the mining company's responsibility for the water loss in the springs and to calculate increased operation and maintenance costs owed to the landowners.

FINDINGS OF FACT

The Parties

1. The Appellants are Kenneth and Kimberly Jones, who, with their two children Kaitlyn and DJ, reside at 415 West Roy Furman Highway, Glenwich, Pennsylvania. (Notice of Appeal; T. 8)



2. The Appellee is the Pennsylvania Department of Environmental Protection (Department), the agency of the Commonwealth of Pennsylvania charged with enforcing the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1 – 1406.21.

3. The Intervenor is Consol Pennsylvania Coal Company (Consol), which is the permittee of the Bailey Mine in northwestern Greene County. (T. 251)

4. The Jones have resided in their current home since 1992. They purchased the home in January 1993. (T. 9)

5. The Jones own two parcels of property: Tax Map No. 118A, which consists of 1.5 acres of property situated along Route 21, and Tax Map No. 118, which consists of approximately 60 acres situated on the opposite side of Route 21. (T. 12-14, 109; Board Ex. 1)

6. The Jones' house sits on Tax Map No. 118A. Also situated on that parcel are a shed and some fencing for sheep. (T. 12, 13, 107, 109, 125)

7. Tax Map No. 118, which sits opposite the road from 118A, contains a barn which the Jones constructed. (T. 21-22)

The Bailey Mine

8. The Bailey Mine is an underground mining complex that mines primarily by the longwall method in the Pittsburgh coal seam. (T. 251) It has been in existence for approximately 25 years. (T. 251)

9. Consol applied for a 10,000 acre expansion to the Bailey Mine in January 1997, and a permit granting the expansion was issued in February 2000. (T. 252)

10. Developmental mining for Panel 1I of the Bailey Mine was conducted under the Jones' property, Tax Map No. 118, between April 2003 and November 2003. (T. 253; Board Ex. 1)

11. The developmental mining was done by the room and pillar method. (T. 253)

12. Longwall mining of Panel 1I under the Jones' property, Tax Map No.118, took place between January 2004 and February 2004. (T. 254; Board Ex. 1)

Agricultural Usage of Jones' Property

13. Mrs. Jones has been involved in farming since the age of five or six. (T. 9-10)

14. The Jones' daughter, Kaitlyn, who was born in 1994, has been involved in farming since the age of four or five. (T. 10)

15. Kaitlyn's first involvement with farming at the age of four or five included walking, exercising, bathing and feeding sheep. The Jones also had ducks and chickens at that time. (T. 11)

16. At the time of the trial, the Jones had expanded their livestock to include eight ewes, a heifer, a steer, pigs and chickens. (T. 11-12)

17. From the time they purchased the property in 1993 to February of 2004, the Jones developed it for agricultural purposes, including developing springs, putting up fencing,

building a new barn on the 60 acre (Tax Map No. 118) property, and purchasing a tractor and a trailer for hauling livestock. (T. 46-48)

18. Since February 2004, the Jones have continued to develop their property for agricultural purposes. (T. 47)

19. The Jones family is actively involved in farming. (T. 47) They plan to continue farming in the future. (T. 49)

20. The property on which the house and shed sit is not large enough to pasture the number of the sheep that the Jones currently have, nor is it large enough to accommodate a fully developed farm. (T. 174-75)

21. The Jones' farming plans include the 60 acre parcel and that is the reason they developed springs on the property. (T. 175)

22. The 60 acre parcel has the potential to hold approximately 120 cows. (T. 144)

23. The only water source that was in place when the Jones purchased the property in 1993 was one well. (T. 24) The well was located on the same parcel as their house, Tax Map No. 118A. (T. 24)

24. The Jones drilled a second well in 2002. (T. 24, 32)

25. W1 and W2 refer to the two wells on the Jones property. (T. 345)

26. The first spring that the Jones developed on their property is designated as S2. (T. 15-16)¹ S2 is located on the 60 acre parcel, Tax Map No. 118. (T. 24, 71)

¹ Although the bathtub spring was the first spring developed on the Jones' property, it is

27. S2 is also referred to as the “bathtub spring” because it has a bathtub reservoir.
(T. 18; Appellants’ Ex. 2)

28. The Jones developed S2 in 1995 or 1996 for wildlife and agriculture purposes.
(T. 15-16)

29. S2 was not used for agricultural purposes until approximately 2000 or 2001, when the Jones’ daughter, Kaitlyn, obtained a sheep. (T. 19-20)

30. Kaitlyn would walk the sheep to the spring for exercise and for drinking water.
(T. 20)

31. From 2001 to 2004 or 2005, the Jones acquired more sheep and Kaitlyn walked them to the spring for water. (T. 21)

32. Kaitlyn walked the sheep to the bathtub spring for water anywhere from daily to two to three times a week. (T. 20)

33. Beginning in approximately 2001 or 2002, after the Jones had developed a second spring and acquired a treadmill for their lambs, they used the bathtub spring less frequently.
(T. 20-21, 116-17)

34. Use of the bathtub spring for providing water to the sheep ended in approximately 2004 or 2005 because the water in the spring diminished. (T. 20-21)

35. In a deposition Mr. Jones stated that the bathtub spring was no longer used when the second spring was developed and when the treadmill was acquired for the lambs.
(Commonwealth Ex. 3)

referenced as “S2” due to its location. (T. 18)

36. Mr. Jones is not as familiar with the farming operation as is Mrs. Jones. Mrs. Jones was the one who walked the sheep to the spring or assisted Kaitlyn in doing so. (T. 186-87)

37. Mrs. Jones' testimony as to the usage of the springs is more credible due to her involvement with the springs.

38. The second spring the Jones developed is designated as S1. It was developed on the 60 acre parcel in approximately 2001 or 2002. (T. 22, 124)

39. S1 is referred to as the "barrel spring" because its reservoir consists of a barrel. (Appellants' Ex. 1)

40. In terms of distance, the barrel spring, S1, is the closest spring to the Jones' house which is located on the parcel across the street. (T. 124)

41. The barrel spring sits approximately 100 feet behind the Jones' barn. It was developed because of its proximity to the barn so that it could be used for watering the animals housed in the barn. (T. 22, 125)

42. The Jones intended to include the barrel spring, S1, within fencing to be used for pasturing their animals. (T. 23)

43. The barrel spring, S1, was used until approximately 2004, when it went dry. (T. 23)

44. The purpose of developing the springs was for farming. (T. 22)

45. S3 is a black piece of pipe that runs across the road and drains into the Jones' field. (T. 19; Appellants' Ex. 3)

46. S3 was developed in approximately 2002. (T. 23)

47. S3 was developed when the Jones were digging in that area to bail out a gas well and discovered that water existed there. (T. 23-24)

48. The Jones' water loss complaint did not include S3. (T. 127)

49. S1, S2 and S3 are located on the 60 acre parcel of property (Tax Map No. 118) that is located across the street from the parcel on which the Jones' residence sits. (T. 24, 71)

Groundwater Inventory and Pre-Mining Survey

50. A groundwater inventory is required as part of a mine permit application. (T. 335-36)

51. The first groundwater inventory done on the Jones' property was conducted by Killam Associates in June 1996. (T. 26, 133, 240-41; Intervenor Ex. 1)

52. Killam's groundwater inventory was done when the only water source on the Jones property was one well. (T. 146-47)

53. The groundwater inventory was submitted to the Department in January 1997 in connection with Consol's application for the South Bailey Mine expansion. (T. 312) That permit was issued in February 2000. (T. 312)

54. No pre-mining surveys were done on the Jones property between the time of the original groundwater inventory in 1996 and the start of developmental mining in 2003. (T. 356)

55. A pre-mining survey is conducted after a mining permit is authorized by the Department. The purpose of a pre-mining survey is to identify water supplies, acquire a physical description of the water supplies, document their use, assess their quality and quantity and sample for certain chemical constituents. (T. 202)

56. The pre-mining survey is conducted prior to mining reaching within 1,000 feet of the water supply. (T. 202)

57. The pre-mining survey is done by the coal company, either in-house or contracted out to a consulting firm. (T. 202-03)

58. A copy of the pre-mining survey is sent to both the homeowner and the Department. (T. 238)

59. The difference between a groundwater inventory and a pre-mining survey is that the groundwater inventory is done during the application phase and the pre-mining survey is done after issuance of the permit but prior to the mining coming within 1,000 feet of a water supply. (T. 207)

60. The purpose of conducting both a groundwater inventory prior to permit issuance and a pre-mining survey prior to mining is to ensure the most up-to-date analysis of any water supply that could be potentially affected by mining. (T. 207-08, 214)

61. The Jones received a pre-mining notice from Consol in March 2002. Mr. Jones checked the box that permitted Consol to enter the property in order to conduct a pre-mining survey. (T. 145-46, 180, 182; Commonwealth Ex. 2) The form lists the property as Tax Map No. 118 (the 60 acre parcel containing the springs.) (Commonwealth Ex. 2)

62. The card signed by Mr. Jones authorized Consol to enter the Jones property and identify all water sources on that property. (T. 221-22)

63. In October 2003, Moody and Associates conducted a pre-mining survey on the Jones property. At that time they conducted pump tests on both of the Jones' wells. (T. 134) This took place after developmental mining had taken place but prior to longwall mining being conducted. (T. 346-47)

64. Consol's pre-mining survey for Panel 11 was done after developmental mining had occurred because it was Consol's position that developmental mining did not cause subsidence. It was their understanding that the pre-mining survey had to be done only prior to when the longwall mining was within 1,000 feet of the water source. (T. 340-41)

65. The Jones experienced water loss as a result of a clogged filter that occurred during the pre-mining survey. It was resolved by cleaning the filter. (T. 25-26, 340; Intervenor Ex. 3)

66. Developmental mining took place under the Jones property from April 2003 to November 2003. (T. 253; Board Ex. 1)

67. Long wall mining took place under the Jones property from January 2004 to February 2004. (T. 254; Board Ex. 1)

68. The half barrel spring, S2, is located north of where the developmental mining took place. (T. 316)

69. The bathtub spring, S1, was located above the longwall panel 11. (T. 317)

70. The springs are closer to the area of mining than are the wells. (T. 278)

The Jones' Water Loss Complaint

71. In February 2004, the Jones notified the Department of water loss. At that time the Jones had lost water in their wells and also noticed that the water level in their springs was diminishing. (T. 30, 31, 32)

72. The notification to the Department consisted of Mrs. Jones placing a telephone call to Kim Patterson in February 2004 and advising her of the water problems they were experiencing. (T. 32-33, 75)

73. When a landowner contacts the Department's California District Mining Office regarding water loss believed to be due to mining, their first point of contact is Kim Patterson. (T. 256-57)

74. Ms. Patterson is a legal assistant in the California District Mining Office. Her duties include receiving fax forms submitted by coal companies whenever they have received a complaint of water loss or mine subsidence. (T. 257)

75. When a member of the public calls the Department regarding a water loss, it is treated as the filing of a complaint. (T. 209)

76. If the complaint falls within what is known as the rebuttable presumptive zone, there is a presumption that the water loss or subsidence is due to the coal company's mining. The presumption may be rebutted by the coal company. (T. 257)

77. If the complaint is outside the rebuttable presumptive zone, the Department conducts an investigation. (T. 257)

78. The determination of whether the complaint falls within the rebuttable presumptive zone is made by one of the District Mining Office's three engineers. (T. 258)

79. The bathtub spring was directly undermined by longwall mining, and the barrel spring and S3 appear to be within the presumptive zone. (T. 278-79)

80. Mrs. Jones believed her complaint to the Department included the springs. (T. 79, 82)

81. Ms. Patterson at the Department advised Mrs. Jones that she needed to contact Don Teter, project engineer at Consol, regarding her complaint. (T. 129; 338)

82. Mrs. Jones contacted Mr. Teter on February 12, 2004, complaining of water loss. (T. 341)

83. Mr. Teter filed a mine operator's report with the Department regarding the Jones' complaint. (T. 342; Appellants Ex. 8) His report described the nature of the complaint as "water loss in well" because that was the only water supply he was aware of on the Jones property. (T. 343; 350-51)

84. The mine operator's report stated that it covered Tax Map No. 118. (T. 274; Appellants Ex. 8)

85. In response to the complaint, Consol placed a water buffalo on the Jones property. (T. 88-89)

86. Mrs. Jones heard nothing further until Joe Matyus of the Department contacted her in December 2005. (T. 33) Mr. Matyus is a geologic specialist with the Department's California District Mining Office. (T. 296)

87. Mr. Matyus has been a geologic specialist with the Department since February 2001. In this capacity he conducts permit reviews, water supply investigations and stream investigations. (T. 296)

88. Prior to joining the Department, Mr. Matyus worked with Consol Energy for 26 years. (T. 296)

89. Mr. Matyus was assigned the principal task of investigating the Jones' water loss complaint. (T. 297)

90. Mr. Matyus conducted a site visit to the Jones property in early January 2006 and met with Mrs. Jones at that time. (T. 296)

91. Mr. Matyus' understanding of the scope of the investigation, based on his initial conversation with Mrs. Jones and the Department's report form, was that it just covered the wells. (T. 298)

92. Mrs. Jones told Mr. Matyus about the springs on the property across the road, but he said he wanted to focus on the wells at that time. (T. 37)

93. Mrs. Jones believed that Mr. Matyus wanted to focus on the wells at that point and would focus on the springs at a later time. (T. 87)

94. Mr. Matyus recalls that Mrs. Jones mentioned the springs to him during his initial visit in January 2006, but he did not believe the springs to be of consequence to the investigation at that time. (T. 298)

95. Mr. Matyus did not ask Mrs. Jones if she had experienced diminution of water in the springs. (T. 305)

96. Mr. Matyus wrote a letter to Brendan Midla at Consol on February 24, 2006. The letter stated that Mr. Matyus was investigating the Jones well diminution complaint and that a search of the Bailey Mine file showed a groundwater inventory listing for W1 (well 1) but nothing for W2 (well 2) or S1 (Spring 1) and S2 (Spring 2). The letter requested Mr. Midla to submit pre-mining data for both of the wells and the springs. (Appellants' Ex. 6)

97. Mr. Matyus agreed that if a well were affected by underground mining, it would be logical to conclude that a spring located even closer to the area of mining would be affected too. (T. 304)

98. Mr. Matyus based his investigation on what was stated in the complaint form given to the Department by Consol. The form only mentioned one of the Jones' wells. (T. 306-07; Appellant Ex. 8)

99. If the complaint form given to him had included the springs, he would have followed up on the springs. (T. 305-06)

100. Moody and Associates conducted an additional pre-mining survey in January 2006. (T. 27) This pre-mining survey was done in preparation for Consol's proposed eastern expansion of the Bailey Mine. (T. 280-81)

101. In connection with the pre-mining survey, a representative of Moody was on the Jones property on the same day as Mr. Matyus' visit. (T. 37-38)

102. Moody's January 2006 survey covered the two wells on the Jones property and the two springs, S1 and S2. (Appellant's Ex. 5) A copy of the report was sent to the Jones on July 6, 2006. (T. 63; Appellants' Ex. 5)

103. Joel Folman, a surface subsidence agent in the Department's California District Mining Office, accompanied Moody on the January 2006 pre-mining survey and was aware of S1 and S2. (T. 280-84) Mr. Folman was present when the location of the springs was determined. (280-81)

104. Moody sent its report to the Jones on January 24, 2006 and copied Mr. Folman on it. The report included S1 and S2. (Appellant Ex. 12; T. 282-83)

105. At least as early as January 24, 2006, the Department was aware of S1 and S2. This is within two years of when longwall mining was conducted on the Jones' property. (T. 283-84)

106. Mr. Folman also accompanied Civil Environmental on the Jones property while they conducted a habitat study, which involved the classification of wetlands. (T. 39) The study included looking at the springs. (T. 39-40)

107. The Jones also reported water loss in a stream on their property during the same timeframe as the loss of their wells and springs. (T. 33-34) Mrs. Jones registered a complaint with the Department for the stream loss. (T. 82)

108. The Department's investigation of the Jones' complaint of stream loss began in early 2004 and was ongoing at the time of the trial in January 2009. (T. 33-34) During this timeframe, Department representatives were entering the Jones property. (T. 360)

109. Access to the stream on the Jones' property leads one past S1 and S2 (the barrel spring and the bathtub spring). (T. 35)

110. From February 2005 to September 2005, Ronald DesLauriers was a surface subsidence agent with the Department. (T. 163)

111. Mr. DesLauriers was not involved in the Jones well investigation, but as part of his training with Mark Frederick of the Department, Mr. DesLauriers visited the Jones site. (T. 164, 170)

112. He first visited the Jones site in March 2005. At that time he walked the site with Mr. Frederick. Mr. Frederick pointed out the barrel spring to Mr. DesLauriers, and they also observed the bathtub spring and S3 on that occasion. (T. 158-60, 165)

113. There was only a trickle of flow coming out of the barrel spring and S3 and no flow coming out of the bathtub spring. (T. 158)

114. Mr. DesLauriers visited the Jones site on approximately six to eight occasions from March 2005 to September 2005. (T. 158-68)

115. During Mr. DesLauriers' visits to the Jones property, Mrs. Jones recalls pointing out S1 and S2 to him. (T. 45-46)

116. On June 13, 2006, the Department sent a letter to Consol advising it that the Department had determined that Consol's mining operation at the Bailey Mine was

responsible for diminution of the Jones' water supply. It requested Consol to submit a plan and schedule for providing the Jones with a permanent water supply. (Appellants Ex. 7)

117. The report accompanying the letter was prepared by Mr. Matyus and referred only to the wells. However, Attachment C to the report, labeled "Ground Water Inventory," lists S1 and S2 and W1 and W2. (Appellants' Ex. 7; T. 69)

118. The report states that W1 and W2 were abandoned because the Jones were using a water buffalo at the time. (T. 70)

119. When Mrs. Jones contacted Kim Patterson at the Department in the summer of 2006 to inquire about the water loss investigation and was told that Mr. Matyus was handling it, Mrs. Jones assumed the investigation included the springs. (T. 42-43)

120. Mrs. Jones found out that her water loss complaint did not include the springs during a meeting with JoAnna Niecgorski of Consol in October 2007. (T. 43)

121. The purpose of the meeting was to review a proposed agreement by Consol for the increased operation and maintenance costs of the public water supply that had been provided to the Jones. (T. 41-43, 130, 190)

122. The springs were not included in the proposed agreement presented by Consol. (T. 130, 190)

123. Shortly after that meeting, on October 7, 2007 Ms. Niecgorski sent the Department a fax form regarding the Jones' complaint of diminution of their springs. (Commonwealth Ex. C-4; T. 258; T. 319) Ms. Niecgorski also sent the Department

information for the purpose of rebutting the presumption of liability for the diminution of the springs. (T. 260)

124. Following receipt of the fax form from Ms. Niecgorski, Joe Szunyog, a geologist at the California District Office, was assigned to investigate the spring diminution. (T. 262; 310)

125. Mr. Szunyog was assigned the matter on November 27, 2008 and he began working on it that day. (T. 318)

126. The following day, on November 28, 2008, Mr. Szunyog sent a letter to the Jones denying the water loss claim for the springs. Mr. Szunyog stated he had no authority to hold Consol liable for diminution of the springs because (a) the springs were not documented prior to mining as having a use and (b) no pre-mining data was available. (Commonwealth Ex. 10) At the trial, he also added the following reason: the October 7, 2007 complaint occurred three years after mining took place. (T. 320-21, 326-27)

127. Mr. Szunyog agreed that the reasons set forth in his letter are the responsibility of the coal company, not the landowner. (T. 321-22)

128. Mr. Szunyog's letter to the Jones stated only the first two reasons; it did not state that the complaint had been filed too late. (T. 326-27; Appellants Ex. 10) Mr. Szunyog stated it was an omission on his part. (T. 327)

129. The Jones were not aware that the Department had determined the water loss complaint for the springs to be untimely until they read it in the Department's pre-hearing memorandum. (T. 78)

130. If the mining company fails to provide pre-mining data, Mr. Szunyog admitted that the landowner gets no investigation from him due to the lack of pre-mining data. (T. 328)

131. The Jones were connected to the public water supply in or about July 2006. (T. 92) The connection included the house and the new barn located on the parcel across the street from their residence. (T. 93-94)

132. The only other usable source of water on Tax Map No. 118 is the barrel spring, but it does not produce enough water for them to conduct their agricultural activities. (T. 48)

133. There is currently no water in the bathtub spring or S3. (T. 48)

134. The Department required Consol to post a water supply bond in the amount of \$22,011 for increased operation and maintenance costs for the Jones water supply. (Commonwealth Ex. 1) The operation and maintenance costs covered the wells, not the springs. (T. 151-52)

135. It was Mrs. Jones' belief that the Department's investigation of the February 2004 water loss complaint included S1 and S2. (T. 70)

The Jones' Agricultural Water Needs

136. The Jones currently have a steer which drinks approximately 30 gallons of water a day. (T. 105-06)

137. The Jones have had a heifer in the past and were planning to purchase one at the time of the trial. (T. 106)

138. Once the fence is constructed, the heifer will live in the pasture beside the barn. It will drink public water from the tap in the barn because the springs are not producing enough water to supply it. (T. 106)

139. The heifer will drink approximately 30 gallons of water a day. (T. 106) Between the steer and the heifer, they will consume 60-80 gallons of water a day. (T. 106)

140. Prior to the water diminishing, the barrel spring produced enough water to supply both the steer and the heifer. (T. 107)

141. The Jones currently have eight sheep. (T. 108)

142. The sheep reside on the same parcel of property as the Jones' house, i.e., Tax Map No. 118A. (T. 107)

143. Either Mrs. Jones or Kaitlyn walk the sheep to the 60 acre parcel on the other side of the road (Tax Map No. 118) every other day for exercise. (T. 107) The sheep stay on that side of the road for approximately three to four hours. (T. 108)

144. When the sheep are on the 60 acre parcel, they drink from the public water supply. (T. 108) Prior to that, they would have drunk from the bathtub spring or the barrel spring. (T. 116-17)

145. When the sheep are on the 1.5 acre parcel (Tax Map No. 118A), they drink from the public water supply. Prior to the wells going dry, their water came from the wells. (T. 112-13)

146. The Jones generally have two lambs per year. (T. 111-12)

147. S1, S2 and S3 would all be useful for the Jones' future farming plans. (T. 143-44)

Failure to Accurately Show Jones' Water Supplies

148. The Department provides fact sheets regarding water supply replacement and mine subsidence to members of the public at informal conferences held prior to mining in their area and also mails them to homeowners in advance of mining. (T. 211-13)

149. If the Department discovers that a coal company failed to identify water sources pre-mining either intentionally or through omission, the Department might take a compliance action against the company. (T. 216)

150. It was Consol's responsibility to inventory all water supplies on the Jones' property when their mining reached within 1,000 feet of the property. (T. 228-29)

151. Consol's mining map showing mining between November 2003 and April 2004 shows only one well on the Jones property, even though the Moody report done in October 2003 showed that two wells existed at that time. (T. 267-71; Intervenor Ex. 2; Appellants Ex. 11)

152. Consol's June 24, 2004 six month mining map, which showed the developmental mining and longwall mining under the Jones property, did not show the springs. (Board Ex. 1; T. 314-15)

153. Consol's environmental resources map, also known as an Exhibit 19.2 map, which would have been included with its permit application for the expansion of its mine, did not contain the springs. (T. 335)

154. In or about December 2005, the Jones complained to their state representative and to the Department that Consol had not properly inventoried all of the water supplies on the Jones property. (T. 288-89)

155. It is not uncommon for farmers in Greene County to develop springs on their property on a regular basis. (T. 356)

156. When conducting a pre-mining survey, it is standard practice to ask the landowner if there are any other water sources on the property. (T. 357)

157. When Moody came onto the Jones property in October 2003 to test the wells as part of the pre-mining survey, Mrs. Jones was not asked whether there were additional water sources on her property. (T. 361)

158. The Jones filed a complaint with the Department for mine subsidence damage to their house in 2005 or 2006. (T. 82)

159. Based on the actions taken by Mr. and Mrs. Jones with regard to both Consol and the Department, it was logical for them to conclude that the water loss investigation initiated by the Department in January 2006 included springs S1 and S2.

160. The Jones' 2004 water loss complaint to the Department did include the bathtub and barrel springs, S1 and S2.

DISCUSSION

This matter involves a water loss claim filed by the Appellants, Kenneth and Kim Jones, for their farm in Greene County. The Jones have the burden of proving by a preponderance of the evidence that their water loss claim included the springs on their property. 25 Pa. Code §

1021.122(c)(2). The Environmental Hearing Board reviews the matter *de novo*, based on the evidence presented to the Board. In other words, in reaching our decision we may rely on evidence that was not considered by or presented to the Department when it took its action. *Smedley v. DEP*, 2001 EHB 131, 155-60. As stated by Former Chief Judge Krancer in the oft-cited *Smedley* decision, "...the Board makes its own factual findings, findings based solely on the evidence of record in the case before it" and in doing so, "[t]he Board protects the procedural due process rights of persons who allege and can prove that they are adversely affected by an action of [the Department.]" *Id.* at 156-57. For the reasons set forth below, we find that the Jones have met their burden.

Section 5.1 of the Bituminous Mine Subsidence and Land Conservation Act requires any mine operator whose underground mining operation has diminished a water supply to restore or replace the supply to its pre-mining use or any reasonably foreseeable use of the supply. 52 P.S. § 1406.5a(a)(1). The term "water supply" includes domestic use as well as agricultural use, including the consumption of water by animals used in agricultural production. *Id.* at § 1406.5a(a)(3). For water supplies covered by Section 5.1 of the Mine Subsidence Act, a claim must be filed within two years of when the supply is adversely affected. *Id.* at § 1406.5a(b); 25 Pa. Code § 89.152(a)(4).

Both the Department and Consol raise two challenges to the Jones' claim: first, that S1, S2 and S3 are not protected water supplies under the Mine Subsidence Act and, second, that the Jones' claim was filed more than two years after the springs were affected by mining. With respect to S3, Consol and the Department raise an additional challenge that no claim was filed for S3. We address each of these arguments separately below.

Did the Jones' claim include S3?

S3 consists of a black pipe that empties into a field on the Jones property. It was installed in approximately 2002 when the Jones bailed out a gas well. S3 does not have a reservoir for collecting water, nor has it been used for domestic or agricultural purposes. The Jones planned to use it for agricultural purposes in the future.

S3 went dry at the beginning of 2004, at the same time as S1 and S2 and the Jones' wells. However, during her testimony Mrs. Jones stated that no water loss claim had been filed for S3. (F.F. 48) Because the Jones did not file a water loss claim for S3, we find that the Department properly excluded it from its investigation.

