Environmental Hearing Board

Adjudications
and
Opinions

1991

Volume III

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COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1991

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Member .....TERRANCE J. FITZPATRICK

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FORWARD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1991.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources 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 Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, upgraded the status of the Board to an independent, quasi-judicial agency and expanded the size of the Board from three to five Members. The jurisdiction of the Board, however, is unchanged by the Environmental Hearing Board Act; it still is empowered "to hold hearings and issue adjudications... on orders, permits, licenses or decisions" of the Department of Environmental Resources.

1991

ADJUDICATIONS

OPINIONS AND ORDERS

1991 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
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M. DIANE SMITH
SECRETARY TO THE BO

POWER OPERATING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 91-222-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 20, 1991**

OPINION AND ORDER SUR
MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

The Department of Environmental Resources' (DER) motion to dismiss will be treated as a motion for judgment on the pleadings where the Appellant's notice of appeal fails to state a claim upon which relief can be granted. The Appellant argues that DER should not have issued a compliance order requiring it to submit a proposal to treat an acid mine discharge, because the Appellant and DER had previously agreed that DER would consider the Appellant's proposal to conduct remining as a means of abating the discharge. The Board cannot grant effective relief to Appellant because the Appellant has submitted its remining proposal to DER in response to the compliance order, and DER has not yet acted upon that proposal.

OPINION

This is an appeal by Power Operating Company, Inc. (Power) from a compliance order issued by DER on April 25, 1991. In this compliance order, DER ordered Power to submit a proposal to treat an acid mine discharge

allegedly emanating from Power's surface mine site - known as the "Vaught Operation" - in Decatur Township, Clearfield County. The fundamental objection raised in Power's notice of appeal is that it was improper for DER to issue the compliance order because DER and Power had agreed, on January 22, 1991, that Power would submit a proposal to abate this discharge by reinstituting mining of the Lower Kittanning coal seam[1] in order to remove the potential sources of the acid mine drainage.

Power submitted a petition for supersedeas and a motion for expedited discovery along with its appeal. On June 5, 1991, DER filed a "motion to dismiss and response to Appellant's petition for supersedeas and motion for expedited discovery." Power submitted a reply to DER's motion on June 7, 1991. This Opinion and Order addresses DER's motion to dismiss.

In its motion, DER argues, first, that the Board lacks jurisdiction to enforce the January 22, 1991 agreement between DER and Power. DER also argues that the appeal and the petition for supersedeas are not ripe for review, because Power has now submitted its remining plan as its proposal to treat the discharge under the compliance order, and that DER is now reviewing the plan. Finally, DER asserts that Power's petition for supersedeas and motion for expedited discovery are premature in that DER has not yet acted upon the remining plan.

In its reply, Power argues that the Board has jurisdiction to determine whether issuance of the compliance order constituted an abuse of DER's discretion in light of the alleged agreement. Power also argues that its appeal is ripe because the compliance order places different requirements

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[1] Power originally had authority to mine this seam, but it relinquished this right in a consent order and agreement dated October, 1989. (Exhibit B to notice of appeal.) In the consent order, Power admitted that it did not have sufficient equipment on the site to complete reclamation (para. J).

upon Power than the January 22, 1991 agreement, and Power will face civil and criminal penalties if it does not comply with the compliance order. Finally, Power argues that its petition for supersedeas and motion for expedited discovery are not premature, because Power needs to discover, and place on the record at a hearing, the facts regarding the agreement between DER and Power.

Evaluating these arguments, we agree with DER that this matter should be dismissed, although our reasoning differs somewhat from DER's. It is clear to us that Power's notice of appeal fails to state a claim upon which relief can be granted, therefore, we will grant DER judgment on the pleadings. See, Borough of Dunmore v. DER, 1990 EHB 689.

The theory underlying Power's appeal is that DER acted in an arbitrary and capricious manner by issuing the compliance order after it had agreed to review a proposal by Power to deal with the discharge by reinstituting mining of the Lower Kittanning seam. The flaw which is obvious on the face of this argument is that DER's compliance order did not specify what type of proposal Power should submit to treat the discharge; therefore, Power was free to submit its remining proposal in response to the compliance order. And this is exactly what Power did. Although Power alleges in its notice of appeal that the compliance order and the alleged agreement subject it to "conflicting legal obligations," the only specific conflict it refers to relates to due dates: it filed the remining plan pursuant to the alleged agreement on May 21, 1991, and it filed the remining plan in response to the compliance order on May 24, 1991 (notice of appeal, para. 21). This trivial difference hardly rises to the level of a conflict. Since Power wants DER to review its remining proposal, and this is precisely what DER is doing, we fail

to see how we can, as a practical matter, grant any relief to Power.[2]

Perhaps Power's real concern is stated in paragraph 15 of its notice of appeal:

> While the DER has not specifically indicated that it would not accept the Remining/Abatement Plan as a response to its Compliance Order the fact that such an Order was issued after the DER had already agreed to accept the Remining/Abatement Plan indicates that the DER has rejected such a plan prior to review, contrary to its own policy and past practice respecting similarly situated parties.

Power's claim that the compliance order indicates that DER has pre-judged its remining plan is not a claim upon which relief can be granted. Under Power's theory, even if we reversed the compliance order, DER would still have to review the remining plan (pursuant to the alleged agreement), and it still might reject the plan. Power will only be able to state a claim upon which relief can be granted if DER rejects Power's remining plan.

Finally, we note that Power has raised various constitutional arguments in its notice of appeal (Paragraphs 25, 27-29, 32). These arguments were not addressed in either DER's motion to dismiss or in Power's reply. However, our reasoning stated above - that we lack the ability to grant effective relief to Power - also disposes of these arguments.

Since we have determined that DER is entitled to judgment on the pleadings, we need not address Power's petition for supersedeas or motion for expedited discovery.

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[2] Power states in paragraph 15 of its notice of appeal that "[t]he single issue before this Board is that since DER already agreed to review the Remining/Abatement Plan which includes abatement of the Roselyn discharge then that Remining/Abatement Plan should be reviewed instead of under the Compliance Order ... ." This is certainly a puzzling statement in light of Power's submission of the remining plan in response to the compliance order.

ORDER

AND NOW, this 20th day of June, 1991, it is ordered that judgment on the pleadings is granted in favor of the Department of Environmental Resources, and the appeal of Power Operating Company, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD[3]

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 20, 1991

cc: **Bureau of Litigation**
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[3] Chairman Maxine Woelfling did not participate in this decision.

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BOARD

NEW HANOVER CORPORATION	:	**EHB Docket No. 91-126-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 21, 1991

OPINION AND ORDER SUR
PETITION TO INTERVENE

By Maxine Woelfling, Chairman

Synopsis

A petition to intervene in the denial of an earth disturbance permit application is denied. Since the basis for denial of the permit is purely legal, the presentation of scientific and technical evidence is irrelevant. The Department of Environmental Resources (Department) can adequately protect the petitioner's interests.

OPINION

This matter was initiated with the March 28, 1991, filing of a notice of appeal by New Hanover Corporation (Corporation) challenging the Department's March 4, 1991, denial of an application for an earth disturbance permit.[1] The Department denied the application relating to the Corporation's proposed landfill in New Hanover Township, Montgomery County, based upon the

[1] The controversy between the Department and the Corporation concerning this earth disturbance permit application is also the subject of the Corporation's appeal at Docket No. 90-379-W.

Corporation's inability to demonstrate a need for this permit due to the Department's prior denial of the Corporation's application for a modification of its solid waste permit. The Corporation alleges that the Department's action was arbitrary, capricious, and taken in bad faith; was a violation of its constitutional rights of due process and equal protection; and made it impossible to obtain the necessary approvals and permits to complete the landfill.

On May 2, 1991, New Hanover Township (Township) filed a petition to intervene, contending that its involvement in a related appeal of the denial of the solid waste permit for the landfill at Docket No. 90-225-W warrants its intervention here. The Township argues that it has an interest in this matter, since the proposed landfill will affect the safety, health, and welfare of its citizens and that this interest is not adequately represented by the Department, since the Township has distinct knowledge of local conditions, the Department may not present any scientific or technical evidence, and because the Township is the Department's adversary in a related appeal at Docket No. 88-119-W. The Township proposes to present expert testimony from several named witnesses, but gives no detail regarding the substance of this testimony. Finally, the Township asserts that it may lose rights and be prejudiced in the related appeals in which it is involved if intervention is not granted here.

On May 13, 1991, the Corporation filed its answer opposing the petition, arguing that the denial of the solid waste permit which is the subject of Docket No. 90-225-W is not relevant to the instant appeal and that the Township failed to establish that its interests are not adequately represented by the Department, concluding that the Township's involvement would only broaden and confuse this appeal.

On May 13, 1991, the Department filed its response to the petition, supporting the petition if intervention is limited to the bases for denial outlined in the Department's March 4, 1991, letter. Specifically, the Department contends scientific and technical evidence is not relevant to this appeal.

As we have stated on numerous occasions, intervention in a matter pending before the Board is within the discretion of the Board. The prospective intervenor has the burden of demonstrating that it has a relevant interest that cannot be adequately represented by the existing parties and that it will be able to present relevant evidence to the Board. Intervention will not be allowed by the Board where it will expand the scope of an appeal or impede the Board's deliberations. See 25 Pa.Code §21.62 and New Hanover Corporation v. DER, EHB Docket No. 90-558-W (Opinion issued May 14, 1991).

The issue before the Board in this appeal is a narrow one - whether the Department abused its discretion in denying the Corporation's earth disturbance permit application because a re-permitting application under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, for a proposed landfill at this same site was denied. While the Township has not identified what scientific and technical evidence it intends to present, that deficiency in its petition is immaterial, for this appeal involves a purely legal issue which can be decided by the Board without resort to any scientific or technical evidence.

The Township has failed to establish that its interests will not be adequately represented by the Department. Although the Township asserts that the Department may not introduce scientific or technical evidence, as explained earlier, such evidence is not germane to this appeal and would only broaden and confuse the issues. Again, this appeal involves purely legal

questions requiring interpretation of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the rules and regulations promulgated thereunder. To the extent that the Township has a distinct interest in the administration of the applicable rules and regulations, the Department is best able to protect that interest.

The Township alleges that the outcome in this appeal may affect its interests in the other appeals concerning the Corporation's landfill which are pending before the Board. While the Township cited several of these other appeals, it did not explain the link between them and the instant appeal, except by asserting that these other appeals may be affected. As we have noted in several of the intervention motions in related appeals, each petition for intervention must be assessed in the context of the particular appeal at which it is filed. The fact that a prospective litigant is involved in multiple appeals relating to a facility, some of which place it in an adversarial position against the Department, does not, in and of itself, establish that the Department's representation would be inadequate in all cases. New Hanover Corporation v. DER, EHB Docket No. 90-558-W (Opinion issued May 14, 1991), and New Hanover Corporation v. DER, EHB Docket No. 90-294-W (Opinion issued May 29, 1991).

O R D E R

AND NOW, this 21st day of June, 1991, it is ordered that New Hanover Township's petition to intervene is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: June 21, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

CHEVRON U.S.A. INC.	:	
	:	
v.	:	**EHB Docket No. 85-410-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 24, 1991**

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

By Robert D. Myers, Member

Syllabus

In an appeal by Chevron from a NPDES permit issued by DER for a refinery along the Schuylkill River in Philadelphia, the Board holds that credits for intake water pollutants provided for in 40 CFR §122.45(g) are required to be granted by DER since there are no more stringent requirements under Pennsylvania law. In the absence of Pennsylvania statutory or regulatory provisions governing the credits, DER is required to administer them and calculate them in accordance with 40 CFR §122.45(g). Credits must be allowed on a pound-for-pound basis with respect to parameters based on mass units. Chevron has demonstrated its entitlement to credits except with respect to generic pollutants.

The Board also holds that DER's wasteload allocation for phenolic compounds was erroneous because of the data used in portions of the mass balance equation and because of the failure to consider tidal action and decay. Finally, the Board holds that DER was justified in establishing one internal monitoring point but not another.

The Board remands the proceeding to DER for action within 90 days.

Procedural History

On October 4, 1985 Chevron U.S.A. Inc. (Chevron) filed a Notice of Appeal from the issuance by the Department of Environmental Resources (DER) on September 18, 1985 of National Pollutant Discharge Elimination System (NPDES) Permit No. 0011533 (1985 Permit) for discharges from Chevron's oil refinery into the Schuylkill River in the City of Philadelphia.[1] With its Notice of Appeal, Chevron also filed a Petition for Supersedeas. After a hearing before Anthony J. Mazullo, Jr., then a Member of the Board, a Supersedeas Order was issued on October 29, 1985 suspending the 1985 Permit, reinstating the prior Permit (with some exceptions), staying all proceedings and directing the parties to meet and discuss the issues raised in the appeal.

During the months that followed, the parties met, exchanged data, discussed the issues but failed to reach a settlement. The stay was lifted on April 22, 1987 and the parties engaged in discovery. Chevron filed its pre-hearing memorandum on October 2, 1987 and DER filed its on November 18, 1987.

A hearing on the merits was held in Harrisburg on May 14, 15 and 16, 1990 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented testimony and exhibits in support of their positions. During the hearing, Judge Myers admitted into the record (over Chevron's objection) three DER exhibits that had not been prefiled as required by the Board's Pre-Hearing Order No. 2, but

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[1] This oil refinery was owned previously by Gulf Oil Corporation (Gulf) and the 1985 Permit was issued in Gulf's name. Chevron became the owner of the oil refinery through its acquisition of Gulf. While the precise date of the acquisition has not been provided, it occurred apparently at or about the time the Permit was issued.

granted Chevron the option of requesting additional hearing time for the purpose of presenting rebuttal evidence with respect to the exhibits. Such a request was made and a fourth day of hearings was held on June 28, 1990.

Chevron's post-hearing brief was filed on September 10, 1990;[2] DER's on October 15, 1990. Chevron filed a reply brief on October 25, 1990. The record consists of the pleadings, a hearing transcript of 490 pages and 36 exhibits. Some exhibits are depositions that have their own exhibits. Chevron had objected to exhibit 8 of James Wentzel's deposition and exhibits 5 and 11, as well as specific portions, of Peter Slack's deposition. These objections are overruled. The exhibits submitted by DER in its letter of July 11, 1990 (Kohut 4, 10 and 12) are not admitted.

After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Chevron is a corporation that operates an oil refinery (Refinery) at 30th Street and Penrose Avenue, Philadelphia, Pennsylvania 19101 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and has the responsibility for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations adopted pursuant to said statute. DER also administers for Pennsylvania the NPDES provisions of the federal Clean Water Act (CWA), 33 U.S.C. §1251 *et seq.*

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[2] Chevron briefed only three issues - (1) Chevron's eligibility for, and DER's method of calculating, credits for pollutants in intake water; (2) DER's waste load allocation for phenolic compounds; (3) the requirement for internal monitoring. All other issues are deemed to have been waived.

3. On November 30, 1979 DER issued NPDES Permit No. 0011533 (1979 Permit) to Gulf for discharges from the Refinery (Notice of Appeal).

4. In response to an application, DER on September 18, 1985 issued the 1985 Permit to Gulf for discharges from the Refinery (Notice of Appeal).

5. Chevron filed a Notice of Appeal on October 4, 1985 challenging certain aspects of the 1985 Permit.

6. A Board Order, dated October 29, 1985, suspended the 1985 Permit, reinstated the 1979 Permit (with some exceptions), stayed all proceedings and directed the parties to meet and discuss the issues raised in the Notice of Appeal.

7. The Refinery uses water from the Schuylkill River for a variety of purposes ranging from production (where the water comes into contact with refinery processes) to cooling (where the water has no contact with refinery processes) (N.T. 17-19).

8. Schuylkill River water, along with stormwater and ballast water (water used to ballast tankers and which is displaced when tankers are loaded with refinery product), go through Chevron's waste water treatment facilities (treatment plant) where it receives tertiary treatment before being discharged into the Schuylkill River at discharge point 015 (N.T. 11-17, 26-27; Exhibits A-35[3] and A-36).

9. At the #4 Separator, process water is separated from river non-contact cooling water. The former is sent through the treatment plant and discharged at discharge point 015. The latter is discharged at discharge point 001 (N.T. 113-114; Exhibit A-35).

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[3] Chevron's exhibits are prefixed with an "A"; DER's exhibits are prefixed with a "C".

10. At the #3 Separator, once-through cooling water is separated from storm water and discharged at discharge point 002 (N.T. 115; Exhibit A-35).

11. The 1985 Permit, *inter alia*, set effluent limits for discharge point 015, imposed a monitoring requirement and set effluent limits with respect to the water leaving the #4 Separator and discharging at discharge point 001 (monitoring point 101), and imposed a monitoring requirement and set effluent limits with respect to the water leaving the #3 Separator and discharging at discharge point 002 (monitoring point 102) (N.T. 20-21, 112-115; Exhibit A-17).

I. Credits for pollutants in intake water

12. The effluent limits contained in the 1985 Permit for discharge point 015 are net limits arrived at by making adjustments for those portions of the discharge composed of ballast water, storm water and process water (N.T. 21-24; Exhibit A-17).

13. The process water adjustment is intended to give credit for pollutants present in the intake process water supply and not removed in the treatment plant (N.T. 24-27; Exhibit A-17).

14. Legal authority for process water credits is derived from regulations adopted by the U.S. Environmental Protection Agency (EPA) pursuant to the CWA, specifically 40 CFR §122.45 (N.T. 29-31).

15. Process water credits apply only to technology-based effluent limits. This includes all of the parameters listed in the 1985 Permit for discharge point 015 except phenolic compounds and free cyanide which are water quality-based (N.T. 47-48, 76; Wentzel dep.[4] 26-33; Slack dep. 31-32;

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[4] Depositions of James Wentzel (June 12, 1987), Peter Slack (August 25, 1987) and Richard L. Hinkle (August 24, 1987), together with certain exhibits footnote continued

Exhibit A-7A).

16. Process water credits are to be calculated under the 1985 Permit by determining the mass volume of each parameter in the discharge and applying against it the percentage of that parameter not removed by the treatment plant. The resulting figure represents the credit for that parameter and is applied against the mass volume in the discharge. For example, if the mass volume in the discharge is 100 pounds per day (lbs/day) and the treatment plant is 90% efficient with respect to that parameter, the credit would be 100 lbs/day x 10% = 10 lbs/day. This credit (assuming it did not exceed the mass volume in the intake water) would then be applied against the mass volume in the discharge, 100 lbs. day - 10 lbs/day = 90 lbs./day (N.T. 28-29, 36-42; Slack dep. 29-31; Exhibits A-1 and A-17).

17. In reacting to a draft version of the 1985 Permit in a letter dated February 19, 1985, Gulf complained that the proposed procedure for calculating the process water credit differed from the method employed in the 1979 Permit (which allowed a pound-for-pound discharge credit for every parameter present in the intake process water supply) and would allow only minimal credit. Gulf went on to explain its concerns over the ability of its treatment plant to remove total suspended solids (TSS) and sulfides present in the river water; and predicted a "significant increase" in the number of violations for TSS and sulfides if full credit were not given (Exhibit A-3).

18. The calculation method proposed in the draft 1985 Permit was based upon 40 CFR §122.45(h) and Chapter 5 of DER's Technical Guidance for the Development and Specification of Effluent Limitations and Other Conditions in

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continued footnote
are part of the record. References to them are designated "Wentzel dep.", "Slack dep." and "Hinkle dep.", respectively, followed by the relevant page numbers.

NPDES Permits, August 1983 (Technical Guidance Manual) (N.T. 30; Slack dep. 13-14, 40; Hinkle dep. 74-76; Exhibits A-2, A-23A and A-25).

19. On or about May 13, 1985 Gulf's legal counsel advised DER that 40 CFR §122.45 had been substantially rewritten and that the relevant provision was now at 40 CFS §122.45(g). Legal counsel insisted that DER's calculation method was abandoned in the new provision and that a discharger was entitled to full credit if it could show that its treatment plant could meet the effluent limits absent the pollutants in the intake water (Exhibit A-4).

20. DER's Peter Slack, whose duties included keeping the Technical Guidance Manual up to date, became aware of the revision to 40 CFR §122.45 shortly after it became effective on September 26, 1984. Although he discussed the revision (along with other changes) in an analysis prepared in November 1984, he did not make any changes to the Technical Guidance Manual because he was of the opinion that no changes were required (Slack dep. 10-17 and Exhibit 2; Exhibit A-23).