Are S1 and S2 protected water supplies under the Mine Subsidence Act?

The Department and Consol argue that S1 (the barrel spring) and S2 (the bathtub spring) are not agricultural water supplies protected by the Mine Subsidence Act. They argue that the bathtub spring was no longer being used at the time that mining took place, and that the barrel spring was only being used minimally.

The term "water supply" is defined under the Mine Subsidence Act as including the following:

any existing source of water used for domestic, commercial, industrial or recreational purposes or for agricultural uses, including use or consumption of water to maintain the health and productivity of animals used or to be used in agricultural production and the watering of lands on a periodic or permanent basis by a constructed or manufactured system in place on the effective date of this act to provide irrigation for agricultural production of plants and crops. . . .

52 P.S. § 1406.5a(a)(3).

The testimony clearly demonstrates that the barrel spring and bathtub spring were developed by the Jones for agricultural usage. (F.F. 44) The Jones have used their property as a farm since approximately 2000 or 2001 and have continued to do so throughout this proceeding. Their future plans include expanding their farming operation. Mrs. Jones has been involved in farming since she was a child, and has passed the tradition on to her children, Kaitlyn and DJ, who are active in 4H. The farm has included sheep, lambs, a steer, a heifer, pigs, ducks and chickens, and has expanded throughout the Jones' years of ownership. The 60 acre parcel that is located across Route 21 from the Jones' house has the potential to hold approximately 120 head of cattle. The Jones actively operate a farm and intend to continue doing so in the future.

The question is whether the barrel spring and the bathtub spring were in existence and being used at the time Consol's mining took place in the fall of 2003 and early 2004.

The bathtub spring (S2) was developed in approximately 1995 or 1996, but it was not used for agricultural purposes until approximately 2000 or 2001. The barrel spring (S1) was developed in approximately 2001. It is Consol's and the Department's contention that the bathtub spring was no longer used by the Jones once the barrel spring was developed. In support of their claim, they point to testimony given by Mr. Jones at his deposition in this matter when he was asked about the bathtub spring and its usage. Mr. Jones stated that usage of the bathtub spring ended in 2001 when the barrel spring was developed and when the family acquired a treadmill for exercising their lambs. At the trial, Mrs. Jones contradicted that testimony and stated that the bathtub spring continued to be used after development of the barrel spring and that it was still a part of the Jones' farming plans. (T. 116-17, 143) It was readily apparent at the trial that Mrs. Jones was more familiar with the usage of the springs in the farming operation than was Mr. Jones. Mrs. Jones was the one who accompanied their daughter, Kaitlyn, to both

the bathtub spring and the barrel spring for the purpose of exercising the sheep and providing a source of water for them. Mr. Jones readily admitted at the trial that he was not involved with walking the sheep or lambs to the spring for water. He handles the bailing of hay and building fences; he is not involved in the raising of the sheep or lambs. (T. 186-87) Mrs. Jones' testimony on the subject of usage of the bathtub and barrel springs should be given more weight than Mr. Jones' recollection of the spring usage.

Consol further argues that usage of the bathtub spring ended when it was discovered there were coyotes in the area of the spring. Mr. Jones did testify that the bathtub spring was used less frequently after coyotes were discovered in the area, but it was not abandoned. (T. 173) He further testified that their future farming plans included continued use of the spring. (T. 173-74) We find the Jones' testimony credible that the bathtub spring was in existence and in use at the time of mining.

Consol and the Department do not dispute the existence of the barrel spring (S1), at the time of mining. They argue, however, that its use was minimal and sporadic and, therefore, does not qualify for protection under the Mine Subsidence Act. This is not supported by the evidence in the record. Mrs. Jones testified that the earlier spring, the bathtub spring, had been used daily or at a minimum two to three times a week prior to the development of the barrel spring. After development of the barrel spring, the bathtub spring was used less frequently, presumably because the barrel spring was now also in use. The barrel spring is located even closer to the Jones' house than is the bathtub spring, and, therefore, is more accessible. It is also located immediately behind the barn constructed by the Jones, and this location was selected for the spring due to its proximity to the barn. The evidence indicates that the barrel spring was used at least as frequently as the bathtub spring and, most likely, was used more frequently. Its use was

neither minimal nor sporadic, but regular and deliberate. The Jones developed the barrel spring for the purpose of providing water to their animals. Section 5.1(a)(3) of the Mine Subsidence Act does not quantify how often a water source must be used in order to qualify as a protected water supply, and the parties have given us no basis for making such a determination here. In any case, the record demonstrates that the Jones used the barrel spring and the bathtub spring as a source of water for their animals and that this usage was ongoing at the time of Consol's mining under their property.

Moreover, the Mine Subsidence Act protects "any reasonably foreseeable uses of the supply." The testimony was clear that the Jones intended to continue to use both the bathtub spring and the barrel spring in their future agricultural plans. The barrel spring was built next to the barn and was placed in an area where the Jones intended to pasture their animals within fencing. The bathtub spring was also developed with future farming plans in mind. Based on their usage at the time of mining and their reasonably foreseeable usage in the Jones' future farming plans, we find that the barrel spring and the bathtub spring qualify as protected water supplies under the Mine Subsidence Act.

Did the Jones file a timely claim for loss of the water in their springs?

The Jones first experienced water loss on their property in January 2004 following developmental mining by Consol in April through November 2003 and longwall mining in January through February 2004. The Jones experienced loss of water in their wells and diminishment or loss of their springs. Mrs. Jones reported the loss of the water supply to the Department. Mrs. Jones also reported a loss of water in a stream that flows through the Jones property. In connection with the report of stream loss, representatives of the Department began entering the Jones property in early 2004 and continued to do so up to and including the time of

the trial in this matter in January 2009. Access to the stream involved walking past the springs. During this time period, from March 2005 through September 2005, Ronald DesLauriers was a surface subsidence agent at the Department. His training included accompanying Mark Frederick of the Department's California, Pennsylvania District Mining Office (California District Mining Office) to the Jones site. He observed the springs on each of his visits to the site. Although he was not involved in the Department's investigation of the Jones water supply loss, his trips to the site involved observation of the springs. Mr. Frederick was also aware of the springs. There is no question that the Department's California District Office was aware of the Jones' springs at least as early as 2005.

Mrs. Jones contacted the Department in February 2004 to complain of loss of her water supply. She called Kim Patterson, a legal assistant in the Department's California District Mining Office. Ms. Patterson's duties include the handling of water loss complaints. Mrs. Jones told Ms. Patterson, "we've lost the water to our property." (T. 129) Ms. Patterson advised Mrs. Jones that she would also need to contact Don Teter at Consol. Mrs. Jones does not recall her conversation with Mr. Teter, but Consol's records indicate that she did notify him of the water loss. In response to the Jones complaint, Consol placed a water buffalo on the Jones property.

In connection with the Jones complaint, Mr. Teter filed a mine operator report with the Department regarding the water loss. The form stated only "water loss in well" because that was the only water source Mr. Teter was aware of on the Jones property. He did not know about the springs because Consol's records did not include the springs. The only pre-mining survey done prior to that occasion had included only the wells.

Over the next 22 months, the Jones heard nothing further from the Department regarding their complaint of water loss to their property. In December 2005, the Jones contacted their State

Representative, Bill DeWeese, regarding the matter. That same month, the Department contacted the Jones to schedule a meeting on their property.

Joe Matyus, a geologic specialist in the Department's California District Mining Office, was assigned to the matter, and he met with Mrs. Jones on her property in January 2006. During the meeting with Mrs. Jones, Mr. Matyus inquired whether she was having any other water problems, and Mrs. Jones told him about the springs on the parcel of property across the road. Mr. Matyus advised her that he wanted to focus on the wells at that time. The mine operator's report given to Mr. Matyus mentioned only the wells on the Jones property and it was his understanding that the investigation included only the wells. Had the report mentioned the springs, Mr. Matyus testified that he would have also focused on the springs at that time. Mr. Matyus admitted that he did not ask Mrs. Jones if she had suffered diminution of water in the springs.

Following his meeting with Mrs. Jones, Mr. Matyus sent a letter to Consol asking for information on the springs because no pre-mining data had been provided by Consol with its application. Mr. and Mrs. Jones received a copy of Mr. Matyus' letter asking for information about the springs. They believed that the Department's investigation of their water loss complaint included the springs.

In December 2005, prior to Mr. Matyus' visit to the site, the Jones had voiced a concern to the Department and also to Representative DeWeese that Consol had not properly inventoried all of the water supplies on their property. They requested the Department to accompany Consol during a groundwater inventory in order to ensure that all water supplies were properly documented. Consol's files at that time consisted of a groundwater inventory that had been conducted by Killam in June 1996, when the only water supply on the Jones property was one

well. Neither the Jones' second well nor the springs were in use at the time of the Killam groundwater inventory. A pre-mining survey conducted by Moody and Associates in October 2003 covered only the two wells on the Jones property. None of Consol's mining maps showed the springs.

At the time of Mr. Matyus' visit to the Jones' site in January 2006 to investigate the water loss complaint, Moody and Associates entered the Jones' property to conduct a second pre-mining water survey in connection with mining to be done in another panel. This survey did include the springs. Presumably in response to the concerns voiced by the Jones a month earlier, a representative from the Department, Joel Folman, accompanied the Moody personnel on the site while they GPS'ed the location of the two springs. Clearly, both Consol's consultant and the Department were aware of the exact location of the springs in January 2006 when Mr. Matyus began his investigation of the Jones' water loss complaint. Moreover, at least as early as December 2005, the Department was aware that the Jones did not believe Consol's groundwater inventory to be accurate.

On June 13, 2006, the Department completed its investigation of the Jones' water loss complaint and issued a letter to Consol regarding the results of its investigation. The letter states in relevant part as follows:

We have completed a preliminary investigation of Kenneth and Kim Jones' water supply problem. Our information shows that the above referenced mining operation [the Bailey Mine] is responsible for the diminution of the water supply.

(Appellants' Ex. 7)

The letter referred only to the Jones' water supply; it did not specifically mention the wells. The letter goes on to require Consol to provide a schedule and plan for establishing a permanent water supply and payment of increased operation and maintenance costs. Attached to

the letter is Mr. Matyus' report. Although Mr. Matyus' report mentioned only the wells, an attachment to the report included data for both the wells and the bathtub and barrel springs. Less than one month later, the Jones received a copy of a letter dated July 6, 2006 from Moody and Associates to Consol that discussed water tests it had performed on the wells and the springs. There was no reason at this point for the Jones to believe that the Department's investigation and conclusions regarding Consol's responsibility for the water loss did not include the springs.

In October 2007, more than one year after the Department's preliminary finding of responsibility by Consol for the water loss complaint, a representative of Consol, JoAnna Niecgorski, met with the Jones to review Consol's proposed payment of increased operation and maintenance costs. The proposal included only the wells, not the springs. When Mrs. Jones asked about the springs, Ms. Niecgorski said that Consol's files included only the wells.

In response, Ms. Niecgorski filed a mine operator report with the Department for the springs on October 7, 2007. The Department treated it as a new complaint, rather than as part of the Jones' 2004 complaint. On November 16, 2007, the Department approved Consol's proposal for payment of the increased operation and maintenance costs in connection with the water loss in the wells. The Department required Consol to post a bond for the operation and maintenance costs in the amount of \$22,011. The amount did not include increased costs in connection with water loss in the springs.

Joseph Szunyog, a licensed professional geologist in the Department's California District Office, was assigned the task of investigating the spring loss. Mr. Szunyog was assigned the case on November 27, 2008. On November 28, Mr. Szunyog denied the complaint, stating (a) the springs were not documented prior to mining as having a use and (b) no pre-mining data was available. He admitted that the reasons for denying the complaint were the fault of the mine

operator, not the landowners. At the trial, Mr. Szunyog stated an additional reason for denying the complaint, which was that it was filed more than two years after the water loss occurred.

We readily dismiss the first two grounds given for denial of the Jones' water loss complaint. Mr. Szunyog admitted that the requirement to provide pre-mining data for the springs was the responsibility of the mine operator, not the landowner. Consol's pre-mining data, provided to the Department in connection with its mining of the 1I Panel under the Jones' property, failed to include the springs. The pre-mining survey done by its consultant Moody and Associates in October 2003 did not show the springs. According to the testimony of Mrs. Jones, the barrel spring was being actively used at that time as drinking water for the sheep. Although the bathtub spring was being used less frequently at that time, it was, nonetheless, still in usage. It is standard practice for a consultant doing a pre-mining survey to ask the landowner about all sources of water on the property. This would have been particularly crucial here since the previous inventory of water sources on the property had been done seven years earlier and showed only one well. Since that time, the Jones had dug another well and developed two springs (as well as constructed a pipe for the area designated as S3). Consol's Mr. Teter agreed that it is not uncommon for landowners conducting farming operations in Greene County to develop springs on a regular basis, which is why it is a standard practice for landowners to be asked about additional water sources during a pre-mining survey.

To allow a mine operator to escape responsibility for replacing a water supply on the basis that it (the mine operator, or its consultant) failed to provide pre-mining data about the water supply or document its usage defies logic. If a mine operator can avoid responsibility for affecting a water supply by simply not supplying complete information in its permit application,

there will be no incentive for the mine operator to conduct an accurate inventory of all water supplies. In fact, it creates a disincentive to do so.

We hasten to add that we are not accusing Consol of deliberately providing inaccurate information. We believe what occurred here was an honest mistake. The original groundwater inventory done by Killam Associates in 1996 showed only one well. When Moody came on the property in 2003 to conduct the pre-mining survey, they simply missed the springs. As noted earlier, it is standard practice for someone conducting a pre-mining water survey to ask the landowner if there are additional sources of water than those already documented. Mrs. Jones testified that Moody never asked her about additional water sources.

Consol points out that the results of Moody's testing of the wells in 2003 were provided to the Jones and that the Jones should have questioned why they were given only test results for the wells and not the springs. Just because test results for the wells were provided to the Jones, that did not place a duty on them to question why the springs weren't included. The duty is on the mining company and its consultant to conduct a thorough inventory and ask the right questions. Of course, the landowners are a part of this process and they are certainly expected to be forthcoming with information when the mining company is conducting a pre-mining survey. However, the burden is on the coal company and its consultants to ensure that the process is as comprehensive as possible. The mining company is the one that the law requires to perform an accurate survey in order to obtain a permit. They are the ones asking for something from the Department and in return they have a duty to provide the required information. The burden should not be on the landowners to follow up on the mining company to make sure it does its job properly.

Moreover, the evidence indicates to us that the Jones were as forthcoming as possible about the sources of water on their property. They made every attempt to ensure that Consol's inventory of their water supplies was accurate, even going so far as to contact their state representative and the Department when they believed that Consol and/or Moody were not properly documenting the Jones' water supplies. If Consol's records were incomplete, it was through no fault of the Jones.

The Department also argues that the complaint was filed more than two years after the Jones experienced water loss which makes it untimely pursuant to 52 P.S. § 1406.5a(b) and 25 Pa. Code § 89.152(a)(4). Those provisions require that a complaint for water loss be filed within two years of when the water supply is affected. We disagree that the complaint is untimely. The evidence demonstrates that the Jones' 2004 complaint covered both the wells and the springs. The fact that the springs were not included in the 2004 complaint is not attributable to the Jones but to omissions on the part of the Department and Consol.

Mrs. Jones contacted the Department and Consol in February 2004 stating that she had lost water to her property. It was assumed by Consol that this included only the wells on the Jones' property because it was the only data they had in their files.² This error was then translated to the Department. Mr. Matyus based his investigation of the Jones water loss complaint on Consol's report which referenced only the wells, not the springs. However, even when Mrs. Jones brought the springs to Mr. Matyus' attention, he did not follow up on them, but continued to focus only on the wells. It was understandable that Mrs. Jones would not question how the Department was conducting its investigation. We suspect that most landowners in this

² In fact, the mine operator report form provided by Consol referenced only one well, even though there were two wells on the property.

situation would have handled the matter exactly as Mrs. Jones did. There was no reason for her to believe that the springs would not be addressed at a later time.

From early 2004 through the period of Mr. Matyus' investigation in 2006, there were a number of Department personnel on the Jones' property in connection with the stream loss investigation. The Department was aware of the Jones' springs at that time, and at least some Department personnel witnessed that the springs had little or no flow. Through the testimony at the trial, we understand that the individuals involved in the stream loss investigation were not involved in the water loss complaint, and the lack of cross-communication is perhaps understandable. However, this is not something that would have been readily apparent to a landowner whose property was being visited on a regular basis by Department personnel. This is particularly true since access to the stream involved walking past the springs. When the Jones submitted their water loss complaint in February 2004, and throughout the entire length of the Department's investigation, they had every reason to believe their spring loss was being investigated along with the loss of water to their wells and the loss of the stream. To them, it was all part of one large investigation, and they were given no reason to believe otherwise. They were given no indication by the Department that the investigation did not include the springs.

Moreover, the Department did not begin its actual investigation of the Jones' water loss complaint until nearly two years after the complaint was filed and only after the Jones had contacted their state representative. Had the investigation been initiated immediately after the filing of the complaint, the lack of information about the springs would have been discovered within the two year timeframe. The Jones should not be penalized for the fact that their complaint was not acted on until it was outside the two year period of liability set forth under 52 P.S. § 1406.5a(b). Their complaint was timely, even if the investigation itself was delayed. If it

can be argued that there was any delay in reporting the water loss in the springs, the delay lies with Consol, not the Jones. Consol's mine operator report to the Department in February 2004 stated only "water loss to well." Consol did not report the spring loss until October 2007. We do believe the testimony of Don Teter at Consol that he was not aware of the loss of water to the springs until it was mentioned during the meeting between Mrs. Jones and Ms. Niecgorski. Again, however, this is due to the fault of Consol, not the Jones. Had Consol's pre-mining data on the Jones' property been accurate and up-to-date, the springs would have been included.

What is quite apparent from the evidence presented in this matter is that the Jones did exactly what they were supposed to do every step of the way. They allowed a pre-mining survey to be conducted by the mining company. When they lost water they contacted the Department and Consol. When they were concerned that Consol's inventory of their water supplies was not accurate, they contacted the Department and asked the Department to accompany Moody on its next pre-mining survey. They told Mr. Matyus about the springs and were told he wanted to focus on the wells. They were sent test results by Moody containing information about the springs in July 2006, around the same time as when the Department had concluded Consol was responsible for their "water loss problem." To suggest that the Jones did not provide enough information to Consol or the Department to ensure that the springs were part of the investigation of their 2004 water loss complaint is pointing the finger at the wrong party. Consol erred (through its contractor) by failing to conduct an accurate pre-mining survey, and the Department erred by not conducting a timely investigation and by not following up on the springs when they were raised by Mrs. Jones during her meeting with Mr. Matyus. In fact, the only party not at fault in this proceeding is the Jones family.

Both Consol and the Department suggest that the Jones should have been more diligent or forthcoming with information – that Mrs. Jones should have been clearer when she reported the water loss to Kim Patterson at the Department and Don Teter at Consol, that Mrs. Jones should have specifically mentioned the springs to Moody during the 2003 pre-mining survey, that Mr. and Mrs. Jones should have questioned test results they received from Moody. Certainly, a landowner may not withhold information that will assist the mining company in ensuring that an accurate and comprehensive pre-mining survey is conducted. However, that did not occur here. Mrs. Jones was very forthcoming with information about her property. In fact, the evidence strongly shows that the Jones wanted Consol to have an accurate inventory of the water on their property, and they went so far as to contact their state representative and the Department in an attempt to ensure that any groundwater inventories or pre-mining surveys conducted on their property were accurate. To suggest that the burden was on the Jones to ensure that the mining company conducted a proper groundwater inventory and pre-mining survey of the water sources on their property or risk omitting them from the Department’s investigation places a much higher burden on the landowner than we believe was intended by the Mine Subsidence Act.

In summary, the evidence demonstrates that the Jones’ 2004 water loss complaint did include the bathtub spring (S2) and the barrel spring (S2). The Department should have included the springs in its investigation of the Jones’ water loss complaint. Therefore, we remand the matter to the Department for further action. We are mindful of the fact that the Jones’ water loss complaint is fast approaching six years, and they deserve to have a speedy resolution of this matter. Because the springs are closer to the area where mining took place (and, in fact, the barrel spring is directly over the 1I Panel) than are the wells, which have already been found to be affected by Consol’s mining, the Department should be able to conclude its

investigation of the water loss in the springs promptly. In the likely event that the Department determines Consol's mining to be responsible for water loss in the Jones' springs, it is then ordered to proceed with the calculation of increased operation and maintenance costs pertaining to the springs.

In the interim, any payment by Consol for increased operation and maintenance costs related to the Jones' wells may be accepted by the Jones without it affecting any calculations pertaining to their springs

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter and reviews it *de novo*, based on the evidence presented to the Board. *Smedley, supra*.

2. The bathtub spring (S2) and the barrel spring (S1) are protected water supplies as defined by the Mine Subsidence Act. 52 P.S. § 1406.5a(a)(3).

3. The Jones' complaint of water loss of their springs was filed within two years of when their water supply was affected by mining.

4. No water loss claim was filed for S3, and therefore, the Department properly excluded it from its investigation of the Jones' water loss complaint.

5. The Department erred by not treating the water loss in the springs (S1 and S2) as part of the Jones' 2004 water loss complaint.

6. The Department may not refuse to investigate a water loss complaint on the basis that it does not have pre-mining data available where the failure to provide pre-mining data is the fault of the mining company.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KENNETH AND KIM JONES

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and CONSOL
PENNSYLVANIA COAL COMPANY

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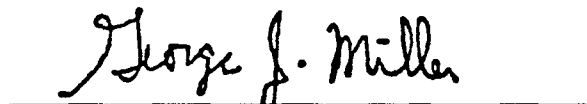
EHB Docket No. 2007-281-R

ORDER


AND NOW, this 6th day of October 2009, the appeal of Kenneth and Kim Jones is **granted** as to the barrel spring (S1) and bathtub spring (S2). This matter is remanded to the Department to determine Consol's responsibility for the loss of water in the springs and calculation of increased operation and maintenance costs as appropriate. A report of the Department's findings shall be provided to the Jones, Consol, and the Pennsylvania Environmental Hearing Board within 90 days of the date of this order.

ENVIRONMENTAL HEARING BOARD


THOMAS W. RENWAND
Acting Chairman and Chief Judge


GEORGE J. MILLER
Judge


MICHELLE A. COLEMAN
Judge


BERNARD A. LABUSKES, JR.
Judge

DATED: October 6, 2009

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

CRUM CREEK NEIGHBORS

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and PULTE HOMES OF
 PA, LP, Permittee**

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EHB Docket No. 2007-287-L

Issued: October 22, 2009

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board remands an NPDES stormwater discharge permit to the Department for further consideration because the Department analyzed the site as a nondischarge site when in fact there will be direct discharges to an Exceptional Value stream. In addition, the appellant's showing that there is a significant, credible risk of a diminution in the flow of the Exceptional Value stream as a result of the permitted residential subdivision requires further investigation and analysis.

FINDINGS OF FACT

The Development Site

1. On November 8, 2007, the Department of Environmental Protection (the "Department") issued an individual National Pollutant Discharge Elimination System ("NPDES") permit for stormwater discharges associated with construction activities, No.



PAI012306006, to Pulte Homes of PA, L.P. (“Pulte”) for a residential development project known as Sentinel Ridge consisting of 58 townhouses and 160 condominiums in Marple Township, Delaware County. (Notes of Transcript pages (“T.”) 221, 461; Crum Creek Neighbors Exhibit No. (“CCN Ex.”) 4; Department Exhibit No. (“DEP Ex.”) 18, 19.)

2. The permit authorizes 20.2 acres of earth disturbance on a 34.88-acre site. (CCN Ex. 4.)

3. As its name would imply, the Sentinel Ridge development is perched on the top of a ridge bounded to the west, east, and south by very steep slopes. To the west is Crum Creek, a Warm Water Fishery (WWF), to the south is Old State Road (S.R. 1008), and to the east is Holland Run (a.k.a. Hotland Run but referred to herein as Holland Run). Holland Run flows into Crum Creek. (CCN Ex. 4.)

4. The site in its current condition contains the remnants of an old abandoned farm but it is otherwise largely wooded. (CCN Ex. 4.)

5. There are three surface water drainage areas on the existing site. Predevelopment Area A is 21.32 acres, includes a small off-site area, and drains largely by sheet flow to Holland Run. Area B is 2.3 acres and drains to the south. Area C is 15.26 acres and drains to Crum Creek. (CCN Ex. 4; *see also* T. 481-82.)

6. About half of the runoff from the site currently flows to Holland Run. (T. 482.)

7. There are various springs and drainage paths that drain into Holland Run on the eastern slope of the site, as well as a designated unnamed tributary (UNT) of Holland Run (sometimes referred to as “the finger tributary”) that flows down the steep slope into the main branch of the stream. (T. 54; CCN Ex. 1)

8. The finger tributary is about 1000 feet upstream from Old State Road and flows down the hillside below a portion of the proposed project area. (T. 163-64; CCN Ex. 1.)

9. The finger tributary is primarily fed by groundwater. (T. 164, 512.)

10. Holland Run has an existing Exceptional Value (“EV”) use from its headwaters (including the finger tributary) extending down to the upstream edge of the culvert under Old State Road. (T. 410-11, 422-23; DEP Ex. 32.)

11. Holland Run does not have an Exceptional Value use downstream from the upstream edge of the culvert under Old State Road. In other words, the portion of the stream in the culvert itself is not Exceptional Value. Holland Run is a Warm Water Fishery (WWF) downstream of the EV section. (T. 405-40, 418, 422.)

12. The Department in evaluating Holland Run applied its antidegradation integrated benthic macroinvertebrate scoring test described at 25 Pa. Code § 93.4b(a)(2)(i)(A) and § 93.4b(b)(1)(v). The protocols upon which this scoring test is based is briefly described as follows: Selected benthic macroinvertebrate communities are sampled from both the stream under investigation (Holland Run) and a reference station on an EV stream (Rock Run, Chester County, in this case). Rock Run has served as an EV reference stream in other Departmental surveys. The comparisons were done by computing several benthic macroinvertebrate community metrics for each sample. This comparative benthic macroinvertebrate scoring test used the following metrics – selected to as good indicators of aquatic community health: taxa richness; modified EPT index (total number of intolerant Ephemeroptera, Plecoptera, and Trichoptera taxa); modified Hilsenhoff biotic index; percent dominant taxon; and percent modified mayflies. Based on these five metrics, the pertinent section of Holland Run had a biological condition score of 95, which is greater than the EV criterion of 92. This indicated that

the portion of Holland Run upstream of Old State Road qualifies for an EV designation under the Department's regulatory criteria. (T. 389-403.)

13. Beyond the characterization that Holland Run is a small stream, there is no record evidence of its flow. (T. 401.)

14. The finger tributary has very low flow, but it does have regular flow, and it was flowing on the day of the Board's site visit (April 14, 2009). (T. 164, 661-63.)

Crum Creek Neighbors

15. Crum Creek Neighbors ("CCN"), the Appellant, is a citizens' group interested in the protection of the Crum Creek watershed, which includes Holland Run.

16. At least two members of CCN, Bruce Litecky and David Pines, live on property abutting Crum Creek downstream and within one mile of the proposed development. Both individuals have an aesthetic appreciation for Crum Creek and its tributaries, and they both use the streams and their environs for recreation. (T. 29-44; CCN Ex. 9, pp. 5-17.)

The Project & Its Post-Construction Stormwater Management Plan

17. Pulte's permit application was the subject of intense public comment and scrutiny and a public hearing, and the application underwent a lengthy period of deliberation, review, revision, and analysis. (T. 222-27, 249-55, 364-74, 444-47, 483-90, 592; DEP Ex. 1, 2, 4, 5, 6, 7, 12, 17, 19, 28, 29, 37; Pulte Ex. 5, 8, 9, 14, 15, 17, 18, 23, 27, 28; CCN Ex. 4.)

18. In order to obtain a permit, Pulte, through its design engineer, Cynthia Smith of Horizon Engineering Associates, was required to prepare and commit to implement a Post-Construction Stormwater Management Plan ("PCSM Plan") that maximizes groundwater infiltration, protects the structural integrity of the receiving streams, and protects and maintains

existing and designated uses. (DEP Ex. 11, p. 8.) Receiving streams must be protected from degradation. (DEP Ex. 19, p. 1.)

19. Pulte's PCSM Plan includes the following structural Best Management Practices ("BMPs"): five recharge basins, two detention basins, three rain gardens, seven water quality structures, six vegetated swales, porous pavement, parking stalls, and dry wells. Recharge basins (a.k.a. "retention basins" or "infiltration basins") are designed to trap stormwater so that all the water can infiltrate or evaporate. Detention basins are designed to empty continuously but in the process slow down the rate of stormwater discharging from the site. (T. 56-57; CCN Ex. 4.)

20. The recharge facilities, porous pavement, and dry wells are infiltration BMPs. (T. 234.)

21. Pulte's PCSM Plan includes the following nonstructural BMPs: clustering of buildings, using retraining walls to reduce disturbance, providing underground parking for condominium units, and providing a 150-foot stream buffer for Crum Creek and Holland Run. (T. 56-57; CCN Ex. 4.)

22. The project divides the post-development site into surface water drainage sheds A1, A2, A4, A5, A6, C1, and C2, which correspond to recharge basins A-1, A-2, A-4, C-1, and C-2 and detention basins A-5 and A-6. (There is no Basin A-3.) (CCN Ex. 1, 4; DEP Ex. 22.)

23. Basins C-1 and C-2 are infiltration basins designed to handle flow from western portions of the site. (T. 61, 501; CCN EX. 1, 4.)

24. The A-basins are lined up in a row along the eastern side of the site. They are designed to control runoff that would have flowed toward Holland Run prior to development. The system is designed such that water that does not infiltrate in the recharge basins (A-1, A-2,

and A-4) will flow through pipes to A-5 and thence to the WWF section of Holland Run. (T. 58-59; DEP Ex. 22.)

25. Pulte's design includes a storm sewer pipe buried up to 17 feet deep that begins at an overflow pipe in Basin A-1, continues along the slope below A-2 and A-4, and discharges into A-5. (T. 58-59, 179; DEP Ex. 22.) The purpose of the sewer line is to carry overflow to Basin A-5, which in turn discharges below the EV section of Holland Run. (T. 179.)

26. Pulte's permit does not expressly authorize any direct discharge of stormwater runoff into the Exceptional Value portion of Holland Run. (T. 61, 194, 422-23, 589, 668; DEP Ex. 19.)

27. The only planned, permitted discharge of stormwater runoff from the eastern portion of the site will be directed into the Warm Water Fishery portion of Holland Run about five feet below the Exceptional Value portion of the stream. The discharge will emerge where a preexisting stormwater pipe empties into the side of the culvert underneath Old State Road. (T. 61, 194, 422-23, 589.)

28. Pulte's permitted stormwater collection and treatment system is purposely designed to divert all stormwater runoff from the eastern side of the site that does not infiltrate or evapotranspire to a discharge point downstream of the Exceptional Value portion of Holland Run. (T. 61, 194, 422-23, 589.)

Springhouse Water

29. Water emerging at an existing spring at an old springhouse associated with the abandoned farm and located on the southern side of the site up the hill from Old State Road will be collected and tied into existing piping below the road and will continue to flow into manmade wetlands created by PennDOT located on the other side of Old State Road. The spring does not

give rise to what can fairly be called a tributary of Holland Run, and the project work in the area of the springhouse will not cause any degradation to surface waters or harm to the PennDOT wetlands. (T. 248, 526-28.)

Stormwater System's Ability to Manage Large Storms

30. Recharge Basins A-1, A-2, and A-4 are the basins directly up the hill from the Exceptional Value portion of Holland Run. (CCN Ex. 1.)

31. Recharge Basins A-1, A-2, and A-4 are designed to intercept and prevent direct discharges to the EV portion of Holland Run and manage the captured stormwater through (1) containment, (2) infiltration and evaporation, and (3) overflow via pipes to lower stormwater basins. (CCN Ex. 4.)

32. There is no disagreement among the experts that the recharge basins can adequately manage anything up to a two-year storm (3.36 inches measured over the course of 24 hours). (T. 65, 131, 138-39, 597-98.)

33. We credit the expert opinion of Michele Adams, P.E., that the recharge basins either individually or in combination will not be able to contain, infiltrate, and discharge through the riser pipes all of the water flowing into them during five-year storms and larger. (T. 69-70, 80, 94, 97, 113-14, 129-30.)

34. During such large storms excess water will go over the basins' emergency spillways and flow down the hill and discharge into the EV portion of Holland Run. (T. 114, 652-58; CCN Ex. 1.)

35. We credit Ms. Adams's opinion (and reject the opinions of the other experts to the extent that they testified to the contrary) that there will be direct discharges from the recharge basins for several reasons, including the following:

- a. Adams is a qualified and experienced expert in stormwater issues. (T. 48-51.) Among other accomplishments, she wrote significant portions of the Department's BMP Manual, the guidance document that the Department encourages consultants to use when they prepare stormwater management systems. (T. 63.)
- b. Adams has conducted a thorough review and analysis of the site and the project. (T. 52-53; 54-150 *passim*.)
- c. Adam's opinion is supported by detailed calculations that she explained on the record. She relied largely on Pulte's basic numbers and her conclusions are not necessarily dependent upon any particular methodology or computer model. (T. 75-92, 94-97, 113-14, 651-59; CCN Ex. 4A-1, 4A-2, 4A-4, 4A-5.)
- d. For example, although as much as 124,000 cubic feet of water could enter Basin A-2 during a 100-year, 24-hour storm, the basin can only hold and infiltrate about 25,000 cubic feet over those 24 hours. Similar disparities apply to Basins A-2 and A-4. (T. 90, 652-59.)
- e. The recharge basins are designed to retain water, not to control the rate of discharge. In contrast, Basins A-5 and A-6 are *detention* basins designed to control rate and they are not listed as contributing significantly to infiltration. (T. 69-70, 239-49; CCN Ex. 1 (Tables).)
- f. Adams credibly explained that recharge basins, unlike detention basins, are not designed to reduce the flow rate of runoff during the peak flow period by discharging water continuously during a storm at a slower rate than it enters the basin. Recharge basins have no outlet other than infiltration until they are nearly full. (T. 64-65, 69-72, 77-83.)
- g. Infiltration will be ongoing but it is unlikely to be able to keep pace with inflow during a large storm. (T. 237.)

- h. Dr. Browne acknowledged that the basins will not infiltrate enough to take the whole volume of a 100-year storm: “They’re only infiltrating for the two-year storm.” (T. 352.) Excess water will need to flow through the riser pipe for a five-year storm on up. (T 353-55.)
- i. As inflow outpaces infiltration, the basin will fill up. There is no other outlet. At some point during 5-year storms and larger, the water in the basin will reach the height of the riser pipe and spillway.
- j. Once a recharge basin is full, water must go out as fast as it comes in or it will overflow. (T. 69, 83, 93.)
- k. Designing the basins to allow for a continuous discharge (e.g. with an outflow pipe with holes starting at the bottom) would have defeated the primary goal of maximizing infiltration. (T. 237-38; CCN Ex. 1, 4, p.6.)
- l. The overloading of A-4 will be exacerbated by excess flow that originates from A-2. (T. 115, 609.)
- m. We credit Ms. Adams opinion that the 6-inch riser pipes will not be enough to prevent the recharge basins from overtopping. (T. 652, 657-58.)
- n. Because water in the recharge basins cannot enter the riser top until the water level reaches top of the pipe, and the top of the pipe is at or very near to the same elevation as the spillways in the recharge basins, overflow is likely to flow out of the emergency spillways. (T. 652-58.)
- o. Calculations derived by Pulte and the Department using an engineering method known as the Modified Rational Method do not demonstrate that Adams is wrong about the recharge basins overtopping. Among other things, that method is best suited for calculating a

rate of discharge from *detention* basins that have a continuous engineered discharge outlet. (T. 69-70, 238-39.)

p. Neither Pulte nor the Department explained any correlation between their Modified Rational Method calculations and the sizing of the riser pipes. (See, e.g., Pulte proposed Finding of Fact (“FOF”) 58, citing T. 245 (discussing outlet structure for *detention* basins); T. 353 (equating outflow to infiltration).)¹

36. We do not credit Adams’s secondary opinion that A-1, A-2, and A-4 are likely to infiltrate at less than the design infiltration rate (T. 113) or the opinion of the Department’s expert, Domenic Rocco, P.E., that the basins are likely to infiltrate at more than the design rate. We accept the design rate used by Pulte’s geotechnical consultant and design engineer as one to four inches per hour, which was characterized by Dr. Browne as representing a “good safety factor.” (T. 109, 241, 243, 331, 510-11; DEP Ex. 37A; CCN Ex. 4, App. N, p. 17.) In any event, Adams used the design rate in predicting that the basins will overflow. (FOF 35.)

37. It does not appear that any overflows from the detention basins (A5 and A6) will flow into the EV section of Holland Run. There is no record evidence that overflow from the other A-basins was factored into the sizing of A-5. (T. 92, 115, 176-77, 610; CCN Ex. 1, 4A-5.)

38. The A-basin (A-1 through A-5) portion of the Pulte system does not constitute a “nondischarge alternative.” (FOF 30-37.)

39. Basins C-1 and C-2 are similarly undersized for large storms, but overflow is likely to be into Crum Creek, a Warm Water Fishery. The record does not support a finding that C-basin discharges will damage the structural integrity of the stream or interfere with its

¹ Pulte cites T. 275 for the contrary proposition but there is no mention of the outflow structures on that page.

designated use or cause excessive erosion and sedimentation or exacerbate downstream flooding. (T. 92-94; CCN Ex. 4C-1, 4C-2.)

Risk to Holland Run's Baseflow

40. The project's stormwater management system is specifically designed to divert excess runoff that would formerly have contributed to the flow of Holland Run away from the EV portion of the stream. (T. 194-96; CCN Ex. 4.)

41. The Exceptional Value portion of Holland Run is also fed by groundwater. (T. 512, 164-65, 661-63.)

42. An unknown quantity of groundwater that flowed toward Holland Run under predevelopment conditions will be diverted as a result of the project. (T. 164-65, 194-96.)

43. The recharge area for the finger tributary and its associated wetlands will be substantially altered by construction. (T. 164-69; CCN Ex. 1.)

44. At least some portion of the former recharge for the finger tributary will be directed out of the recharge area and toward Basin A-2. (T. 520-21; CCN Ex. 1.)

45. To the extent that Basin A-1 was designed to provide recharge to the finger tributary, due to its placement directly upslope of a dry drainage ditch north north-east of the tributary, it is unclear whether any infiltrate from the basin will reach the tributary. (T. 168-72, 514-15 (drainage feature to the east of the tributary), 519-20.)

46. Water in subbasins A-5 and A-6 that may formerly have contributed to the EV portion of Holland Run's flow will be diverted post-construction to the WWF portion of Holland Run. (T. 176-77, 244; CCN Ex. 1, 4.)

47. The proposed recharge facilities (A-1, A-2, and A-4) as well as vegetated swales and raingardens will result in increased evapotranspiration after development that may help control flooding, but may also reduce baseflow to Holland Run. (T. 530-32.)

48. Potential interference with baseflow to Holland Run is associated with the sewer pipe and the trenching for the pipe that connects Basin A-1 to Basin A-5. (T. 178-80.)

49. The first 250 to 300 feet of the sewer pipe will be perforated. This design is intended to give what are supposed to be rare overflows from Basin A-1 another chance to infiltrate into the ground, but it is more often likely to intercept upgradient groundwater recharge. (T. 124, 180-81, 513, 524; Board Ex. 1.)

50. Trench plugs are to be installed in the trench to prevent an unintended diversion of groundwater, but the first plug is outside of the apparent recharge zone for the finger tributary. (T. 513, 525, 611.)

51. We credit the opinion of CCN's experts, Adams and Schmid, that there is a significant credible risk that there will be a material diminution in at least some portions of Holland Run's flow as a result of the project. (T. 124-26, 160-72, 180-81, 194-96.)

52. No specialist in hydrogeology testified in this case. (*See, e.g.*, T. 265-66.)

53. Pulte's expert, Dr. Frank Browne, did no work on the site to determine which way groundwater flows. (T. 360.) Dr. Browne does not believe that anyone has done sufficient testing to say exactly in which direction groundwater flows. (T. 360-61.)

54. Holland Run supports a robust population of invertebrates and wetland plants. (T. 165-66.)

55. The Department has not evaluated the ability of Holland Run to support its Exceptional Value use in the event of a diminution in flow.

56. CCN's expert on ecology, Dr. James Schmid, credibly and without contradiction opined that, *if* the finger tributary dries up as a result of development, it will have a devastating impact on the ecology of the tributary itself as well as noticeable impact on the biota in the larger vicinity of the stream. (T. 172-73.)

DISCUSSION

Direct Discharges During Large Storms

The eastern half of the Sentinel Ridge site is in the Holland Run watershed. Holland Run is a resource of exceptional value. It is the only Exceptional Value (EV) stream in Delaware County and a rare example of such an exceptionally valuable resource in southeastern Pennsylvania. Unlike some EV streams that are located in remote areas that few people may have an opportunity to see, Holland Run flows in the midst of suburban development and contributes in no small way to the attractive nature of Marple Township.

Not all of Holland Run is classified as Exceptional Value. There is no doubt that its EV status begins at its headwaters, but the parties disagree on exactly where the status ends. The official designation states that its EV classification terminates at Old State Road. (DEP Ex. 32.) The Department says that means that Holland Run's EV classification ends at the upstream edge of a concrete culvert that channels the stream under the Old State Road. CCN argues that this delineation, done at Pulte's request, is mighty convenient because Pulte's stormwater discharge flows through existing stormwater pipes into the side of the culvert a mere five feet below the EV terminus. As a result, Pulte's planned and permitted discharge is into the Warm Water Fishery (WWF) portion of Holland Run. Had the discharge point been a mere five feet upstream, it would have discharged into the EV portion of the stream. CCN argues that the

stream's EV use should extend into the culvert and the only "fair" point of demarcation is that spot in the culvert that corresponds to the middle of the road.

We see no logical, technical, or legal reason why one half of the portion of the stream channellized in the culvert should be EV and the other should not. CCN's reference to common law principles of property ownership is not helpful. Property lines have nothing to do with the existing uses of a stream. The Department's interpretation comports with the reality that a completely channellized stream running through a concrete pipe under a road does not have the biological and physical characteristics necessary to support Exceptional Value uses. (T. 406-411.) Therefore, the Department did not err by concluding that Pulte's designed discharge is into the WWF part of the stream.

The evidence, however, shows that the design discharge into the culvert will not be the only point source discharge from the Pulte site into Holland Run. The Department erred by concluding otherwise. The record demonstrates that the recharge basins on the eastern side of the site (Basins A-1, A-2, and A-4) are likely to overflow and discharge to the EV portion of Holland Run during heavy storms. (FOF 30-38.)

This case has forced us to select among contradictory expert opinions, all of which were given by qualified and sincere experts. CCN's expert opines that the basins will discharge; the Department and Pulte's experts opine that they will not. As we explained in *UMCO v. DEP*, 2006 EHB 489, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007)(*en banc*),

The weight to be given to an expert's opinion depends upon such factors as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. Perhaps more fundamentally, we look to opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of a case. *Bethayres Reclamation Corp. v. DER*, 1990 EHB

570, 580-81. See, e.g., *Sunoco, Inc. (R&M) v. DEP*, 2004 EHB 191, 246, 249; *aff'd*, 865 A.2d 960 (Pa. Cmwlth. 2005); *Birdsboro & Birdsboro Municipal Authority v. DEP*, 795 A.2d 444, 447-48 (Pa. Cmwlth. 2002); *T.R.A.S.H. Ltd. v. DER*, 1989 EHB 487, *aff'd*, 710 A.2d 1228 (Pa. Cmwlth. 1998). As the fact finder, weighing credibility and selecting among competing expert testimony is one of our most basic and important duties. *Bethayres*, 1990 EHB at 580.

UMCO, 2006 EHB at 544-45.

Questions of resolving conflicts in evidence, witness credibility, and evidentiary weight are with the exclusive discretion of the fact finding body; here, this Board. *Birdsboro v. DEP*, 795 A.2d. 444, 447 (Pa. Cmwlth. 2002). We are under no obligation to accept expert testimony, even if it is not contradicted. *Id.*; *Feldbauer v. Dep't of Public Welfare*, 525 A.2d 837, 839 (Pa. Cmwlth. 1987). It is not always possible to articulate specific reasons for finding one witness credible over another. *Birdsboro; Sherrod v. WCRB*, 666 A.2d 383, 385 (Pa. Cmwlth. 1995).

We are persuaded by the opinion of CCN's expert, Michele Adams, that Basins A-1, A-2, and A-4 will overflow and discharge into Holland Run during large storms. (FOF 35.) We found Ms. Adams's use of specific calculations to support her reasoning to be understandable and convincing. We were concerned by, as CCN puts it, the tendency on the part of others "to not look beyond computer programs and look at what actually will happen to the stormwater on this site when the basins fail to control the peak rate of the large storms." (Reply Brief at 4.) Ms. Adams explained that, regardless of which engineering protocol is used, these A-basins are not by a significant margin likely to be able either individually or in combination to contain large storms. The basins were designed to provide enough capacity to infiltrate up to a two-year storm, which is 3.36 inches of precipitation measured over the course of 24 hours at this location. Pulte's expert, Dr. Frank Browne, confirmed that the basins are only designed to infiltrate a two-year storm. (T. 352.) During larger storms, infiltration will simply not be able to keep pace

with inflow and the basins will fill up. At that point, the water can only go two places: through the opening at the top of a riser pipe in the basins or over the basins' emergency spillways. Ms. Adams credibly and without any direct contradiction testified that the riser pipes are too small to discharge all of this water at once. Therefore, the basins will overtop. There was no dispute that those discharges will flow down the hill and thence into the EV section of Holland Run.

To the extent that the other experts contradicted Ms. Adams's prediction, we do not find their opinions to be credible. They never really confronted Adams's calculation with any degree of specificity. Although Ms. Adams relied upon the same infiltration rates as Pulte's design engineer,² and Dr. Browne's opinion that Pulte's plan "is a really excellent stormwater management plan" was based in part on the good safety factors reflected in the design infiltration rates, the Department's expert, Mr. Domenic Rocco, oddly enough for a Department witness, testified that the design rates are in effect too conservative. We do not find Mr. Rocco's opinion to be credible, which was a significant component of his larger opinion that the basins are properly sized.

In truth, we do not have the sense that any of the experts disagree strongly that the recharge basins will overflow in very heavy storms. Rather, Pulte and the Department would have us believe that these discharges may be ignored. To a large extent, the Department and Pulte approached this issue by listing BMPs, describing compliance with the Department's checklists, policy manuals, the local ordinance, and accepted engineering practices, and justifying the use of particular engineering models instead of showing that there would in fact be no discharges to the stream. For example, the Department is simply wrong in concluding that meeting Control Guidance 1 (CG-1) as set forth in its guidance document automatically and *ipso*

² We reject Adams's secondary opinion that the design rates are too optimistic based upon the construction of the basins.

facto constitutes a “nondischarge alternative” under the antidegradation regulations. See 25 Pa. Code § 93.4c(b)(1)(i). (T. 583.) As we said in *Zlomsowitch v. DEP*, 2004 EHB 756, 784-87, there is either a discharge or there is not. Determining whether there will be a discharge is not about checking off boxes on a form. We specifically rejected this type of reasoning not only in *Zlomsowitch*, but in *Blue Mountain Preservation Association v. DEP and Alpine Resorts*, 2006 EHB 589, as well, where we held that compliance with Chapter 102 regulations regarding erosion and sedimentation control does not automatically constitute compliance with the antidegradation requirements. *Blue Mountain Preservation Association*, 2006 EHB at 613. The Department’s analysis concerning the adequacy of BMPs or the antidegradation best available combination of technologies (ABACT) may be appropriate as a step down the road in assessing whether a discharge should be permitted, 25 Pa. Code § 93.4c, but it is *not* a basis for pretending that there is, in fact, no discharge.

Mr. Rocco pointed out that the focus of the BMPs on the site is to deal with storms that happen on a routine basis. (T. 562.) He was concerned that large basins sit empty most of the time and encroach unnecessarily on “sensitive areas.” (T. 561-62.) He noted that the BMPs will control as much as 95 percent of storm events in any given year. (T. 582.) These points do not substantially contradict Adams’s testimony that only five-year and larger storms may result in direct discharges to the stream.

Thus, we conclude that there will be direct discharges to the EV stream. These discharges are not necessarily prohibited, but the Department erred by treating this site as a “nondischarge site.” See *Zlomsowitch, supra*, 2004 EHB at 787 (periodic discharges from stormwater controls as a result of large storms trigger antidegradation requirements). The

Department must consider the effect of these discharges in accordance with antidegradation regulations.

The Department's error, however, is not cause for revocation of the permit as demanded by CCN. CCN has not shown that the infrequent discharges from the recharge basins will, in fact, degrade Holland Run. It must be remembered that these post-construction discharges will be from a largely vegetated system designed to control runoff from a residential development. There is no reason to assume the discharges will result in pollutant loading. *Contrast Zlomsowitch, supra*, 2004 EHB 756 (no dispute that stormwater discharge from quarry operation would carry excess levels of suspended solids). A 150-foot forested buffer is being left intact around the stream. Overflows are only likely in five-year storms or larger, i.e., storms that can be expected to occur only once every five years or even less frequently. The spillways on the basins have been designed to disperse flow. (T. 563-64.) During a large storm, flooding may already be occurring to the point that the stream banks have overflowed, which tends to dissipate energy and can help protect long-term stream structure, which can in turn render the impact of stormwater discharges during such events less problematic. (T. 498.) We also cannot forget that large amounts of stormwater would have been flowing off of the site to the stream in a five-year storm even if the site had remained undeveloped. It is not incumbent upon Pulte to *improve* the quality of Holland Run during large storm events.

One could argue in light of these mitigating factors that the Department's characterization of the site as a "nondischarge site" was harmless error and that we should simply approve the permit and dismiss the appeal. We are not particularly receptive to that alternative based on the existing record because emergency spillways are not meant to be used as periodic discharge points, no matter how well designed they are. At least some of the discharges on the site will

flow over built up retaining walls and down very steep hillsides. There is no evidence that better designed outflow pipes, for example, were considered, or what the consequences of such engineering modifications on retention basin A-5. We are convinced that the better approach under the circumstances is a remand to the Department for it to bring its expertise to bear on how best to deal with the discharges that will occur at the Sentinel Ridge project. As discussed below, a remand to reconsider baseflow concerns is necessary in any event. Rather than revoke Pulte's permit as requested by CCN or dismiss the appeal as requested by Pulte and the Department, we will suspend the permit and remand the matter for further consideration by the Department in accordance with antidegradation requirements.

The Department argues that it is unreasonable to require stormwater BMPs to be designed to manage the total increase in runoff volume from large storm events. (DEP Ex. 34.) That apparently is the case even if the discharges flow into special protection waters. We do not necessarily disagree. We are not hinting that Pulte's system must be redesigned. The Department's error here was to issue a permit based upon the inaccurate factual assumption that no discharges from the recharge basins as they are currently designed will occur. We are simply insisting upon a proper analysis based on the proven fact that the recharge basins will discharge directly to the EV portion of the stream.

Baseflow

The purpose of Pennsylvania's antidegradation regulations is to protect the existing quality of High Quality and Exceptional Value waters and the existing uses of all surface waters. The Department's Antidegradation Implementation Guidance Document (DEP Ex. 30) states that the Department will evaluate the effect of proposed projects that do not involve a discharge but that may nevertheless affect EV or High Quality (HQ) surface waters to ensure that the use of the

special protection waters will be maintained and protected. (DEP Ex. 30, p. 41.) The Department's guidance is legally sound. A permittee may not degrade a stream by altering its physical or biological properties any more than it may degrade a stream by the direct discharge of pollutants. 35 P.S. § 691.1; *PDG Land Development v. DEP*, EHB Docket No. 2007-041-R (Opinion & Order, May 21, 2009).³ This cornerstone of Pennsylvania law was firmly laid down in the seminal case of *Oley Township v. DEP*, 1996 EHB 1098, which is merely one of the many invaluable contributions to environmental jurisprudence made by departing Judge George J. Miller over the course of his long and distinguished career. The principle that degrading a stream by materially changing its movement, circulation, or flow is prohibited has been repeated in numerous other cases and it is now beyond dispute. *UMCO, supra*; *PUSH v. DEP*, 789 A.2d 319, 329 (Pa. Cmwlth. 2001); *PDG Land Development, supra*, slip op. at 6-7; *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 1038, 1042, 1045; *Consol Pennsylvania Coal Co. v. DEP*, 2003 EHB 239, 243; *Consol Pennsylvania Coal Co. v. DEP*, 2003 EHB 792, 795, 800; *Tinicum Township v. DEP*, 2002 EHB 822, 832; *Borough of Roaring Spring v. DEP*, 2003 EHB 825, 840. See also, *S.D. Warren Co. v. Maine Board of Environmental Protection*, 126 S. Ct. 1843, 1852-53 (2006); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 114 S. Ct. 1900 (1994). The most obvious example is a direct water withdrawal, *S.D. Warren Co.*, but indirect effects such as a loss of baseflow from mining subsidence or water supply well withdrawals are subject to the prohibition of pollution as well, *UMCO*; *Oley Township*.