21. After discussing the revision to 40 CFR §122.45 with a representative of EPA and being informed that it did not change the calculation method, DER rejected Gulf's interpretation in a letter dated August 22, 1985. The 1985 Permit, as issued on September 18, 1985, retained the calculation method set forth in the draft version of the permit (N.T. 398-399; Exhibits A-6 and A-17).

22. Following the Board's October 29, 1985 Order directing the parties to meet and discuss the issues raised in the appeal, Chevron prepared and submitted to DER a tabulation covering the period from October 1, 1985 through May 31, 1986 and revealing that, in the absence of pollutants in the intake process water supply, the effluent at discharge point 015 would meet the effluent limits of the 1985 Permit (N.T. 49-65; Exhibit A-31).

23. Based on the tabulation submitted by Chevron, DER's George E. Kohut concluded that, for the 8-month period covered, Chevron's treatment plant was able to meet effluent limits for TSS and biochemical oxygen demand (BOD) with or without the presence of pollutants in the intake process water supply. Consequently, he concluded that Chevron had not demonstrated a need for any process water credits (N.T. 374-383, 409-413; Exhibits A-31, C-3, C-4 and C-5).

24. Data derived by Chevron from Discharge Monitoring Reports (DMRs), required to be completed and filed with DER, covering the period January 1, 1984 through December 31, 1989, reveal that:

(a) there were 8 occasions when process water credits (calculated on a pound-for-pound basis) would have been necessary, in whole or in part, to meet either daily maximum or monthly average effluent limits set by the 1985 Permit for TSS at discharge point 015;

(b) there were 15 occasions when process water credits (calculated on a pound-for-pound basis), even though allowed in full, would have been insufficient to meet either daily maximum or monthly average effluent limits set by the 1985 Permit for TSS at discharge point 015;

(c) there were 7 occasions (all in 1984 and 1985) when process water credits (calculated on a pound-for-pound basis), even though allowed in full, would have been insufficient to meet either daily maximum or monthly average effluent limits set by the 1985 Permit for BOD at discharge point 015; and

(d) the number of occasions when process water credits would be needed is greater with respect to the effluent limits set by the 1985 Permit than with respect to the less stringent effluent limits set by the 1979 Permit (N.T. 462-477; Exhibit A-47).

25. In a letter to DER in January 1987, Chevron stated that the "levels of TSS and BOD found in comparative samples demonstrates that the constituents of each generic measure can be defined as insignificant, rather than similar or dissimilar" (N.T. 125, emphasis in original).

II. Waste load allocation for phenolic compounds

26. The 1985 Permit set the following effluent limits for phenolic compounds at discharge point 015: daily maximum - 10.4 lbs/day, average monthly - 4.2 lbs/day (Exhibit A-17).

27. These effluent limits are water quality-based and were derived from a waste load allocation. Since they were more stringent than the technology-based limit of 20.5 lbs/day daily maximum, the water quality-based limits were used (N.T. 67, 76; Wentzel dep. 24, 28; Hinkle dep. 83-85; Exhibit A-2).

28. A waste load allocation seeks to preserve water quality for protected uses by determining the allowable level of a pollutant (through a mass balance equation) and then allocating it among the dischargers (N.T. 77, 143).

29. The waste load allocation employed the following formula:

$$\frac{SF\ (goal-bkgd)}{WF} = Y$$

SF = stream flow in cubic feet per second (cfs)

goal = concentration of the pollutant in parts per billion (ppb) permitted for the protected use in 25 Pa. Code Chapter 93

bkgd = background stream concentration of pollutant in ppb

WF = combined waste flows of dischargers in cfs

Y = net concentration limit of pollutant in ppb to be allocated among dischargers

(N.T. 79-82; Wentzel dep. 47-48; Exhibits A-7A and A-11).

A. Stream flow (SF)

30. The stream flow (SF) required to be used in the formula is equal to "Q7-10", defined in Chapter 93 of DER's regulations to be the lowest 7 consecutive-day average flow that occurs once in 10 years for a stream with unregulated flow, or the estimated minimum flow for a stream with regulated flow[5] (N.T. 92-95, 103, 130, 136; Wentzel dep. 83; Hinkle dep. 18, 20).

31. The use of "Q7-10" as the stream flow (SF) in the mass balance equation is intended to provide protection during "design" low flow conditions. "Q7-10" does not reflect the lowest flows on record (N.T. 330-332).

32. DER calculated the net concentration limit for phenolic compounds at or about 14.13 lbs/day daily maximum and, after allocating it between Gulf (73.6%) and Atlantic Refining Company (Atlantic) (26.4%) in proportion to their contributions to the waste flow (WF), assigned Gulf a daily maximum limit of 10.4 lbs/day (N.T. 82-83, 296; Exhibits A-7A, A-8 and A-11).

33. Prior to issuance of the 1985 Permit, Gulf had objected to the water quality-based effluent limits for phenolic compounds, questioning the accuracy of the calculation, the determination of Gulf's contribution to the waste flow (WF) and the failure to consider the effect of tidal action at discharge point 015 (Exhibits A-3, A-4 and A-5).

34. DER determined stream flow (SF) to be 69 cfs[6] by using Q7-10 as

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[5] While Q7-10 is defined in the regulations to mean both the lowest 7 consecutive-day average flow that occurs once in 10 years and minimum flow, the term traditionally has been used only to symbolize the former. The witnesses generally used the term in its traditional sense. To distinguish the two in this Adjudication, Q7-10 will be used to signify the traditional meaning and "Q7-10" will be used to signify the regulation meaning.

[6] DER deducted 3 cfs from the 69 cfs to account for the net loss of river footnote continued

reflected in Water Resources Bulletin No. 12 for the U.S. Geological Survey (USGS) gauging station (No. 01474500) located on the right bank of the Schuylkill River about 150 feet upstream from Fairmont Dam. The Bulletin covered the years 1933 through 1972 (Wentzel dep. 83-88).

35. If DER had used data for USGS gauging station No. 01474500 up to and including the year 1984, all of which was available in 1985 prior to the date when the 1985 Permit was issued, its determination of stream flow (SF) would have been 86 cfs rather than 69 cfs (N.T. 207-214, 272-273; Exhibits A-29A through A-29F).

36. DER agrees that it should have used 86 cfs as a starting point (N.T. 385-386).

37. Stream flows (SF) of 69 cfs and 86 cfs derive from DER's use of Q7-10 without giving any consideration to whether or not the Schuylkill River in the vicinity of discharge point 015 has unregulated flows (Wentzel dep. 99, 106-107; Hinkle dep. 26).

38. According to the Delaware River Basin Commission (DRBC) Administrative Manual - Part III, Basin Regulations - Water Quality, revised to include amendments through March 10, 1980, utilized by DER in performing the mass balance equation for phenolic compounds with respect to the 1985 Permit:

> 1.20.7 "Unregulated streams" means streams where the quantity of flow, including its distribution in time or place, are not significantly altered by the activities or works of man.
>
> 1.20.8 "Regulated streams" are streams where the quantity of flow, including its

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continued footnote
water in the Atlantic Refinery. Chevron has not challenged this deduction directly (although Dr. Lawler considered the 3 cfs to be high) and we will accept it as appropriate.

distribution in time or place, are altered by the activities or works of man.

(Wentzel dep. 102-104; Exhibit A-33).

39. Following the Board's October 29, 1985 Order directing the parties to meet and discuss the issues raised in the appeal, both DER and Chevron contacted James R. Kolva, Hydrologic Data Chief at USGS's sub-district office in Malvern, Pennsylvania, and an expert in hydrology, to discuss data available on flows in the Schuylkill River. During these discussions, Kolva informed them of his opinion that the Schuylkill River is a regulated stream by reason of (a) diversions by the City of Philadelphia for drinking water purposes upstream from USGS's gauging station No. 01474500 and (b) controlled releases from upstream reservoirs, particularly Blue Marsh Lake (N.T. 100-101, 216-219, 224; Wentzel dep. 90; Hinkle dep. 30).

40. USGS data from gauging station No. 01474500 reflect the fact that the City of Philadelphia's diversions for drinking water purposes for the years 1979 through 1984 amount to 200 cfs - 300 cfs per day and that such diversions can diminish the flow at the gauging station by 50% or more during dry periods (N.T. 209-211; Exhibits A-29A through A-29F).

41. Schuylkill River flows at Philadelphia have been controlled, in one degree or another, by Still Creek Reservoir since 1933, by Blue Marsh Lake since 1979, by Green Lane Reservoir since 1956 and by Lake Ontelaunee (N.T. 209; Exhibits A-29E and A-29F).

42. Blue Marsh Lake, which (of all the lakes and reservoirs) has had the most significant effect upon flows in the Schuylkill River, is on Tulpehocken Creek, a tributary of the Schuylkill in Berks County. It is a multi-purpose facility built by the U.S. Army Corps of Engineers for flood control, water supply, water quality control, low flow augmentation and recreation (N.T. 176, 219, 275; Exhibit A-41).

43. Blue Marsh Lake has been used primarily to hold back water to reduce peak flows and to release water to increase low flows (N.T. 219).

44. Minimum releases from Blue Marsh Lake total 50 cfs - 41 cfs for conservation and 9 cfs for Western Berks Water Authority (N.T. 177-178; Exhibits A-30 and A-41.

45. DRBC is obligated by its drought emergency operating plan to keep minimum freshwater flows in the Delaware River. To meet this obligation, DRBC can request the Corps of Engineers to release additional water from Blue Marsh Lake. Releases also have been requested by DRBC to raise the level of dissolved oxygen in the Schuylkill River (N.T. 175-176; Exhibit A-41).

46. From 1979 through 1988 DRBC requested releases from Blue Marsh Lake, over and above the minimum releases, as follows:

Year	No. of days	Average Amt. of Release Over min.
1979	-0-	-0-
1980	32	94 cfs
1981	8	175 cfs
1982	-0-	-0-
1983	-0-	-0-
1984	-0-	-0-
1985	21	136 cfs
1986	7	150 cfs
1987	17	88 cfs
1988	11	86 cfs

All of these requests were honored by the Corps of Engineers (N.T. 179-187; Exhibits A-30, A-32 and A-41).

47. While the Corps of Engineers has not refused a release request from DRBC, it has the power to do so. Therefore, in times of drought the minimum releases from Blue Marsh Lake could fall below 50 cfs. (N.T. 199, 329-330, Wentzel dep. 144).

48. USGS, as a rule of thumb, considers a stream to be regulated if the flow varies (because of the activities or works of man) by more than 10% (N.T. 237).

49. The Schuylkill River is regulated at Philadelphia. While the City of Philadelphia's diversions are the most significant factor, the Schuylkill would still be regulated absent Philadelphia's diversions, because of the upstream lakes and reservoirs (N.T. 242-245).

50. Because the Schuylkill River is regulated at Philadelphia, minimum flow rather than Q7-10 should have been used as stream flow (SF) in the mass balance equation. Determining minimum flow could start with an estimate of Q7-10 on an unregulated basis, followed by additions or subtractions to account for the regulation (N.T. 225-226, 241).

51. DER's James Wentzel and Richard L. Hinkle, the persons primarily involved in making the waste load allocation in connection with the 1985 Permit, now agree that the Schuylkill River is regulated according to the DRBC definition (Wentzel dep. 107; Hinkle dep. 142).

52. Based on the testimony of Dr. John P. Lawler, an expert in civil and sanitary engineering and in the field of waste load allocations, who testified on behalf of Chevron:

(a) the Q7-10 for the Schuylkill, using the data from 1933 through 1984, is 86 cfs (see Findings of Fact 35 and 36);

(b) the existence of Blue Marsh Lake during the last 5 years of the 1933 to 1984 period had little impact on the Q7-10 of 86 cfs;

(c) the Q7-10 for Tulpehocken Creek, based on USGS records from 1965 through 1984 and with flows unaffected by Blue Marsh Lake, is 21 cfs;

(d) the minimum releases required to be made from Blue Marsh Lake into the Tulpehocken Creek is 50 cfs, a figure which exceeds the Q7-10 for Tulpehocken Creek by 29 cfs (50 cfs - 21 cfs = 29 cfs);

(e) The additional 29 cfs present in Tulpehocken Creek under minimum flow conditions, as a result of the operation of Blue Marsh Lake, increases the flows in the Schuylkill under minimum flow conditions from 86 cfs to 115 cfs (86 cfs + 29 cfs = 115 cfs); and

(f) the minimum flow in the Schuylkill, as a regulated stream, for the purposes of a mass balance equation is 115 cfs (N.T. 250, 261, 272-280; Exhibit A-37).

53. Lawler's calculation of minimum flow is consistent with Kolva's suggested approach.

B. Goal

54. DER's goal for phenolic compounds in the Schuylkill River at Philadelphia in 1985 was 20 ppb (N.T. 85).

C. Background (bkgd)

55. DER determined the background (bkgd) level of phenolic compounds to be 4.1 ppb by using Storet data from DER's long-term sampling station WQN 110 near Falls Bridge on the Schuylkill River just upstream of Fairmont Dam. (101-102, 104-105; Wentzel dep. 58-59; Exhibits A-7A and A-10).

56. The Storet data involved 57 samples covering the period May 13, 1976 to November 30, 1982. Of these samples, 31 found phenolic compounds at or above the level of detection, producing a mean concentration of 2.1 ppb. The remaining 26 samples found phenolic compounds below the level of detection. These samples, identified in the printout with a "K", are tabulated at the level of detection even though the actual values are known to be less than that. The mean concentration produced by the "K" samples was 6.6

ppb. The entire 57 samples produced a mean concentration of 4.1 ppb, which is the figure used by DER (N.T. 105-108, 284-286; Wentzel dep. 66-71; Exhibits A-10 and A-13).

57. Storet data, covering the period May 13, 1976 to February 21, 1985 and which would have been available to DER prior to issuance of the 1985 Permit, produced a mean concentration of 1.9 ppb for 37 samples finding phenolic compounds at or above the level of detection, produced a mean concentration of 6.6 ppb for 26 "K" samples and a mean concentration of 3.8 ppb for all 63 samples (N.T. 107-110; Exhibit A-13).

58. The 26 "K" samples, all of which relate to the period prior to 1980, reflect two levels of detection. One level, 10 ppb, applies to 16 of the samples during the period May 13, 1976 to January 16, 1978. The other level, between 1 ppb and 2 ppb, applies to 9 samples during the period November 12, 1977 to November 26, 1979. The remaining sample (May 9, 1979) reflects a detection level of .01 ppb (Exhibit A-13).

59. Of the 37 samples finding phenolic compounds at or above the detection level, 28 relate to the period December 18, 1979 to February 21, 1985. Of these 28 samples, 25 found no concentrations of phenolic compounds; the remaining 3 samples found concentrations of 2 ppb, 2 ppb and 1 ppb, respectively (N.T. 288-292; Exhibit A-13).

60. The higher detection level applicable to the earlier years (10 ppb) unfairly weights the arithmetical mean computed by using all the samples (N.T. 291-292).

61. DER's James Wentzel learned how "K" samples were used in determining mean concentrations in the Storet data during the pendency of this

appeal. Since then he has not accepted at face value the mean concentrations reported in the Storet data when developing background concentrations for other NPDES permits (Wentzel dep. 72).

62. The arithmetical mean of the 37 samples finding phenolic compounds at or above the detection level is 1.9 ppb. These samples are sufficient from a statistical standpoint to determine the background concentration (N.T. 291-292; Exhibit A-13).

D. Waste flow (WF)

63. DER used a combined waste flow (WF) for Gulf and Atlantic of 14.8 million gallons per day (MGD) - 10.88 MGD for Gulf and 3.91 MGD for Atlantic. The Gulf figure was developed by adding together the discharge volumes at discharge point 015 (8.77 MGD) and discharge point 001 (2.11 MGD) (N.T. 78-87; Exhibits A-7A, A-8 and A-11).

64. Prior to issuance of the 1985 Permit, Gulf had objected to the inclusion of discharge point 001 since it consists of river non-contact cooling water to which no phenolic compounds are added by the Refinery operations (N.T. 87-90, 151; Exhibit A-5).

65. The 1985 Permit sets no effluent limits for phenolic compounds at discharge point 001; but does at monitoring point 101, which measures the periodic overflow from the #4 Separator that is part of the discharge at discharge point 001 (N.T. 88, 405-406; Exhibit A-17).

E. Tidal action and decay

66. Both the Chevron Refinery and the Atlantic refinery discharge to a section of the Schuylkill River that is part of the tidal estuary of the Delaware River (Wentzel dep. 49, 57; Hinkle dep. 102).

67. The ebb and flow of tides, which provides additional dilution, dispersion and mixing, affect the stream flow (SF) and background (bkgd)

factors used in the mass balance equation (N.T. 428; Wentzel dep. 55; Hinkle dep. 104).

68. In performing the wasteload allocation for phenolic compounds, DER's James Wentzel did not consider tidal effects because he was not aware of techniques for doing so (Wentzel dep. 49, 76, 108-109).

69. Phenolic compounds decay under certain environmental conditions, primarily as the result of bacterial action (N.T. 432-433; Hinkle dep. 105).

70. In performing the wasteload allocation for phenolic compounds, DER's James Wentzel and Richard L. Hinkle did not consider decay because they were unsure whether phenolic compounds were conservative (not subject to decay) or non-conservative (subject to decay) (Wentzel dep. 56; Hinkle dep. 105).

71. Techniques exist for considering tidal action and decay in making wasteload allocations for phenolic compounds (N.T. 429-438).

III. Internal Monitoring

72. DER set effluent limits and required internal monitoring of the periodic overflow from the #4 Separator, because the overflow can include process water that mixes with river non-contact cooling water before being discharged into the Schuylkill River at discharge point 001 (N.T. 112-114, 387-388, 405-406; Hinkle dep. 67-68; Exhibits A-17 and A-35).

73. The effluent limits for discharge point 001 pertain to total organic carbon, temperature and pH. The effluent limits for monitoring point 101 pertain to numerous parameters appropriate to the discharge of process water, similar to those for discharge point 015 (Hinkle dep. 67-68; Exhibit A-17).

74. Because of the infrequent nature of the overflow and the variability of the volume, not only of the overflow but also of the river

non-contact cooling water, DER concluded that it was impractical to set effluent limits at discharge point 001 to cover all contingencies (389-390; Hinkle dep. 68-70).

75. DER set effluent limits and required internal monitoring (monitoring point 102) of non-contact cooling water coming into the #3 Separator and before it mixes with stormwater, because the technology-based effluent limits are different for these two types of water (N.T. 388-389; Exhibits A-17 and A-35).

76. The effluent limits for discharge point 002 pertain to total organic carbon, oil and grease, temperature and pH. The effluent limits for monitoring point 102 pertain only to total organic carbon (Exhibit A-17).

77. On or about May 13, 1985 Gulf's legal counsel advised DER of Gulf's objections to monitoring points 101 and 102 (Exhibit A-4).

78. DER's fact sheet makes no mention of any internal monitoring points (Hinkle dep. 70-74; Exhibit A-7A).

DISCUSSION

Chevron, as the party challenging the conditions of the 1985 Permit, has the burden of proving by a preponderance of the evidence that DER violated the law or abused its discretion: 25 Pa. Code §21.101(a).

Congress established the NPDES program by amending the CWA in 1972. Pursuant to the intent of the program, Pennsylvania was given primary jurisdiction to administer the NPDES program within its borders. Statutory authority, in addition to the CWA, stems from the CSL. Regulations governing the NPDES program constitute Chapter 92 of 25 Pa. Code. According to §92.31, effluent limits must correspond with those set by EPA under the CWA and with any more stringent requirements of Pennsylvania law. Thus, if Chapters 91, 93, 95, 97, 99 and 101 (all dealing with various aspects of water pollution

control) would impose more stringent effluent limits on a discharge for which a NPDES permit is required, they will override the EPA standards: 25 Pa. Code §92.17.