CCN's experts have credibly testified that there is a significant, credible risk that the Sentinel Ridge project will reduce flow in Holland Run. (FOF 51.) The finger tributary is particularly at risk, which of course presents a commensurate risk to the main branch of the

³ Degradation occurs when an activity or discharge interferes with existing or designated in-stream uses or the level of water quality necessary to protect existing uses. 25 Pa. Code § 93.4a(b). Degradation of an Exceptional Value stream occurs if there is *any* lowering of water quality. 25 Pa. Code § 93.4a(d).

stream as well. To the extent Pulte and the Department's experts opined that there is no risk whatsoever to the flow of the stream, their opinions are not credible.

Holland Run is fed by groundwater, and to a much lesser extent, some surface runoff. For example, the finger tributary is little more than the surface manifestation of a spring that emerges from the side of the hill directly below the project. Shallow groundwater tends to mimic topography. The topography of fifty-five percent of the predevelopment site currently directs surface water, and presumably shallow groundwater, toward Holland Run. Much of the topography in that area will be dramatically altered by the project. Extensive regrading, areas of fill, numerous retaining walls, and even some blasting will be necessary for the site to accommodate the project. Water that now contributes to the flow of the stream will in all likelihood be diverted as a result of these changes. For example, there will likely be less water in the post-development subbasins A-5 and A-6 to contribute to the EV portion of Holland Run's flow, not only because of the reconfiguration of the site but because Basins A-5 and A-6 are not designed for infiltration. Basins A-5 and A-6 will direct water downstream of the EV section of Holland Run. Basin A-2 does not appear to be located at a place that will supply baseflow to the finger tributary. The Department was not able to explain the purpose of Basin A-1, which would seem to be an important tool for recharging the finger tributary. Mr. Rocco surmised that the basin's purpose is to maintain the spring that feeds the finger tributary (T. 517-21), but Pulte did not address this particular issue.

Other less important but still significant risk factors include the placement of Basin A-1 above a different drainage feature than the finger tributary. Although Pulte makes light of CCN's description of a "ridge" east of the tributary that will block flow, CCN's concern is not so much with the ridge, as with the well-defined drainage path directly downgradient of Basin A-1.

It is not clear why the Department believes that flow coming from this direction will bypass this gulley and continue to feed the finger tributary.

CCN's experts have expressed legitimate concerns regarding the sewer line that will lead from Basin A-1 to A-5. Among other things, the first section of the pipe itself will be perforated, with the idea that water will leak out of it and contribute to baseflow. Yet, this pipe will only enhance flow if water in Basin A-1 reaches the top of the riser pipe, which the Department asserts will be a rare event. At all other times the pipe may actually divert upgradient flow. There is no evidence that the Department considered this fact. The Department confidently proclaims that any flow diverted sideways from an "unintended french drain effect" by the pipe and its trenching will be redirected down the hill toward Holland Run by trench plugs. However, the first plug is considerably downgradient from the finger tributary.

The Department points to a buffer zone being left around the stream, but there is no evidence that the stream is a gaining stream and that this buffer will preserve flow. The evidence suggests that flow in the finger tributary is largely a function of its headwater spring, and much of the proposed buffer zone, to the extent it somehow protects baseflow, is downgradient of that spring. The Department also states that an as yet unquantified amount of evapotranspiration will occur after development that did not occur before development. Although the Department's point was that this evapotranspiration will aid in flood control, this is another example of the lack of attention given to the issue of preserving baseflow. Presumably, at least some of this water being lost to evapotranspiration would have been contributing to Holland Run's flow.

In light of CCN's successful demonstration that the project presents a significant and credible risk to the flow of the stream, it was incumbent upon the Department and Pulte to show that the risk will not be realized and the stream will not be harmed. *Blue Mountain Preservation*

Association, 2006 EHB at 605-06; *Birdsboro v. DEP*, 2001 EHB 377, 398; cf. *Marcon, Inc. v. DER*, 462 A.2d 969, 971 (Pa.Cmwlt. 1983) (shifting burden of going forward where challenges to permitting action presented credible expert scientific evidence that tended to show that activity would have a serious deleterious effect on special protection waters); *Lehigh Township v. DEP*, 1995 EHB 1098, 1112 (if appellant presents proof of severe and deleterious effects, burden of proof may shift to DEP and the proponent of the action because of special concerns regarding permitted activities affecting special protection waters).

Pulte and the Department have not countered CCN's showing by proving that Holland Run will in fact be protected from degradation. Although Pulte is to be credited for implementing several BMPs calculated to maximize groundwater infiltration, we repeat that it is not enough to follow accepted engineering practices, install approved BMPs, and hope for the best. In this case there simply is no thorough, scientifically sound understanding of the hydrogeological regime of the stream basin before and after development. Part of the problem is that Pulte and the Department calculated infiltration for the site as a whole, which glosses over potentially significant changes in *where* infiltration is likely to occur and how those changes will impact water flow in the EV portion of Holland Run. The concern is that Pulte and the Department's intense focus on avoiding any surface discharges into the EV section of Holland Run so that the project could be characterized as having implemented a nondischarge alternative may have had the unintended consequences of diverting too much baseflow away from the stream as well.⁴

⁴ The antidegradation regulations require a party proposing a discharge to an EV stream to evaluate and implement nondischarge alternatives when possible. 25 Pa. Code § 93.4c(b)(1)(i)(A). If a nondischarge alternative is not environmentally sound, however, nondegrading discharges are permitted. 25 Pa. Code §§ 93.4c(b)(1)(i)(A) and 93.4c(b)(1)(i)(B). See *Zlomsowitch, supra*, 2004 EHB at 884 ("The regulation also contemplates the possibility that the only nondischarge alternatives available to a discharge proponent may ultimately prove more harmful to the environment overall."). We are neither encouraging nor discouraging implementation of a discharge alternative

Perhaps most fundamentally, the Department did not evaluate the recharge zone for the stream. Defining the recharge zone of the stream before and after development would seem to be the starting point for any thoughtful hydrogeologic analysis, but it was not done here. The Department has not explained why the alteration of at least part of the recharge zone as discussed above is not of concern. There are two components to the complete analysis of potential harm: the site and the stream. We have virtually no information regarding the stream. Among other things, if there will be some loss of flow, there has been no analysis of the extent to which that loss will impact the EV use of the stream. It may be that the loss is immaterial. Or, if portions of the stream such as the finger tributary will be permanently and completely dewatered, common sense and the unrebutted testimony of Dr. Schmid tell that a dry streambed will not be able to support an EV use. The Department did not study this issue because it assumed that there would be absolutely no diminution of flow.

The Department and Pulte emphasized that the finger tributary has intermittent and very low flow, apparently implying that there is no need to concern ourselves with such a little stream. This attempt to marginalize the finger tributary is disconcerting for several reasons. Even if surface flow disappears during some reaches of the stream, such disappearances are not unusual for small streams and steady, shallow, subsurface flow is readily apparent given the prevalence of wetland species in and near the stream channel. (T. 165.) Second, if the stream is insignificant, we are left to wonder why the Department classified it as Exceptional Value. Third, the law does not recognize a hierarchy of streams based upon their size, and it does not countenance segmenting watersheds down to components that may appear inconsequential when improperly viewed in isolation. *PDG, supra; UMCO, supra.* Here, as in *UMCO*, the stream is

here. Our point remains that this project must be evaluated and designed based upon a thorough, scientifically sound understanding of Holland Run to ensure that the stream will not be degraded.

part of a larger hydrogeologic system that includes springs, seeps, groundwater flow, and multiple branches of a stream. Fourth, as a small, spring-fed stream flowing down a steep hillside, the stream seems more, not less, vulnerable to impacts. Fifth, it is not just the stream that is at risk; any impact to the tributary will presumably have some commensurate impact on the main branch of the stream and the surrounding, contiguous, and presumably EV wetlands. Sixth, the stream contributes to the ecology and overall aesthetic of the drainage basin as a whole. Finally, there is unrebutted testimony from Dr. Schmid that the stream supports a robust community of water-dependent flora and fauna. (FOF 54.)

Although all of the experts who testified in this case appeared to have a working peripheral knowledge of hydrogeology as it relates to stormwater management, we did not have the benefit of the opinion of a qualified specialist in hydrogeology. The testifying experts are eminently qualified in engineering and, in the case of Schmid, ecology, but it was readily apparent that they think primarily in terms of hydrology, which is a separate discipline from hydrogeology. None of the experts, for example, discussed the flow of the stream itself, or its vulnerability to any loss of flow. Indeed, Dr. Browne acknowledged that no one has conducted a hydrogeologic investigation on this site. It is true as he said that such investigations are not typically done, but everyone agrees that this is not a typical site and it is not a typical receiving stream. Ms. Adams's focus was clearly on hydrology. In response to the questions regarding groundwater, Ms. Smith did not profess to be a geotechnical expert. Dr. Schmid is an ecologist with particular strength in plant biology. Mr. Murrin provided no specific, supported opinion regarding baseflow. Mr. Rocco gave the most thought to groundwater, but his focus like that of the other engineers was clearly on surface flow. His opinions were expressed in terms of hydrology, not hydrogeology.

The Department retains a considerable amount of discretion in establishing limits in NPDES permits so long as its actions are consistent with applicable regulations and it has reasonable grounds for its decision. *BP Products of North America v. DEP*, 2007 EHB 1, 3; *Shenango Incorporated v. DEP*, 2006 EHB, 783, *aff'd*, 934 A.2d 135 (Pa. Cmwlth. 2007); *Municipal Authority of Union Township v. DEP*, 2002 EHB 50. It is certainly not required to ensure beyond all doubt that no impacts will occur. *Birdsboro, supra*, 2001 EHB at 402-03. The Department's review of a permit application in setting such as this one, however, must be based upon the proper level of investigation and analysis that disregards neither periodic, direct discharges that are likely to occur nor demonstrated risks to water flow.

The extent to which the Department must evaluate a project's effect on water *quantity* issues will, of course, vary dramatically from project to project. We suspect that a hydrogeologic investigation of stream flow will not be necessary in the vast majority of stormwater management cases. Indeed, such an investigation has not been shown by CCN to be necessary for the Sentinel Ridge project as it relates to Crum Creek, the WWF portion of Holland Run, the springhouse spring, or any aspect of the project other than the portion relating to the Exceptional Value portion of Holland Run. Such an investigation is only necessary for that part of the project which threatens Holland Run because CCN has proven as a factual matter that the project presents a significant, credible risk to the flow of those special-protection waters.

CCN has not advocated further study, instead asking that we revoke Pulte's permit. As with the periodic direct discharges, however, we see this remedy as being too extreme. CCN has met its burden of proving that further evaluation is required given the significant, credible risk, but it has not as yet convinced us that the risk will be realized or that it is unavoidable. Nor, of course, is it required to do so. *Blue Mountain Preservation Ass'n, supra*. We believe that the

appropriate course under the circumstances is to suspend the permit pending a remand to the Department for proper consideration of the issue. We understand the somewhat conflicting goals and difficult constraints with which Pulte must deal. For example, had Pulte proposed all retention basins to help prevent direct discharges, even more baseflow would have been eliminated. We are not at this point adopting CCN's argument that more attention should have been given to developing a project with a smaller footprint. Our holding is limited to requiring further investigation and analysis to ensure that the project fully complies with antidegradation requirements.

CONCLUSIONS OF LAW

1. CCN has standing to pursue this appeal because at least two of its members live in close proximity to the site and the receiving streams. They use, enjoy, and have an aesthetic appreciation for the streams, and they stand to be adversely affected by any adverse effects of the project on those streams.

2. Whether the Department erred depends upon whether it acted lawfully and reasonably and whether our findings of fact support the Department's decision. *Jones v. DEP*, EHB Docket No. 2007-281-R, slip op. at 20 (Adjudication, October 9, 2009) (quoting *Smedley v. DEP*, 2001 EHB 131, 156-57); *TRRAAC v. DEP*, EHB Docket No. 2008-315-L, slip op. at 5-6 (Opinion, September 1, 2009); *O'Reilly v. DEP*, 2001 EHB 19, 32.

3. Although the individual NPDES permit issued to Pulte was issued for "discharges associated with construction activities," in order to obtain the permit Pulte was required to design and commit to implement a PCSM Plan. (DEP Ex. 19, Part C. 5.) *See generally, Valley Creek Coalition v. DEP*, 1999 EHB 935, 946-50 (discussing regulation of post-construction stormwater discharges). The PCSM Plan was required to identify the BMPs that will be installed to manage

and treat stormwater discharges to protect water quality after construction. The BMPs must be designed to maximize groundwater infiltration, to protect the structural integrity of receiving streams, and to protect and maintain existing and designated uses of the waters of the Commonwealth. (*Id.*) Pulte has not shown that its project will protect and maintain the existing use of Holland Run.

4. CCN bears the burden of proving that the Department erred. 25 Pa. Code § 1021.122(c)(2). CCN satisfied that burden in this case by demonstrating by a preponderance of the evidence that (1) the Department analyzed the site as a nondischarge site when in fact there will be direct discharges to an Exceptional Value stream, and (2) the Department failed to conduct an adequate investigation regarding the impact of the project on the water flow of the Exceptional Value stream.

5. Where, as here, an appellant demonstrates that there is a significant, credible risk that permitted activity will have a serious and deleterious effect on Exceptional Value waters, it is incumbent upon the Department to conduct an adequate investigation to ensure that the degradation will not occur.

6. Determining whether there will be a discharge to a special protection stream is a factual inquiry. The Department errs to the extent that it automatically equates compliance with regulatory requirements or guidance documents with a factual determination that a permitted project will not have discharge.

7. A permittee may not interfere with the existing uses of a stream or reduce the water quality of an Exceptional Value stream.

8. Holland Run's Exceptional Value status ends at the upstream edge of the culvert under Old State Road.

9. The Department did not err in approving any aspect of the project except those portions that will have an impact on the EV portion of Holland Run. The project will not interfere with the uses of Crum Creek or increase downstream flooding.

10. Degradation can result from changing the course, movement, or flow of waters of the Commonwealth.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRUM CREEK NEIGHBORS

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION and PULTE HOMES OF
PA, LP, Permittee

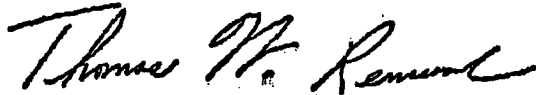
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EHB Docket No. 2007-287-L

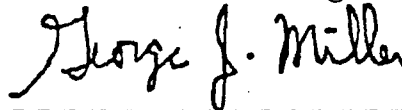
ORDER

AND NOW, this 22nd day of October, 2009, it is hereby **ORDERED** that Pulte's stormwater discharge permit is suspended and remanded to the Department for further consideration in accordance with this Adjudication. Jurisdiction is relinquished.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



GEORGE J. MILLER
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judges Michael L. Krancer and Richard P. Mather, Sr., did not participate in this Adjudication.

DATED: October 22, 2009

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**LOUIS ARPINO, GENE L. REED,
 AND RONALD W. DOWNEY**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION and PLEASANT VALLEY
 SCHOOL DISTRICT, Permittee**

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**EHB Docket No. 2008-305-K
 (Consolidated with 2008-313-K
 and 2008-314-K)**

Issued: November 17, 2009

**OPINION AND ORDER GRANTING THE DEPARTMENT OF
 ENVIRONMENTAL PROTECTION'S MOTION TO DISMISS AND
 PERMITTEE'S MOTION FOR SUMMARY JUDGMENT**

By Michael L. Krancer, Judge

Synopsis:

The Board grants the Department's Motion to Dismiss and Permittee's Motion for Summary Judgment from three appeals by neighbors of DEP's issuance of a renewed Water Quality Management Permit. The appeals were filed well after 30 days from the date of publication of the issuance of the renewal in the Pennsylvania Bulletin. Having failed to file an appeal within the 30 day time period, the departmental action is final as to all and not subject to appeal now. 35 P.S. § 7514(c).

Factual Background

The background of this case is not complicated. By letter dated April 14, 2008, the Department issued to Pleasant Valley School District a renewal of Water Quality Management (WQM) Part II Permit No. 4507406 (the Permit). The Permit is dated April 14, 2008. The



April 26, 2008 edition of the Pennsylvania Bulletin contained the notice of the issuance of the Permit. These three appeals, which have been consolidated, were filed on October 27, 2008 (Arpino), November 4, 2008 (Reed) and November 5, 2008 (Downey), respectively. Obviously, the appeals were filed well after 30 days from the date of publication of the renewal of the Permit in the *Pennsylvania Bulletin*.

Pending before us is the School District's Motion for Summary Judgment and the Department's Motion to Dismiss for Lack of Jurisdiction. The basis of both motions, of course, is the lack of timeliness of the appeals and, therefore, our lack of jurisdiction.

Discussion

It is hornbook law that an appeal by a third party must be filed to be timely within 30 days of the date of the notice in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a)(2)(i). Appellants claim that *Pennsylvania Bulletin* notice is not enough but that claim is without merit. 45 Pa. C.S. § 904; 1 Pa. Code § 5.4 (providing that publication in the *Pennsylvania Bulletin* is sufficient to give notice to any person affected by the action); *Clabatz v. DEP*, 2005 EHB 46; *Pikitus v. DEP*, 2005 EHB 354.¹ They also claim that this case is like *Stevens v. DEP*, 2000 EHB 438, where they say the Board held the *Pennsylvania Bulletin* notice "did not provide effective notice of the permit." That claim likewise must be rejected. *Stevens* is not on point here. *Stevens* involved *Pennsylvania Bulletin* notice of approval of a general permit for the application of sewage sludge. Because of the nature of a general permit, it is and was impossible in *Stevens* to tell from the *Pennsylvania Bulletin* notice whether and where the sewage sludge

¹ Appellants do not claim that their appeals should be allowed *nunc pro tunc*. An appeal *nunc pro tunc* would be appropriate only when "there is fraud or a breakdown in the court's operation [or] there is a non-negligent failure to file a timely appeal which was corrected within a very short time, during which any prejudice to the other side of the controversy would necessarily be minimal." *Bass v. Commonwealth*, 401 A.2d 1133, 1135-36 (Pa. 1979). See also *Spencer v. DEP*, 2008 EHB 573; *Eljen v. DEP*, 2005 EHB 918. There is nothing in the filings which would even raise a hint of any fraud or breakdown in the Board's operation nor a non-negligent failure to file an appeal.

would be applied. Moreover, such general permits and the regulations under which they are issued require that once plans for application are in place that adjacent landowners receive notice then. Therefore, as was said in *Stevens*, requiring adjacent property owners to appeal on the basis of the *Pennsylvania Bulletin* notice of approval of the general permit, before they receive the notice mandated by the permit and the regulations, would require them “to be clairvoyant in regards to whether a person will some day decide to spread sewage sludge on property adjacent to theirs and appeal every general permit the Department issues for land application of sewage sludge.” *Stevens, supra* at 440. Here, of course, this is not a general permit. The identity of the party and the property subject to the permit are included on the face of the permit. These neighbors were on notice.

Appellants also argue that they had no “actual” notice that the School District was expanding its sewage treatment lagoons until “the School District began cutting trees in the nature preserve across the driveway from our homes in October 2008.” Their implicit argument is that only actual notice to them starts the 30-day appeal period running, not the *Bulletin* notice. Their implicit factual argument is that they had no way of knowing that the permit covered an expansion of the School District’s sewage facilities. Even if this claim had any legal vitality, which it does not, it does not pan out factually.

Both Judge Labuskes in *Clabatz v. DEP*, 2005 EHB 46, and Judge Miller in *Pikitus v. DEP*, 2005 EHB 354, dispatched the same argument Appellants try to make here from a legal standpoint. Judge Labuskes noted in *Clabatz* that, as a legal matter, it is true that where a statute requires specific actual notice to a party notice in the *Pennsylvania Bulletin* would not be sufficient to begin the 30-day appeal period. *Stoystown Water Borough Authority v. DEP*, 1997 EHB 1089, 1090-91; *Fontaine v. DEP*, 1996 EHB 1333, 1347. However, as in *Clabatz*,

Appellants here likewise cite no such statutory provision which would be applicable to them in this case nor could we find one. Also, it cannot be doubted that *Pennsylvania Bulletin* notice satisfies due process. As Judge Labuskes said,

[i]n fact, "numerous opinions of the Commonwealth Court and this Board have held that publication of the issuance of a permit in the *Pennsylvania Bulletin* is adequate to afford due process notice from which the 30 day time to appeal begins to run." *Stevens v. DEP*, 1996 EHB 430, 431-32. See also *Grimaud v. DER*, 638 A.2d 299, 303-04 (*Pa. Cmwlth.* 1994); *Reading Anthracite Co. v. DEP*, 1998 EHB 602, 607.

Clabatz, *supra* at 48-49; *Pikitus*, *supra* at 357-58 (citing *Clabatz*). This is not unfair. As Judge Miller noted in *Pikitus* quoting Judge Labuskes from *Clabatz*, "[The appellant's] charge that it is unfair to require ordinary citizens to read the *Pennsylvania Bulletin* was put to rest in *Grimaud*, 638 A.2d at 302." *Pikitus*, 2005 EHB at 358.

As a factual matter, there ought not to have been any surprises to Appellants here. The *Pennsylvania Bulletin* notice of the issuance of the permit published on April 26, 2008 states that the permit is "for expansion of the existing wastewater treatment and spray irrigation systems serving the Brodheadsville Campus." Also, the Permit on its face states that it approves, an "expanded facility" including ". . .the addition of processing tanks, storage lagoons and spray irrigation fields." Even long before this, as part of the WQM permitting process, the School District presented a proposed revision to the Chestnut Hill Township Official Sewage Facilities Plan for the contemplated expansion of the existing sewage facility and notice thereof was published in the *Pocono Record* for public comment on July 12, 2007. This newspaper notice stated, among other things, that the prospective project was an upgrade of the existing Middle School WWTP from 10,200 gallons per day (gpd) to 30,000 gpd with additional process tanks, equipment storage lagoons, an expansion to the existing control building, and additional spray irrigation for effluent disposal. The Department approved the Plan revision on December 13,

2007. Then, the receipt by the Department of the WQM permit application was published in the *Pennsylvania Bulletin* on December 22, 2007. That notice, requesting public comments, specifically stated that the project consisted of an addition to the existing wastewater treatment plant and spray irrigation field that will increase the capacity to 30,000 gpd and addition of processing tanks, storage lagoons and spray irrigation fields.

Appellants say they do not believe that pre-permit issuance notification requirements had been complied with. They refer to 25 Pa. Code § 92.61 which, a bit ironically, calls for *Pennsylvania Bulletin* notice of DEP's receipt of a permit application, but also with posting of notice of the receipt of the application in the area. They also refer to 40 CFR § 124.10(c)(2)(i) which calls for local newspaper notice when a draft permit has been prepared. They say that such notice or notices "would have helped provide us actual notice." As we have highlighted before, there was an abundance of pre-permit issuance notification, and actual notification at that, of the details of this project not only before this permit was issued but long before this permit was even applied for.²

Whether even more notice would have summoned the Appellants' attention is not legally relevant. At the end of the day, whether adjacent landowners like these ought to have more notice, notice in a different form, or a different trigger for the starting the Board's jurisdictional clock than *Pennsylvania Bulletin* notice, which is what the law is now, are policy questions for legislators and rulemakers. We are bound by existing law and regulation in the subject. Under that existing law and regulation, the *Pennsylvania Bulletin* notice published on April 26, 2008

² In an abundance of caution, we issued an order regarding appellants' reference to 25 Pa. Code § 92.61(a) on October 30, 2009 asking DEP and the Permittee to address what we called in our Order the "apparent" factual question of whether the notice provisions of 25 Pa. Code § 92.61(a) regarding *Pennsylvania Bulletin* notification and posting of receipt of the permit application were complied with and, if such provisions were not followed, the legal significance, if any, of such failure. DEP correctly points out that Section 92.61(a) applies to NPDES permit applications, not WQM permit applications. In any event, as we have discussed, there can be no question that there was plenty of notice, both actual and constructive, in this case.

comports with due process notice requirements and is what started the jurisdictional 30-day clock. That clock ended on Monday, May 26, 2008 and these appeals were not filed until October 27, 2008, November 4, 2008 and November 5, 2008, respectively. The thirty days had long expired.

In conclusion, we must dismiss these appeals. We, therefore, enter the following:


MICHAEL L. KRANCER
Judge


RICHARD P. MATHER, SR.
Judge

DATED: November 17, 2009

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Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**HATFIELD TOWNSHIP MUNICIPAL
 AUTHORITY, et al.**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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**EHB Docket No. 2004-046-L
 (Consolidated with 2004-045-L)
 and 2004-112-L)**

Issued: November 18, 2009

**OPINION AND ORDER ON
MOTION TO COMPEL**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to compel the Department to provide responses to discovery because the information sought is reasonably calculated to lead to the discovery of admissible evidence.

Background

The Appellants have filed petitions for attorneys fees and costs pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). That section authorizes the Board to “order the payment of costs and attorney’s fees it determines to have been reasonably incurred” by a party in litigation pursuant to the law. The Appellants collectively seek fees and costs in excess of \$600,000.



The underlying appeals arise from the ongoing effort of the Environmental Protection Agency (EPA) and the Department to establish a Total Maximum Daily Load (TMDL) for phosphorus for the Neshaminy Creek watershed in southeastern Pennsylvania. A memorandum of understanding entered into between the Department and EPA in 1997 provided that the Department was to have lead responsibility for the development of TMDLs in Pennsylvania. The impetus for this agreement was a consent decree between the EPA and several public interest groups which charged that EPA should have imposed TMDLs where Pennsylvania had failed to do so in a timely manner. The settlement required the development of TMDLs for the waters identified as impaired on the 1996 303(d) listing, including the Neshaminy. The Department established the Neshaminy TMDL and posted it on its website in January 2003.

In February 2004, with the exception of the Chalfont-New Britain Township Joint Sewage Authority (Chalfont),¹ the Appellants appealed the nutrient portion of the Neshaminy TMDL, contending among other things that the TMDL had been issued in an “unduly expedited manner” in order to comply with deadlines imposed by a federal consent decree between EPA and other third parties. Specifically, the Appellants alleged that the TMDL was based upon faulty scientific premises and methodologies and resulted in a discharge limit for phosphorus that was needlessly restrictive. Discovery ensued. In April 2004, the Department discovered a calculation error in the formula used to develop the wasteload allocations for phosphorus and announced that it intended to withdraw and recalculate the TMDL. This error may have come to the Department’s attention in connection with discovery requests made by the Appellants. The Department offered a settlement of the matter which would have preserved the Appellants’ rights to appeal any future TMDL, while withdrawing the present appeals (a so-called “Homes-of-Distinction” settlement, a model of which is set forth on the Board’s webpage). However, the

¹ Chalfont filed its appeal in May 2004.

Department would not withdraw the TMDL until authorized to do so by EPA. The Appellants rejected the settlement proposal because of administrative finality concerns.

In early July 2004, the Board issued a stay of proceedings and required the parties to work together to make reasonable efforts to resolve the disputed issues. The Department had hoped to conclude the TMDL revision process in January of 2005, but abnormal weather conditions and problems with the model used to generate the TMDL impeded the process. The parties met in November 2004. New modeling performed by the Department generated a more stringent limitation for nutrient discharges than the limits in the original TMDL. In December 2004, the Department reported to the Board that it was prepared to begin drafting a revised TMDL. After meeting with the parties, the Board continued the stay of proceedings.

At the same time, EPA was in the process of finalizing a TMDL for the neighboring Skippack Creek watershed, and it indicated to the Department that its approach could be used to develop the TMDL for the Neshaminy. The Department continued to work on a draft of the Neshaminy TMDL and met with the Appellants again in April 2006. At the end of June, the Board dissolved the 2004 stay and set a schedule for discovery. A draft TMDL was published in the Pennsylvania Bulletin in August 2006 for public comment.

Meanwhile, EPA notified the Department of its intent to withdraw the Skippack TMDL and replace the nutrient limits with more restrictive limits. In January 2007, the Department decided to withdraw not only the appealed version of the Neshaminy TMDL, but the proposed revised TMDL in order for the Neshaminy TMDL to be evaluated in light of EPA's work on the Skippack TMDL. The actual withdrawal of the Neshaminy TMDL, however, was delayed for over a year, apparently because the Department needed EPA's approval. EPA was still embroiled in settlement negotiations with federal plaintiffs other than the Department. It was not

until April 2008 that the TMDL was withdrawn. Several months later, in October, the Appellants and the Department entered into a settlement agreement which reserved the Appellants' rights to challenge any future Neshaminy TMDL.

The Appellants now petition for an award of fees, arguing that the Department's conduct over the course of four years was "egregious" and forced the Appellants to expend large amounts in order to protect their interests. They argue that, but for the litigation, the Department would not have discovered the modeling error in the Neshaminy TMDL and subsequently made the decision to withdraw it. Specifically, they allege that, as a result of discovery posed by the Appellants, the Department discovered that the wrong value for the "k-rate" or "k7" value had been used to generate the limits for phosphorus. Thereafter, the Department embarked on a process to revise the scientific basis for the TMDL in conjunction with work that was being done by EPA in connection with Skippack Creek TMDL. The Appellants remained actively involved throughout the revision process and their claim for reimbursement includes the fees incurred in connection with these efforts. The amount of fees at stake, of course, continues to grow as this fee litigation progresses.

The Department claims that the Board should make no award of costs and fees because TMDL litigation is not an appropriate context for awarding fees under Section 307 of the Clean Streams Law. It contends that the relationship between a TMDL and subsequent NPDES permitting is such that the withdrawal of a TMDL will not result in a benefit to the Appellants sufficiently tangible to justify an award of fees. The Department argues that success cannot be measured until an NPDES permit is issued consistent with the TMDL so that the effect of the TMDL on the permittee only then can be known.² The Department argues that the request for

² The Department, however, does not appear to concede that an aggrieved party can challenge the basis of the TMDL in an appeal from the issuance of the subsequent NPDES permit.

costs and fees does not meet the Board's criteria for an award of fees. It claims that it offered a withdrawal of the TMDL because it independently discovered a flaw in the modeling that formed the basis of the TMDL while responding to the Appellants' discovery, not as a result of any contention by the Appellants. The Department claims that the conduct of the Appellants in refusing to accept a reasonable settlement offer deprives them of any right to an award. The Department says that the result of the litigation did nothing to advance the goals and purposes of the Clean Streams Law. Indeed, the Department says it did nothing to benefit the Appellants because the result of the withdrawal of this TMDL will likely be the issuance of a TMDL with even more strict wasteload allocations. As a procedural matter, the Department has maintained that it is entitled to a hearing on the reasonableness of the fees and costs claimed in the petition. As to Chalfont, the Department claims it made no contribution to the result and is only a "free rider" whose conduct should not be rewarded. At the very least, the Department says the Board should use its discretion to reduce any fees that are awarded to a small percentage of the overall values sought.

After consideration of the parties' filings and a number of conference calls with all of the parties, the Board by Order dated June 18, 2009 demurred ruling on the fee petitions pending a hearing to address factual issues raised by the Appellants' petitions. We strongly encouraged the parties to enter into as many factual stipulations as possible in order to save time and expense. The parties indicated a desire to conduct some discovery. After some extensions, the hearing is now set to begin on January 11, 2010. In our June 18 Order, we directed the parties to focus upon the following issues:

1. Was each petitioner a prevailing party with respect to the standard for phosphorus used by the Department in developing the TMDL, leading the Department to decide to withdraw the challenged Neshaminy TMDL in May 2004?

2. Was the Department substantially justified in its opposition to the appeals of the TMDL, including the question of the ripeness or justiciability of the appeals?
3. Does the Department have any evidence that the Board should accept to challenge the amounts of costs and fees claimed by petitioners as being reasonably incurred by them before July 2004, when the Department offered to settle the appeals, including the claimed hourly rate for hourly-time devoted to the appeals?

The Motion to Compel

On September 8, 2009, Lansdale and the Hatfield Appellants served the Department with joint discovery requests. The Department was to have served complete responses to the joint discovery requests by October 14, 2009. The Department responded to the discovery, but the Appellants are not satisfied with the Department's responses and have filed a motion to compel. The gravamen of the parties' discovery dispute appears in the Department's response to Interrogatory No. 5:

The Department specifically objects to this interrogatory to the extent it seeks information relating to the Department's proposed revisions to the Neshaminy TMDL, which never were finalized, let alone appealed. The Department believes that it is well beyond the scope of legitimate discovery in this fees proceeding for the Appellants to seek information related to these proposed revisions, as distinct from the original TMDL that was the subject of the underlying appeals. Accordingly, the Department objects to this interrogatory on the grounds that it would cause unreasonable annoyance and burden to the Department; would require the making of an unreasonable investigation; seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; and is overly broad, vague and/or ambiguous.

The Department believes that discovery in this fees proceeding is appropriate as to information about the original Neshaminy TMDL appealed by the Appellants, but not as to information about revisions that never were finalized or appealed. It objects to the fact that the Appellants are asking for discovery for activities related to draft and future TMDLs, and not just activities that

are related to the TMDL actually under appeal. It says that fees should not be recoverable for activities related to draft and future actions and, as a logical and necessary consequence of that conclusion, discovery in support of such claims should not be allowed. It notes that this position is consistent with our Order of June 18, which references May and July 2004.

Interestingly, the Department adds that, as a general rule, *no* additional discovery should be necessary in most fees proceeding beyond that obtained in the underlying litigation. We actually share that sentiment to some extent, and we have expressed our concern that these fees cases should not turn into instances of the tail wagging the dog. *See Solebury Township v. DEP*, 2008 EHB 658, 682 (“At the parties’ joint request, the Board reluctantly allowed for an extended period of discovery in this case following remand.”)³ Here, however, it is our understanding that the Department agreed to a period of additional discovery.

It would seem that the parties are using this discovery dispute to obtain a clarifying ruling from us on the important underlying question of whether the Appellants are entitled to fees for their work after the events of 2004.⁴ We do not believe, however, that such a ruling is necessary to resolve the immediate discovery dispute. As we have stated on many occasions, “[t]he scope of discovery is very broad.” *PDG Land Development v. DEP*, 2008 EHB 254, 255. A party may obtain discovery regarding any non-privileged matter which is “related to” the subject matter involved in the pending appeal, and it is not ground for objection that the information sought will be inadmissible at the hearing if it appears reasonably calculated to lead to discovery of admissible evidence. *Id.*; Pa.R.Civ.P. 4003. Therefore, the question before us at the moment is

³ Congress has expressed concerns regarding protracted legal proceedings in EAJA litigation. The 1985 reenactment of that statute contains language expressing the sense of Congress that no additional discovery should be necessary in order to determine whether the government’s position was substantially justified. *See* H.REP 99-120(I), at 13, *reprinted in* 1985 U.S.C.C.A.N.

⁴ The Department asserts that we already made such a ruling and it is memorialized in our Order of June 18.

not whether information regarding the post-2004 TMDL revision process is relevant; the question is whether the information appears reasonably calculated to the discovery of relevant evidence.

Information regarding the post-2004 TMDL revision process appears to us to be reasonably calculated to lead to the discovery of relevant evidence. Even if we assume for purposes of argument that the Department is correct in arguing that post-2004 fees should not be awarded, it is not difficult to imagine that post-2004 developments may shed light on the extent to which fees should be awarded for efforts prior to the Department's announcement that it intended to withdraw and recalculate the TMDL. As only one example, if the central scientific and procedural disputes have not been resolved, or if they have been resolved in a way that was not advocated by the Appellants in their appeal, or in a way that is not in their interests, or in a way that does not promote the underlying purposes of the Clean Streams Law, those findings may have some bearing on the amount of fees that we award. As another example, the Department says that future nutrient TMDLs for the Neshaminy are likely to be more rather than less stringent than those developed in both the original 2003 TMDL and the proposed (but never issued) 2006 TMDL. Although the Appellants argue that this contention is speculative, the Department has been consistent in this view. Discovery may shed further light on this issue.

As we explained in *Solebury Township v. DEP*, 2008 EHB 658, this Board has "broad discretion" to award fees under Section 307 of the Clean Streams Law where we believe it is appropriate to do so. *Ibid* (quoting *Solebury Township v. DEP*, 928 A.2d 990 (Pa. 2007)). We continued:

It would also be a mistake to view fee awards as an all-or-nothing affair. Whether we will award fees in a particular case and the amount of the fees that we will award will depend upon several considerations, no one of which will be dispositive. We may need to consider exactly what the party accomplished, the

extent to which the litigation brought about the accomplishment, the particular party's role in the process, and the extent to which the accomplishment matches the relief sought by the fee applicant. In other words, a party's degree of success can vary widely, and we will take that into consideration in awarding fees. *See In re LaRocca*, 246 A.2d 337, 340 (Pa. 1968) (fee award depends in part on the result obtained). *See also Krebbs*, 893 A.2d at 789; *Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa. Super. 2005) ("The prevailing party's degree of success is the critical consideration in determining an appropriate fee award."); *Borough of Bradford Woods v. Platt*, 799 A.2d 984, 991-92 (Pa. Cmwlth. 2002). We will consider whether an appeal involved multiple statutes, and whether litigation fees overlap fees unrelated to the litigation itself. *Harborcreek Twp. v. Ring*, 570 A.2d 1367, 1372-73 (Pa. Cmwlth. 1990) (fees recoverable only for efforts within the case). *See generally Hensley v. Eckerhart*, 461 U.S. 424, 429-30 (1983). We will also consider how the parties conducted themselves in the litigation, the size, complexity, importance, and profile of the case, the degree of responsibility incurred and risk undertaken, and the reasonableness of the hours billed and the rates charged. *See In re LaRocca Estate*, 246 A.2d at 339; *Holz v. Holz*, 850 A.2d 751, 760-61 (Pa. Super. 2004), *app. denied*, 871 A.2d 192 (Pa. 2005); *South Whitehall Twp. v. Karoly*, 891 A.2d 780, 784-85 (Pa. Cmwlth. 2006); *DER v. PBS Coals, Inc.*, 677 A.2d 868, 875 (Pa. Cmwlth. 1996).

The Clean Streams Law authorizes this Board to award fees in recognition of the fact that appeals are often essential to the effectuation of fundamental public policies embodied in the Clean Streams Law, and that without some mechanism authorizing the award of attorneys' fees, appeals to effectuate such policies will as a practical matter frequently be infeasible. *See Solebury*, 928 A.2d at 1002 (*citing Graham*, 101 P.3d at 149). If the purpose of fee shifting in EHB appeals is to see that public policies are effectuated through the correction of Departmental errors, it is only appropriate that we consider the extent to which an appeal effectuated such policies when we consider whether to award fees. *See Krebbs v. United Refining Co.*, 893 A.2d 776, 788 (Pa. Super. 2006) (award of fees should be made in a manner consistent with the aims and purposes of the statute), and *id.* at 791 (court should assess whether award will promote the purposes of the Act); *Krassnoski v. Rosey*, 684 A.2d 635, 639 (Pa. Super. 1996) (court should consider whether an award of fees would promote the purposes of the specific statute involved).

Id. 2008 EHB at 674-76 (footnotes omitted). Given this broad inquiry, we do not believe that the Department is justified in its objections to the Appellants' discovery.

The numerous uncertainties inherent in this case further compel us to err on the side of allowing discovery without the temporal limitation proposed by the Department. Among other things, the appropriate timing and forum for challenging a TMDL is far from settled. The

Appellants are concerned that they will never be able to attack the basis of the TMDL after a permit has been issued because the Federal Water Pollution Control Act requires that a TMDL be incorporated as a part of the Commonwealth's continuous planning process following issuance of the TMDL and that EPA's approval of that planning process may bind the hands of the Department in any permit action it may take. It is also not clear that a TMDL would be viewed as being ripe for review by a federal court until an NPDES permit is issued. These uncertainties may have informed the parties' tactical decisions and accordingly may play a role in our award of fees.⁵

Finally, the Department in its response to the Appellants' motion to compel provides little support for its claim that responding to the written discovery regarding the TMDL revision process will cause unreasonable annoyance, burden, or expense, or that it will require the making of an unreasonable investigation. We have no indication that making non-privileged information in the Department's files available for inspection and copying at its offices would involve an inordinate amount of effort above and beyond what has already been expended to provide the Appellants with partial responses.

Accordingly, we issue the Order that follows.

⁵ Issues regarding the Board's jurisdiction to review TMDLs are squarely presented at EHB 2008-238-K; 2008-265-K; 2008-273-K and 2008-272-K.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**HATFIELD TOWNSHIP MUNICIPAL
AUTHORITY, et al.**

v.

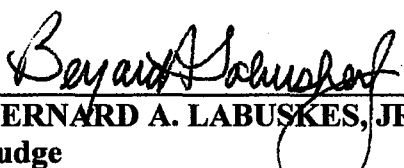
**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

**EHB Docket No. 2004-046-L
(Consolidated with 2004-045-L)
and 2004-112-L)**

ORDER

AND NOW, this 18th day of November, 2009, it is hereby ordered that the Appellants' motion to compel is granted. The Department shall make its files that contain documents responsive to the Appellants' written interrogatories available for immediate inspection and copying. In the interest of moving this matter forward as expeditiously as possible, detailed written responses to the interrogatories are not required.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: November 18, 2009

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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**MICHAEL D. RHODES and VALLEY RUN
 WATER COMPANY, LLC**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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**EHB Docket No. 2008-156-L
 (Consolidated with 2008-258-L,
 and 2008-260-L)**

Issued: November 18, 2009

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal from a \$48,340 civil penalty assessment under the Safe Drinking Water Act. A person who obtains a construction permit may not operate the permitted system in whole or in part before obtaining an operations permit. The Department is not estopped from issuing the assessment by virtue of statements made by Department representatives because, among other reasons, the statements did not relate to holders of a construction permit. The permittee had control over his system notwithstanding his lack of legal ownership of the distribution lines at the time of the violations giving rise to the penalty. The corporate appellant is also liable by virtue of its status as an operator of the system.

FINDINGS OF FACT

1. Michael D. Rhodes ("Rhodes") formerly owned a 154-acre tract of land in Washington Township, Berks County. (Rhodes Exhibit ("Rhodes Ex.") 1.)

2. Rhodes planned to develop an "over-55" senior community of 342 home lots and common facilities. The development came to be known as Spring Valley Village. (Notes of Transcript page ("T.") 415, 421-22; Department Exhibit ("DEP Ex.") 82.)

3. Rhodes planned to serve all 342 homes with one community water system. (T. 408-422; DEP Ex. 24, 82.)

4. Representatives of the Department started working with Rhodes and his representatives on permitting a new public water system for Spring Valley Village in 2001. (T. 74-78, 182-85, 222-24, 364-67, 372-80; DEP Ex. 2, 4, 15-16.)

5. The Department told Rhodes on several occasions that his proposed new water system would be a public water system and he would be required to get a Safe Drinking Water Act ("SDWA") construction permit prior to any construction of a system at the site and an operating permit prior to operating the system. (T. 74-81, 171, 180-82, 222-28; DEP Ex. 2-4, 7, 13, 15-16.)

6. Representatives of the Department and Rhodes met on January 16, 2003 to discuss the permitting process including the possibility of commencing service quickly. A Department representative summarized that portion of the meeting as follows:

Which brings us to the length of time to get anything started out here. Rhodes is very anxious from a business perspective to get started in that he is in negotiations with the surrounding Washington Township to lend them money for their sewer system in exchange for hook ups in the future. He is apparently relying on income from Spring Valley Village to make that deal workable. He wants to get started. I told him that the best approach might be to reduce the size of this project, submit a simple permit application for Phase I and hope for a quick, painless review. But, I told him that they need to talk to you, Tom, to review the permitting requirements and how to go about getting the process started. I know that Elmer has ideas about phased projects and I'm not sure what our latest position on that is.

(DEP Ex. 10. *See also* T. 412-15, 466.)

7. The Department and Rhodes's representatives met to discuss the permitting process again on January 27, 2003. The Rhodes representatives expressed their desire to begin building homes as quickly as possible to get some money flowing. A Department representative accurately summarized that portion of the meeting as follows:

The developer would like to construct the initial small system serving < 15 connections or < 25 people. They would like to do this to get the project moving. Then the PWS permit application would be submitted to handle the first phase of the project.

We told them that regulations require a permit to construct the PWS system. Told them that if they proceed with the initial construction project to serve < 15 connections and < 25 people, they proceed at their own risk.

Told them we don't have authority to tell them they can't proceed, won't tell them they can.

(DEP Ex. 13. *See also* T. 79-81, 160-63, 167, 171, 228, 390-92, 415-23, 463-69.)

8. The Department never told Rhodes at the January 27, 2003 meeting or at any other time that he could apply for and obtain a SDWA construction permit and then begin operating part of the system prior to obtaining an operating permit. (DEP Ex. 13; T. 79-81, 160-63, 171, 228, 415-23, 468-69.)

9. Rhodes interpreted the Department's remarks to mean he could operate a small system before submitting an application for a construction permit. (T. 418-21.)

10. Rhodes would have called the Department before proceeding to hook up homes had he stayed more directly involved in the project. (T. 419.)

11. The Department has never interpreted the SDWA to mean that a party who obtains a SDWA construction permit for a public water system may begin serving drinking water using that permitted system before obtaining an operations permit. (T. 63-66; DEP Ex. 1, 10.)

12. Rather than construct or operate a small, unpermitted system, Rhodes instead, six months after the January meeting on June 20, 2003, applied for a construction permit to build a large system for 342 homes with an initial phase of 101 homes. (T. 86-89, 96, 167-68; DEP Ex. 20, 21, 30, 82.)

13. On March 8, 2004, the Department issued Construction Permit No. 0603506 to Rhodes as the permittee for the construction of a new public water system designed and planned for the Spring Valley Village housing development. (T. 96; DEP Ex. 23.)

14. The Department letter covering the permit read in part as follows:

Issuance of the enclosed construction permit is authorized in accordance with the provisions of the laws of the Commonwealth. **Our office should be notified at least 30 days prior to the use of the proposed facility so that an inspection can take place. If the facility has been constructed in accordance with the material submitted, an operation permit will then be issued.**

(DEP Ex. 23 (emphases in original).)

15. The permit did not authorize operation of the system, and in fact included several preconditions to the issuance of an operating permit. (T. 59-66; DEP Ex. 23.)

16. There is no record of any activity at the site through the remainder of 2004 and early 2005. In May 2005, Rhodes suffered a serious injury and decided to sell the project to Spring Valley Village, LLC, the principals of which are Lee and Eric Williams. (T. 406-10, 425-28.)

17. Rhodes sold the property on or about February 1, 2006. (T. 128, 407; Rhodes Ex. 1.)

18. Rhodes reserved an easement, which gave him and Valley Run Water Company, LLC the permanent right to operate and maintain the water system at the development. (DEP Ex. 29.)

19. Valley Run Water Company, LLC, through its only member, Rhodes, and Spring Valley Village, LLC, through its members, Lee D., Lee J., and Eric Williams, entered into a water services agreement pursuant to which Valley Run agreed to supply water service to the development. (DEP Ex. 30.)

20. Spring Valley Village, LLC (the Williamses) agreed to construct the water system's distribution lines and thereafter dedicate them to Valley Run. (T. 136-40, 153, 430-33; DEP Ex. 30, 75.)

21. At the times pertinent hereto, the Williamses had not dedicated the lines to Rhodes. (T. 153; DEP Ex. 75.)

22. Although Rhodes did not own the lines, he controlled the use of the lines for the distribution of drinking water. (T. 139-40; DEP Ex. 29-30.)

23. On August 18, 2005, Valley Run Water Company, LLC applied to the Pennsylvania Public Utility Commission for the right to charge customers at the Spring Valley Village for water supplied to them for human consumption. On the application, Randy Eddinger is listed as the contact person and Rhodes is listed as the owner. (DEP Ex. 24.)

24. Randy Eddinger at all relevant times was the Responsible Official, Supervising Professional Engineer, Authorized Representative, and Certified Water Operator for Rhodes and Valley Run Water Company. (T. 64-65, 85-88, 113, 122, 131, 148, 225-26, 281-82, 350, 412, 438-39; DEP Ex. 18, 24, 74-75, 82.)

25. Certified Operators must apprise owners and permittees of any actual or potential violations. (T. 208.)

26. There is an old farmhouse well near Rhodes's system. Rhodes's construction permit did not allow the use of the farmhouse well as a water source. (T. 87, 96-97, 324-25; DEP Ex. 23.)

27. The Williamses, with the full knowledge and consent of Rhodes and Valley Run Water's authorized representative, Randy Eddinger, hooked up the farmhouse well via some black plastic pipes to Rhodes's permitted system and thence into four homes. The hookups authorized by Rhodes and Valley Run occurred on September 20 and 26 and December 18, 2006, and January 7, 2007. (T. 94-95, 120-23, 141, 155, 229-32, 235-36, 350-51, 496-97; DEP Ex. 42, 74, 75; Board Ex. 1.)

28. The homes were occupied and the Williamses began supplying water to the residents on November 3, 2006 and January 26 and 31, 2007. (T. 120-24, 140-42, 155, 245; DEP Ex. 42, 74-75.)

29. Water from Rhodes's *permitted* sources was delayed at least in part as a result of a disagreement between Rhodes and the Williamses about who was to pay for electric service. (T. 118-20, 435-37; DEP Ex. 35, 74-75.)

30. Neither Rhodes nor Valley Run had an operating permit. (DEP Ex. 23.)

31. Rhodes was personally aware and authorized service to up to 14 homes. (T. 438-39.)

32. Rhodes did not own or control the farmhouse well or the plastic pipes. (T. 141; DEP Ex. 74-75.)

33. Williams understood that Rhodes personally or through Eddinger had the ability to shut off water flowing into Rhodes's system at any time. (T. 140.)

34. Neither the well nor the black plastic lines were permitted. (T. 141, 155, 324-25; DEP Ex. 18.)

35. On October 25, 2006, a representative of the Williamses installed an unpermitted chlorine treatment device to the farmhouse well. (T. 236-37; DEP Ex. 42, 74-75.)

36. In a November 1, 2006 letter to Spring Valley Village, LLC, Randy Eddinger, on behalf of Valley Run Water Company, stated that Valley Run had inspected service connections at the Spring Valley Village and that the service connections built as of that date were acceptable to Valley Run. (T. 119-20; DEP Ex. 38.)

37. Spring Valley Village, LLC needed the November 1, 2006 letter to prove to Washington Township that water could be supplied to the homes so that the Township could issue occupancy permits. (T. 120.)

38. In response to Eddinger's request, on Friday, March 2, 2007, the Department inspected Rhodes's public water system at the site. (T. 229; DEP Ex. 42.)

39. During this inspection, the Department inspector noticed that no water was coming from Rhodes's permitted sources and she asked Eddinger whether there were occupied homes at Spring Valley Village. (T. 231.) Eddinger told her to "leave those guys alone." (T. 232; DEP Ex. 42.)

40. The Department inspector observed that homes at the site were occupied and discovered the unpermitted source. (T. 231-36; DEP Ex. 42.)

41. An unpermitted treatment device attached to the unpermitted farmhouse well was not functional. (T. 235-38; DEP Ex. 42.)

42. During this inspection, the Department inspector determined from sampling that no chlorine residual was detected in the water flowing in the distribution system. (T. 236-39; DEP Ex. 42.)

43. The inspector advised Williams to immediately sample the water for bacteria. (T. 241; DEP Ex. 42.)

44. The inspector advised Williams to post a Boil-Water-Advisory public notice to all persons consuming the water until the quality of the water could be determined. (T. 241; DEP Ex. 42.)

45. Without a chlorine residual in the water, there is an imminent threat of bacteria contamination which exposes consumers to an acute health risk. (T. 238-39; DEP Ex. 42.)

46. The inspector observed that the nonfunctional device had been supplied with laundry bleach as a disinfectant. (T. 240; DEP Ex. 42.)

47. During this inspection, the inspector found that a gully had developed around the unpermitted farmhouse wellhead, thus threatening the well's integrity and its ability to prevent surface contaminants from entering the water. (T. 236, 240-41; DEP Ex. 42.)

48. Soon after the March 2, 2007 inspection, Williams contacted Eddinger concerning the Department's findings during the inspection. (T. 127-28; DEP Ex. 74, 75.)

49. Williams told Eddinger that the chlorine pump connected to the farmhouse well was broken and that they needed a new pump installed. (T. 127, 475-476; DEP Ex. 74-75.)

50. Sometime between March 2 and March 5, 2007, Eddinger brought a chlorine pump to the site and the pump was installed. (T. 128, 475-76; DEP Ex. 42, 74-75.)

51. During a March 5, 2007 reinspection, the Department observed that the nonfunctional unpermitted treatment pump had been replaced and there was chlorine residual in the water in the distribution system. (T. 248-49; DEP Ex. 47.)

52. Williams faxed to the Department two water quality monitoring reports from 2006 that he had obtained from the farmhouse well water. (T. 251-52, 257-58; DEP Ex. 48.)