I. Credits for pollutants in intake water

Such credits became a facet of EPA administration of the CWA during the mid-1970s. See American Iron and Steel Institute v. EPA, 526 F.2d 1027, 1056 (U.S. Ct. App., 3d Cir. 1975) and American Petroleum Institute v. EPA, 540 F.2d 1023, 1035 (U.S. Ct. App., 10th Cir. 1976). The regulatory provision as it existed when the 1985 Permit was issued read, in part, as follows:

> (g) Pollutants in intake water.
> (1) Upon request of the discharger, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the discharger's intake water if:
>
> (i) The applicable effluent limitations and standards contained in 40 CFR Subchapter N specifically provide that they shall be applied on a net basis; or
>
> (ii) The discharger demonstrates that the control system it proposes or uses to meet applicable technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.
>
> (2) Credit for generic pollutants such as biochemical oxygen demand (BOD) or total suspended solids (TSS) should not be granted unless the permittee demonstrates that the constituents of the generic measure in the effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outfall or elsewhere.
>
> (3) Credit shall be granted only to the extent necessary to meet the applicable limitation or standard, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with permit limits.

> (4) Credit shall be granted only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made....
>
> (40 CFR §122.45(g)

Since these credits are an integral part of the effluent limits established by EPA's regulations, the provisions of 25 Pa. Code §92.31 would seem to require DER to grant them unless doing so would violate more stringent requirements of the CSL or the water pollution control regulations in 25 Pa. Code. DER has not cited any statutory or regulatory provision denying the use of the credits; and, by granting them to Chevron in the 1985 Permit, has acknowledged that they do not violate Pennsylvania's standards.

DER argues, however, that it is not <u>required</u> to grant credits and that, if it elects to do so, it may proceed at its own discretion. Its assertion is set forth in the following words at page 23 of its post-hearing brief:

> No regulation <u>requires</u> allowance of such credits; Chevron has not averred incorporation of §122.45(g) into the Commonwealth's regulatory, as opposed to practical, system for NPDES permit review. To the extent that the Commonwealth gratuitously uses §122.45(g) as a guideline, it is entitled to interpret that guideline in any manner as long as that does not result in effluent limits less stringent than those of EPA....(Emphasis in original)

The basic premise of DER's position is wrong. 25 Pa. Code §92.31, by incorporating the effluent limits derived by EPA from the CWA, <u>requires</u> DER to grant the credits unless doing so would violate more stringent limits derived from Pennsylvania law. Recognizing that Pennsylvania has the legal power to impose more stringent limits, we are unaware of any statutory or regulatory provision exercising that power in such a way as to limit the EPA credits.

That none exists is apparent from another excerpt from page 23 of DER's post-hearing brief:

> As a matter of informal practice, rather than regulation, statute or policy, the Commonwealth has allowed net/gross credits for intake parameters on technology based limits....

Putting aside DER's incredibly arrogant assertion that it has unfettered discretion in administering credits, the evidence clearly shows that what DER refers to as its "informal practice" stems from the Technical Guidance Manual which was based on the EPA credit regulation (then located at §122.45(h)) in effect during August 1983 when the Manual was prepared. For DER to take the position (once it learned that the EPA regulation had been replaced in 1984 by §122.45(g)) that the federal methodology is no longer relevant is fatuous. DER's obvious intent, as reflected in the Technical Guidance Manual and in the testimony of the DER officials involved with the 1985 Permit, was to administer the credits in accordance with EPA regulations and not pursuant to some separate mission of its own.

We conclude that DER must grant credits for pollutants in intake water in accordance with the above-quoted portion of 40 CFR §122.45(g). We now turn to a consideration of Chevron's entitlement. Several features stand out in the regulatory provision. The credit applies only to technology-based effluent limits and only if such limits either are required to be administered on a net basis or would be attainable in the absence of intake water pollutants. The intake water and the discharge must involve the same body of water. The credit is allowed only to the extent necessary and only to the extent the pollutant is present in the intake water. Constituents of generic pollutants must be substantially similar unless appropriate additional limits are imposed on the discharge.

The parameters for which technology-based effluent limits have been set at discharge point 015 are the following: BOD, TSS, chemical oxygen demand (COD), oil and grease, ammonia as nitrogen, sulfide, total chromium, hexavalent chromium, first stage oxygen demand (FSOD) and pH. There is no suggestion that the effluent limits for these parameters, established by EPA for the petroleum industry in 40 CFR Part 419, are required to be administered on a net basis. Consequently, Chevron must show the following for each parameter:

1. That it is present in the intake water;

2. That the treatment plant would be able to meet the effluent limits set by the 1985 Permit if the pollutant were not present in the intake water;

3. That a credit is necessary to enable Chevron to keep its discharge within the limits set by the 1985 Permit; and

4. That the intake water and the discharge involve the same body of water.

In addition, with respect to generic pollutants, Chevron must establish either that the constituents in the intake water and discharge are substantially similar or that appropriate additional limits have been imposed on the discharge.

There is no controversy concerning items 1 and 4; but there is a considerable difference of opinion about items 2 and 3. DER maintains that no credits are needed because Chevron's treatment plant is capable of meeting the effluent limits with or without pollutants in the intake water. That

conclusion is supported by the data submitted by Chevron for the 8-month period ended May 31, 1986. It is refuted, in part, by the data submitted by Chevron for the 6-year period ended December 31, 1989.[7]

The latter data, compiled from DMRs prepared and submitted to DER on a monthly basis, disclose that Chevron's treatment plant is capable of meeting the effluent limits, despite the presence of pollutants in the intake water, on nearly every occasion. There are times, however, when the credit is needed to some extent; and times when the entire credit is not enough.[8] We conclude, therefore, that Chevron has satisfied items 2 and 3.

The extent to which the credit is needed depends on the method used to calculate it. This is the point on which the disagreement is sharpest. DER defends the methodology inserted in the 1985 Permit by the following language in the pre-1984 version of the EPA regulation:

> Adjustments under this paragraph shall be given only to the extent that pollutants in the intake water...are not removed by the treatment technology employed by the discharger.
>
> (40 CFR §122.45(h)(2), rescinded)

This language, DER maintains, is intended to avoid the situation where a discharger meets the effluent limits (because of credits) without the

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[7] DER has complained about the admission of this data, but its presentation was prompted by DER's offering of Exhibits C-3, C-4 and C-5 (pertaining to the 8-month period) on the third day of hearing without having prefiled them, as required by Board procedure, and without having given copies to opposing counsel prior to that day. The exhibits were admitted, over objection, and Chevron was given the option of reopening the record to present countering testimony. The option was exercised, the record was reopened and the evidence on the 6-year period was admitted. This ruling is affirmed.

[8] We do not view these occasions, as does DER, as conclusive evidence that the treatment plant is incapable of meeting effluent limits regardless of pollutants in the intake water. A handful of exceedances over a 6-year period simply does not prove DER's point.

employment of the highest degree of treatment technology. Such a discharger, DER claims, would be rewarded for being located on a dirty stream.

The chances of that happening appear remote, since all dischargers are required to meet effluent standards representing the best practical control technology currently available (BPT), the best conventional pollutant control technology (BCT) and the best available technology economically achievable (BAT): section 301(b) of the CWA, 33 U.S.C.A. §1311(b); 40 CFR §125.3. Criteria specific to the petroleum industry have been established by EPA: 40 CFR Part 419. With these technology standards in place and applicable on a nationwide scale, there is little likelihood that dischargers will be able to manipulate the treatment processes so as to fudge on parameters to which a credit applies while, at the same time, meet the effluent limits on non-credit parameters.

Regardless of DER's concerns, EPA saw fit to delete the above-quoted language when it revised the credit regulation in 1984. Whatever support the language provided for DER's methodology was removed at that time. In its place, EPA inserted language limiting the credit to the amount necessary to meet the effluent limits up to the maximum amount of the parameter present in the intake water (see §122.45(g)(3) quoted above). Where a credit is necessary and where mass units are involved as they are here, we conclude that the revised language mandates a pound-for-pound credit as advocated by Chevron.

BOD, TSS, COD, and FSOD are generic pollutants in the effluent at discharge point 015. To be entitled to a credit for each of these pollutants, Chevron had to show (in addition to the 4 items just discussed) either that the constituents in the intake water were substantially similar to those in the discharge or that appropriate additional limits have been imposed on the

discharge. Chevron made little effort to satisfy the first alternative and appears to have abandoned it in its post-hearing brief. The only evidence is a brief cryptic quote from a January 1987 letter from Chevron to DER characterizing the constituents of BOD and TSS as insignificant rather than similar or dissimilar. This evidence is inadequate to satisfy the regulatory prerequisite.

Chevron did produce evidence showing that effluent limits had been imposed on discharge pollutants other than generics; but there is no evidence to show how these limits are appropriate to warrant credits for generic pollutants. Without such evidence, we are unable to determine whether the regulatory standard for generics has been met. Chevron had the burden of presenting such evidence.

II. Wasteload allocation for phenolic compounds

As noted at the outset of the Discussion, the regulations pertaining to NPDES permits in 25 Pa. Code Chapter 92 provide for the imposition of more stringent effluent limits if mandated by Chapters 91, 93, 95, 97, 99 and 101 of the regulations. Water quality-based effluent limits are derived from the provisions of Chapter 93. If they result in more stringent limits than under Chapter 92, they take precedence.

Following this regulatory scheme, DER calculated a water quality-based effluent limit for phenolic compounds at discharge point 015, allocated it between Chevron and Atlantic and (finding it to be more stringent than the technology-based limit calculated under Chapter 92) inserted it in the 1985 Permit. The mass balance equation used to make the waste load allocation is not a subject of controversy; the values assigned to some components of the equation are.

A. Stream flow (SF)

Water quality-based limits are to be achieved at a design flow equal to "Q7-10": 25 Pa. Code §93.5(b). As defined in §93.1, that term has two meanings. The first (which uses the term in its traditional sense) is the lowest 7 consecutive-day average flow that occurs once in 10 years - applicable to unregulated streams. The other is the estimated minimum flow - applicable to regulated streams. While both meanings are intended to make certain that water quality protection exists even at low flow levels, they make no attempt to reflect the lowest possible flow conditions.

DER determined stream flow (SF) in the mass balance equation by using the Q7-10 figure provided by USGS for gauging station No. 01474500 located a short distance upstream of Fairmont Dam on the Schuylkill River in Philadelphia. Data used by DER covered the years 1933-1972 and produced a Q7-10 of 69 cfs. DER concedes that, prior to issuance of the 1985 Permit, data was available for the years 1933-1984 which should have been used, producing a Q7-10 of 86 cfs.

This concession did not end the stream flow controversy, however, because Chevron maintains that the Schuylkill is a regulated stream. As such, it is subject to a minimum flow calculation and not a Q7-10. The evidence overwhelmingly supports Chevron's position. Paraphrasing the DRBC definition, the Schuylkill's quantity of flow, including its distribution in time or place, is significantly altered by the City of Philadelphia's diversions and by the upstream reservoirs, particularly Blue Marsh Lake.

DER's stream flow value, given the regulated condition of the Schuylkill, should have been the estimated minimum flow. No set procedure exists for calculating this figure. James R. Kolva, a Hydrologic Data Chief in USGS's Malvern, Pennsylvania office, outlined a methodology to which

Chevron's expert witness, Dr. John P. Lawler, added refinements and numbers. The operation begins with a Q7-10 for the Schuylkill River (86 cfs), which already accounts for the Philadelphia diversions, and proceeds to adjust for flow augmentations by upstream reservoirs.

Lawler concluded that, because of the duration of their existence, the operations of the upstream reservoirs were already reflected in the Q7-10 at Philadelphia except for Blue Marsh Lake. The existence of this facility - five years in 1984 - could have influenced the Q7-10 at Philadelphia (based on a half-century of data) only minimally. Accordingly, some adjustment to the Q7-10 was appropriate to account for Blue Marsh's operation. Lawler's investigation revealed minimum releases from Blue Marsh into Tulpehocken Creek, a tributary of the Schuylkill, at the rate of 50 cfs daily. He then reconstructed a Q7-10 (21 cfs) for Tulpehocken Creek in its natural condition. A comparison of these figures convinced him that an additional 29 cfs can be expected to flow from the Tulpehocken into the Schuylkill during low-flow periods since the completion of Blue Marsh Lake. Eventually, this increased flow will affect the Q7-10 at Philadelphia. In the meantime, it is reasonable to determine minimum flow by increasing the Q7-10 (86 cfs) by the 29 cfs, producing a total of 115 cfs.

DER's only attempt to discredit Lawler's analysis focused on the reliability of the minimum releases from Blue Marsh Lake. The facility is controlled by the Corps of Engineers and serves a multitude of purposes. It is possible, both from a legal and practical standpoint, for the Corps to reduce these releases under compelling circumstances. It is difficult to envision this happening except during a drought emergency - a change in condition that would authorize DER to order a temporary reduction in the discharge of phenolic compounds, if that was thought to be necessary: 25 Pa.

Code §92.51(2)(iii).

Lawler's calculations are reasonable and we accept his determination of 115 cfs as the estimated minimum flow for the Schuylkill at the USGS gauging station upstream of Fairmont Dam.

B. Background (bkgd)

DER determined the background concentration of phenolic compounds (4.1 ppb) by using Storet data from its sampling station WQN 110 upstream of Fairmont Dam. This data consisted of 57 samples covering the period 1976-1982. At the time the 1985 Permit was issued, Storet data was available for the period 1976-1985. This data, consisting of 63 samples, produced a mean concentration of 3.8 ppb.

Both the 4.1 ppb used by DER and the 3.8 ppb reflected in the more up-to-date Storet data represent arithmetical means arrived at by considering all of the reported samples, whether truly quantifiable or not. Of the 63 samples covering the 1976-1985 period, 26 were "K" samples (concentrations below the level of detection). The "K" samples were factored into the arithmetical mean at the level-of-detection values even though it was known that the true values were less.

What really skewed the result was the high level of detection (10 ppb) that prevailed prior to 1978 and affected 16 of the "K" samples. After the level of detection dropped, the 10 remaining "K" samples ranged from .01 ppb to 2 ppb. While there are 3 quantified samples reported at 10 ppb or above, proving that concentrations can sometimes reach that level, they represent only a small fraction of the 37 quantified samples.

Since the "K" samples cannot be quantified accurately and since there are 37 samples that can be, there is no sensible reason to consider the "K" samples at all. DER's James Wentzel, who learned how the "K" samples were

tabulated only during the pendency of this appeal, admitted that he no longer uses the arithmetical mean determined from all samples. The 1.9 ppb, representing the arithmetical mean of the 37 quantified samples, is sufficient from a statistical standpoint to serve as the background concentration for phenolic compounds.

C. Waste flow (WF)

DER calculated Chevron's contribution to the combined waste flow by adding together the discharge volumes at discharge point 015 and discharge point 001. Most of the discharge at the latter point consists of river non-contact cooling water that contains no phenolic compounds. DER acknowledged that fact when it refrained from placing an effluent limit on phenolic compounds for that discharge point. Periodically, however, the overflow from the #4 Separator is discharged there. The precise volume and frequency of this periodic discharge are unknown at this point; so are the components. DER has mandated that the overflow be monitored and has set effluent limits (including those for phenolic compounds) to govern it.

We will get to the monitoring issue presently. Our concern here is with the reasonableness of DER's inclusion of the entire volume at discharge point 001 when only an occasional contribution might contain phenolic compounds. While we are mindful of DER's conservative approach to the whole subject of wasteload allocation, we conclude that the formula should employ the most accurate figures available. Since no evidence exists to show whether and in what volume phenolic compounds are discharged at discharge point 001, we conclude that only the volume at discharge point 015 (8.77 MGD) should have been used.

D. Tidal action and decay

The evidence is decisive that tidal action in the Schuylkill River affects the stream flow (SF) and background (bkgd) factors in the mass balance equation. Decay also can be an important consideration in determining the allowable concentrations of phenolic compounds. DER did not consider tidal action because its people were unaware of techniques for doing so. DER did not consider decay either, apparently because the Technical Guidance Manual treats phenolic compounds both as conservative and non-conservative.

Dr. Lawler[9] described a technique for measuring the effect of tidal action and went through a computation. We did not get the impression from his testimony that the technique was exclusionary or that the results of the computation were finite. While we are satisfied that tidal action should have been accounted for by DER, we are not prepared to mandate a specific technique or specific results. Accordingly, we will remand the permit to DER.

For similar reasons, we are unwilling at this point to compel a specific determination of the decay factor. We are satisfied that phenolic compounds do decay, but the evidence is insufficient to enable us to determine the appropriate method for measuring the effect. 25 Pa. Code §95.3(e) requires DER to consider decay and to detail the mathematical calculations used to measure it. We will expect DER to follow this regulatory provision on remand.

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[9] DER objects to the admission of Lawler's testimony as rebuttal evidence. When questions on this subject were posed to Lawler during Chevron's case in chief, DER's legal counsel objected on the basis that tidal effect and decay were not properly raised as issues. The objection was taken under advisement. Later, at the outset of DER's case in chief, James Wentzel's deposition was accepted into evidence. When it was pointed out that this deposition covered tidal effects and decay, the Administrative Law Judge permitted Chevron to present Lawler's testimony as rebuttal. This ruling is affirmed.

III. Internal Monitoring

DER established monitoring points 101 and 102 in the 1985 Permit, requiring Chevron to monitor internal waste streams. Chevron claims that DER acted beyond its authority. 40 CFR §122.45(h) provides, in part, as follows:

> (1) When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring required by §122.44(i) shall also be applied to internal waste streams.
>
> (2) Limits on internal waste streams will be imposed only when the fact sheet under §124.56 sets forth the exceptional circumstances which make such limitations necessary, such as when the final discharge point is inaccessible..., the wastes at the point of discharge are so diluted as to make monitoring impractical, or the interferences among pollutants at the point of discharge would make detection or analysis impracticable.

The establishment of monitoring point 101 is authorized by the foregoing regulation: Texas Municipal Power Agency v. EPA, 836 F.2d 1482 (U.S. Ct. App., 5th Cir., 1988). The overflow from the #4 Separator constitutes process water similar to that which goes through the treatment plant and discharges at discharge point 015. Effluent limits similar to those set for discharge point 015 also are applicable to the overflow. Because the overflow is periodic in nature and mixes with the river non-contact cooling water that is the major component of the discharge at discharge point 015, the parameters applicable to the overflow may be too diluted to measure at the discharge point. Monitoring of the overflow itself before it mixes with the river non-contact cooling water is the only sensible way to assure that untreated process water is not discharged to the river.

Chevron complains that there is nothing in the DER fact sheet justifying internal monitoring. While that is true, the testimony presented in this appeal adequately fills the information gap. To require DER to go through the motions of putting that information in the fact sheet, at this late date, would unnecessarily elevate procedure above substance.

The evidence with respect to monitoring point 102 is less satisfactory. Non-contact cooling water mixes with stormwater at the #3 Separator before being discharged at discharge point 002. The two types of water combined here do not present a situation similar to that justifying monitoring point 101. While DER's evidence indicated that the two waste streams have different effluent limits, the only parameter listed for the non-contact cooling water is total organic carbon. This same parameter is present in the stormwater at a higher effluent level. No explanation has been offered why monitoring this parameter at the discharge point is impracticable. Accordingly, the requirement for monitoring point 102 will be stricken.

III. Miscellany

Two final matters deserve comment. One relates to DER's complaint that much of Chevron's data was not submitted to DER until after the 1985 Permit was issued. While this is true to a certain extent, it is also understandable. The fine details of DER's calculations were not subjected to intense scrutiny until after the appeal had been filed and the parties had been directed to discuss the issues. Some of the issues had not even been raised prior to that time. Ideally, all of this should be done while a permit is in a draft stage; but the failure to do so cannot excuse DER's errors in choosing data or interpreting regulations.

The final point relates to DER's argument for a conservative approach to setting effluent limits in NPDES permits. Certainly DER has a high

responsibility to protect the water of the Commonwealth from pollution, but that responsibility cannot be used as a justification for ignoring the most timely and most reliable data. As the Technical Guidance Manual states, "NPDES permit terms and conditions must be technically correct...and must be legally defensible." (Emphasis in original). Adherence to these standards will achieve the protective goals of the CSL and the water pollution control regulations in 25 Pa. Code.

CONCLUSIONS OF LAW

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

2. Chevron has the burden of proving by a preponderance of the evidence that DER violated the law or committed an abuse of discretion.

3. In setting effluent limits for NPDES permits, DER is required to employ EPA standards unless more stringent standards are mandated by Pennsylvania law.

4. Credits for intake water pollutants are an integral part of the EPA standards and must be granted by DER unless doing so would violate more stringent standards of the CSL or the regulations at 25 Pa. Code Chapters 91, 93, 95, 97, 99 and 101.