53. These sampling results did not include many of the contaminants for which monitoring is required for community water systems. (T. 252, 258, 351-52; DEP Ex. 48.)

54. The farmhouse well water had not been properly monitored for the required contaminants before serving water for human consumption. (T. 251-58, 351-52; DEP Ex. 48.)

55. As a result of the water quality results, the inspector told Williams, that the Boil-Water-Advisory public notice would need to be upgraded to a "Do Not Consume" public notice. (T. 107-08, 272, 258; DEP Ex. 53.)

56. On March 13, 2007, the Department issued notices of violation to both Rhodes and Williams. (DEP Ex. 52, 53.)

57. On March 16, 2007, after receipt of a telephone call from a resident of Spring Valley Village, the Department notified the resident that the water advisory was still in effect and faxed the resident a copy of the Do-Not-Consume public notice. (T. 275-79.)

58. On March 20, 2007, the Department issued an operations permit to Rhodes. (T. 279; DEP Ex. 57.)

59. Special Condition Number Five of the operations permit prohibited Rhodes from lifting the Boil-Water-Advisory and Do-Not-Consume public notices until the listed prerequisites for lifting the notices had been met and until receipt of written notice by the Department advising Rhodes otherwise. (T. 107-08, 279-82; DEP Ex. 57.)

60. On March 20, 2007, representatives of the Spring Valley Village, LLC removed the public notices, despite not having received written notice from the Department that they could do so, as prohibited by Special Condition Number Five in Rhodes's operations permit. (T. 279-82; 490-91; DEP Ex. 61.)

61. On July 25, 2008, the Department issued an amended assessment of civil penalty assessing a penalty of \$48,340 against Rhodes and Valley Run Water Company for violations of the SDWA. (DEP Ex. 69.)

62. Rhodes was a Member of Valley Run Water Company, LLC. (DEP Ex. 24, 29, 82.)

63. Valley Run Water Company, LLC participated in the unpermitted operation of the system covered by the construction permit by, among other things, directing the use of a specific type of pipe for the distribution lines (T. 116-17, 433; DEP Ex. 32, 33), inspecting the service connections to the four homes among others (T. 119-20; DEP Ex. 38), applied for PUC approval (DEP Ex. 24), entered into the easement agreement and water services agreement (DEP Ex. 29, 30), and otherwise held itself out through Eddinger as the operator of the system (DEP Ex. 74, 75).

64. The Department assessed the following civil penalties against Rhodes and Valley Run:

Operation without a permit	\$ 23,040
Substantial modification without a construction Permit	\$ 180
Failure to operate and maintain	\$ 16,640
Operation without Disinfectant residual	\$ 360
Significant Interruption in Key Water Treatment Processes	\$ 560
Notification Violations	<u>\$ 7,560</u>
	\$ 48,340

DISCUSSION

Rhodes¹ raises four objections to the Department's assessment of civil penalties. First, he argues that a person such as himself who applies for and obtains a construction permit to build a public water system may use that system to serve up to 14 connections without being subject to the Safe Drinking Water Act, 35 P.S. § 721.1 *et seq.* ("SDWA"), or the regulations promulgated thereunder. Second, he argues that the Department is estopped from claiming otherwise as a result of certain statements that its representatives made at a pre-permitting meeting. Third, he argues that he cannot be held liable under the Act because he did not operate or control the farmhouse well, the pipes connecting the well to his permitted distribution system, or the portion of his permitted distribution system used to convey water to the four homes. Fourth, he argues that Valley Run Water Company, LLC cannot be held liable because it was not a permittee and it was an inactive entity during the time of the violations.

It is perhaps worth noting what Rhodes is *not* arguing. First, with the possible exception of the public notice violations as discussed below, Rhodes is not contesting the particulars of any of the violations giving rise to the assessment. For example, he does not contest the fact that there was no chlorine residue in the water being supplied, or that the farmhouse well and black plastic piping connecting that well to the distribution system were not permitted, or that a nonfunctional chlorine treatment device had been improperly supplied with laundry bleach as a disinfectant, or that a potentially hazardous gully had formed around the unpermitted farmhouse wellhead, or that inadequate water sampling and monitoring had been conducted. He does not dispute that his system was used for several months to convey water from this unpermitted,

¹ Throughout this discussion, "Rhodes" unless otherwise noted refers to both of the Appellants.

sometimes untreated source. Instead, Rhodes contends that he is not liable for *any* violations for the four reasons mentioned above.

Secondly, Rhodes did not challenge the amount of the civil penalty in his notice of appeal, and we precluded him from attempting to amend his appeal to do so for the first time a few days before the hearing. *See Rhodes v. DEP*, (Opinion and Order issued June 19, 2009.) In other words, this has been a liability case from the beginning.

Use of Permitted System to Supply Less Than 15 Connections

The Safe Drinking Water Act provides that it is “unlawful for any person to construct, operate or substantially modify a community water system without first having received a written permit from the Department.” 35 P.S. § 721.3. A community water system is the type of public water system that is pertinent here. A “public water system” is defined as follows:

A system for the provision to the public of water for human consumption which has at least 15 service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. The term includes:

- (1) Any collection, treatment, storage and distribution facilities under control of the operator of such system and used in connection with such system.
- (2) Any collection or pretreatment storage facilities not under such control which are used in connection with such system.
- (3) A system which provides water for bottling or bulk hauling for human consumption.

35 P.S. § 721.7(a). A “public water supplier” is a person who owns or operates a public water system. 35 P.S. § 721.7(a).

The Department implements a two-step permitting process:

- (a) A person may not *construct* a public water system without first having obtained a construction permit from the Department under § 109.503 ...;

- (b) A person may not substantially modify a permitted public water system without first obtaining an amended construction permit from the Department under § 109.503(b);
- (c) A person may not *operate* a public water system without first having obtained an operations permit from the Department under § 109.504...;
- (d) A person may not operate a substantially modified facility without first obtaining an amended operations permit from the Department under § 109.504.

25 Pa. Code § 109.501 (emphasis added). Thus, in order to operate a public water system, a person must have *both* a construction permit and an operations permit. In order to obtain an operations permit, the operator must, among other requirements, certify that the system was built in accordance with the construction permit, and the Department must approve the certified construction. 25 Pa. Code § 109.504. At the time Rhodes allowed the operation of his permitted system, he held a construction permit but not an operations permit. This would seem to be a clear violation of 25 Pa. Code § 109.501(c), which creates the rather self-evident requirement that a person may not operate without an operating permit.

Rhodes argues that the requirement to obtain an operations permit before operating his system did not apply to him because he had connected less than 15 of the 342 homes he eventually planned to connect to the system at the time of the Department's inspections. Rhodes argues that his system, although permitted as a public water supply, was not in fact a public water supply until the fifteenth home was connected. Therefore, until that point, he was not legally required to comply with his permit or, for that matter, any of the safe drinking water requirements. He was free to supply untreated water from a farmhouse well not identified in the permit. Indeed, he was free to build his permitted system in any way he chose and use any water source he chose until the fifteenth home was connected. He had no obligation to treat the water

or notify the customers that they were receiving untreated water. Fundamentally, in his view, he had simply no statutory or regulatory obligation to provide safe water. This argument has no merit.

It is not necessary for us to decide what obligation Rhodes might or might not have had if he had opted to proceed without obtaining a permit. The critical fact in this case is that Rhodes did obtain a permit. Rhodes's water system became a public water system on the day he obtained his permit. The permit on its face very clearly provides that it did not authorize operation of the permitted system until certain steps were taken (e.g. flushing the system, certifying its proper construction, etc.). (DEP Ex. 23.) Indeed, it specifically stated that it did *not* authorize operation. (*Id.*)

Rhodes did not design, obtain a permit for, and build a system for 14 homes. There was never a time when he proposed to serve 14 or less homes or even a phase of the larger system limited to 14 or less homes. There was only one system here. *Compare Fry v. DEP*, 2001 EHB 683 (issues of fact regarding possible existence of multiple systems prevented issuance of summary judgment). He designed, obtained a permit for, and built a system to initially serve 101 homes and ultimately serve 342 homes. (DEP Ex. 82.) He defined his system as a public water system when he applied for his permit. He became the permittee of a public water system when he applied for and accepted a permit for a public water system. From that point forward, he was required to comply with the law as it relates to public water supplies, and one of those duties is to obtain an operations permit before operating his system, in whole or in part. 25 Pa. Code § 109.501(c).

Much has been made in this case about how the Department *interprets* the SDWA and its implementing regulations. We only need to delve into the Department's interpretation of a

statute or regulation, however, if the law is ambiguous. *Eagle Environmental v. DEP*, 833 A.2d 805, 808 (Pa. Cmwlth. 2004). A regulation is only ambiguous if there are at least two *reasonable* interpretations of the regulation that are both consistent with the implementing statute. *Id.* In such cases, we must defer to the Department's interpretation if its interpretation is one of those reasonable interpretations. *NARCO v. DEP*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002).

In this case we detect no ambiguity.² The Department has given the regulatory requirement that construction permittees obtain an operations permit before operating its only reasonable interpretation. The carve-out from permitting requirements for small systems does not apply once a person actually obtains a permit for a large system. Stated in another way, any interpretation of the SDWA or regulations that would allow a person who has obtained a construction permit to begin serving customers prior to obtaining an operations permit would be clearly erroneous.

Rhodes's violations and indeed his defenses to liability strike at the heart of the SDWA permitting process. When a person boards an elevator, the certificate of compliance on the wall provides a modicum of assurance that the person will arrive safely. Similarly, if a member of the public uses a permitted water supply, that person is entitled to a certain level of expectation and trust based upon the knowledge that the Department has approved the system and inspected it to ensure that it is safe. If Rhodes's interpretation were to prevail, a SDWA permit essentially means nothing. The permit creates the false impression that DEP has approved the supply when that may not be the case because of, for example, the various exceptions crafted by Rhodes to escape responsibility. Users of the permitted system may unwittingly use untreated water from

² In the interest of creating a complete record, to the extent there is any ambiguity in the applicable statutory or regulatory provisions, we find that the Department's "interpretation," which is the same as ours, is reasonable and has been uniformly and consistently applied for many years across the Commonwealth. (T. 54-55, 62-68, 166, 185, 509-14; DEP Ex. 79.)

an unsafe farm well, for example, under the false impression that DEP has approved the use of that well.

Rhodes's interpretation is inconsistent with the orderly, logical operation of the two-tiered permitting process. The process is designed to ensure that a water system is built to approved specifications before it is used. This is a very common approach to permitting, not only in the environmental area but in other fields as well (e.g. building permits v. occupancy permits). Rhodes interpretation would create a limbo period where rules are uncertain, there is no assurance that a system was built properly, and safety is not required. It is easy to imagine interruptions or even terminations in service for the unfortunate first fourteen homeowners if an engineer is unable to certify or the Department is unable to approve the construction of the system once the fifteenth home comes on line. It is perfectly reasonable to insist that the system be inspected, certified, and approved *before* it is operated.

Estoppel

It has been said that equitable estoppel may lie against the government under certain limited circumstances. *See, e.g., Baehler v. DEP*, 863 A.2d 57, 60 (Pa. Cmwlth. 2004); *Bernacci v. DEP*, 2005 EHB 560, 572. The estoppel cases, however, often involve the unauthorized receipt of some benefit that should not have been received rather than violations of public health and safety laws. *See e.g., Chester Extended Care Center v. Department of Public Welfare*, 586 A.2d 379 (Pa. 1991). Rhodes has not referred us to any case in which the government has been estopped from taking an enforcement action or assessing civil penalties for violations of the law. *See Leeward Construction v. DEP*, 821 A.2d 145, 150-51 (Pa. Cmwlth. 2003) (DEP not estopped from issuing civil penalty by virtue of its approval of permittee's erosion control plans). Ordinarily, a person who would operate a public water system has a duty to inform himself of the

applicable laws and regulations. *See generally Commonwealth v. Packer*, 798 A.2d 192, 199 (Pa. 2002). Even in those cases where a Department employee gives a clear but wrong legal opinion, responsibility for compliance with the law ordinarily rests with the regulated party. Estoppel cannot be invoked against the Commonwealth where to do so would violate positive law. *Borkey v. Centre Township*, 847 A.2d 807, 712 (Pa. Cmwlth. 2004). Assuming *arguendo* that the doctrine is available in a case such as this one, in order to find estoppel there must be misleading words, conduct, or silence by the government officials, unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting estoppel, and a lack of a duty to inquire on part of the party asserting the estoppel. *Baehler*, 863 A.2d at 60; *Bernacci*, 2005 EHB at 571-72; *Attaweed v. DEP*, 2004 EHB 858, 879. We find these elements to be lacking here.

Rhodes's estoppel claim is primarily based upon statements made by Department representatives at a pre-permitting meeting on January 27, 2003.³ A Department representative's notes of that meeting accurately reflect what was said:

The developer would like to construct the initial small system serving < 15 connections or < 25 people. They would like to do this to get the project moving. Then the PWS permit application would be submitted to handle the first phase of the project.

We told them that regulations require a permit to construct the PWS system. Told them that if they proceed with the initial construction project to serve < 15 connections and < 25 people, they proceed at their own risk.

Told them we don't have authority to tell them they can't proceed, wont't tell them they can.

³ Rhodes's certified operator, Randy Eddinger, also claimed to have heard similar statements from "several other people at different regions" but this testimony is too vague to support Rhodes's estoppel claim. (T. 485-87.) We do not find credible Mr. Eddinger's equivocal indication that "other regions" have addressed the precise question that is at issue in this case; namely, the right of a construction permittee to operate without an operations permit. (T. 485-87.)

(DEP Ex. 13.)

The Department's words do not support Rhodes's estoppel claim for several reasons. Most importantly, the Department was discussing whether Rhodes's could build a small system *before* applying for the necessary permits. The Department told him to get a permit and if he did not do so he proceeded at his own risk. The safe course, the one free from risk of violating the law, was to get a permit. In fact, that is exactly what Rhodes did. Rhodes did not pursue the risky option. Instead, he did the correct thing and applied for and obtained a construction permit. He did not in fact rely on the option of proceeding without a permit. Then, roughly two years later, he allowed his permitted system to be used without obtaining an operations permit. The Department never told him he could do that. The Department never advised Rhodes that he could apply for and obtain a construction permit and then begin operating the system without an operations permit. Once Rhodes opted to obtain the construction permit, the Department's statements regarding what he could and could not do without obtaining any permits became largely irrelevant. Whether Rhodes could have proceeded without any permits based upon the Department's statements is a moot point.

In light of the construction permit itself, there could be no reasonable reliance on the Department's remarks. The permit on its face says that it authorizes construction only. (DEP Ex. 23.) It lists several prerequisites that must be met before an operations permit would be issued. Whatever reliance was justified before the permit was issued, no reliance was appropriate, at least without clarification, after the permit was issued.

Furthermore, it is quite telling that Rhodes conceded in his testimony that he would have called the Department before hooking up the homes had he stayed more directly involved. (T. 419.) Of course, one who serves drinking water to the public needs to stay informed. But

putting that aside, Rhodes was entirely correct in conceding that clarification and notification were in order under the circumstances. Indeed, the Department's words cried out for clarification, even if Rhodes had not received a permit. Where the public health and safety are concerned, it was not too much to ask for a permittee in Rhodes's position to make a quick call to the Department to ensure that he could begin operating with impunity. Instead, in Eddinger's words, Rhodes tried "to get away with it." Where, as here, a reasonable person would have made further inquiries, estoppel does not lie. *Chester Extended Care, supra*.

We are actually having difficulty accepting Rhodes's claim that his representative, Eddinger, in fact relied on the Department's statements. Eddinger repeatedly acknowledged that *he* interpreted the law to mean an operator need not comply with the SDWA. For example, when Eddinger discussed the issue with Eric Williams, the home builder, he did not quote the Department's remarks. He said: "That's our interpretation of the law. Check it out for yourself." (T. 114.) When Eddinger discussed the issue with Rhodes, he told him that "he might be able to get away with hooking up to 14 connections." (T. 502.) These statements hardly demonstrate unambiguous proof of reasonable reliance, which is what must be shown for estoppel to lie.

Still further, the isolated remarks of January 27 should not be given too much weight by pulling them out of context. Even during the meeting itself the Department repeated that Rhodes needed to get permits. (DEP Ex. 13.) The Department could undoubtedly have been more clear, but it did tell Rhodes that proceeding without a permit would be a risky proposition. Over the course of numerous communications the Department advised Rhodes repeatedly of the need for permits. (T. 74-81, 180-82, 222-28; DEP Ex. 2, 3, 13, 15, 16.) Rhodes is placing too much emphasis on one off-the-cuff disclaimer of Department staffers. This situation is to be

distinguished, for example, from a written response to a written inquiry given after proper internal review including input from the legal staff.

Rhodes makes the related claims that the Department “tacitly approved” what he did, and that the Department hid its secret interpretation of the law from Rhodes thereby allowing him to go astray. We reject these arguments for the same reasons that we reject his estoppel defense. The evidence simply does not bear out his claim that the Department approved operating without an operations permit, even to a limited extent. The Department certainly did not approve operating a permitted system with water from an old farm well without proper monitoring or maintenance and using household bleach as a disinfectant to the extent any disinfectant was used at all. As to the Department withholding information, we do not see any evidence of a concealed interpretation. Neither the Department’s SDWA guidance documents nor any other Department document says that a construction permittee may operate without an operating permit. (*See, e.g.*, DEP Ex. 1.) Most if not all of the Department’s guidance documents are readily available on its website. The Department assisted Rhodes throughout the permitting process, and indeed the meeting itself was evidence of the Department’s openness. (T. 180; DEP Ex. 15, 16, 27.)

No Control

Rhodes next argues that he cannot be held responsible for the violations because he had no control over the water system. If this were true it would mean that he obtained his construction permit under false pretenses, which could obviously have very serious legal ramifications of its own. The Department may not issue a construction permit to a person who does not have control over the system being permitted. 35 P.S. § 721.3; 25 Pa. Code §§ 109.1, 109.4. Rhodes’s permit was issued based upon this representation of control. (DEP Ex. 82.) Putting the legal consequences aside, it is rather disconcerting to hear a safe drinking water

supplier contend that he cannot control his own permitted system. It makes one wonder whether the supplier understands and fully appreciates the trust that has been imparted upon him to ensure the supply of safe drinking water.

In any event, the evidence belies any notion that Rhodes lacked the requisite control over his own system. The easement agreement between Rhodes, Valley Run, and Spring Valley Village, LLC (i.e. the Williamses) grants Valley Run the right of entry and access and control over the system. (DEP Ex. 29, 30, 75 (¶ 64).) The agreements were effective immediately; otherwise, the permits would not have been issued and may not remain in place. Aside from his legal right of access and control, Rhodes in fact exercised control. The Williamses acknowledged, correctly, that Rhodes could have shut off the illegal source or insisted on safe operation at any time. (T. 117-22, 140; DEP Ex. 33.)

Rhodes argues strenuously that he does not yet own the distribution lines. Fortunately for Rhodes's continuing status as a permittee, the SDWA does not require ownership. It also does not require *exclusive* control. It only requires control. 35 P.S. § 721.3. The Department's ability to enforce the law and the terms of a permit, as well as to ensure that the public is served with safe drinking water, does not turn on the details of the legal relationship between Rhodes and his contractor or obscure principles of property law. Indeed, one of the fundamental purposes of a permitting program is to ensure that the Department has a clear target for imposing responsibility and enforcing the law should problems arise. The agency should not be required to expend public resources chasing down various entities and individuals connected with a project when a permit is in place which assigns clear responsibility. This would seem to be particularly appropriate when the regulated activity is the round-the-clock supply of drinking water to the

public. The agency must be in a position to act very quickly should problems arise that threaten the public health.

There is no dispute that part of Rhodes's permitted system was used to convey water. (FOF 27.) That use is sufficient to create liability. *Oerman v. DER*, 1991 EHB 1542, 1549 (water from another system supplied through operator's lines).⁴ Rhodes in his arguments emphasizes that he did not control the farmhouse well or the black pipes leading from that well into his system. Whether that is true or not, the applicable regulation states that a "public water system" "includes collection or pretreatment storage facilities *not* under control of the operator which are used in connection with system." 25 Pa. Code § 109.1 (emphasis added). *See also* 35 P.S. § 721.3 (to the same effect). Collection facilities are "[t]he parts of a public water system occurring prior to treatment, including source, transmission facilities, and pretreatment storage facilities." 25 Pa. Code § 109.1. Thus, the farmhouse well was part of Rhodes's public water system even if he had no control over the well.

A related theme that runs through Rhodes's brief is that he should not be held liable for the acts of his contractor, Spring Valley. It is, of course, not necessary that Rhodes personally drive the backhoe in order to impose liability on him as the operator and permittee. It is axiomatic that a permittee may not escape liability for compliance with the terms of the permit or the law by engaging another to carry out the responsibilities thereof. *Morcoal Co. v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983); *Middletown Township Municipal Authority v. DER*, 300 A.2d 515, 517 (Pa. Cmwlth. 1973). In any event, the record demonstrates that Spring Valley connected the farmhouse well and began using Rhodes's permitted system with his and his responsible agent's full knowledge and consent. (FOF 31; T. 113-22, 502; DEP Ex. 33, 38, 42.)

⁴ This case does not present the issue of whether Rhodes would have had any liability if the Williamses supplied water from wellhead to coffee pot from a completely separate system.

Valley Run

Rhodes's final argument, set forth briefly on two pages of his 65-page brief, is that in addition to the other defenses discussed above that relate equally to Rhodes and Valley Run Water Company LLC, Valley Run is also not liable because it was "not a permittee, did not own any of the assets, and was an inactive entity during the time of the alleged conduct from November 2006 through March 27, 2007." Pointedly, Rhodes does not dispute the Department's contention that Valley Run was a public water supplier during the pertinent time period by virtue of the fact that it was an *operator* of the system. *See* 25 Pa. Code § 109.1 (defining public water supplier as "a person who owns or operates a public water system"). In any event, the record supports the Department's conclusion that Valley Run is liable as an operator of the system. Randy Eddinger was the point man for this project on water supply issues and he represented both Rhodes and Valley Run. (T. 113-14, 117, 119-20, 132, 140; DEP Ex. 33, 28, 74, 75, 82.) Valley Run held the easement granting access and control to the system. (DEP Ex. 29.) Valley Run inspected the service connections and applied for PUC tariffs. (T. 119-20; DEP Ex. 24, 38.) Valley Run entered into the water service agreement with Spring Water Village, LLC. (T. 114-16, 428-291; DEP Ex. 30, 74, 75.) Valley Run oversaw what types of materials were used for the distribution system and in fact disapproved one material. (T. 117; DEP Ex. 33.) Rhodes was a Member of Valley Run and signed documents on its behalf. (DEP Ex. 24, 29, 82.)

Furthermore, Rhodes's argument once again comes dangerously close to demonstrating that his permit was obtained under false pretenses. The construction permit application identifies the water company's name as the "Valley Run Water Company". (DEP Ex. 82.) To now assert that "Valley Run Water Company, LLC" is an entirely separate entity without liability does not seem to be entirely consistent with this representation. Finally, Rhodes has not cited and we are

not independently aware of any legal authority to support Rhodes's claim that an operator otherwise liable can avoid liability because it was an "inactive entity." Rhodes also did not bring forward any evidence to support his claim that Valley Run was "inactive" in the face of the Department's evidence showing that Valley Run was in fact fully engaged.

Alternatively, both parties acknowledge that the record is sparse regarding Valley Run. This may be in part due to the fact the Rhodes's joint and several liability for the penalty means that the distinct liability of the corporate entity has little practical import. However, it also is the result of the fact that Rhodes and Valley Run refused to comply with this Board's January 15, 2009 order to respond to the Department's discovery that was specifically directed at uncovering Valley Run's financial information. Although, Rhodes unsuccessfully appealed that order to Commonwealth Court, *see* Commonwealth Court Docket No. 150 C.D. 2009 (Order issued March 4, 2009), Rhodes never complied with the Board's Order. The Department's pending motion for sanctions for Rhodes's and Valley Run's failure to answer discovery concerning this issue seeking to preclude Valley Run from asserting that it is not a public water supply, previously taken under advisement pending the parties' post-hearing briefs, is hereby granted as an alternative basis for rejecting Valley Run's defense that it is not liable as a result of its status as a public water supplier during the pertinent period.

Miscellaneous

Rhodes argues somewhat obscurely (Brief at 13, 63) that he is not liable for the notification violations because the Department only directed the Williamses to post the do-not-consume and boil-water advisories. Even if we assume this to be the case, Eddinger knew of the failure to provide treatment, which created an independent obligation on the part of Rhodes to post notices. 25 Pa. Code §§ 109.407, 109.408. Furthermore, the evidence shows that

previously posted notices were not maintained *after* the operations permit was issued. (DEP Ex. 61.) The operations permit specifically required the previous postings to remain in place until the Department directed otherwise. (DEP Ex. 57.) To the extent that Rhodes is arguing that the Department had an obligation to track him down personally, we reject that contention. The Department routinely deals with Certified Water Operators and it is entitled to do so. That person is responsible for keeping the owner or permittee of a system apprised. *See* Section 13(e) of the Water and Wastewater Systems Operators' Certification Act, 63 P.S. § 1013(e).

Speaking more generally, Rhodes advances the theme throughout his brief that he was personally removed from the violations at the site due to, among other things, his struggle to recover from his accident. Although we are sympathetic to his past health issues, these arguments would have gone more to the amount of penalties than the existence *vel non* of violations of the law. Rhodes did not challenge the amount of the penalties. In any event, as previously discussed, the evidence shows that Rhodes was in fact aware of the farmhouse well scheme. His representative, Randy Eddinger, was thoroughly involved in it from the start and throughout the Department's enforcement process, and Rhodes personally authorized the use of his system.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(1).
2. Rhodes bears the burden of proving the affirmative defense of estoppel. *Bernacci v. DEP*, 2005 EHB 560, 571.
3. In an appeal from a civil penalty assessment, the Board determines whether the underlying violations occurred, and then decides whether the amount assessed is lawful,

reasonable, and appropriate. *Department of Environmental Protection v. Kennedy*, 2007 EHB 15, 25; *Farmer v. DEP*, 2001 EHB 271, 283.

4. A person who obtains a SDWA construction permit to operate a public water system may not operate the system in whole or in part until the person receives an operations permit. 25 Pa. Code § 109.501(c).

5. Rhodes and Valley Run operated a community water system without first obtaining an operations permit in violation of 35 P.S. § 721.7 and 25 Pa. Code § 109.501(c).

6. Rhodes and Valley Run allowed their system to be substantially modified by the addition of an unpermitted source without first obtaining an amended construction permit in violation of 35 P.S. § 721.7 and 25 Pa. Code § 109.501(a).