5. There is no Pennsylvania or regulatory provision imposing more stringent effluent standards in such a way as to limit the credits for intake water pollutants provided by EPA.

6. DER has been given no power to administer credits for intake water pollutants in a manner different from that set forth in 40 CFR §122.45(g).

7. The parameters for which technology-based effluent limits were set for discharge point 015 are all present in the intake water.

8. The intake water and the discharge at discharge point 015 involve the same body of water - the Schuylkill River.

9. Chevron's treatment plant is capable of meeting the effluent limits, despite the presence of pollutants in the intake water, on nearly every occasion.

10. There are times when the intake water pollutants credits are needed to some extent, and times when the entire credits are not enough.

11. The methodology for calculating credits for intake water pollutants incorporated into the 1985 Permit was based on language that had been deleted from EPA regulations in 1984.

12. Pursuant to the revised language now contained at 40 CFR §122.45(g)(3), credits are to be allowed on a pound-for-pound basis where parameters are based on mass units.

13. Chevron failed to prove, with respect to generic pollutants, either that the constituents in the intake water are substantially similar to those in the discharge or that appropriate additional limits have been imposed on the discharge.

14. Based on its determination that the water quality-based effluent limit for phenolic compounds at discharge point 015 was more stringent than the technology-based effluent limit, DER was required to impose the water quality-based effluent limit in the 1985 Permit.

15. Since the Schuylkill River is a regulated stream at Philadelphia, DER erred in using Q7-10 for stream flow rather than calculating minimum flow.

16. Dr. Lawler's calculation of minimum flow, tracking the same methodology outlined by Mr. Kolva, is reasonable.

17. Stream flow (SF) for purposes of the mass balance equation is 115 cfs, less the 3 cfs discussed in footnote 6, or a net of 112 cfs.

18. DER erred in its determination of the background (bkgd) concentration of phenolic compounds by using data that was not the latest available and by considering the "K" samples at the level of detection.

19. The 37 quantified samples are sufficient from a statistical standpoint to determine the background (bkgd) concentration.

20. The background (bkgd) concentration of phenolic compounds for purposes of the mass balance equation is 1.9 ppb.

21. In the absence of evidence to show that any phenolic compounds are discharged at discharge point 001, DER erred in including the volume of this discharge in the determination of waste flow (WF).

22. Chevron's contribution to the combined waste flow (WF) is 8.77 MGD.

23. Tidal action and decay of phenolic compounds should have been considered by DER in making the wasteload allocation, but there is insufficient evidence to enable the Board to do the calculations necessary to account for these factors.

24. DER was justified in establishing monitoring point 101 to monitor the overflow from the #4 Separator, despite the fact that there is nothing in the fact sheet on this point.

25. The evidence is inadequate to show justification for monitoring point 102.

ORDER

AND NOW, this 24th day of June, 1991, it is ordered as follows:

1. Chevron's appeal is sustained in part and dismissed in part.

2. The proceeding is remanded to DER for action in accordance with this Adjudication. Such action shall be completed within 90 days after the date of this Order.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Chairman Maxine Woelfling and Board Member Richard S. Ehmann did not participate in this adjudication.

DATED: June 24, 1991

cc: See next page for service list

EHB Docket No. 85-410-M

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M. DIANE SMITH
SECRETARY TO THE BOAI

C. W. BROWN COAL CO., INC.	:	
	:	
v.	:	EHB Docket No. 83-159-G
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 25, 1991

ADJUDICATION

By the Board

Synopsis

Consolidated appeals of the Department of Environmental Resources' issuance of compliance orders to a surface mine operator for unauthorized discharges from its mine site causing degradation of a stream, pond, and springs and for failure to reclaim are dismissed. A mine operator is responsible for all mine drainage on its permitted area and is required to treat it in order to meet the applicable effluent limits, whether or not the mine drainage predated operation of the mine.

Further, a mine operator is required to reclaim the site in accordance with the requirements of 25 Pa.Code, Chapter 87. Consequently, the Department's orders to the operator to treat mine drainage on its permitted area and to complete reclamation of the site are sustained.

Background

This matter is a consolidation of five appeals. It involves six orders issued by the Department of Environmental Resources ("the Department" or "DER") to C. W. Brown Coal Company, Inc. ("Brown") with respect to a surface mine located in the "Chestnut Ridge" area of Donegal Township, Westmoreland County, which Brown operated from 1973 to May 1982 under authorization of Mine Drainage Permit ("MDP") No. 3473SM13 and Mining Permit ("MP") No. 273-4 and amendments thereto. The orders directed Brown to take corrective action with respect to water quality problems which the Department determined to have been caused by Brown's mining activities.

Specifically, the orders involved are as follows:

Order of August 28, 1981 ("Order I")

This order was issued to Brown for "untreated discharges of mine drainage emanating from and originating on [Brown's mine site]" which then entered an unnamed tributary to Four Mile Run designated as "Unnamed Tributary No. 1." The Department determined this to be in violation of "Additional Special Condition No. 3"[1] to Brown's MDP. The order directed Brown to collect and treat or abate the discharges. Brown appealed Order I on September 10, 1981 at EHB Docket No. 81-145-G, contending that there were no untreated discharges of mine drainage emanating from and originating on its mining operation and entering Unnamed Tributary No. 1 and that the Department's samples were not an accurate representation of the situation since they were collected following heavy rains.

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[1]Although Order I makes reference to "Special Condition No. 4," we believe this was meant to read "Additional Special Condition No. 3," as the latter condition contains the operative language quoted in the order.

Order of May 18, 1983 ("Order I(A)")[2]

This order cited Brown for degradation of Unnamed Tributary No. 1 and general failure to reclaim the mine site. An appeal was taken from this order on June 16, 1983 and was docketed at Docket No. 83-124-G. This appeal was then consolidated with the appeal of Order II , discussed below, at Docket No. 83-159-G on October 31, 1983.

Order of June 29, 1983 ("Order II")

This order cited Brown for discharging mine drainage which failed to comply with applicable effluent limits and water quality criteria, resulting in the degradation of Unnamed Tributary No. 1, and failing to properly reclaim the site. The order directed Brown to treat the discharges and to perform corrective work necessary to restore and stabilize the site. Brown appealed on August 1, 1983 at EHB Docket No. 83-159-G, denying that it had failed to reclaim or that its mining activities had contributed to any increased effluent levels.

Order of March 29, 1984 ("Order III")

This order cited Brown for degrading the water quality of two springs used as a private water supply by Lawrence Pospisil ("Pospisil Springs") and directed Brown to provide a replacement water supply for the Pospisil residence. No appeal was taken from this order.

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[2]Because the other orders involved have been consistently designated by the parties as Orders I, II, III, IV, and V throughout this proceeding, we will continue to assign those same designations in this Adjudication in order to avoid any confusion. For this reason, the order of May 18, 1983 will be referred to as "Order I(A)".

Order of May 23, 1984 ("Order IV")

This order cited Brown for failure to comply with Order III. It also charged him with discharging water from the toe of spoil on MP 273-4 which exceeded iron and manganese limits and for a discharge from a pond, known as "Pine Brook" which exceeded effluent limits for pH, acidity, and manganese. Brown appealed the order on June 14, 1984 at EHB Docket No. 84-207-G. The appeal denied that Brown was discharging water from its mine site which failed to meet the applicable effluent limits and asserted that any such condition existed in the area prior to any mining taking place. Brown also denied having to comply with Order III but stated that, in any event, it was "attempting by some possible means to satisfy the situation with respect to the Pospisil water supply."

Order of July 13, 1984 ("Order V")

This order cited Brown for failure to comply with Order IV. An appeal was taken on August 16, 1984 at EHB Docket No. 84-288-G, with Brown contending that Order IV should be stayed since an appeal had been taken from it.

All of the above appeals were consolidated at Docket No. 83-159-G by Order of the Board dated October 18, 1984. The consolidated appeals were heard by Former Board Member Edward Gerjuoy on December 17-19, 1984; April 29 and 30, 1985; May 1 and 31, 1985; and June 26, 1985.[3]

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[3]Subsequent appeals filed by Brown at Dockets No. 85-311-G, 86-002-G, 86-039-G, 86-262-G, and 86-396-R were stayed by the Board pending an adjudication on the merits of this matter.

During the course of proceedings, on or about February 27, 1985, the Department filed a Motion for Partial Summary Judgment. In its Motion, the Department asserted that since Order III had not been appealed, its finding that Brown had degraded the water quality in the Pospisil Springs was final. Based on that finding, the Department contended that it was entitled to judgment on the broader issue of whether Brown had caused or allowed unauthorized discharges from its surface mine. Brown submitted a Brief in Opposition on April 10, 1985, contending that the Motion was untimely as having been filed after the commencement of hearings. The Department filed a Reply on April 22, 1985, arguing that the Motion was timely since the issue had been raised at the start of hearing on December 17, 1984, but the Board had deferred ruling on it. On the fourth day of the hearing, April 29, 1985, Mr. Gerjuoy elected to treat the Department's Motion for Partial Summary Judgment as a Motion to Limit Issues and ruled that the findings of Order III were res judicata and were not subject to challenge. (T. 453)[4]

Subsequently, on April 10, 1985, Brown filed a Memorandum of Law in response to Mr. Gerjuoy's Order of December 20, 1984 requesting the parties to submit memoranda of law outlining the issues involved in the consolidated appeals. Brown's Memorandum closed with, "For the record, C. W. Brown Coal Company presents a Motion to Dismiss." Brown asserted that the Department had not met its burden of proof because it had failed to show a causal connection between any alleged pollution and Brown's mining activities. The Department replied on April 22, 1985, asserting that it had met its initial burden of

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[4]All references to "T. ___" are to pages of transcript from Volumes I through VII. A reference to "Vol. VIII, p. ___" is to a page in Volume VIII of the transcript. The page numbering of Vol. VIII does not follow consecutively after Vol. VII, but begins with p. 1.

proof and had set forth substantial evidence in support of its contentions. It appears that no ruling was made on Brown's apparent motion for judgment in its favor. In any event, the issuance of this adjudication renders Brown's request moot.

Post-Hearing Briefs were filed by Brown and the Department on or about April 3, 1986 and October 16, 1986, respectively. In its Brief, the Department argues that Brown had caused unauthorized discharges from its mine site which failed to meet the effluent limits of the regulations and its MDP and that, as a result, the water quality of a nearby stream, pond, and springs had been degraded. It also contended that it had established various reclamation violations which still existed at the time of hearing. Brown, in its Brief, argued that there were no discharges emanating from the Brown site which exceeded the applicable effluent limits, that the Department's samples were inaccurate since some were taken after heavy rains, and that any water quality problems found by the Department pre-existed Brown's mining.

As we have consistently held, any issues not preserved by a party in its Post-Hearing Brief are deemed to have been abandoned. John Percival v. DER, EHB Docket No. 83-094-W (Adjudication issued September 13, 1990); Laurel Ridge Coal, Inc. v. DER, EHB Docket No. 86-349-E (Adjudication issued May 11, 1990).

Mr. Gerjuoy having left the Board before an adjudication was issued, this adjudication has been prepared from a cold record. Lucky Strike Coal Co. v. Commonwealth, Department of Environmental Resources, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988).

After a full and complete review of the record, we enter the following findings of fact:

FINDINGS OF FACT

1. The Appellant is C. W. Brown Coal Company, Inc., a Pennsylvania corporation with a business address of P. O. Box 23, Whitney, Westmoreland County, Pennsylvania 15693.

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

Background and Area

3. Commencing in or about 1973, Brown operated a surface mine in Donegal Township, Westmoreland County, under authorization of MDP 3473SM13 and MPs 273-4, 273-4(A), 273-4(A2), 273-4(A3), and 273-4(A4). (T. 23, 29, 495; Comm. Ex. 1) The mining permits cover approximately 84 acres. (T. 125)

4. The surface mine is located in the Chestnut Ridge and slopes gently from northeast to northwest to southeast. (T. 24)

5. There are two unnamed tributaries which receive drainage from the mining site. (T. 24)

6. The first such unnamed tributary ("Unnamed Tributary No. 1") originates in the eastern section of the mine site and flows in a southerly direction. It runs adjacent to the site and parallel to the road connecting Ridge Road and Legislative Route 64201. (T. 24-25, 29-30, 305; Comm. Ex. 1)

7. The second unnamed tributary ("Unnamed Tributary No. 2") is located south of the mining operation and flows from north to south. It runs from Pine Brook Pond and mixes with Unnamed Tributary No. 1 and a third unnamed tributary prior to its crossing under Legislative Route 64201. It is depicted on Commonwealth Ex. 1 as a solid line separated by dots. (T. 24-25, 305-306; Comm. Ex. 1)

8. A third unnamed tributary ("Unnamed Tributary No. 3") originates southwest of the permit area and is located north of Legislative Route 64201. The stream flows in a southeasterly direction parallel to Legislative Route 64201. It comingles with Unnamed Tributaries Nos. 1 and 2 prior to its crossing under Legislative Route 64201. It is marked on Commonwealth Ex. 1 as "Unaffected Trib." (T. 305-306, 1088-1089; Comm. Ex. 1)

9. An area of land known as "Pine Brook" is located approximately one-eighth of a mile south of the surface mine. (T. 1057; Comm. Ex. 1) There are two springs ("Pine Brook Springs") emanating on the Pine Brook Property which flow into a pond ("Pine Brook Pond") on the property. The Pine Brook Pond discharges into Unnamed Tributary No. 2. (Tr. 137-138, 305; Comm. Ex. 1)

10. There are several wells and springs located to the southeast of the surface mine which are used as private water supplies by individuals residing in the area. Included among these are the Ronald Pospisil Well, the Richard Pospisil Well, the Lawrence Pospisil, Sr. Well, the Frank Pospisil Well, the Lawrence Pospisil, Jr. Springs, the Miller Spring, and the Barlock Spring. (T. 202-210, 226-228, 572, 599; Comm. Ex. 1, Comm. Ex. 6)

Pre-Mining Water Quality Conditions - Field Investigation

11. Prior to the comencement of Brown's mining activities at the surface mine, the Department conducted a field investigation of the area proposed to be mined. (T. 92-94; Comm. Ex. 4)

12. The investigation was conducted on the following dates in 1973: June 5, June 6, July 10,[5] and August 1. It was conducted by William Sray, a former Mine Conservation Inspector with the Department. (T. 92, 93, 119-121; Comm. Ex. 4)

13. Mr. Sray conducted the field investigation by walking over the entire area of the proposed mine site, collecting water samples of discharge points, and noting the location of all sampling points on a topographic map. (T. 93-94, 105-106)

14. Subsequent to the completion of the survey Mr. Sray prepared a Field Engineer's Report ("Report") consisting of the following information: the location and surface features of the proposed mine site, sampling point locations, and the results of laboratory analyses of the water samples. The report also included the topographic map with notations identifying the locations of the water samples. (T. 101-103, 105-108, 188-189; Comm. Ex. 4 and 4A)

15. Included in the various water samples collected by Mr. Sray during the pre-mining investigation were four samples identified as follows:

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[5]Two sets of analysis sheets contain the date "6/5/73". However, it appears that the second such set of samples was actually taken on a different date from the first since the data is different. Also, testimony by DER witness Mike Smith indicates that it is likely that the samples were taken on different dates. (T. 964) Since the second set of analysis sheets also contains the date "7/10/73" at the top of the page, it is the Board's belief that the samples were taken on July 10, 1973, and that the date "6/5/73" actually refers to the date when the first set of samples was taken.

Pre-Mining Survey Sample 2293 -
Taken from Unnamed Tributary No. 1, at the junction of Township Road 405 and Legislative Route 64229.

Pre-Mining Survey Sample 2294 -
Taken from Unnamed Tributary No. 1, at its headwaters.

Pre-Mining Survey Sample 2295 -
Taken from Unnamed Tributary No. 1 at the junction of Legislative Routes 64201 and 64132.

Pre-Mining Survey Sample 2296 -
Taken from Unnamed Tributary No. 3 at the junction of Legislative Routes 64201 and 64132 before entering Unnamed Tributary No. 1.

Mr. Sray sampled at each of these four locations once on June 5, 1973 and a second time on July 10, 1973.[6] (Comm. Ex. 4 and 4A)

16. The chemical analyses of Pre-Mining Survey Samples 2293, 2294, 2295, and 2296 on June 5, 1973 and July 10, 1973 reflect the following data (measured in milligrams per liter ("mg/l") for iron, alkalinity, and sulfate):

	pH Value	Alkalinity	Total Iron	Sulfate[7]
6-05-73:				
2293	6.3	26	.18	
2294	6.3	28	.16	
2295	6.3	64	.20	
2296	6.4	24	.22	
7-10-73:				
2293	4.7	6	.32	12
2294	6.0	14	.05	20
2295	6.0	8	.13	20
2296	6.4	60	.19	15

(Comm. Ex. 4)

17. Where samples are unpreserved, the iron level decreases. (T. 657)

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[6]See explanation contained in the previous footnote.

[7]Sulfates were not measured on the June 5, 1973 samples.

18. It is likely that Mr. Sray's samples were unpreserved and, therefore, may have shown lower than actual iron readings. (T. 805)

19. Independent Geologist Edward Steele's review of pre-mining samples in the area showed high iron in at least one sample and low sulfate levels. He concluded that iron was and is being produced in the area through natural processes. (T. 768-769, 797)

20. Mr. Steele has reviewed other pre-mining samples from this particular area which showed low pH levels in the range of 4.0 to 5.0. (T. 864)

21. There is no mention of discoloration of any of the tributaries sampled in Mr. Sray's Report. If Mr. Sray had noticed any discoloration in any of the Unnamed Tributaries during his pre-mining investigation, he would have noted so in his Report. (T. 103, Comm. Ex. 4)

22. Notations made on the field map accompanying the Report which showed the location of staining were made by Department Hydrogeologist Nancy Pointen during a hydrogeologic inspection of the site in 1981. (Vol. VIII, p. 25, 26)

Pre-Mining Water Conditions - Observations of Area Residents

23. Glenn Frye purchased the Pine Brook property in 1970. Since that time he has spent numerous weekends on the property and has become familiar with the streams on the property. (T. 1056-1058).

24. In 1970, he installed a culvert in one of the unnamed tributaries on his property. He testified that at that time, prior to Brown's mining activities, the stream was clear, but that at the time of hearing it was a rusty brown color, and the stones were brown. (T. 1057-1058)

25. Mr. Frye also testified that a white precipitate had formed on the stones in an unnamed tributary into which his pond discharges, and that this condition did not exist prior to Brown's mining. (T. 1059)

26. At the time of hearing, Michael Hvizdos had owned, since 1949, a one hundred four (104) acre tract of land which included part of the area subject to the surface mine. (T. 1047).

27. Mr. Hvizdos testified that he was familiar with the area in question. At the time of hearing he owned a home situated approximately one to one and three-quarters miles from the surface mine. Mr. Hvizdos used to operate a nursery on that part of his property which is subject to the surface mine, and he used to do a great deal of hunting and walking on that property. Additionally, Mr. Hvizdos helped Mr. Frye install the culvert which was referred to in Paragraph 24 above. (T. 1046-1048).

28. Mr. Hvizdos testified that prior to Brown's mining activities Unnamed Tributary No. 1 was "nice and clear" and that at the time of hearing it was "rusty and orange looking." (T. 1053)

29. At the time of hearing, Richard Pospisil, age 36, had lived in the area in question for 34 years. During his childhood, he lived on property owned by his father which is adjacent to the mining operation. (T. 567-569, 571-572)

30. Richard Pospisil testified that Unnamed Tributary No. 1 contained a reddish stain when he was a child and that it looked the same at the time of the hearing as it did when he was a child. Mr. Pospisil testified that as a child he played in the stream and that his clothes would become stained or reddish brown from playing in it. (T. 569-570)

31. Richard Pospisil had observed no changes in Unnamed Tributary No. 1 from 1949 to the present. (T. 584-585)

32. Richard Pospisil had observed other mine openings in the area, including one on MP 273-4(A2) and one above the open pit area near MP 273-4(A4). (T. 577-579)

33. Frank Pospisil, 62, owned property directly adjacent to the mining operation. He had been living in the area of the Brown surface mine all his life. (T. 595)

34. Frank Pospisil testified that the condition shown in the photographs marked as Comm. Ex. 3A-3F, i.e. red staining in the water, was the same as that which existed prior to Brown's mining, except that there was no staining of rocks in the stream prior to mining. (T. 597)

35. Frank Pospisil observed the pond on Glenn Frye's property as being clear and not colored at the time of hearing, and the tributary coming down from the property as being "nice and clear now." (T. 606)

36. He experienced no problems with the water from his well following Brown's mining and described it as "good water." (T. 599-600)

37. John Weiman, age 89, owned property where Brown built a dam across Unnamed Tributary No. 1. He observed the stream at least once a week, and had most recently seen the stream two days before the hearing. (T. 607-608)

38. He recalled that when he was a child, the stream had red spots in it, and that there was a little iron water in a nearby spring. (T. 610)

Physical Conditions of the Surface Mine at the Time of Hearing

39. At the time of hearing, the surface mine was in various stages of reclamation:

a) The area of the surface mine subject to MP 273-4 and MP 273-4(A) had been reclaimed, and the bonds thereon had been released. (T. 125, 127; orange area of Comm. Ex. 1)

b) The area of the surface mine subject to MP 273-4(A2) had been almost entirely reclaimed. A small section of the western part of the permitted area needed to be regraded, topsoiled, and planted. (T. 134, 472, 474; green area of Comm. Ex. 1, Brown Ex. 8)

c) The area of the surface mine subject to MP 273-4(A3) had been rough backfilled but needed to be regraded, topsoiled, and planted. (T. 127, 134, 474-475; red area of Comm. Ex. 1)

d) The area of the surface mine subject to MP 273-4(A4) had been partially rough-graded. However, it contained an area with open pits and spoil piles which required backfilling and grading, top-soil, and revegetation. (T. 127, 133-134, 149; blue area of Comm. Ex. 1; Comm. Ex. 5A, 5B, and 12J)

40. At the time of hearing, there was an open pit located on an unbonded area within the boundary of the MDP. The pit was located directly north of Township Road 405, approximately 2000 feet west of the intersection of Unnamed Tributary No. 1 and Township Road 405. Seepage from mining spoils flowed into the open pit. (T. 205; Comm. Ex. 1)

41. A series of treatment ponds were located on the area of the surface mine subject to MP 273-4(A5). (T. 126, 150; Comm. Ex. 12B, 12C, and 5D)

42. A large sedimentation pond was located on the southern section of MP 273-4(A4), above the three treatment ponds. (T. 128; Comm. Ex. 12G)

43. Three smaller sedimentation ponds were also located on the southern portion of MP 273-4(A4). A collection ditch extended from these three sedimentation ponds to the larger sedimentation pond. (T. 128-129).

44. As of three weeks prior to the hearing, the collection ditch was silted in and was not working adequately. Water which was supposed to be

diverted to the larger sedimentation pond was flowing directly into Unnamed Tributary No. 1. (T. 129-130)

45. No erosion controls were maintained on the area of the surface mine subject to MP 273-4(A2) and MP 273-4(A3), other than one pond which had become silted. (T. 129-130)

46. Silt-laden water had been washing off the northwestern edge of the surface mine. (T. 129-130)

47. At the time of hearing, there were stockpiles of topsoil which had not been stabilized by a temporary vegetative cover. These were located on the western section of the area subject to MP 273-4(A2), along the northern edge of the area subject to MP 273-4(A3), and on the western side of the area subject to MP 273-4(A4). (T. 135)

Operation and Inspection of the Mine Site

48. Upon inspection of the surface mine on August 7, 1981, August 10, 1981, and August 18, 1981, Department Mine Conservation Inspector John Marryott observed a yellowish-orange staining in the stream bed of Unnamed Tributary No. 1, approximately half-way down the stream from the headwaters. (T. 39, 41-49; Comm. Ex. 3A-3F)

49. During his inspections, Mr. Marryott observed various discharges into the stream. These consisted of a discharge on the east bank of the stream, and two discharges on the west bank of the stream ("the stream bank discharges"). (T. 37-38, 41-49; Comm. Ex. 3A-3F)

50. Mr. Marryott observed the yellow-orange discoloration in the stream beginning at the discharge points and continuing downstream. (T. 42)

51. During his inspections of the surface mine on August 7, 10, and 18, 1981, Mr. Marryott collected water samples of the stream bank discharges and

samples of Unnamed Tributary No. 1 in the same locations as Mr. Sray's pre-mining samples of 1973. (T. 30-34, 37-39, 51)

od 52. Following Mr. Marryott's inspection of August 10, 1981 and upon receipt of the laboratory analyses of the water samples, DER cited Brown for violations with respect to water quality parameters of the tributary and directed Brown to treat the discharges ("Order I"). (T. 49-50)

53. On September 4, 1981, September 21, 1981, and October 5, 1981, Mr. Marryott and Department representatives conducted water quality sampling of the stream bank discharges and of Unnamed Tributary No. 1, in the same locations as previous sampling had been conducted. (T. 51-52, 59, 61; Comm. Ex. 2C, 2D, 2E)

54. Subsequent to Mr. Marryott's inspection of September 4, 1981, Brown submitted a plan to the Department to provide for the collection and treatment of the stream bank discharges. The plan provided for the segregation of surface water from the groundwater by the construction of a surface water ditch which would drain into a sedimentation pond. The groundwater was to be intercepted by an embankment placed across the stream bed. The water was then to be pumped into a series of treatment ponds where the iron could settle and be discharged into a final settling pond which in turn would be discharged to Unnamed Tributary No. 1. (T. 54-56)

55. Sometime thereafter, Brown implemented the collection and treatment plan. (T. 56)

56. The plan was not implemented in the exact design as the plan approved by the Department, in that the series of three treatment ponds were not constructed in the size outlined in the plan. (T. 56-59)

57. On October 26, 1981 Mr. Marryott conducted an inspection of the surface mine and the treatment facilities and observed that there was seepage below the breastwork of the impoundment that was placed in Unnamed Tributary No. 1. (T. 69) DER Inspector Barbara Gunter also observed a breach in the impoundment which allowed the majority of water to go into the tributary untreated rather than into the treatment pond. (T. 136)

58. Subsequent to the construction of the collection and treatment facilities, Brown resumed coal removal activities at the surface mine, and continued them until May 12, 1982. From May 12, 1982 to the time of hearing, Brown conducted no mining at the site. (T. 505-506)

59. Brown continued to treat the discharges until June or July of 1982. (T. 506-507)

60. On May 18, 1983, Brown was cited for degradation of Unnamed Tributary No. 1 and failure to reclaim the mine site. ("Order I(A)") (Notice of Appeal - EHB Docket No. 83-124-G, consolidated at No. 83-159-G)

61. On June 29, 1983, Brown was again cited for water quality violations and for degradation of Unnamed Tributary No. 1, as well as for failure to reclaim ("Order II"). (T. 51)

62. There is a toe of spoil discharge located on the area covered by MP 273-4. The discharge had a flow of five to six gallons per minute, with high iron and manganese, but with a good pH level. (T. 125, 139-140; Comm. Ex. 5L, 5M)

63. Between December 17, 1981 and November 13, 1984, representatives of the Department conducted water quality sampling at various points. These sampling points included the following: discharge from the sedimentation pond, Unnamed Tributary No. 1 at Township Road 405, Unnamed Tributary No. 1 at

the headwaters, Unnamed Tributary No. 1 at Legislative Route 64201, Unnamed Tributary No. 1 at a monitoring point located below the discharge of the treatment pond and above the discharge of the sedimentation pond, the impoundment in Unnamed Tributary No. 1, the seepage below the impoundment in Unnamed Tributary No. 1, the treatment pond discharge, the pit water accumulation, the Lawrence Pospisil, Jr. Springs, the Pine Brook Springs and Pond, and Unnamed Tributary No. 2. (T. 65, 173-176, 202-208; Comm. Ex. 2F-20 and 2Q-2KK, Comm. Ex. 6)

64. Cyrus Brown, president of Brown, also conducted sampling of various discharges on the mine site from June 9, 1982 to April 27, 1985. The results of his sampling show pH level within an acceptable range, but show much lower iron levels than the DER samples. (T. 516-521; Brown Ex. 9)

65. Mr. Brown used what is referred to as a "HACH Kit" to test iron levels. Testimony elicited from Mr. Brown at hearing indicated confusion on his part as to proper procedure for using the kit and for reading the results. (T. 540-545)

66. Samples of various discharge points collected and analyzed on March 15, 1984 and January 10, 1985 by Earthtech, a consulting and testing firm employed by Brown, showed acceptable pH levels, except that the raw pit water, Pine Brook Springs, and the Elizabeth Pospisil Spring showed pH levels well below 6.0. While Earthtech's samples showed iron at acceptable levels except at one location, they also showed elevated levels of manganese and sulfate. (T. 645-657; Brown Ex. 10 and 11)

67. Brown was cited on May 23, 1984 for discharges which failed to comply with effluent limitations ("Order IV") and on July 13, 1984 for failing to comply with Order IV ("Order V").

Water Quality

68. Acid mine drainage is characterized by a low pH, acidity greater than alkalinity, high metal concentrations, and, most significantly, moderate to high sulfate concentrations. (T. 214, 276)

69. The elevated level of sulfate concentrations in acid mine drainage results from the oxidation of iron sulfite minerals, which is a process in the formation of acid mine drainage. A typical source of elevated sulfates in acid mine drainage is the oxidation of pyrites. (T. 214, 940-941)

70. If acid mine drainage is neutralized by some calcareous material, the majority of its chemical constituents will change, except for the sulfate concentrations. The pH will increase, alkalinity will increase, acidity will decrease, but sulfates will remain the same. (T. 276-277, 335)

71. A recharge area is an area where rain water or snow melt can infiltrate into the ground and recharge a groundwater reservoir or aquifer. The recharge area for a particular discharge point is stratigraphically and topographically higher than that discharge point. (T. 204, 311)

72. A spring is a natural discharge point for groundwater. (T. 203-204)

73. The typical water quality in the Chestnut Ridge area is characterized by a pH around 6.5, low alkalinity, no acidity, iron less than 1 mg/l, manganese less than 1 mg/l, aluminum less than 1 mg/l, and sulfates in the range of 14-16 mg/l. (T. 318)

74. The high alkalinity levels in water in the Chestnut Ridge area is usually associated with the presence of limestone or a highly calcareous shale. (T. 284)

Unnamed Tributary No. 1 - Stream Bank Discharges

75. Groundwater flow at the surface mine is from the west to the southeast, from, approximately, the lower section of the area subject to Mining Permit 273-4(A3) to the point identified as D-2 on the map identified as Comm. Ex. 1. (T. 282; Comm. Ex. 1)

76. Water which emanated as stream bank discharges to Unnamed Tributary No. 1 flows through the surface mine. (T. 279, 283, 292, 304)

77. The Department's samples of the stream bank discharges on August 7, 1981, August 10, 1981, August 18, 1981, September 4, 1981, September 21, 1981, and October 5, 1981 reflect that the concentration of iron in the discharges was in excess of 7 mg/l and the concentration of manganese in excess of 4 mg/l. (T. 328-329; Comm. Ex. 2A (Sample #174), 2B (Samples #177, #178, and #179), 2P (Samples #060, #061, and #062), 2C (Samples #194, #195, and #196), 2D (Samples #214, #215, and #216), 2E (Samples #108, #109, and #110), and Comm. Ex. 10)

78. The Department's samples from May 12, 1982 to November 2, 1983, of the impoundment in Unnamed Tributary No. 1 which collects the stream bank discharges, and the seep below the impoundment, reflect that the iron concentrations are in excess of 7 mg/l and the manganese concentrations are in excess of 4 mg/l. (T. 326-327, 329; Comm. Ex. 2G (Sample #372), 2H (Sample #392), 2J (Sample #028), 2K (Sample #047), 2L (Sample #059), 2M (Samples #076, #077), 2EE (Sample #589), 2GG (Sample #698), 2HH (Sample #846), 2R (Sample #606), 2T (Sample #656), 2X2 (Sample #902), 2DD (Sample #165), and Comm. Ex. 10)

79. The stream bank discharges are characteristic of neutralized acid mine drainage in that they are alkaline yet they have elevated metal and sulfate concentrations. (T. 318; Comm. Ex. 10)

80. There are discharges coming from the mine site which have affected the quality of Unnamed Tributary No. 1, and the mining site has altered the quality of water flowing from the spoils and the pit such that when it travels underground to the Pine Brook discharge, it reflects characteristics of acid mine drainage. (T. 335)

81. The Department's pre-mining sample #2293 of July 10, 1973[8] taken at the junction of Township Road 405 and Legislative Route 64229, shows low iron and sulfate concentrations at .32 mg/l and 12 mg/l respectively, with a pH level of 4.7 and alkalinity of 6 mg/l. (Comm. Ex. 4 (Sample #2293); Comm. Ex. 10). The Department's post-mining samples taken from August 7, 1981 to March 20, 1984 at the same location reflect that the sulfate concentration increased dramatically with values ranging as high as 1176 mg/l. The iron concentration also increased dramatically, with values as high as 11.8 mg/l. Alkalinity also increased with values ranging from 21 mg/l to 188 mg/l. Additionally, the concentration of manganese in the post-mining samples[9] was high, ranging from 4.63 mg/l to 104 mg/l. The pH level did not increase significantly except for samples taken on May 12, 1982; June 22, 1982; and February 9, 1984, with levels of 8.0, 7.5 and 7.2 respectively. (T. 321; Comm. Ex. 10, p. 3-4)

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[8]We are looking solely at the July 10, 1973 pre-mining sample since the June 5, 1973 sample did not measure sulfate levels.

[9]No pre-mining testing was done for manganese or aluminum.

82. The Department's pre-mining sample #2294 of July 10, 1973, taken at the headwaters of Unnamed Tributary No. 1, shows a pH value of 6.0, acidity of 21 mg/l, and a low sulfate concentration of 20 mg/l. (T. 322; Comm. Ex. 4 (Sample #2294), Comm. Ex. 10) The Department's post-mining samples of the same location taken from August 7, 1981 to June 2, 1983 reflect a significant change in sulfate levels. The sulfate concentration increased dramatically, with the values ranging from 242 mg/l to 1290 mg/l. Acidity and pH level did not show a significant change, except that a sample taken on June 2, 1983 showed a high acidity value of 74 mg/l. (T. 322; Comm. Ex. 10, p. 5)

83. The Department's pre-mining sample #2295 of July 10, 1973 was taken at the junction of Legislative Routes 64201 and 64132. This monitoring point includes a combination of flows from Unnamed Tributaries No. 1, 2, and 3. The pre-mining sample shows a low sulfate concentration of 20 mg/l. (T. 325; Comm. Ex. 4 (Sample #2295), Comm. Ex. 10) The Department's post-mining samples at this same location reflect that the sulfate concentration increased dramatically, with values ranging from 340 mg/l to 582 mg/l. There was a slight increase in iron concentration, going from .2 mg/l to a high of 1.9 mg/l, as well as an increase in acidity, going from 0 up to a high of 108. Both manganese and aluminum were present at elevated levels: manganese at a high of 5.74 mg/l and aluminum at a high of 5.03 mg/l. The increases in acidity and sulfates are attributable to Brown's mining activities. (T. 325; Comm. Ex. 10, p. 6)

84. A water quality analysis of Unnamed Tributary No. 3, which does not receive mine drainage from the Brown site, reflects that the water has a pH of approximately 6.5, low alkalinity, no acidity, iron less than 1 mg/l, manganese less than 1 mg/l, aluminum less than 1 mg/l, and sulfate values of

14-16 mg/l. This is typical of the water quality present throughout much of Chestnut Ridge, and is nearly identical to Unnamed Tributary No. 3's pre-mining water quality when it was sampled by Mr. Sray in 1973. (T. 317-318; Comm. Ex. 10, p. 1)

85. The water quality data of the post-mining samples of Unnamed Tributary No. 1 is not typical of water quality conditions in areas of Chestnut Ridge that have not been affected by mining. (T. 1010-1012)

Pine Brook Springs and Pond

86. The Pine Brook Springs and Pond are located south of the mine and to the southeast of that area of the MDP on which is located an open pit. They are located on property owned by Glenn Frye. (T. 137-138, 306-307; Comm. Ex. 1)

87. The highwall at the open pit consists of a highly weathered sandstone with a great deal of soil mixed therein. This material is very porous and receptive to the passage of water. (T. 309)

88. The pit dips in a southeasterly direction toward the Pine Brook Springs and Pond; the topography and strata also dip in that direction. Water entering the pit flows downhill and accumulates in the lowest end of the pit. The water flows into the ground water and toward the Pine Brook Springs and Pond. (T. 309-311, 367, 954-958)

89. The quality of the water seeping into the pit and of the water accumulation itself is characterized by a low pH, high acidity, and high levels of iron, manganese, aluminum, and sulfate. (T. 230)

90. Except for iron levels, the water quality of the two Pine Brook Springs is similar to that of the pit water. It is characterized by a low pH,

high acidity, low iron concentration, and high levels of manganese, aluminum and sulfate. (T. 229-230, 314-316; Comm. Ex. 6 and 10).

91. The quality of the water accumulation in the pit and of the Pine Brook Springs and Pond is very different from naturally occurring water quality conditions in the Chestnut Ridge area, in that the water in the pit and Pine Brook Springs and Pond has a significantly higher level of acidity, manganese, and sulfates. (T. 233)

92. The quality of both the water seeping into and accumulating in the pit and the water emanating at the Pine Brook Springs and Pond is characteristic of acid mine drainage. (T. 355)

93. The recharge area for the Pine Brook Springs and Pond is the area beginning at the springs and going northwest up the swale, to a point approximately 400 feet south of Area No. 2 on Comm. Ex. 1. It includes the area of the surface mine subject to MP 273-4(A4), on which is located the open pit, as well as the area to the west of MP 273-4(A4). (T. 229-230, 312-313; Comm. Ex. C-1)

94. Brown's mining activities have degraded the quality of water of the Pine Brook Springs and Pond. (T. 233, 234, 335)

95. There are no activities being conducted in the recharge area for the Pine Brook Springs and Pond, other than Brown's mining activities, that could produce the water which exists in the Springs and Pond. (T. 231, 316)

Pospisil Spring

96. The Pospisil Spring is located approximately 1200 feet southeast of the surface mine. (T. 203)

97. The Pospisil Spring is identified as a monitoring point in Brown's MDP. Brown sampled the water quality at that point on a quarterly basis and submitted the information to the Department. (T. 203, 210; Comm. Ex. 7)

98. The Pospisil Spring is formed by two smaller springs (the south and north springs) which feed the main springhouse. The two smaller springs are located approximately 10 to 20 feet from the springhouse. (T. 207-208)

99. The quality of water in the two smaller springs is similar, and their quality is representative of the quality of water in the main spring. (T. 215)

100. Areas of the Brown surface mine which have been previously mined are located directly upgradient in a hydrogeologic and a topographic sense from the Pospisil Spring. (T. 203)

101. The recharge area for the Pospisil Spring is the area upslope of the spring. Portions of the mine site which have been surface mined, including the areas identified as Auger Area #2 and MP 273-2(A2), are part of the recharge area for the Pospisil Spring. (T. 204, 230, 238)

102. The quality of water in the Pospisil Spring was good in 1980 and 1981. (T. 252-253)

103. On May 3, 1983, a water quality complaint was registered with the Department by Lawrence Pospisil, Jr. (T. 178)

104. The Department conducted an investigation of Mr. Pospisil's complaint on May 16, 1983, which included sampling the springs on his property. (T. 145-148, 177-178, 204-208; Comm. Ex. 2S, 2II, 2JJ)

105. Samples of the Pospisil Spring taken from May, 1983 until November, 1984, showed unusually high acidity levels, a low pH, and high manganese, aluminum, and sulfate concentrations. These levels were more extreme than

what would normally be seen in a private water supply or natural spring. (Comm. Ex. 2S, 2II, 2JJ; Comm. Ex. 6; T. 212)

106. From October, 1980 to January, 1984 there was a strong long-term trend of increasing acidity in the Pospisil Spring, a decrease in pH, and an increase in sulfate and manganese concentrations (T. 216-223; Comm. Ex. 8, 9)

107. The water in the Pospisil Spring tasted bitter and metallic. (T. 213)

108. The water quality of the Pospisil Spring is not typical of the background water quality conditions in that area, nor is it typical of the quality of water in a private water supply. (T. 208, 212, 234)