7. Rhodes and Valley Run violated 25 Pa. Code § 109.4, which requires public water suppliers to:

- (1) Protect the water sources under the supplier's control.
- (2) Provide treatment adequate to assure that the public health is protected.
- (3) Provide and effectively operate and maintain public water system facilities.
- (4) Take whatever investigative or corrective action is necessary to assure that safe and potable water is continuously supplied to the users.

8. By failing to evaluate the quality of the water for the new source, Rhodes and Valley Run violated 25 Pa. Code § 109.503(a)(1)(iii)(B).

9. By failing to prevent the connection of a well that had not been tested for primary MCLs, secondary MCLs, and viruses and protozoan cysts and by operating the public water system after that well was connected, Rhodes and Valley Run failed to effectively operate and

maintain public water system facilities, and failed to take necessary investigative and corrective action to assure that safe and potable water was continuously supplied to the users in violation of 25 Pa. Code § 109.4(3) and (4).

10. Rhodes and Valley Run failed to effectively operate and maintain public water system facilities, and failed to take investigative or corrective action necessary to assure that safe and potable water is continuously supplied to the users as a result of their failure to provide adequate disinfection in violation of 25 Pa. Code § 109.4(3) and (4).

11. By failing to continually maintain an appropriate public notification after learning that the chlorine treatment unit serving the farmhouse well was not operating and adequate monitoring and sampling had not been performed, Rhodes and Valley Run violated 25 Pa. Code §§ 109.407 and 408.

12. The Department is not estopped from enforcing the SDWA or issuing a civil penalty against Rhodes as a result of statements made by Department representatives at a January 27, 2003 meeting.

13. Rhodes had control of his water system at the time of the violations.

14. Valley Run Water Company, LLC is a public water supplier. 35 P.S. § 721.3; 25 Pa. Code § 109.1.

15. The Department acted lawfully and reasonably in assessing a \$48,340 civil penalty against Rhodes and Valley Run.

16. Rhodes and Valley Run are jointly and severally liable for paying the civil penalty assessment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL D. RHODES and VALLEY RUN :
WATER COMPANY, LLC :
 :
v. : EHB Docket No. 2008-156-L
 : (Consolidated with 2008-258-L,
 : and 2008-260-L)
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

ORDER

AND NOW, this 18th day of November, 2009, it is hereby ordered that this appeal is
dismissed.

ENVIRONMENTAL HEARING BOARD



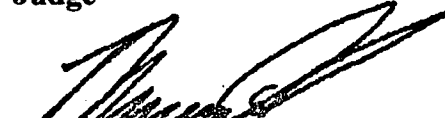
THOMAS W. RENWAND
Chairman and Chief Judge



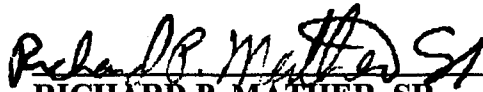
MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge



RICHARD P. MATHER, SR.
Judge

DATED: November 18, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
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BARRY PEARSON

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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:

EHB Docket No. 2009-055-C

Issued: December 3, 2009

**OPINION AND ORDER
 DISMISSING THE APPEAL**

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses the Appellant’s appeal as a sanction for failure to follow Board rules and orders.

OPINION

The Board dismisses this appeal because the Appellant has failed to comply with Board orders demonstrating a lack of intent to pursue his appeal. The Appellant, Barry Pearson, appealed the Department of Environmental Protection’s March 25, 2009 compliance order for violations of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. §§ 693.1-693.27. The compliance order alleges that the Appellant constructed a pond in a wetland area without first obtaining a permit in violation of 25 Pa. Code § 105.11(a) and 32 P.S. §§ 693.6 and 693.18.



The Board issued an order on June 11, 2009 requiring the parties to submit status reports with the Board on or before July 1, 2009. The Appellant never submitted a status report. On June 18, 2009, the Department served its First Set of Interrogatories and First Request for Production of Documents upon the Appellant. The Appellant never provided responses to the Department's discovery requests. On August 24, 2009 the Department filed a motion to compel answers to discovery and to require the Appellant to comply with the Board's June 11, 2009 order requiring a status report to be filed with the Board. The Appellant never filed a response to the motion to compel. On September 18, 2009 the Board ordered the Appellant to provide discovery responses to the Department and to provide a status report to the Board and the Department on or before October 2, 2009.

The Appellant never provided a status report, or responses to the Department's discovery requests. As a result, on November 5, 2009 the Board issued a rule to show cause upon the Appellant to show cause why his appeal should not be dismissed as a sanction for failing to comply with Board orders. The rule also provided that a failure to comply with the September 18, 2009 order will result in dismissal of the appeal. The rule was returnable to the Board on or before November 20, 2009. To date no response to the rule has been filed, nor compliance with the September 18, 2009 order. In fact, the Board has not received any correspondence from the Appellant except for the filing of his notice of appeal.

It is well established that the Board has the power under its Rules of Practice and Procedure to impose sanctions, including dismissal of the appeal for failure to comply with our rules and orders. 25 Pa. Code § 1021.161. A sanction resulting in dismissal is warranted when a party demonstrates a lack of intent to pursue its appeal by failing to comply with Board orders. *See Bishop v. DEP*, EHB Docket No. 2008-325-R (Opinion and Order issued May 19, 2009);

Miles v. DEP, EHB Docket No. 2008-136-C (Opinion and Order issued March 27, 2009); *RJ Rhodes Transit, Inc.*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54. The Appellant has routinely ignored our orders and has had no contact with the Board since the filing of this appeal. We dismiss this appeal as a sanction pursuant to 25 Pa. Code § 1021.161.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BARRY PEARSON

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

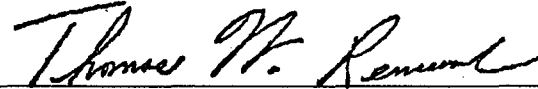
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EHB Docket No. 2009-055-C

ORDER

AND NOW, this 3rd day of December, 2009, it is HEREBY ORDERED that this appeal shall be **dismissed**.

ENVIRONMENTAL HEARING BOARD




THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge



RICHARD P. MATHER, SR.
Judge

DATED: December 3, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
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Office of Chief Counsel

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 SECRETARY TO THE BOARD

**LOWER SALFORD TOWNSHIP AUTHORITY:
 AND UPPER GWYNEDD-TOWAMENCIN
 MUNICIPAL AUTHORITY**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2005-100-K

Issued: December 15, 2009

**OPINION AND ORDER ON
 APPLICATIONS FOR ATTORNEYS' FEES**

By Michael L. Krancer, Judge

Synopsis:

The Board denies the applications for attorneys' fees and costs under Section 307(b) of the Clean Streams Law. The applications fail to meet the criteria for an award of fees and costs.

FACTUAL BACKGROUND

This case is the Clean Streams Law Section 307 petition of Lower Salford Township Authority (LSTA) and Upper Gwynedd-Towamencin Municipal Authority (UGTMA) for attorneys fees and costs which has emanated from the now settled and dismissed substantive litigation which was filed by LSTA and UGTMA challenging the nutrient portion of the Skippack Creek Watershed Total Maximum Daily Load (TMDL). LSTA and UGTMA filed their original appeal of the Skippack TMDL on May 16, 2005. The underlying litigation was the subject of several prior Board opinions and a Commonwealth Court disposition. *Lower*



Salford v. DEP, 2005 EHB 854 (denying DEP's motion to dismiss); *Lower Salford v. DEP*, 2005 EHB 893 (denying petition for reconsideration and to amend order to allow interlocutory appeal); *DEP v. Lower Salford*, 2477 CD 2005 (Pa. Cmwlth. 2006) (denying DEP's petition for review); *Lower Salford v. DEP*, 2006 EHB 657 (denying DEP's motion for summary judgment). The factual, legal and procedural background of the Skippack TMDL and the litigation against it by LSTA and UGTMA is described in the earlier Board opinions and we will not repeat it here.

The Appellants, of course, challenged the technical merits of the TMDL in their appeal to the Board. They argued, among other things, "that the Skippack TMDL was (1) premised upon an indefensible scientific position which is fundamentally flawed and technically insufficient; (2) based on flawed modeling; (3) not substantiated by fact or law; and (4) contrary to law." LSTA Application ¶ 37, LSTA Notice of Appeal ¶¶ 44-67. However, the threshold issue in the motion practice before the Board was the jurisdictional question, *i.e.*, whether the TMDL was issued by the Commonwealth or by the federal EPA. If the TMDL were the Commonwealth's, *i.e.*, an action of the DEP, then the Board had jurisdiction. If the TMDL was an action of the federal EPA then we would not have had jurisdiction since, of course, we have jurisdiction only over actions of the state DEP, not the federal EPA. 35 P.S. § 7514(a) (the Board has the power and duty to hold hearings and issue adjudications . . . on orders, permits, licenses or decisions *of the department*) (emphasis added); 35 P.S. § 7514(c) ("no action *of the department* adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board . . .") (emphasis added).

That threshold jurisdictional issue was never resolved as a final matter of law or fact in that the Board decisions merely denied DEP's motion to dismiss on October 25, 2005 and DEP's motion for summary judgment on September 19, 2006. On September 26, 2007, however, as

the parties' Stipulation of Settlement of the underlying litigation states, "EPA issued a document entitled *Decision Rationale For the Withdrawal of the Nutrient TMDLs for the Skippack Creek Watershed, Montgomery County, Pennsylvania*, which states that "EPA is now withdrawing the nutrient TMDLs, and preparing to propose replacement nutrient TMDLs." Stipulation of Settlement, ¶ E.

Notwithstanding this federal withdrawal of the nutrient TMDLs, the litigation continued. In a nutshell, LSMA and UGTMA say that they were unable to abandon the litigation for fear that they would suffer from the adverse collateral damage of administrative finality as the legal questions of the appropriate timing and forum for challenging a TMDL is not settled. So the Board scheduled a trial for December 2008 limited to the issue of whether the Board had jurisdiction over the Skippack TMDL. Stipulation of Settlement, ¶ F. The Department's contention for trial was that the Skippack TMDL was established by the EPA and, as such, is not an action of the Department subject to the jurisdiction of the Board. Stipulation of Settlement, ¶ G.1. The Appellants' contention for trial was that the Skippack TMDL was established by the Department, and as such, is an action of the Department subject to the jurisdiction of the Board. Stipulation of Settlement, ¶ G.2.

That trial never took place as the parties entered into their Stipulation of Settlement in December and January 2008-2009 and the Stipulation was filed with the Board on January 23, 2009. The Board entered an Order that day dismissing the underlying litigation.

The attorneys' fees and costs applications were filed in February 2009 and briefing was completed on June 30, 2009. In short, the applicants argue they are entitled to fees and costs because they were "prevailing parties" in the sense of "[having] achieved some degree of success on the merits" and that their suit made a "substantial contribution" to the withdrawal of the

TMDL. They say that the expert reports in their case filed on November 14, 2006 disclosed problems with the two mathematical regressions which had been foundational in the establishment of the 2005 Skippack nutrient TMDL, to wit, the Dodds Regression and the Cattaneo Regression. They say that the TMDL was, thus, voluntarily withdrawn “because of [the appeal].” Sure enough, the EPA does confirm in a lengthy discussion in its September 26, 2007 *Decision Rationale For the Withdrawal of the Nutrient TMDLs for the Skippack Creek Watershed, Montgomery County, Pennsylvania*, that the two regressions were flawed for their use in the Skippack TMDL. Department’s Responses to Appellants’ Respective Applications For Recovery of Attorneys’ Fees and Costs, Affidavit of Martha E. Blasberg, Exhibit J.

DEP notes that the TMDL was withdrawn by the EPA, not DEP. LSTA’s Application admits that the TMDL was officially withdrawn “by EPA.” LSTA Application, ¶ 72 (emphasis added). LSTA, however, adds as a footnote to this admission that, “[d]espite the fact that the Skippack TMDL was withdrawn by EPA, the Appellants maintain and the record of this appeal demonstrates that the Skippack TMDL was established by the Department.” *Id.* at ¶ 72 n. 11. Also, DEP says that, in any event, the EPA became aware of the deficiencies in the two regressions a few weeks earlier, in a different case, from an independent source who was not even a party in the Skippack TMDL litigation. DEP says that EPA was made aware of the problems with the regressions through public comments filed with DEP on October 25, 2006 by the Pennsylvania Periphyton Coalition with respect to the Neshaminy TMDL which comments were copied to EPA.¹ Thus, says DEP, the EPA’s withdrawal of the Skippack TMDL could not have been brought about in any way, shape or form by the Appellants’ litigation. In addition, DEP makes the interesting point that the EPA withdrew the Skippack TMDL because it was not

¹ The Neshaminy TMDL matter is the subject of another attorneys fees petition which is pending before the Board. *Crum Creek Neighbors*, EHB Docket No. 2007-287-L (petition filed on November 19, 2009). In that case, unlike this one, all parties agree that the Neshaminy TMDL is the Pennsylvania DEP’s promulgated TMDL.

strict enough. The *Decision Rationale* document says that “EPA is withdrawing the existing nutrient TMDLs that were established for the Skippack Creek watershed based on our determination that the 2005 nutrient TMDLs were not sufficient to attain and maintain existing water quality standards and water uses” and “EPA will re-establish the nutrient TMDLs for the Skippack Creek watershed by June 30, 2008.” *Decision Rationale*, p. 1. So, says DEP, this can hardly be a victory in any sense of the word for Appellants who were complaining that the TMDL of 2005 was too strict.

ANALYSIS

Section 307(b) of the Clean Streams Law provides as follows:

Any person having an interest which is or may be adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law, and from the adjudication of said board such person may further appeal as provided in Title 2 of the Pennsylvania Consolidated Statutes (relating to administrative law and procedure). The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in *proceedings pursuant to this act*.

35 P.S. § 691.307(b). The Supreme Court in *Solebury Township v. DEP*, 928 A.2d 990 (Pa. 2007), and our opinions following remand from the Supreme Court, *Solebury Township v. DEP*, 2008 EHB 658, *reconsideration denied*, 2008 EHB 718, provide the guide for interpreting this provision. As we explained in our *Solebury* decision on remand, we do not view what the Supreme Court did in *Solebury* as so dramatic a shift in Pennsylvania law on fee-shifting as some have thought it to be. In our view, the Supreme Court's *Solebury* decision allows us to continue to take a *Kwalwasser* approach so long as we do not do so too narrowly. *Solebury*, 928 A.2d at 1004-05.

We see the gravamen of the *Solebury* decision as announcing two key principles. First,

the Court declined to accept for application to Section 307(b) the approach of the majority opinion of the United States Supreme Court in the seminal case of *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health & Human Services*, 532 U.S. 598 (2001). Second, and perhaps this is a corollary to the first point or an explication thereof, it eliminated the hard and fast requirement that the applicant for fees is required to have won a formal final judgment or consent decree in court. As Justice Saylor said, "we cannot interpret Section 307 to eliminate the availability of attorneys fees to parties that may have incurred legitimate expenses solely on the basis of a restrictive interpretation of a federal [mining] statute." *Solebury*, 928 A.2d at 1004.

If we are excluded from the territory of the *Buckhannon* majority then where are we? We think we are left inside the territory of Justice Ginsberg's dissent in *Buckhannon*. This could be called the "catalyst" approach. As set forth by Justice Ginsberg, three major criteria compose that approach: (1) the applicant has to show that the other party provided some of the benefit sought in the suit; (2) the applicant has to show that the suit stated a genuine claim, *i.e.*, one that was at least colorable, not frivolous, unreasonable or groundless; and (3) the applicant has to show that its suit was a substantial or significant cause of the defendant's action providing relief. *Buckhannon, supra*, 532 U.S. 598, 626-30 (Ginsburg, J., dissenting).²

The Board has not taken the approach that we are at square one after *Solebury* and we have applied a catalyst approach which borrows heavily from Justice Ginsberg's three criteria. Judge Labuskes noted in *Solebury* upon remand from the Supreme Court that the catalyst approach "appears to mirror quite closely the Pennsylvania Supreme Court's vision . . . of how Section 307 should be applied." *Solebury*, 2008 EHB at 671.

This approach, which is more liberal than the *Buckhannon* majority or the strict

² We are not dealing here in this case with evaluating the amount of fees to be awarded because, as we demonstrate, the applicants here do not qualify for the award of fees at all.

application of the *Kwalwasser* mining statute criteria is consistent with Justice Saylor's injunction that our view of Section 307 take into account the public policy of Pennsylvania favoring a liberal construction of fee-shifting provisions. Moreover, this approach relies on identifiable criteria which have been and are being applied by other courts in other cases under other fee-shifting provisions of other statutes including the federal Clean Water Act. In this regard, we note that while rebuking the EHB for its over-reliance on federal mining fee-shifting provisions, Justice Saylor clearly signaled that it would be appropriate for us to turn to similar federal Clean Water Act statutes, namely 33 USC § 1365(d). *Solebury*, 928 A.2d at 1004. That statute, as Justice Saylor pointed out, allows fees to be awarded to both "prevailing parties or substantially prevailing parties".

While the petitioning party need not be a prevailing party in the technical "term of art" sense as discussed by the *Buckhannon* majority or by Justice Scalia in his concurrence, the petitioner must still be at least a substantially prevailing party in that the party must have attained some result from the other side which is positive from the party's point of view and the suit must have been a substantial or significant cause of the defendant's action providing relief. Justice Saylor in his *Solebury* opinion directs us to a source which provides support for this and also insight into what this means in practice. He refers to an article by Jason Klein in the *Hastings Journal of Environmental Law and Policy*. *Solebury*, 928 A.2d at 1004 n.11 citing Jason Klein, *Attorney's Fees and the Clean Water Act After Buckhannon*, 9 *Hastings W.-N.W.J.Env.L. & Pol'y* 109 (2003) (hereinafter "*Hastings*"). In that article Mr. Klein discusses the history behind the insertion of the term "substantially prevailing party" into the Clean Water Act. He explains that in earlier days both the federal Clean Water Act and the federal Clean Air Act contained fee-shifting provisions with no reference at all to prevailing party or substantially prevailing party.

Both statutes provided that a "court may award costs of litigation whenever it determines that such award is appropriate." *Hastings* at 114. In 1983 the United States Supreme Court dealt with that version of the Clean Air Act fee-shifting provision and it rejected an argument that fees should be awardable even though the court had rejected all of petitioners' claims, and rejected their relief, on the ground that the suit had nevertheless "contributed to the goals of the CAA." The Court said, "some degree of success is required before it is 'appropriate' to award fees." *Ruckleshaus v. Sierra Club*, 463 U.S. 680.

Four years later Congress drove home the point made by the Court in the *Ruckleshaus* decision by amending both the Clean Air Act and the Clean Water Act to include the phrase "prevailing or substantially prevailing party." The Senate Report says:

the purpose of . . . the amendment [] is to clarify the circumstances under which costs of litigation may be awarded. In *Ruckleshaus* the lower court had said it was appropriate to award fees to a party even though the government prevailed on all issues. The Committee does not believe that it is reasonable or appropriate . . . for a party to pay the costs of an opposing party to a lawsuit when the opposing party has not prevailed on the issues. Accordingly, these amendments would limit awarding of costs under the CWA to prevailing or substantially prevailing parties.

Hastings at 115 citing S. Rep. No. 50, 99th Cong., 1st Sess. 33 (1985).

Mr. Klein also notes that Black's Law Dictionary does not define "substantially prevailing party" but it does define "substantially" as "essentially, without material qualification, in the main, in a substantial manner." There are no modifiers like "nearly," "almost," or "approximately" so, as he says, the definition is limited to substantive success. *Hastings* at 113.

Judge Labuskes in the *Solebury* remand echoes these principles. He emphasized that the applicant for fees should show that "the lawsuit brings about a voluntary change in the defendant's conduct consistent with the relief sought by the fee applicant in the litigation". Further, he notes that we look to see whether "the proceedings caused the Department to alter its

behavior, even in the absence of a Board order on the merits or a Board approved settlement;” and “what the party accomplished, the extent to which the litigation brought about the accomplishment, the particular party’s role in the process, and the extent to which the accomplishment matches the relief sought by the fee applicant;” and, “the important point is that the agency changed its conduct at least in part as a result of the appeal.” 2008 EHB at 671, 672, 673, 675-76. Also, as we said in our *Solebury* opinion on reconsideration, “[f]inally, let us take this opportunity to be clear: fee awards are not available in frivolous, groundless or nuisance appeals.” *Solebury*, 2008 EHB at 722.

It is noteworthy that even the applicants in this Section 307(b) case see that the catalyst criteria in basically the form set forth by Justice Ginsberg in her dissent in *Buckhannon* are the key and they do argue that they were a “prevailing party” in the sense of “[having] achieved some degree of success on the merits” and that their suit made a “substantial contribution” to the withdrawal of the TMDL. They say the withdrawal was “because of UGTMA’s Appeal.” Memorandum of Law, §§ 2, 3 (the pages are not numbered). UGTMA calls this the “modified *Kwalwasser* Criteria” which are resultant from the Supreme Court’s *Solebury* case.

Application of the Criteria to This Case

We think there is quite an adequate record to determine these applications without further litigation. The parties’ pleadings and the Stipulation of Settlement provide an adequate basis upon which to decide this particular case. At the end of the day, applying the criteria discussed above we do not believe that Section 307 of the state Clean Streams Law can or should be a vehicle for recovery of fees and costs where it was not DEP who took the action being claimed as being the victory or the substantial victory. Here it was not DEP that did anything or took any action or changed any behavior which supplied what the applicants point to as their good result.

It was, instead, the federal EPA that withdrew the Skippack TMDL as even the applicants admit.

In this case the applicants obviously cannot show that “the other party” to the litigation provided some of the benefit sought in the suit. Even if the EPA’s withdrawal of the Skippack TMDL can be considered a benefit to the applicants, it was EPA, a federal sovereign and a non-party to the EHB suit, which provided that benefit. As Judge Labuskes points out numerous times in the *Solebury* decision, we need to look at whether the “the lawsuit [brought] about a voluntary change in the *defendant’s conduct*” and “if the proceedings caused *the Department* to alter its behavior.” *Solebury*, 2008 EHB at 671, 672.

As noted earlier, while the applicants admit, as they must, that EPA withdrew the Skippack TMDL they qualify that admission by saying, “Appellants maintain and the record of this appeal demonstrates that the Skippack TMDL was established by the Department.” LSTA Application, ¶ 72 n. 7. First, the record does not establish anything in this case other than DEP was not entitled to the granting of a motion to dismiss nor a motion for summary judgment. The underlying allegation of Appellants, that it was DEP that promulgated the TMDL as a matter of fact was, of course, never resolved. Indeed, the Board’s opinion denying summary judgment categorized the as of yet unresolved and not fully developed competing factual points on the radar screen for each party on that question. *Solebury*, 2006 EHB at 663.

We think it would be perverse and useless to now hold a mini-trial on the threshold jurisdictional issue of who promulgated the TMDL. Nobody contends that fee-shifting provisions, whether from the Clean Streams Law or anywhere else, necessitate trials on the matters settled in order to resolve the subsequent fee petition claims. The Supreme Court’s *Solebury* decision certainly does not point in that direction. Also, as Judge Labuskes said in *Solebury* on remand, “We are reluctant to hazard what would be little more than a guess in this

context, and fee applications should not turn into mini-trials on the merits.” *Solebury*, 2008 EHB at 675.

In addition, there would be no point to the exercise of conducting a mini-trial now of whose TMDL it was here. Regardless of who promulgated this TMDL in the first place in 2005, nobody here disputes that it was EPA that withdrew it on September 26, 2007. So the answer to the question is of no consequence in the context of a Section 307(b) fees application.

We do believe that the Appellants appeal in this case was colorable, and it was not frivolous, unreasonable or groundless. First, on the threshold jurisdictional question, that the Board rejected two DEP requests for summary relief and a motion for reconsideration shows that the claims were certainly credibly brought in our court in the first instance. As to the technical merits of the case, we have no reason to doubt that the technical points were colorable. After all, the EPA did withdraw the Skippack nutrient TMDL and it appears that this was done, at least in part, for some of the same reasons upon which Appellants grounded their challenge on the merits to the TMDL. However, as discussed at length above, the threshold jurisdictional question was never resolved so we have no way of knowing whether we ever would have had jurisdiction over the technical merits of the case. Moreover, we demur from holding two mini-trials, one over the jurisdiction question and if Appellants win the day on that mini-trial, another mini-trial on the technical merits of the case. Actually, to call either one of those a mini-trial would be a misnomer. Both would be “maxi”-trials in that they would be huge undertakings.

We need not conduct a detailed “post-game analysis” to determine what role, if any, the Appellants’ activities in the EHB litigation may have had on EPA’s decision to withdraw the Skippack TMDL because it was EPA, not DEP, which took that action. Thus, the resolution of the interesting question of what extent, if any, the Appellants’ expert reports versus the public

comments filed in the Neshaminy TMDL matter might have played in bringing about or causing *EPA's action* is not necessary. It was EPA's action, not DEP's.

Our last sentence provides a good segue into the third criteria. The action from which the applicants claim victory (or substantial victory) is an action of the federal EPA, not DEP. It really does not matter, then, whether the Appellants' actions in this suit had a substantial or significant causal connection in bringing about that result, even if that result were to be viewed as some of the benefit sought in the suit, for the simple reason, as discussed above, the defendants, *i.e.*, DEP, did not provide that relief.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

**LOWER SALFORD TOWNSHIP AUTHORITY:
AND UPPER GWYNEDD-TOWAMENCIN
MUNICIPAL AUTHORITY**

v.

EHB Docket No. 2005-100-K

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

ORDER

AND NOW, this 15th day of December, 2009, it is HEREBY ORDERED that the applications for fees and costs under Section 307(b) of the Clean Streams Law of LSTA and UGTMA are denied.

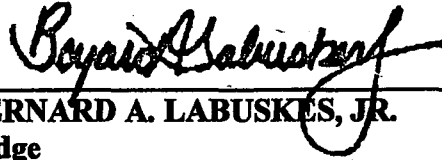
ENVIRONMENTAL HEARING BOARD



**THOMAS W. RENWAND
Chairman and Chief Judge**



**MICHELLE A. COLEMAN
Judge**


BERNARD A. LABUSKES, JR.
Judge


MICHAEL L. KRANCER
Judge

Judge Richard P. Mather, Sr. is recused and did not participate in this decision.