109. The quality of the water in the Pospisil Spring is characteristic of acid mine drainage. (T. 213-214)

110. The quality of water in the Pospisil Spring is similar to the quality of water in the Pine Brook Springs. They both have abnormally low pH levels, high acidities, and high manganese, aluminum, and sulfate concentrations. (T. 229)

111. The quality of the water in other private water supplies in the vicinity of the Pospisil Spring, including the Miller Spring, the Barlock Spring, the Ronald Pospisil Well, and the Richard Pospisil Well, is good. (T. 226-227; Comm. Ex. 6)

112. Although the Ronald and Richard Pospisil Wells are directly downgradient from the mining operation, their quality has not degraded. Since these are drilled wells, they are deeper than a spring and are cased off near the surface. (T. 226)

113. There are no activities being conducted within the recharge area of the Pospisil Spring, other than Brown's mining activities, which could produce

the degradation in water quality which is present in the Pospisil Spring (T. 234-235, 246)

114. On March 29, 1984, DER issued an Order to Brown ("Order III") finding that Brown's surface mining operation had contaminated the private water supply of Lawrence Pospisil, and ordered Brown to provide the Pospisil residence with a replacement water supply. (Bd. Ex. 1)

115. Order III was not appealed. (T. 20, 453-455)

116. At the time of hearing, Brown had taken no steps to comply with Order III. (Vol. VIII, p. 6)

Stream Survey

117. The Department's Water Pollution Biologist, Hobart Baker, Jr. conducted an aquatic survey on the Four Mile Run Watershed in Westmoreland County on October 26 and 27, 1981. (T. 1067-1068)

118. Mr. Baker conducted the survey for the purposes of generally evaluating the watershed and for evaluating the actual and potential effects of surface mining on the watershed. (T. 1068)

119. Mr. Baker reviewed eight different points, or stations, on the watershed. (T. 2028)

120. One of the stations reviewed in the survey was located on Unnamed Tributary No. 1, and was identified by Mr. Baker as Station 3-FRT. (T. 1075-1076)

121. Mr. Baker had not conducted any survey of 3-FRT or Unnamed Tributary No. 1 prior to Brown's mining activities. (T. 1087)

122. When it is necessary to analyze the effect of mining on a stream and there is no pre-mining survey, the standard procedure the Department uses is to conduct a survey on an area of the same stream upstream of the area

affected by mine drainage. If that is not possible, then it is necessary to select another tributary in the vicinity which is unaffected by any activities and which is similar to what the tributary in issue would be like if it had not been affected by mine drainage. (T. 1088)

123. Mr. Baker chose Unnamed Tributary No. 3 to make a comparison to Unnamed Tributary No. 1. He identified the station on this tributary as Station 4-FRT. (T. 1088-1089)

124. Mr. Baker chose Unnamed Tributary No. 3 as a comparison stream because it was in close proximity to Unnamed Tributary No. 1, was of a similar size, and drained from a similar area as the affected stream. (T. 1090)

125. The physical conditions of Unnamed Tributary No. 3 were such that it appeared to be unaffected by mine drainage. There was very little sediment in the stream, the stream bottom appeared clear, and there was aquatic vegetation that is not normally found in streams affected by mine drainage. (T. 1092-1093)

126. As part of the survey, the aquatic macroinvertebrate communities and the fish populations were assessed and water samples were taken for laboratory analysis. (T. 1068)

127. Mr. Baker used the kick screen method to assess the invertebrate communities. (T. 1069-1070)

128. Mr. Baker used the grab sample method to collect water samples. (T. 1071)

129. At the time of the survey of Station 3-FRT, the water was moderately high and turbid, but there was obvious orange staining on the rocks in the stream. (T. 1076)

130. At Station 3-FRT, the kick screen test showed the existence of one crane fly larva and one crayfish. (T. 1078)

131. At Station 4-FRT, the kick screen test showed the existence of a healthy aquatic community consisting of 13 different types of invertebrates. (T. 1093-1095)

132. Many of the invertebrates found at Station 4-FRT are intolerant to siltation and/or other stream bottom disturbances and to acidic water conditions. Their presence indicates that the water quality is good. (T. 1093-94)

133. Mr. Baker had the opportunity to review the conditions at Station 3-FRT again in the spring of 1984. (T 2002-2003)

134. He conducted a kick screen analysis at that time and the results of that analysis were very similar to the first analysis, with the exception that only one invertebrate, a crane fly, was found. (T. 2003)

135. The stream at Station 3-FRT was clearer and lower than in 1981, but the stream bottom still exhibited similar siltation and there was still iron staining on the rocks. (T. 2003).

136. On that date, Mr. Baker also conducted a kick screen test at Station 4-FRT. He found a very similar assemblage of organisms to that which he found in October of 1981. (T. 2003-2004)

137. Also on that date, Mr. Baker noticed a white precipitate on the bottom of Station 3-FRT near Legislative Route 64201. (T. 2004)

138. While investigating this condition, Mr. Baker discovered and surveyed Unnamed Tributary No. 2. (T. 2004-2005)

139. Mr. Baker did a kick screen test immediately downstream of the confluence of Unnamed Tributaries No. 1 and 2 at the area where the white precipitate occurred, and found no aquatic organisms. (T. 2004)

140. In Mr. Baker's experience, a white precipitate on the bottom of streams located in areas where mining activities are conducted is an indication of aluminum precipitate. (T. 2006)

141. Given the concentration of aluminum in the samples of the Pine Brook Springs and Pond and of Unnamed Tributary No. 2, one would expect to see a white aluminum precipitate on the bottom of the stream. (T. 2008-2009)

142. In December of 1984, Mr. Baker again surveyed the three stations he had previously surveyed. (T. 2015)

143. The physical conditions at Station 3-FRT in December 1984 were similar to the conditions that existed on the two previous occasions that Mr. Baker had surveyed the area. (T. 2016) Mr. Baker sampled for invertebrates at Station 3-FRT on that date and found only a crane fly. (T. 2016)

144. The physical conditions at Station 4-FRT in December 1984 were similar to the conditions that existed on the two previous occasions on which Mr. Baker had surveyed the area in that it had a clear bottom substrate with little or no siltation. (T. 2016) Mr. Baker also sampled for invertebrates at Station 4-FRT on that date and found a very similar assemblage of invertebrates to that which he previously had found. (T. 2016)

145. The physical conditions of the area downstream of the confluence of Unnamed Tributary No. 2 with Unnamed Tributary No. 1 in December 1984 were similar to the conditions that existed on the previous occasion when Mr. Baker

surveyed it, in that it had a white precipitate and obvious siltation on the stream bottom. (T. 2017) When Mr. Baker sampled for invertebrates, he found only one stone fly. (T. 2017)

146. The depressed aquatic community at this location is attributable to the acidic nature of the water and to aluminum precipitate on the stream bed. (T. 2017)

147. During his December 1984 investigation, Mr. Baker also surveyed Unnamed Tributary No. 2 upstream of its confluence with Unnamed Tributary No. 1 and immediately downstream of the Pine Brook Pond. (T. 2019)

148. That section of the tributary did not have as much precipitate on the stream bed as noted downstream of the confluence of the two tributaries, though there was a whitish tinge to the substrate. There was little or no obvious undue bottom deposition or siltation. (T. 2019)

149. A kick screen sample was done at this point and a Dytiscidae beetle and a type of fish fly were found. The beetle is found in virtually all pondwater in the region of Pennsylvania in which the surface mine is located. The fish fly is commonly found in acid degraded areas. (T. 2020)

150. In a watershed comprised of a number of different tributaries that are all unaffected by mining activities and have similar water quality, the aquatic communities of those various tributaries will be similar. (T. 2038-2039)

151. A comparison of the invertebrate communities at Stations 3-FRT and 4-FRT indicates that something is having an adverse effect on Unnamed Tributary No. 1 so as to depress the aquatic community. (T. 1078)

152. The analyses of water samples taken at Stations 3-FRT and 4-FRT by Mr. Baker reflect that the water at Station 3-FRT had 7 mg/l of iron and the

water at Station 4-FRT had .32 mg/l of iron. Also, the water at Station 3-FRT had 778 mg/l of suspended solids, whereas the water at Station 4-FRT had only 28 mg/l of suspended solids. (T. 1095, Comm. Ex. 14)

153. The suspended solids were the result of runoff from the disturbed area upstream of Station 3-FRT. (T. 1095-1096)

154. The physical conditions of Unnamed Tributary No. 1 have caused the depressed aquatic community of 3-FRT; iron precipitation and siltation fill up the rock interstices and thereby eliminate the interstitial spaces between rocks which form the living spaces for the aquatic community. (T. 1096)

155. Station 3-FRT exhibits characteristics of mine drainage. (T. 2000)

DISCUSSION

In this consolidated appeal of five compliance orders, the Department bears the burden of proving by a preponderance of the evidence that it acted within its authority and did not abuse its discretion in issuing the orders in question. 25 Pa.Code §21.101(b)(3); Percival, supra. We find that the Department has met its burden of proof with respect to each of the appeals consolidated herein.

Degradation of Pospisil Spring - Orders III and IV

Before reviewing the appealed-from orders and the violations cited therein, we first address Order III, which was not appealed. As noted earlier, Mr. Gerjuoy ruled at the hearing that Order III, which found that Brown's mining activities had polluted the private water supply of Lawrence Pospisil, Jr. and which ordered Brown to provide a replacement water supply for the Pospisil residence, was final and not subject to challenge.

Since Brown did not appeal Order III, under the doctrine of administrative finality that order became final and binding on Brown and may not be challenged in this proceeding. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa.Cmwlth. 280, 348 A.2d 765 (1975); Armond Wazelle v. DER, 1984 EHB 748. Therefore, we affirm Mr. Gerjuoy's ruling.

Order IV, which was appealed, cited Brown for, inter alia, failure to comply with Order III. At the hearing, the parties stipulated that Brown had taken no steps to comply with Order III. (Vol. VIII, p.6). Therefore, this portion of Order IV is sustained.

Unauthorized Discharges

Before proceeding, we note that the Department, in its Post-Hearing Brief, discusses at great length the discharge limits imposed on Brown by its MDP and, in particular, Special Condition No. 3 and Standard Conditions No. 10, 11 and 12. Unfortunately, we are not able to review the aforesaid permit conditions since the Department did not see fit to introduce the MDP into the record. Therefore, we have no way of determining whether the discharges from Brown's site failed to comply with the conditions of the MDP.

However, despite the fact that we do not have available to us the terms and conditions of Brown's MDP, the compliance orders in question also cite Brown for violating sections 5, 315, 402, and 610 of the Clean Streams Law, 35 P.S. §§691.5, 691.315, 691.402, and 691.610, as well as the effluent limitations set forth in 25 Pa.Code §87.102. The evidence establishes that there are numerous discharges emanating from Brown's mine site which do not

meet the effluent limitations of §87.102 of the regulations, and that these discharges have, over time, degraded the quality of Unnamed Tributary No. 1 and Pine Brook Pond and Springs.

The Clean Streams Law prohibits a surface mine operator from discharging mine drainage which is not authorized by permit and by the regulations. 35 P.S. §§691.301, 691.307, 691.315(a); Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed 415 U.S. 903. Section 87.102 of the regulations, 25 Pa.Code §87.102, prohibits the discharge of water from an area disturbed by coal mining activities unless such discharge meets the following effluent limits:

- Alkalinity greater than acidity
- pH level between 6.0 and 9.0
- Iron not exceeding 7.0 mg/l
- Manganese not exceeding 4.0 mg/l

Various discharges on Brown's site which were sampled and analyzed by the Department showed concentrations exceeding these limits.

Samples collected prior to and immediately following issuance of Order I, although within an acceptable pH range, reflect iron and manganese levels exceeding 7.0 mg/l and 4.0 mg/l, respectively. A sample collected at the toe of spoil discharge on MP 273-4 and 273-4(A) on August 7, 1981, three weeks prior to issuance of Order I, had a total iron reading of 12.5 mg/l and a total manganese reading of 12.4 mg/l. (Comm. Ex. 2A) Samples of stream bank discharges within the boundary of the MDP, taken on August 10, 1981, also showed high readings of iron and manganese, with iron as high as 33.8 mg/l and manganese up to 12.9 mg/l. (Comm. Ex. 2B) Readings taken eight days later showed iron as high as 22.1 mg/l and manganese again at 12.9 mg/l. (Comm. Ex. 2P) The stream bank discharges were sampled again on September 4, 1981,

following issuance of Order I, and again showed high iron and manganese levels, with iron as high as 14.6 mg/l and manganese at a high of 13.1 mg/l. (Comm. Ex. 2C) Samples of discharges collected on September 21, 1981, October 1981, and December 17, 1981 showed similar high readings of iron and manganese. (Comm. Ex. 2D, 2E, 2F)

In appealing Order I, Brown argued that the samples taken by the Department were not an accurate representation of the water quality since the samples were taken following heavy rains in August 1981. Brown introduced nothing into the record supporting this argument. Moreover, even if we were to accept this argument, it does not account for the fact that the September, October, and December 1981 readings also showed high levels of iron and manganese.

Furthermore, discharge samples taken subsequently in 1983, prior to issuance of Order II, again showed high levels of iron and manganese, as well as low pH levels. A January 4, 1983 sample of groundwater flowing into the open pit located on the mine site showed a pH level of 3.1 and iron and manganese concentrations of 29.1 mg/l and 54.0 mg/l, respectively. (Comm. Ex. 2M) A sample of pit water taken on the same date showed a pH level of 3.6 and manganese at 22.9 mg/l. Iron in the pit water sample was at an acceptable level of 3.64 mg/l. (Comm. Ex. 2M) Samples of two discharges below a collection pond on the site, taken on February 1, 1983, showed iron at 12.5 mg/l and 14.5 mg/l and manganese at 9.5 mg/l and 9.3 mg/l (Comm. Ex. 2N) These samples also contained elevated levels of aluminum and sulfates. Subsequent sampling revealed pH at an acceptable level, but continued to show high levels of manganese and, in some cases, iron. (Comm. Ex. 2R-2V)

From August 1982 to April 1985, Brown's president, Cyrus W. Brown, also sampled various discharges on the mine site for pH and iron levels. These sample points included the treatment pond, a collection pond, a discharge pond, and a culvert. His samples indicated pH levels within acceptable range, as was also found by the Department at most of its sampling points. However, Mr. Brown's samples show iron levels much lower than those found by the Department and well below the 7.0 mg/l limit set by the regulations. (T. 516-521; Brown Ex. 9)

However, we find the results of Mr. Brown's sampling to be less credible than those presented by the Department. Whereas the Department's samples were collected by experienced personnel and analyzed by a trained laboratory staff, Mr. Brown's samples were collected and analyzed by himself using a less accurate field testing kit. The samples were not analyzed by personnel trained to perform this function. (Finding of Fact ("F.F.") 64, 65) In fact, Mr. Brown's testimony at hearing indicated that he was not well-versed in the proper procedure for use of the testing kit and, in particular, was confused as to how to read the results. (T. 540-545)

An independent geochemical testing firm, Earthtech, retained by Brown, also conducted sampling of discharges on the mine site and certain other points on March 15, 1984 and January 10, 1985, before and after the Department's issuance of Orders IV and V. All of Earthtech's sampling revealed pH and iron levels within acceptable range, except for the pit water and two other locations located off the mine site.[10] (Brown Ex. 10 and 11)

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[10]The pit water had an iron reading of 8.4 mg/l and a pH level of 3.1. The two offsite locations, Pine Brook Spring, located on the property of Glenn
footnote continued

By comparison, the Department's samples taken throughout 1984 also revealed that the majority of discharges sampled during that period contained iron levels well below the maximum limit. For example, Department samples of the treatment pond discharge from August 1983 to November 1984 showed iron to be at an acceptable level, ranging from a low of .20 mg/l in October 1984 to a high of 3.06 mg/l in February 1984. (Comm. Ex. 10, p. 9) However, at least 5 samples taken during that same time frame still showed iron levels exceeding the maximum limit.[11] For example, a discharge from an impoundment on the mine site contained 11.62 mg/l of iron when sampled on January 12, 1984. (Comm. Ex. 2W) A sample from the breach in the collection sump located below the main water impoundment, taken on March 20, 1984, showed iron at 15.43 mg/l. (Comm. Ex. 2X2) A discharge emanating from a spoil bank into the first sedimentation pond, also sampled on March 20, 1984, contained 14.65 mg/l of iron, and Inspector Barbara Gunter, who collected the sample, noted iron staining. (Comm. Ex. 2X2) A sample of the toe of spoil discharge collected on the same date contained 14.21 mg/l of iron. (Comm. Ex. 2X2) Seepage from the bottom of an impoundment located along Unnamed Tributary No. 1, sampled on November 13, 1984, contained 17.90 mg/l of iron. (Comm. Ex. 2dd) We note that only one of these locations was also sampled by Earthtech--the toe of

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continued footnote
Frye, and a spring located on the property of Elizabeth Pospisil, also showed low pH levels.

[11]Unfortunately, the discharge sampling data presented by the Department is a hodgepodge of information showing little consistency with respect to location of sampling points. Therefore, it is difficult to compare the data over long periods of time or with that collected by Earthtech except for isolated instances.

spoil discharge. Earthtech's samples of this location on January 1, 1985 revealed iron at 0.2 mg/l where the discharge was clear and at 1.6 mg/l where the discharge had staining. (Brown Ex. 11)

There is no way to align the two sets of sampling data, except we note that, other than the toe of spoil discharge, none of the Department's and Earthtech's samples were taken at the same discharge points. Nor does it appear that any samples were taken at the same point in time. We further note that both Earthtech's and the Department's samples show manganese levels exceeding the 4.0 mg/l limit, as well as elevated sulfate levels.

We do not accept Brown's argument that the data collected and analyzed by the Department was not reliable. On the contrary, the Department presented testimony at length describing the sampling methods employed by its inspectors and the testing procedures utilized in its laboratories. We find the data presented by the Department to be credible and reliable and, therefore, hold that the Department met its burden of proving that discharges exceeding the effluent limits of the regulations were emanating from the site covered by Brown's MDP in violation of the Clean Streams Law and 25 Pa.Code §87.102.

In testimony presented at hearing, Brown's president stated that his operation did not strip mine the entire area covered by the MP's, and that his mining operation did not affect an area of MP 273-4 where the Department had indicated a "discharge" on Commonwealth Ex. 1. (T. 470-471) Mr. Brown

attributed the discharge to an old, abandoned deep mine located on MP 273-4. (T. 471) Since this argument was not raised in Brown's Post-Hearing Brief, it is deemed to have been abandoned. Laurel Ridge, supra.[12]

Degradation of Unnamed Tributary No. 1

The Department asserts that the unauthorized discharges emanating from Brown's site have resulted in the degradation of Unnamed Tributary No. 1, which is a tributary to Four Mile Run. A portion of Unnamed Tributary No. 1 flows through the area covered by Brown's MDP, specifically the section designated as "Auger Area" on Comm. Ex. 1.

Four Mile Run and its tributaries are designated as "trout stocked fisheries" at 25 Pa.Code §93.9. As such, they must meet specially designated water quality criteria set forth at 25 Pa.Code §93.7. The water quality criteria for trout stocked fisheries include the following limitations:

pH	6.0-9.0
Iron	Not exceeding 1.5 mg/l for total iron
Manganese	Not exceeding 1 mg/l
Sulfate	Not exceeding 250 mg/l

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[12]However, we wish to point out that under §316 of the Clean Streams Law, 35 P.S. §691.316, Brown, as an "occupier" of the entire site covered by the MP's, is liable for any unlawful discharges emanating from the site, regardless of whether the area where the discharges arose was mined or not. See Harbison-Walker Refractories v. DER, 1989 EHB 1166, 1173; See also Adams Sanitation Co., Inc. v. DER, EHB Docket No. 90-479-W (Opinion and Order issued February 20, 1991) (Landfill operator held liable for contamination emanating from entire leased site, not simply that portion where waste had been disposed.) Furthermore, as to Brown's argument that any discharge on MP 273-4 is attributable to the abandoned deep mine located there, under section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), a surface mine operator is liable for any unauthorized discharge from its permit site, even if the discharge pre-existed the mining and regardless of whether the operator affected or worsened it. Thompson & Phillips Clay Co., Inc. v. DER, 1989 EHB 298, aff'd ___ Pa.Cmwlth. ___, 582 A.2d 1162 (1990); Bologna Mining Co. v. DER, 1989 EHB 270.

Pre-mining samples of Unnamed Tributary No. 1, taken by former Department Mine Conservation Inspector William Sray on June 5, 1973 and July 10, 1973, showed iron and sulfate levels within these limits.[13] Mr. Sray sampled at four locations: three points along Unnamed Tributary No. 1 (Samples No. 2293, 2294, and 2295) and at one point along unaffected Unnamed Tributary No. 3 (Sample No. 2296). The results were as follows:

	2293	2294	2295	2296
6-15-73:				
Iron (mg/l)	.18	.16	.20	.22
Sulfate (mg/l)	___	___	___	___
7-10-73:				
Iron (mg/l)	.32	.05	.13	.19
Sulfate (mg/l)	12	20	20	15

(Comm. Ex. 4)

In 1981, by which time Brown had been conducting mining at the site for approximately eight years, Department Inspector John Marryott collected samples from the same locations as those surveyed by Mr. Sray above.[14] Mr. Marryott's sampling revealed that iron levels had increased somewhat and that sulfate levels had risen dramatically at the points along Unnamed Tributary No. 1 as follows:

	2293	2294	2295	2296
8-7-81:				
Iron (mg/l)	7.25	.64	1.33	.08
Sulfate (mg/l)	540	340	340	14
8-10-81:				
Iron (mg/l)	8.78	___	2.01	.20
Sulfate (mg/l)	640	___	360	16

[13]The June 5, 1973 samples were tested for iron only. The July 10, 1973 samples were tested for both iron and sulfate.

[14]As noted earlier in footnote 11, the Department did not consistently sample at the same locations and, therefore, we do not have data for each location on each date of sampling.

	2293	2294	2295	2296
9-4-81:				
Iron (mg/l)	11.8	—	—	—
Sulfate (mg/l)	364	—	—	—

(Comm. Ex. 2A, 2B, and 2C)

With respect to the sampling points along Unnamed Tributary No. 1, both iron and sulfates had increased from their pre-mining levels. In particular, the iron level at sampling point no. 2293 was well above the maximum allowable limit of 1.5 mg/l on all three dates that Mr. Maryott sampled. In addition, sulfate levels were elevated at all three of the sampling points along Unnamed Tributary No. 1, exceeding the maximum 250 mg/l limit set by §93.7. Only sampling point no. 2296 along Unnamed Tributary No. 3, the tributary not affected by mine drainage, showed no significant change from pre-mining samples and was well within the limits of §93.7.

Brown presented testimony at hearing from Geologist Edward Steele, who testified that the pre-mining samples taken by Mr. Sray may reflect lower than actual iron levels because it is likely that his samples were unpreserved at the time they were collected. (T. 805) (F.F. 17, 18) However, even though this may be true, it does not account for the dramatic increase in iron levels of the samples taken from Unnamed Tributary No. 1, especially sample no. 2293. Nor does it explain the lack of an increase in the iron level of sample no. 2296, along the tributary not affected by mine drainage.[15]

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[15]Comm. Ex. 2P contains the results of samples taken by Inspector Barbara Gunter on August 18, 1981. One sample shown therein is stated to have been collected at the same point as No. 2296. However, the readings (iron at 6.02 mg/l and sulfate at 840 mg/l) are completely out of proportion with those of August 7 and 10, 1981. Unfortunately, the Department presented no samples after this date which were clearly identified as having been taken at point No. 2296, so we have nothing further to which to compare this apparent inconsistency. However, since it appears unlikely that iron and sulfate footnote continued

Samples of Unnamed Tributary No. 1 taken in 1983 by Inspectors Marryott or Gunter again show elevated levels of iron, sulfate and, also, manganese. Unfortunately, the samples are not clearly identified as having been taken in the same locations as pre-mining sampling points 2293-2296, so we can make no pre-mining/post-mining comparison. Also, as with most of the post-mining sampling data presented by the Department, there appears to be no consistency as to where the Department sampled but, rather, we are simply faced with data on samples taken from scattered locations.

On March 10, 1983, Inspector Marryott sampled Unnamed Tributary No. 1 above and below its intersection with a discharge from the treatment pond on Brown's site. The sample above the intersection showed manganese at 17.09 mg/l and sulfate at 774 mg/l. Iron was at an acceptable level of 1.25 mg/l. (Comm. Ex. 20) The sample collected downstream of the intersection showed manganese at 8.99 mg/l and sulfate at 738 mg/l. Iron again was at an acceptable level of .20 mg/l. (Comm. Ex. 20) A sample collected below the treatment pond and sediment pond discharge on August 25, 1983 shows iron at what appears to read 2.28 mg/l, manganese at 11.01 mg/l and sulfate at 984 mg/l. (Comm. Ex. 2R) A November 2, 1983 sample of the tributary taken below the mining operation contained 8.07 mg/l of manganese and 1020 mg/l of sulfate. (Comm. Ex. 2T)

Department samples of Unnamed Tributary No. 1 collected in 1984 continued to show elevated levels of manganese, sulfate, and, in some instances, iron. A sample taken by Inspector George Hartenstein on February

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continued footnote
levels would have increased so dramatically in such a short period of time, we believe that Inspector Gunter's August 18, 1981 sample incorrectly labeled this point as no. 2296. We, therefore, discount the data contained in that laboratory report.

9, 1984, approximately twenty feet below where the treatment pond discharge entered Unnamed Tributary No. 1, contained 9.28 mg/l of manganese, 858 mg/l of sulfate, and 10.04 mg/l of iron. (Comm. Ex. 2X1) Additional sampling conducted throughout 1984 consistently revealed elevated levels of manganese and sulfate and, in certain instances, iron. (Comm. Ex. 2X2 to 2dd)

Other sampling conducted by the Department also indicated that the odality of Unnamed Tributary No. 1 had been degraded by mine drainage. Ideally, in order to determine whether mine drainage has caused degradation of a stream, an area upstream of the pollution is compared to an area downstream of it. (F.F. 122) However, that was not possible in this particular instance, according to Department Water Pollution Biologist Hobart Baker, who surveyed Unnamed Tributary No. 1 in October 1981. Therefore, he compared the condition of Unnamed Tributary No. 1 with another tributary of Four Mile Run, Unnamed Tributary No. 3, which was not receiving any drainage from the Brown mine site. (F.F. 124, 125) As part of the survey, Mr. Baker took water samples and assessed the aquatic communities of the two streams. Unnamed Tributary No. 3 appeared clear, had very little sediment, and contained a healthy aquatic community consisting of thirteen different types of invertebrates and vegetation not normally found in streams affected by mine drainage. (F.F. 125, 131, 132) On the other hand, Unnamed Tributary No. 1 had a depressed aquatic community containing only a crane fly larva and a crayfish. In addition, there was orange staining on the rocks. (F.F. 129, 130)

Water samples taken at these points showed Unnamed Tributary No. 3 with only .32 mg/l of iron, while Unnamed Tributary No. 1 contained 7 mg/l of

iron. Unnamed Tributary No. 1 also contained a much higher amount of suspended solids. (F.F. 152)

Mr. Baker conducted the same survey again in the spring of 1984 with similar results. Unnamed Tributary No. 3 contained a similar assemblage of organisms as those observed in October 1981. (F.F. 136) Unnamed Tributary No. 1 again showed signs of siltation and orange staining on the rocks, as well as white precipitate on the bottom of the stream. Only one aquatic invertebrate, a crane fly, was found. (F.F. 134, 135, 137)

Mr. Baker conducted a third survey of the same stations in December 1984, again with similar results. (F.F. 142, 143, 144) While the survey odint at Unnamed Tributary No. 3 was clear and contained a variety of aquatic invertebrates, the survey point at Unnamed Tributary No. 1 was in the same condition as on Mr. Baker's prior visit and contained only a single crane fly. (F.F. 143, 144) At this time, Mr. Baker also surveyed at a point downstream of Unnamed Tributary No. 1's confluence with a second affected tributary, designated as Unnamed Tributary No. 2. This location contained white precipitate and obvious siltation on the bottom of the stream bed. No aquatic invertebrates were found except for a single stone fly. (F.F. 145)

According to Mr. Baker, in a watershed comprised of a number of different tributaries, such as Unnamed Tributaries No. 1 and 3, the aquatic communities will be similar where they have not been affected by mining activities. (F.F. 150) The fact that the aquatic communities of Unnamed Tributaries No. 1 and 3 are so startlingly dissimilar indicates that something has had an adverse effect on the water quality of Unnamed Tributary No. 1. (F.F. 151) The findings of Mr. Baker's surveys show that the physical conditions of Unnamed Tributary No. 1, i.e. elevated iron and siltation, have

caused its depressed aquatic community. According to Mr. Baker, he has never seen conditions comparable to those at the survey point along Unnamed Tributary No. 1 in any unaffected stream, and it is his conclusion that Unnamed Tributary No. 1 definitely exhibits characteristics of mine drainage. (F.F. 154, 155)

Finally, both sides presented eyewitness testimony as to the condition of Unnamed Tributary No. 1 both prior to and after mining had taken place. The Department presented the testimony of two individuals familiar with the area. They testified that prior to Brown's mining, Unnamed Tributary No. 1 had been clear, but that following mining it had turned a rusty-brown color and stones in the stream bed had turned brown. (F.F. 24, 28) On the reverse side, Brown presented the testimony of three long-time residents of the area who claimed that the tributary had contained red staining long before Brown's mining had taken place, and that the condition of the stream at the time of hearing was no different from that prior to mining. (F.F. 30, 31, 34, 38)

Despite this conflict in testimony as to the pre-mining condition of Unnamed Tributary No. 1, we note, as the Department points out in its Post-Hearing Brief, that Inspector Sray's pre-mining report and survey of Unnamed Tributary No. 1, prepared in 1973, makes no mention of any red or brown staining in the stream.[16] Had there been any staining at that time it would have been noted in Mr. Sray's report.

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[16]Although there are notations on the field map accompanying the survey which show the location of staining in Unnamed Tributary No. 1, Department Hydrogeologist Nancy Pointen testified that she placed the notations on the map during a hydrogeologic inspection of the surface mine site in 1981, after mining had begun. (F.F. 24)

Based on the evidence before us, we find it more credible that there was little or no staining of Unnamed Tributary No. 1 prior to Brown's mining. Also based on the evidence before us, we find that the unauthorized discharges emanating from Brown's mine site have caused degradation of Unnamed Tributary No. 1. Therefore, we sustain the Department's issuance of Order I and those portions of Orders I(A) and II dealing with degradation of Unnamed Tributary No. 1.

Degradation of Pine Brook Springs and Pond

Order IV charged Brown with unauthorized discharges causing the degradation of Pine Brook Springs and Pond, located on the property of Glenn Frye.

The water quality of Pine Brook Springs and Pond at the time of hearing was characteristic of acid mine drainage in that it had a low pH level, high acidity, and high levels of manganese, aluminum, and sulfate.[17] (F.F. 90, 92) It is not typical of the naturally-occurring water quality condition in the Chestnut Ridge area, which has good pH level, little or no acidity, and significantly lower levels of manganese and sulfates (less than 1 mg/l and 14-16 mg/l, respectively). (F.F. 91) On the other hand, except for iron level, the water quality of Pine Brook Springs and Pond is very similar to that of the pit water found on Brown's site. (F.F. 90) The pit itself

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[17]Samples taken from April 1984 to November 1984 showed pH levels ranging from 3.5 to a high of only 4.6, acidity as high as 248 mg/l, manganese ranging from 5.10 mg/l to 12.50 mg/l, aluminum ranging from 2.42 mg/l to 21.40 mg/l, and sulfate levels averaging near 500 mg/l. Only iron was at an acceptable level, ranging from .10 mg/l to 1.99 mg/l. (Comm. Ex. 6 and 10)

dips in the direction of Pine Brook Springs and Pond. In addition, the recharge area for the Springs and Pond includes that part of the surface mine on which the pit is located. (F.F. 88, 93)

Although the Department was not able to produce any pre-mining samples of Pine Brook Springs and Pond to compare with its post-mining condition, it is apparent that something has degraded the quality of the Springs and Pond since it is atypical of other water in the area, but closely resembles pit water from the mine site. Based on the data available, Department Hydrogeologists Michael Smith and Joseph Schueck concluded to a reasonable degree of scientific certainty that Brown's mining activities had caused degradation of the water quality of Pine Brook Springs and Pond. (T. 233-34, 335) Furthermore, although Brown's expert witness, Geologist Edward Steele, testified that his study of the area did not lead him to believe that the contamination of the Springs and Pond had been caused by Brown's mining, he could identify no other possible source of contamination.

Brown argued in its appeal that some other source was responsible for any degradation of Pine Brook Springs and Pond and Unnamed Tributary No. 1, and that discharges from its site had not resulted in any contamination. However, the Department clearly established that discharges not meeting the limits of 25 Pa.Code §87.102 were emanating from Brown's mine site. The Department further established that the condition of Unnamed Tributary No. 1, Pine Brook Springs and Pond, and the Pospisil Spring has degraded since the start of Brown's mining. Finally, no evidence was presented as to any possible sources of contamination in the area other than the Brown mine site.

We find that the Department met its burden of proving that unauthorized discharges from Brown's mine site entered waters of the Commonwealth in violation of the Clean Streams Law and 25 Pa.Code §87.102.

Failure to Reclaim

Order II cited Brown for failing to backfill concurrent with mining, failing to construct and maintain adequate erosion and sedimentation controls, failing to control accelerated erosion and sedimentation, failing to apply mulch to all regraded and topsoiled areas, failing to adequately revegetate backfilled areas, and failing to establish temporary vegetative cover on stockpiles of topsoil.

Department Inspector Barbara Gunter testified that, even as late as the date of hearing, the mine site was in various stages of reclamation. The area of the mine site covered by MP 273-4(A3), although backfilled, still needed to be regraded, topsoiled, and planted. No erosion controls were being maintained on the areas covered by MP 273-4(A2) and MP 273-4(A3), other than one pond which had become silted. The section of the surface mine subject to MP 273-4(A4) had been partially rough-graded, but still contained an area with open pits which required backfilling and grading, topsoil, and revegetation. Stockpiles of topsoil which had not been stabilized by temporary vegetative cover were located on parts of the areas subject to MP's 273-4(A2), 273-4(A3), and 273-4(A4). Finally, the previously mentioned large open pit, located on an unbonded area within the boundary of the MDP, still remained, and seepage from spoils was flowing into it. (F.F. 39, 40, 45, 47) Brown's president confirmed that reclamation had not been completed at the time of hearing. (T. 474-475)

Failure to backfill and grade is a violation of 25 Pa.Code §87.141 and section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), which requires that backfilling be performed in connection with operation of a mine. Failure to apply vegetative cover violates 25 Pa.Code §§87.147 and 87.153. Failure to maintain adequate erosion and sedimentation controls constitutes a violation of 25 Pa.Code §87.106.

The evidence indicates that Brown failed to reclaim the mine site in accordance with the requirements of the Clean Streams Law and the regulations, and that the Department was clearly acting within its authority in issuing Orders I(A) and II requiring Brown to comply with the requirements thereof. 35 P.S. §691.610.

Conclusion

Having found that Brown violated the Clean Streams Law and 25 Pa.Code §87.102 by causing or allowing unauthorized discharges of mine drainage from its site to enter waters of the Commonwealth, thereby causing them to degrade in quality, and, further, having found Brown in violation of the reclamation requirements of the regulations, we hold that the Department did not abuse its discretion in issuing to Brown each of the compliance orders discussed herein.

CONCLUSIONS OF LAW

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

2. The Board may issue an adjudication based upon a cold record. Lucky Strike, supra.

3. The Department has the initial burden of proof in the appeals of its orders which require Brown to take affirmative action to abate pollution. 25 Pa.Code §21.101(b)(3).

4. Brown has the burden of proof of affirmative defenses to the orders. 25 Pa.Code §21.101(a).

5. Because Brown failed to appeal Order III, which found that Brown had contaminated the private water supply of Lawrence Pospisil and which required Brown to replace Mr. Pospisil's water supply, the findings of that order are final and binding upon Brown and Brown cannot challenge them in this proceeding. Armond Wazelle, supra.

6. Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), prohibits a discharge from a mine unless the discharge is authorized by permit and complies with the regulations. Harmar Coal, supra.

7. Section 87.102 of the regulations, 25 Pa.Code §87.102, prohibits any discharge from a surface mine which is acidic and which has a pH less than 6.0. The maximum limits allowable for concentrations of iron and manganese are 7 mg/l and 4 mg/l, respectively.

8. Section 401 of the Clean Streams Law, 35 P.S. §691.401, prohibits the pollution of the waters of the Commonwealth from any source.

9. Causing and allowing unauthorized discharges from a surface mine or discharges which pollute and degrade the waters of the Commonwealth constitutes a public nuisance. Sections 3, 307(c), and 401 of the Clean Streams Law, 35 P.S. §§691.3, 691.307(c), §691.401; Commonwealth v. Barnes and Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974) ("Barnes and Tucker I").

10. Whenever the Department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the Department has authority to order the landowner or occupier to correct the condition in a manner satisfactory to the Department. Section 316 of the Clean Streams Law, 35 P.S. §691.316.

11. Brown has caused and allowed discharges of mine drainage from the surface mine which exceeded the applicable effluent limitations in section 87.102 of the regulations, 25 Pa.Code §87.102.

12. Brown has caused and allowed discharges of mine drainage from the surface mine which have polluted and degraded Unnamed Tributary No. 1 and Pine Brook Pond and Springs.

13. Brown has created a public nuisance by causing and allowing discharges from the surface mine which exceed the applicable effluent limitations in the regulations and by polluting and degrading Unnamed Tributary No. 1 and Pine Brook Pond and Springs.

14. Brown is liable, as an occupier, for correcting the polluting conditions on the surface mine. 35 P.S. §691.316.

15. Brown has failed to operate the surface mine in accordance with all applicable regulations.

16. Brown has failed to comply with the regulations which require a surface mining operator to backfill and reclaim a surface mine to approximate original contour within sixty (60) days after the completion of all coal removal, to apply mulch to all areas of the surface mine that have been regraded and topsoiled, to revegetate the surface mine, to construct and maintain appropriate erosion and sedimentation controls, and to establish temporary vegetative covers on stockpiles of topsoil. 25 Pa.Code §§ 87.98, 87.106, 87.141, 87.147, and 87.153.

17. The Department has authority to issue such orders as are necessary to obtain compliance with the provisions of the Surface Mining Act and the Clean Streams Law and to abate public nuisances, including orders requiring reclamation and the collection and treatment of mine drainage from a surface

mine. Section 4.3 of the Surface Mining Act, 52 P.S. §1396.4c, and Section 610 of the Clean Streams Law, 35 P.S. §691.610.

18. The Department acted reasonably and in accordance with the law and did not abuse its discretion in issuing the orders which are the subject of this appeal.

19. The Department has sustained its burden of proof in this consolidated appeal of its orders.

O R D E R

AND NOW, this 25th day of June, 1991, it is ordered that the Department's orders of August 28, 1981; May 18, 1983; June 29, 1983; March 29, 1984; and May 23, 1984 are sustained, and Brown's appeals of these orders, consolidated at EHB Docket No. 83-159-G, are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann recused himself in this matter.

DATED: June 25, 1991

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

rm

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

FERN E. SMITH	:	
	:	
	:	
v.	:	**EHB Docket No. 90-433-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: June 25, 1991**
and FULKROAD LANDFILL, INC., Permittee	:	

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

A Motion for Summary Judgment is granted in favor of a permittee when the objections stated by a third-party appellant relate to prior permits and alleged lax enforcement on the part of DER. Allegations of non-compliance under prior permits will not be considered a challenge to permittee's compliance history when the only documents relate to a period prior to permittee's acquisition of a landfill. An appellant proceeding without legal counsel is not excused from stating a case under principles of substantive law.

OPINION

Fern E. Smith (Appellant), without assistance of legal counsel, filed a Notice of Appeal on October 16, 1990 from the issuance by the Department of Environmental Resources (DER) on September 27, 1990 of Solid Waste Permit No. 101539 to Fulkroad Landfill, Inc. (Permittee), authorizing the construction

and operation of a municipal waste landfill in Washington and Upper Paxton Townships, Dauphin County. The objections stated in the Notice of Appeal are as follows:

1. The issuance of Permit No. 101539.
2. The issuance of past permits relating to Fulkroad Landfill.
3. Adjacent land owners not being notified when permit changes were made.
4. Our well not charted on landfill maps.
5. The Department's lack of enforcement in regards to past non-compliance.