DATED: December 15, 2009

c: DEP Bureau of Litigation:
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WILLIAM T. PHILLIPY IV
 SECRETARY TO THE BOARD

**JAMES B. DALY, d/b/a JBD WASTE
 HAULING, LLC and TINA M. DALY**

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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**EHB Docket No. 2008-221-M
 (Consolidated with 2008-222-M)**

Issued: December 24, 2009

**OPINION AND ORDER
 DISMISSING THE APPEAL**

By Richard P. Mather, Sr., Judge

Synopsis:

The Board dismisses the Appellants' appeal as a sanction for failure to follow Board rules and orders.

OPINION

The Board dismisses this consolidated appeal because the Appellants, James B. Daly, d/b/a JBD Waste Hauling, LLC and Tina M. Daly, have failed to comply with Board orders. The Appellants both filed an appeal with the Board on July 3, 2008 objecting to the Department's June 13, 2008 compliance order for violations of the Solid Waste Management Act, 35 P.S. §§ 6018.101, *et. seq.* The compliance order alleges that the Appellants disposed of or assisted in the transportation and disposal of solid waste without a permit in violation of 35 P.S. Sections 6018.201, 6018.501 and 6018.610. These two appeals were consolidated by Board order on July 14, 2008.



The Board issued an order on March 16, 2008 requiring status reports to be filed with the Board on or before April 20, 2009.¹ The Appellants never filed a status report. The Board issued a Pre-Hearing Order No. 2 on June 26, 2009 scheduling the hearing and pre-hearing memoranda submissions. After a conference call with the parties, the Board amended its Pre-Hearing Order No. 2 on July 22, 2009 extending the pre-hearing memoranda submission deadline. On September 10, 2009 the Department, with the Appellants' concurrence, requested an extension of the pre-hearing memoranda deadlines. The Board granted the request on September 14, 2009. The Department's pre-hearing memorandum was due on October 31, 2009 and the Appellants' pre-hearing memorandum was due on November 13, 2009. The Board received the Department's memorandum, however the Appellants failed to file their memorandum.

As a result of the Appellants' failure to file a pre-hearing memorandum the Board issued a rule to show cause on November 19, 2009. The rule required the Appellants to show cause why their appeal should not be dismissed for failure to file a pre-hearing memorandum. The rule was dischargeable by the Appellants by filing their pre-hearing memorandum on or before December 4, 2009. As of this date, the Appellants have again ignored a Board order and failed to comply with the rule to show cause.

The Board has the power under its Rules of Practice and Procedure, specifically 25 Pa. Code Section 1021.161, to impose sanctions for failure to comply with Board rules and orders. Section 1021.161 provides:

The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or

¹ Subsequent to the Board's March 16, 2008 order but prior to the due date of the status reports, the Board issued an order allowing Appellants' counsel to withdrawal his appearance. The Appellants have been proceeding on a *pro se* basis since March 19, 2008.

documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161. An appellant's failure to comply with several Board orders clearly demonstrates a lack of intent to pursue an appeal and dismissal of the appeal is warranted. *See Barry Pearson v. DEP*, EHB Docket No. 2009-055-C (Opinion and Order issued December 3, 2009); *Bishop v. DEP*, EHB Docket No. 2008-325-R (Opinion and Order issued May 19, 2009); *Miles v. DEP*, EHB Docket No. 2008-136-C (Opinion and Order issued March 27, 2009); *RJ Rhodes Transit, Inc.*, 2007 EHB 260; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

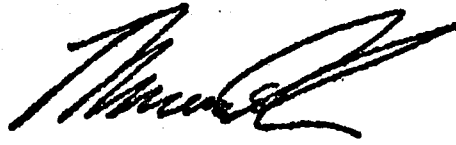
As set forth above, the Appellants have failed to follow three Board orders. The Board cannot allow parties to repeatedly ignore Board orders and violate Board rules, as Judge George Miller stated in *Swistock v. DEP*, 2006 EHB 398:

The integrity of the appeal process before the Pennsylvania Environmental Hearing Board is dependent upon the willingness of the parties to follow the rules of procedure and the orders of the Board. Because of [a party's] repeated failure to abide by those rules this Board will dismiss [the] appeal as a sanction for that failure.

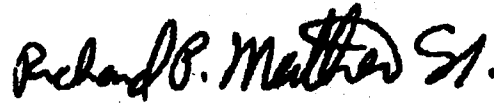
Swistock, 2006 EHB at 401.

We are aware that Appellants are representing themselves in this matter, however that does not excuse them from following our rules of procedure. *Goetz v. DEP*, 2002 EHB 976. Therefore, the Board dismisses this appeal for Appellants' repeated failures to comply with Board orders as a sanction pursuant to 25 Pa. Code § 1021.161.

Accordingly, we issue the following Order.



MICHAEL L. KRANCER
Judge



RICHARD P. MATHER, SR.
Judge

DATED: December 24, 2009

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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EDWARD BALLAS

v.

**COMMONWEALTH OF PENNSYLVANIA,
 DEPARTMENT OF ENVIRONMENTAL
 PROTECTION**

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EHB Docket No. 2009-007-L

Issued: December 29, 2009

**OPINION AND ORDER
 ON MOTION TO DISMISS**

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of a letter of the Department of Environmental Protection because the letter is not appealable.

OPINION

Edward Ballas filed a citizen complaint with the Department's Cambria District Mining Office on November 25, 2008. The complaint alleged that Britt Energies, a subcontractor for Alverda Enterprises who has a permit to mine on Ballas's property, failed to exercise due diligence in protecting Ballas's building from damage related to surface mining activities. The Department conducted an inspection in response to the complaint on December 9, 2008. The Department sent a letter to Ballas dated December 24, 2008 declining to take any enforcement action against Britt or Alverda. Mr. Ballas filed this appeal from the Department's December 24, 2008 letter.

The Department has filed a motion to dismiss, arguing that the letter sent to Ballas is not an appealable action. Mr. Ballas filed a one-paragraph response to the motion that does not respond to the Department's arguments regarding the appealability of the letter, instead reasserting his substantive claim that the Department erred because it "did not take appropriate steps to enforce the permit." We will grant the Department's motion to dismiss.

A letter from the Department may under some circumstances constitute an appealable action. *Middle Creek Bible Conference, Inc., v. DER*, 645 A.2d 295, 300 (Pa. Cmwlth. 1994); *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. Where, however, a letter does no more than describe the outcome of the Department's investigation of a third-party complaint and reports that the Department will not pursue enforcement action against the object of the complaint, the letter is generally not appealable absent a claim of bias or corruption or perhaps other unusual circumstances. *DEP v. Schneiderwind*, 867 A.2d 724, 727 (Pa. Cmwlth. 2005); *Law v. DEP*, 2008 EHB 213, 216-18, *aff'd*, 1071 C.D. 2008 (Pa. Cmwlth., January 23, 2009). *See also, Mystic Brooke Development v. DEP*, EHB Docket No. 2009-016-L, slip op. at 3 (Opinion and Order issued June 16, 2009) ("[T]his Board will not interfere with the Department's exercise of its prosecutorial discretion. . . . This Board has no authority to order the Department to take enforcement action against [the permittee]."); *Koken v. One Beacon Insurance Co.*, 911 A.2d 1021, 1031 (Pa. Cmwlth. 2007) ("The discretion involved in subjective assessment of the strength of a given claim and whether the best allocation of resources are spent on enforcement may not be compelled, and is not subject to judicial review, because such actions are not adjudicatory in nature.")

In *Mystic Brooke*, we dismissed a third party's appeal from a Department letter to a mine permittee directing the permittee to submit a corrective action plan for three acid mine drainage

seeps. The third party had complained that more seeps should have been included in the plan. In *Law v. DEP*, we dismissed an appeal of an e-mail sent by the Department to the appellant which stated that after an investigation of the appellant's complaint there was no violation of the Department's regulations and the Department was closing its file on the matter. We reasoned that "[s]uch a decision is the exercise of the quintessential enforcement discretion on the part of the Department, which is not subject to judicial review by the Board." *Law*, 2008 EHB at 216.

We explained that the Department's enforcement discretion

derives from the notion that it is the Department, not the Board, which has the legislative authority to pursue enforcement action against violators. Accordingly, it is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board. Therefore, even if an individual is acting unlawfully and the Department chooses to tolerate the conduct by declining enforcement action, the Board will not review that decision by the Department. Similarly, when the Department performs an investigation of a complaint and concludes that there are no violations, that decision, too, will generally remain undisturbed.

Law, 2008 EHB at 216 (footnotes omitted).

In *Schneiderwind*, a citizen filed a complaint with the Department asserting that the Department and Delaware Valley Concrete had diminished the water supply to his farm. After the Department's investigation the Department sent a letter refusing to prosecute his claim. The Department argued the Board did not have jurisdiction over the appeal because it had unreviewable enforcement discretion to decide whether or not to act. The Board disagreed and sustained the appeal after hearing the merits of the case. The Commonwealth Court reversed the Board and found that the Department's refusal to prosecute Schneiderwind's claim was not reviewable by the Board. The Court reasoned that "[t]he Department's election to not proceed on Schneiderwind's complaint opened the door to his commencement of a civil action. . . . Thus,

it did not decide his claim or deprive him of a remedy or avenue of redress; it merely notified Schneiderwind of the Department's discretionary refusal to prosecute the claim on his behalf." *Schneiderwind*, 867 A.2d at 726.

Schneiderwind and *Law* are directly on point. The letter under appeal in this case did no more than decline to take enforcement action in response to Mr. Ballas's complaint. The only relief we could conceivably offer in this appeal is an order directing the Department to take enforcement action, presumably against Alverda Enterprises, who is not a party to this appeal. This we cannot do. *Schneiderwind, supra*. In his brief response to the Department's motion, Mr. Ballas reasserts his disagreement with the Department's findings, but that is not enough to render the Department's enforcement choice reviewable by this Board.

In reviewing the Department letter we are aware that it contains an appeal paragraph. The letter provides the boilerplate language that we see in many Department letters that "[a]ny person aggrieved by this action may appeal, pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. Section 7514." We have consistently held, however, that such a paragraph does not in and of itself transform a nonappealable action into an appealable action. *Law*, 2008 EHB at 217; *Onyx Greentree Landfill, LLC v. DEP*, 2006 EHB 404, 415; *Eljen Corp v. DEP*, 2005 EHB 918, 927.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

EDWARD BALLAS

v.

**COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION**


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EHB Docket No. 2009-007-L

ORDER

AND NOW, this 29th day of December, 2009, it is hereby ordered that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD




MICHELLE A. COLEMAN

Judge



BERNARD A. LABUSKES, JR.

Judge



RICHARD P. MATHER, SR.

Judge

DATED: December 29, 2009

c: DEP Bureau of Litigation:
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**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

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EHB Docket No. 2009-007-L

DISSENTING OPINION

**By Thomas W. Renwand, Chairman and Chief Judge
Joined in by Michael L. Krancer, Judge**

I respectfully dissent. My learned colleagues in the Majority have granted the Pennsylvania Department of Environmental Protection's Motion to Dismiss a citizen complaint alleging damage to his property allegedly caused by surface mining activities of a coal company pursuant to a permit issued by the Department on the ground that the Department's decision is an exercise of prosecutorial discretion. I disagree.

The Majority's holding based on the Board created doctrine of prosecutorial discretion is not only inaccurately applied here, but a misreading of the Commonwealth Court's holding in *Department of Environmental Protection v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005), especially in light of the recent rule revisions enacted by the Pennsylvania Environmental Hearing Board which address this very factual scenario. Finally, the Majority completely ignores the Environmental Hearing Board Act which sets forth our duty to review Department actions.

Under well established case law and as correctly pointed out by the Pennsylvania Department of Environmental Protection on page two of its Memorandum of Law, motions to dismiss are reviewed in the light most favorable to the non-moving party. *Smedley v. Department of Environmental Protection*, 1998 EHB 1281, 1282. The Board will dismiss an action only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Id.* Looking at the paucity of facts cited by the Majority Opinion and reviewing the conclusory summary of the issues set forth in the letter announcing the Department's action under review, I do not see how the Department is clearly entitled to judgment as a matter of law at this stage of the proceedings.

The Majority Opinion does not delve into the facts of the case. According to the Department's letter of December 24, 2008, which explains the Department action under appeal, Mr. Edward Ballas, the Appellant, contacted the Department regarding damages to his property in Pine Township, Indiana County. The property was mined by Alverda Enterprises, Inc. pursuant to a surface mining permit issued by the Pennsylvania Department of Environmental Protection. Mr. Ballas asserts that Alverda's activities damaged his property.

Within two weeks of receiving Mr. Ballas's complaint, the Department assigned a Mine Inspector Supervisor and a Mining Inspector to investigate the claim. The two Department employees actually went to the site and held a meeting with "Permittee Matt Polenik and subcontractor representative Tim Howard." Page 1 of the Department's letter of December 24, 2008 to Mr. Ballas. After discussing and reviewing the matter with the coal mining company and its subcontractor, the Department reached a decision adverse to Appellant. The Department's mining supervisor advised Mr. Ballas that "our office feels that the mining company and its approved subcontractor Britt Energies, Inc. took adequate precautions and due

diligence to protect the structures by maintaining an approximate twenty foot barrier and installing a berm around the buildings. It is also our understanding that the matter has been turned over to the mining companies' insurance company for investigation. Any damage claims are considered a civil matter between the landowners and the Permittee and/or their insurance carrier." *Id.* The letter concludes that the Department considered the matter closed, would take no further action, and advised Mr. Ballas of his appeal rights "to appeal this action" of the Department to the Pennsylvania Environmental Hearing Board.

The Department of Environmental Protection now takes the position, which is endorsed by the Majority Opinion, that this decision reached after consultation and coordination with one of the parties and its representative, *i.e.*, the coal company and its subcontractor, and in the absence of the affected party, *i.e.*, Mr. Ballas, is not reviewable by this Board.

As previously stated in my dissenting opinion in *Law v. Department of Environmental Protection*, 2008 EHB 213, 221-222, prosecutorial discretion at its core is a doctrine of separation of power founded on the belief that a criminal prosecutor has very broad discretion in deciding whether to charge a person with a crime. I continue to believe it has very limited, if any, application to Board proceedings.

The Pennsylvania Environmental Hearing Board Act makes no mention of prosecutorial discretion. 35 P.S. Section 7511 *et. seq.* Instead, it contains broad language declaring that "The Board has the power and duty to hold hearings and issue adjudications ...on orders, permits, licenses or decisions of the Department." 35 P.S. Section 7514(a). Moreover, although "[t]he Department may take an action initially without regard to 2 Pa. C.S. Ch. 5 Subch. A, but no action of the Department adversely affecting a person shall be final ... *until the person has had the opportunity to appeal the action to the Board under Subsection (g).*" 35 P.S. Section

7514(c). (emphasis added). Subsection (g) states that hearings of the Board shall be conducted in accordance with our Rules of Practice and Procedure. Our Rules of Practice and Procedure accord substantive due process rights to the parties.

In other words, the Department upon receipt of a claim can investigate it by just meeting with one of the parties and its representatives and that at this stage there basically are little if any due process safeguards. Those come into play if an action of the Department of Environmental Protection is appealed to this Board.

Under the definition section of the Pennsylvania Administrative Law and Procedure Act, 2 Pa. C.S.A. Section 101, an adjudication is defined as:

Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

Under the Pennsylvania Environmental Hearing Board's Rules of Practice and Procedure definition section, an "action" is defined as follows:

An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.

25 Pa. Code Section 1021.2(a).

The Commonwealth Court decision in *Goldstein v. Pennsylvania Department of Insurance*, 745 A.2d 1271, 1273 (Pa. Cmwlth. 2000), is instructive. This case arose from the insured's complaint to the Pennsylvania Department of Insurance that the insurance carrier, USAA, had changed its payment policies regarding Mr. Goldstein. Mr. Goldstein was paying his premium in installments. However, he was frequently delinquent and so USAA changed his plan from installment payments to one full payment of the annual premium. Mr. Goldstein

complained to the Pennsylvania Insurance Department that this was unfair and that he was harmed by this change.

Upon receipt of the complaint the Pennsylvania Insurance Department investigated the matter. It found that the USAA payment policy as applied to Mr. Goldstein was a reasonable application of the insurer's payment policies. The Insurance Department went on to advise Mr. Goldstein in a letter that the Insurance Department does not have the authority to regulate an insurer's reasonable application of its payment policies unless the insurer unfairly discriminates among individual policy holders. Mr. Goldstein appealed.

The Pennsylvania Commonwealth Court found the letter was an appealable action as it constituted a final agency action and adjudication.

In our view, the letter constitutes an adjudication, either as a determination of the merits of the complaint or a dismissal on jurisdictional grounds. Because the Insurance Department apparently investigated the merits of Goldstein's complaint and found the insurer's actions to be justified we proceed to the merits of Goldstein's appeal.

745 A.2d at 1273.

The Pennsylvania Department of Environmental Protection likewise investigated the complaint lodged by Mr. Ballas in this case. It also reached a decision on the merits of Mr. Ballas's claim. Therefore, that action announcing its decision is an appealable action as it constituted a final agency action. That is one of the fundamental reasons I disagree with the Majority Opinion. Regardless of the merits of this Board (or a court for that matter) applying the non-statutory and non-regulatory doctrine of prosecutorial discretion, what the Department did here is not any type of exercise of prosecutorial discretion. A careful review of the cases involving prosecutorial discretion reveals the policy reasons favoring the application of the

prosecutorial discretion doctrine.¹ Putting aside the notion that policy reasons should more appropriately be applied by the Pennsylvania General Assembly, these policy reasons include conserving agency assets, whether the agency has enough resources to undertake the action, and whether it will waste agency resources by acting against mere technical violations. Here, the Department, even in its view, fully investigated the complaint and reached a decision on the merits of the complaint.

The Department did not go through any of the policy analysis set forth in the decisions discussing prosecutorial discretion. Therefore, none of these considerations are relevant as this is not an instance of prosecutorial discretion. Instead, under the Environmental Hearing Board Act and our Rules of Practice and Procedure, the Department of Environmental Protection has taken an action which is a “decision, determination or ruling” which affects Mr. Ballas’s property rights. As allowed by the Environmental Hearing Board Act, the Department can take this initial decision without affording Mr. Ballas any of the due process and procedural safeguards set forth in 2 Pa. C.S. Chapter 5 Subch. A and guaranteed and protected by the Environmental Hearing Board Act and our Rules of Practice and Procedure because of Mr. Ballas’s right to appeal the decision to the Environmental Hearing Board. According to the Department it reached its decision after consulting with the coal company and the coal consultant. Mr. Ballas was not given any right to question the coal company or its representative. Now the Department says the decision is unreviewable!

¹ See e.g., *D.E.L.T.A. Rescue v. Bureau of Charitable Organizations*, 979 A.2d 415 (Pa. Cmwlth. 2009); *In Re: Nominating Petition of Marie deYoung*, 900 A.2d 954 (Pa. Cmwlth. 2006); *DEP v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005); *Commonwealth v. Sanico*, 830 A.2d 621 (Pa. Cmwlth. 2003); *Pennsylvania Association of Independent Insurance Agents v. Foster*, 616 A.2d 100 (Pa. Cmwlth. 1992); *In Re: Judith Frawley, L.P.N. et al v. Downing*, 364 A.2d 748 (Pa. Cmwlth. 1976); In addition, the Commonwealth Court has relied on the seminal United States Supreme Court case of *Heckler v. Chaney*, 470 U.S. 821 (1985).

I completely agree with the Department's contention "that 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 686, 687 (Pa. Cmwlth. 1998)." Page 3 of the Department's Memorandum of Law. I part company with both the Department and my colleagues as I believe the Department's letter to Mr. Ballas constitutes a decision, determination or ruling and is appealable as of right under the provisions of the Environmental Hearing Board Act. Indeed, the Majority has to resort to a non-statutory and non-regulatory analysis employing the Board created doctrine of prosecutorial discretion to avoid the clear mandate of both the Environmental Hearing Board Act and the Administration Agency Law. I find no support for the position in the Pennsylvania Constitution, statutes, or regulations.

The Department of Environmental Protection cites *Pequea Township, supra*, 716 A.2d 678 (Pa. Cmwlth. 1998) in its Memorandum of Law. I certainly agree that *Pequea Township* and *Warren Sand & Gravel Company, Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975) are the seminal appellate cases regarding the jurisdiction of the Pennsylvania Environmental Hearing Board. These cases emphasize our duty and responsibility to hold *de novo* hearings and in the proper circumstance substitute our judgment for the Department's. Indeed, *Pequea Township* involved the Department of Environmental Protection's denial of a developer's private request. The Environmental Hearing Board, on remand, determined that the Department erred by denying the developer's private request and by failing to order the township to adopt the developer's planning module on the basis that the township's sewage plan was inadequate to meet the developer's sewage needs. The township and Department both appealed saying the Board could not issue such an order.

Commonwealth Court strongly disagreed with the Department in affirming the Board.

The language of the Court is crystal clear:

As set forth in *Warren Sand & Gravel*, where the Board finds, based on the evidence presented at hearing, 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. So although the Board stated that it was "acting in equity," we find this to be harmless error as the Board was acting within the scope of its authority in modifying the Department's action and directing the Department as to the proper action to be taken.

716 A.2d at 686, 687.

The Pennsylvania Environmental Hearing Board reviews all Pennsylvania Department of Environmental Protection final actions *de novo*. *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978) Judge Krancer, in the oft-cited case of *Smedley v. DEP*, 2001 EHB 131, clearly set forth our duty in every case:

We must fully consider the case anew and we are not bound by prior determinations made by the Department of Environmental Protection. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "[d]e novo review involves full consideration of the case anew. The [Environmental Hearing Board], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, 2001 EHB 19, 32.

2001 EHB at 156.

The major legal underpinning of the Majority Opinion's prosecutorial discretion argument, according to the Majority Opinion, is the Commonwealth Court's decision in *Schneiderwind, supra*. However, the Majority Opinion fails to recognize, yet alone discuss, the recent Environmental Hearing Board Rule changes, which just recently became effective,

together with the official Comment added to our revised Rule. See 25 Pa. Code Section 1021.51(h)(i)(j) and accompanying Comment. Indeed, the mining company involved in this matter pursuant to this section of the Board's rules may intervene as of right following service of the notice of appeal "or notice by the Board that the recipient's rights may be affected by an appeal."²

Schneiderwind, supra, involved a complaint filed by a farmer alleging that a quarry which operated pursuant to a permit issued by the Department of Environmental Protection was diminishing the water supply to his farm. The Department investigated the complaint and concluded that the action of the quarry, Delaware Valley Concrete Co., Inc., did not diminish Mr. Schneiderwind's water supply. Mr. Schneiderwind appealed the decision to the Board. Although Delaware Valley Concrete was surely aware of the appeal it chose not to intervene but, instead, decided to lie in wait in the legal underbrush to see what the outcome at the trial court would be.

The Department mounted a full defense and after hearing expert testimony from both sides, Judge Miller, the trial judge and writing for the entire Board, found that "the Department's investigation of the Appellant's water loss complaint was insufficient and its conclusion that the lowering of the water table by the quarry operation did not cause the Appellant's crop loss was in error." 867 A.2d at 726. The Board sustained the appeal. At that point, only after the decision not to its liking was rendered, Delaware Valley Concrete sprang from the sidelines and joined in the appeal taken by the Department of Environmental Protection to the Board's decision. The Commonwealth Court, which can only reverse Board decisions if they are not supported by

² There is no indication on the record that the Appellant, Department, or the Board provided notice to the coal company of this Appeal. The Board can easily do so. Moreover it is beyond the pale to believe that the coal company is not well aware of this appeal and is closely monitoring the case.

substantial evidence or an error of law or constitutional violation, was in a legal quandary. The Board's adjudication was clearly supported by substantial expert testimony. Therefore, the Commonwealth Court, which was clearly upset by the fact that the Board decided the case even though Delaware Valley Concrete freely chose not to intervene, reversed the Board. The Commonwealth Court based its decision on the fact that Mr. Schneiderwind could have pursued an action in Common Pleas Court. Moreover, it forcefully cited Section 504 of the Administrative Agency Law, 2 Pa. C.S. Section 504, which provides that "no adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard." The Commonwealth Court scolded the Board.

the Board's determination of liability in the *absence of proof of notice* and an opportunity for Delaware Valley to be heard ignores the rule stated in 2 Pa. C.S. Section 504, which makes these elements essential to a valid agency adjudication. In addition, it offends basic principles of equity and due process.

867 A.2d at 727-728.

We also note that the *Schneiderwind* Court actually reigned in prosecutorial discretion in a very important way. The Commonwealth Court in *Schneiderwind* specifically recognized a very substantial and important limitation on the cloak of prosecutorial discretion. The Court was careful to note that "[a]bsent some averment that the refusal to prosecute was tainted by some corruption, such a decision is generally not reviewable." 867 A.2d at 727. So, at the end of the day, even *Schneiderwind* does not stand for "absolute" prosecutorial discretion.

Schneiderwind is a classic case of bad facts make bad law. That the Concrete Company could have intervened in the case may not have received full play in the calculus of the case once it left here and got to the Commonwealth Court. Obviously, the absent party had no incentive to

mention that. On reflection we find it hard to believe that the game of “heads I win, tails you lose” which the intentionally absent party played on Mr. Schneiderwind would be countenanced by the Commonwealth Court or any other court for that matter.

Now the case is even clearer for declining to take the off-ramp of prosecutorial discretion to squelch a fairly brought case than it was when *Schneiderwind* was decided. The Pennsylvania Environmental Hearing Board, amended its Rules of Practice and Procedure, as a direct result of the admonition and directive of Commonwealth Court, to now provide the legal mechanism for providing notice to parties such as the coal company in this case so that it may intervene as of right and fully participate in the hearing.³ The Board or any party, can provide notice to the coal company which can then intervene and take advantage of its right to be heard.

Turning to the case at bar, it is obvious that the coal company and its consultant played a substantial role in the Department’s initial decision. Due process certainly affords the coal company the right to intervene as a party and our Rules now provide every avenue for notice and opportunity for them to do so. We would welcome their participation. Moreover, if after notice to intervene as of right, the coal company fails to intervene it seems it would be a gross injustice to all involved and does violence to the Rules to allow them to wait in the legal underbrush like Delaware Valley Concrete, and then emerge if the case is lost and falsely put on the frayed cloak of a victim before the Commonwealth Court. *See* Official Comment to 25 Pa. Code Section 1021.51. It is even a bigger injustice to deny at this stage of the proceedings, Mr. Ballas’s right under the Environmental Hearing Board Act to seek review of the Department’s action.

³ An argument can be made that pursuant to 2 Pa. C. S. Section 504 the Board could order that a party such as the coal company in this case was automatically a party in the case.

In summary, I would deny the Department's Motion to Dismiss. I would issue an Order and serve it on the coal company providing it with notice of this appeal and affording it the opportunity to intervene as of right.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



MICHAEL L. KRANCER
Judge

DATED: December 29, 2009