On February 12, 1991 Permittee filed a Motion for Summary Judgment[1] with the sworn affidavit of Sylvan W. Kretz, P.E. and portions of the deposition of Appellant attached. The Motion asserts that, since Appellant's objections relate solely to prior permits, summary judgment should be entered in favor of Permittee. By letter dated February 15, 1991 DER notified the Board that it had no objection to the granting of Permittee's motion. Although given written notice that any response to Permittee's motion had to be filed by March 4, 1991, Appellant made no such filing. She did respond, however, on April 2, 1991 to a March 25, 1991 letter to the Board from Permittee's legal counsel citing a recent Board decision in support of the Motion. In this response, Appellant basically reiterated her complaints about past compliance problems.

The Motion can be granted if the Notice of Appeal, deposition and affidavit show that there is no genuine issue as to any material fact and that

---

[1] Also included were a Motion to Dismiss for Failure to Prosecute and a Motion for Stay of Requirement to File Pre-Hearing Memorandum. The Motion to Stay was granted in an Order issued February 13, 1991. The Motion to Dismiss is mooted by our disposition of the Motion for Summary Judgment.

Permittee is entitled to judgment as a matter of law: Pa. R.C.P. 1035.[2] In passing upon the motion, the Board is required to view it in the light most favorable to appellant: *Robert C. Penoyer v. DER*, 1987 EHB 131.

The affidavit recites that Permit No. 101539 relates to a new landfill adjacent to one permitted in 1978 and closed in 1988. The old landfill is adjacent to Appellant's property, lying between that property and the new landfill. Chambers Development Company, Inc. purchased the old landfill in 1986 and had the permit transferred to Permittee (a wholly-owned subsidiary) in 1987.

In Appellant's deposition taken on December 20, 1990, she states repeatedly that her objections relate to the old landfill and what she alleges is lax enforcement by DER. The clearest statement is on page 51 where she says -

> In fact, everything I'm disputing has to do with the original permit. Because, had those things been in compliance in the first place, these people wouldn't even be in my neighborhood applying for a permit now. They're only there because they bought a damn mess. That's - - they don't know how to get out of.

Challenges to past permits and permit modifications cannot be considered in this appeal because the Board lacks jurisdiction to review any action of DER not brought before us by appeal during the 30-day period provided in our rules: 25 Pa. Code §21.52.

The only remaining objection concerns DER's alleged lack of enforcement of past non-compliance at the old landfill. Complaints of this nature also do not fall within the Board's jurisdiction since they deal with

---

[2] Appellant also filed a number of documents and a one-page letter apparently intended to be a pre-hearing memorandum on January 23, 1991. This filing also will be considered.

"non-action" rather than "action" and concern DER's prosecutorial discretion: *Washington Township Concerned Citizens v. DER et al.*, Board Docket No. 90-152-F, Opinion and Order issued February 8, 1991.

In an effort to find some sustainable basis for appeal, if possible, we also considered whether this objection could constitute a challenge to Permittee's compliance history under section 503 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, 35 P.S. §6018.503, during the period it has owned the old landfill. Appellant does not specify whether the past non-compliance occurred prior to or subsequent to Permittee's acquisition of the old landfill in December 1986. The documents filed with the Board on January 23, 1991 relate to enforcement problems predating Permittee's acquisition. For us to assume that Appellant intended to challenge Permittee's compliance history on this state of the record would be gross speculation, to say the least.

Our procedural rules require Appellant to state specific objections to DER's action: 25 Pa. Code §21.51. These objections must show a basis for relief under principles of substantive law. Simply because Appellant has chosen to proceed without the assistance of legal counsel does not excuse her from complying with these requirements: *Jones v. Rudenstein*, ____ Pa. Super. Ct. ____, 585 A.2d 520 (1991). There are no genuine issues of fact and Permittee is entitled to judgment as a matter of law.

ORDER

AND NOW, this 25th day of June 1991, the Motion for Summary Judgment is granted and judgment is entered for Permittee.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 25, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Robert Abdullah, Esq.
Central Region
For the Appellant:
Fern E. Smith, Esq.
Harrisburg, PA
For the Permittee:
Eugene E. Dice, Esq.
Harrisburg, PA
sb

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M. DIANE SMITH
SECRETARY TO THE BOARD

SHIPMAN SANITARY SERVICE, INC.	:	
	:	
v.	:	**EHB Docket No. 90-275-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 1, 1991**

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

Where the party bearing the burden of proof in an appeal fails to file a Post-Hearing Brief on the issues raised in its appeal, it is deemed to have abandoned all issues raised therein according to Lucky Strike Coal Company v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). Under such circumstances, an adjudication dismissing the appeal should be entered.

Background

On July 6, 1990, Shipman Sanitary Service, Inc. ("Shipman") filed an appeal with this Board challenging the propriety of conditions placed in Permit No. 603077 as issued to Shipman by the Department of Environmental Resources for the agricultural utilization of sewage sludge on land in Washington Township, Greene County. In due course, the parties filed their respective Pre-Hearing Memoranda and we listed this matter for a hearing on the merits to occur on January 14 and 15, 1991. On January 10, 1991, Board

member Ehmann issued an Order granting in part a DER Motion To Limit Issues (the order also denied a portion of the motion).[1] On January 14, 1991, the Board held the hearing on the merits of this appeal and, after receipt of this hearing's transcript, issued our order of April 3, 1991, as to the filing of Post-Hearing Briefs by the parties. That Order provided in relevant part:

> 1) Shipman Sanitary Services, Inc. shall file its Post-Hearing Brief on or before May 3, 1991;
>
> 2) The Department of Environmental Resources shall file its Post-Hearing Brief on or before June 3, 1991; and
>
> 3) Any reply briefs shall be filed on or before June 13, 1991.

While we received DER's Brief on June 3, 1991, we have had no communication of any type from Shipman or its counsel.

DISCUSSION

The first issue raised in DER's Post-Hearing Brief is dispositive of this appeal without the need for this Board to prepare detailed findings of fact and conclusions of law which relate to the factual and legal issues raised at the merits hearing. Accordingly, we focus on that issue.

Pursuant to 25 Pa. Code §21.101(a), Shipman bears the burden of proof in this case. It is asserting the affirmative, i.e., a right to this permit absent the conditions inserted therein by DER. Municipal Authority of the Township of Union v. DER, 1989 EHB 1156. The fact that Shipman bears this burden is critical, because, through Lucky Strike, *supra*, Commonwealth Court

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[1] See Shipman Sanitation Service, Inc. v. DER, EHB Docket No. 90-275-E (Opinion issued January 10, 1991).

has made it clear that a party appearing before this Board is deemed to waive those issues not raised in its Post-Hearing Brief. Russell Joki v. DER, 1990 EHB 1329. Here, Shipman has failed to file any Post-Hearing Brief. Thus, under Lucky Strike, it has waived its right to contest all issues raised in the Notice Of Appeal it filed with us to commence this proceeding. Laurel Ridge Coal, Inc. v. DER, 1990 EHB 486.

Shipman has thus effectively failed to prosecute its appeal and elected to abandon this proceeding.

Where a party fails to go forward with its case and bears the burden of proof, we have previously dismissed appeals as a sanction pursuant to 25 Pa. Code §21.124. Keystone Mining Company, Inc. v. DER, 1987 EHB 88.

Here, if DER bore the burden of proof, we would not dismiss without first satisfying ourselves that DER's actions were proper. However, Shipman's failure to file its Post-Hearing Brief where Shipman also bears the burden of proof makes such actions unnecessary. We issue the order below, dismissing this appeal based upon the above, not as a sanction but because of Shipman's failure to prosecute same.

ORDER

AND NOW, this 1st day of July, 1991, the appeal of Shipman is dismissed and the action of DER in issuing Permit 603077 to Shipman is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 1, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Gail A. Myers, Esq.
Western Region
For Appellant:
Allan MacLeod, Esq.
Beaver, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

NEW HANOVER CORPORATION	:	**EHB Docket No. 90-379-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** July 3, 1991

OPINION AND ORDER SUR MOTION TO DISMISS AS MOOT

By Maxine Woelfling, Chairman

Synopsis

An appeal of the Department of Environmental Resources' (Department) refusal to process an earth disturbance permit based on its previous denial of a related solid waste re-permitting application is dismissed as moot when the Department, pursuant to a mandamus judgment, denies the earth disturbance permit application.

OPINION

This matter was initiated with the September 12, 1990, filing of a notice of appeal by New Hanover Corporation (Corporation) challenging the Department's August 20, 1990, refusal to process the Corporation's application for an earth disturbance permit modification. The Department refused to process the earth disturbance permit application because it had denied the Corporation's application under the 1988 municipal waste management regula-

tions.[1] In its appeal, the Corporation argued, *inter alia*, that the Department was arbitrary and capricious, that the Department violated its duty under 25 Pa.Code §105.24(a) to coordinate the issuance of permits, and that the Department's refusal to process the permit application violated the Corporation's constitutional rights of due process and equal protection.

On April 17, 1991, the Department filed a motion to dismiss the appeal as moot. In support of its motion, the Department argued that it was ordered by the Commonwealth Court on December 19, 1990,[2] to review and take final action on the Corporation's earth disturbance permit application and that, in response to the Commonwealth Court's order, it denied the Corporation's permit application on March 4, 1991. Because the Corporation has appealed the Department's March 4, 1991, denial to the Board at Docket No. 91-126-W, the Department alleges that there is no further relief for the Board to grant the Corporation with regard to this appeal.

The Corporation, on May 6, 1991, filed an answer to the motion to dismiss, along with a motion to consolidate its appeal at Docket No. 91-126-W with its appeal at Docket No. 90-379-W, contending that the facts and proceedings of the earlier appeal are essential to the Board's consideration of the relief sought in the later appeal. Furthermore, the Corporation argued

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[1] The Department's denial of the Corporation's re-permitting application and the Department's actions with respect to other environmental control permits and approvals sought by the Corporation for its proposed landfill are the subject of numerous appeals before the Board, including those at Docket Nos. 88-119-W and 90-225-W.

[2] The order was issued in response to the Corporation's application for peremptory judgment in mandamus at No. 308 Misc. Dkt. 1990.

that dismissal of the earlier appeal would necessitate supplementing the record in the newer appeal, noting that the proceedings involve common questions of law and fact.

On May 13, 1991, the Department filed its response in opposition to the Corporation's motion to consolidate, stating that all facts relevant to the permit denial could be presented in the appeal at Docket No. 91-126-W. Furthermore, since there is no relief the Board can grant in the appeal at Docket No. 90-379-W, consolidation would not serve to conserve the Board's time and resources.

A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief. Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-187-W (Opinion issued January 24, 1991), and Schuylkill Township Civic Association v. DER, EHB Docket No. 90-541-E (Opinion issued March 27, 1991). For the reasons which follow, the Corporation's appeal at Docket No. 90-379-W will be dismissed as moot.

The Department's March 4, 1991, permit denial is, in effect, an event which prevents the Board from granting any meaningful relief. The Corporation argued in its appeal of the Department's August 20, 1990, letter, that the Department has a duty to process and act on the merits of an application and that its refusal to do so was arbitrary, capricious and violated the Corporation's constitutional rights of due process and equal protection. The Department's subsequent denial of the earth disturbance permit, performed in accordance with Commonwealth Court's mandamus order, resolved these objections, and, consequently, there is no further relief that the Board can grant with regard to the Department's August 20, 1990, letter.

As for the Corporation's claim that the proceedings at this docket number are essential to the resolution of its appeal at Docket No. 91-126-W, this claim ignores one of the fundamental purposes of the mootness doctrine - i.e., to avoid having tribunals expend their resources in the resolution of matters which are no longer in controversy. To the extent that any of the filings at this docket are relevant to the Corporation's appeal at Docket No. 91-126-W, the Corporation may seek to include them in its filings at Docket No. 91-126-W. We will not maintain an appeal on our docket for such a purpose.[3]

O R D E R

AND NOW, this 3rd day of July, 1991, it is ordered that the Department's motion to dismiss New Hanover Corporation's appeal of the Department's letter dated August 20, 1990, is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

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[3] In light of the grant of the Department's motion to dismiss, it is unnecessary to address the Corporation's motion to consolidate or New Hanover Township's February 25, 1991, petition to intervene.

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 3, 1991

cc: **Bureau of Litigation**
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Albert J. Slap, Esq.
Mary Ann Rossi, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

LOUIS COSTANZA	:	
t/d/b/a ELEPHANT SEPTIC TANK SERVICE	:	
	:	
v.	:	**EHB Docket No. 91-140-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 3, 1991**

OPINION AND ORDER
SUR QUESTION OF JURISDICTION

By: Richard S. Ehmann, Member

Synopsis

Subject matter jurisdiction issues may be raised *sua sponte* by the Board. Where it appears that an appeal has been filed from a notice of violation issued by DER which neither changes the *status quo ante* nor imposes new obligations upon the appellant through its issuance, the appeal is not from a DER action or adjudication and thus jurisdiction does not lie. Where the Board determines it lacks jurisdiction over a particular matter, it may dismiss that appeal.

OPINION

On April 8, 1991, Louis Costanza, t/d/b/a Elephant Septic Tank Service ("Elephant"), filed with this Board a document captioned "Notice Of Appeal/Petition For Declaratory Relief". This document appealed from a March

6, 1991 letter from the Department of Environmental Resources ("DER") to Elephant captioned "Notice Of Violation" which related to allegedly incomplete Annual Operations Reports for fourteen permitted septic waste disposal sites.

Because a portion of Elephant's Notice Of Appeal/Petition For Declaratory Relief was a prayer for relief in which Elephant sought a declaratory judgment in its favor on its obligations to pay the annual permit administration fee set forth in 25 Pa. Code §275.222, we notified DER to file a response thereto by May 6, 1991. On May 6, DER's counsel hand delivered DER's response to the Board's office in Pittsburgh.[1] By an Opinion and Order dated May 13, 1991, we denied the portion of Elephant's Notice Of Appeal/Petition For Declaratory Relief which sought declaratory relief, holding that as a Board, we lack legislative authorization to grant such relief. In that Opinion and Order, we retained jurisdiction over the remainder of Elephant's appeal, but provided:

> Since it appears that Elephant has filed an appeal from a DER letter which may not constitute a DER "final action", it is further ordered that within thirty days of the date of this Order, each party shall file with this Board a Memorandum of Law reciting its position on whether DER's letter constitutes "an action" of DER which is appealable to the Board.

On June 12, 1991, we received DER's Memorandum of Law from its counsel. Counsel for Elephant has filed no Memorandum with us. The only communication we have received from Elephant or its counsel since issuing our Order of May 13, 1991 is a copy of a Petition For Review addressed to the Commonwealth Court. It seeks review of our Order of May 13, 1991 or alternatively that

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[1] Counsel for all parties are reminded that in order to be filed with the Board, appeals, briefs, and other documents must be filed with the Board's headquarters in Harrisburg, 25 Pa. Code §21.32(e). While a courtesy copy of a document may be transmitted to the Board's offices in Pittsburgh or Indiana where circumstances may warrant, that document is not officially filed and, therefore, docketed, unless transmitted to the Board's Harrisburg office.

court's provision of declaratory relief through exercise of its original jurisdiction.

As we have held repeatedly in the past, this Board may raise jurisdictional issues *sua sponte*; Plymouth Township v. DER, 1990 EHB 974; Herald Products v. DER, 1989 EHB 1152; Thomas Fahsbender v. DER, 1988 EHB 417. We have done so here.

As an administrative tribunal, our jurisdiction is limited to that which the legislature has authorized. See Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514. We may hold a hearing and issue an adjudication only on an "action".[2] Where DER acts in a fashion which does not fit within this phrase's definition, we lack jurisdiction to adjudicate appeals. A review of the matters before us, where the question is raised of whether or not the Board has jurisdiction, shows that we make decisions on this issue on a case-by-case basis. Borough of Bellefonte v. DER, 1990 EHB 521; JEK Construction Company, Inc. v. DER, 1990 EHB 535; Ed Peterson, et al. v. DER, 1990 EHB 1224.

Turning to DER's letter in this case, it advises Elephant that it is in violation of Section 610(9) of the Solid Waste Management Act, the Act of

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2 The definition of action is found at 25 Pa. Code §21.2(a). It is:

> 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, denials, modifications, suspensions and revocations of permits, licenses, and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.610, and 25 Pa. Code §275.222(d)(1) because Elephant had not submitted the annual $200-per-site permit administration fee covering fourteen permitted sites for the agricultural utilization of sewage sludge, Elephant had failed to submit corrected 1990 reports, and it failed to submit its 1991 reports on the proper forms. DER's letter then tells Elephant that this notice of violation will become part of its permanent compliance history when existing and future permits are reviewed. Further, DER's letter tells Elephant how it can correct these violations (submit the reports, pay the fees, etc.), says Elephant should do so in thirty days, warns that failure may cause DER to assess civil penalties, advises that DER is not waiving any right it has to take action, and concludes by saying the letter should not be construed as a final action of DER. The letter imposes no direct obligations or deadlines on Elephant nor does it require compliance by Elephant with a specific course of conduct. It does not, for example, mandate compliance in thirty days. Thus, the letter is not an appealable action. Robert H. Glessner, Jr. v. DER, 1988 EHB 773; Perry Township Board of Supervisors v. DER, 1986 EHB 888; Basalyga v. DER, 1989 EHB 388; Adams County Sanitation Company ("ACSC") v. DER, 1989 EHB 258.

While the letter does indicate that the violations recited therein may be considered when DER reviews future applications for permits by Elephant and that the violations may, in the future, be the subject of a civil penalty assessment against Elephant by DER, this does not make the letter appealable. If DER denies a permit based on these alleged violations or assesses a civil penalty based thereon, Elephant may challenge the existence of these violations at that time. Fiore v. Commonwealth, DER, 98 Pa. Cmwlth. 35, 510 A.2d 880 (1986); Ed Peterson, *supra*, Adams County, *supra*.

Accordingly, we enter the following Order.

O R D E R

AND NOW, this 3rd day of July, 1991, it appearing to this Board that it lacks jurisdiction in this matter because DER's letter to Elephant does not represent an action of DER, the appeal of Elephant is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 3, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Gail A. Myers, Esq.
Western Region
For Appellant:
Allan MacLeod, Esq.
Beaver, PA

med

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M. DIANE SMITH
SECRETARY TO THE BOARD

MORTON KISE, et al.	:	
	:	
	:	
v.	:	**EHB Docket No. 90-457-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 9, 1991**
and WARRINGTON TOWNSHIP BOARD OF	:	
SUPERVISORS, PERMITTEE and AYCOCK, INC.,	:	
Intervenor		

OPINION AND ORDER
SUR
MOTION FOR PARTIAL SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

The Board denies a Motion for Partial Summary Judgment that seeks to eliminate issues claimed to be purely local in nature and under the exclusive control of the municipality. Reviewing prior decisions of the Board and the appellate courts, the Board rules that DER is required to consider the issues under the planning provisions of the Sewage Facilities Act and in fulfillment of its responsibilities under Article I, Section 27, of the Constitution of Pennsylvania.

OPINION

Morton Kise filed a Notice of Appeal on October 25, 1990 challenging the September 27, 1990 approval by the Department of Environmental Resources (DER) of a revision to the Official Plan of Warrington Township, York County, related to a 4-lot subdivision of a 51-acre tract of land owned by Aycock,

Inc. (Aycock). On October 30, 1990 a Supplemental Appeal was filed adding Dane C. and Monica Bickley as Appellants and an 18th paragraph to the Notice of Appeal setting forth another basis for the appeal. Aycock was permitted to intervene by a Board Order dated January 8, 1991.

On April 1, 1991 Aycock filed a Motion for Partial Summary Judgment, requesting the Board to rule that the grounds for appeal contained in paragraphs 10, 11, 16 and 18 of the Notice of Appeal (as supplemented) are not within the jurisdiction of DER or this Board. Appellants responded to the Motion on April 22, 1991. On April 29, 1991 DER stated its concurrence with the Motion. Warrington Township filed no response. In their response to the Motion Appellants withdrew paragraph 18, leaving only paragraphs 10, 11 and 16 in contention. These paragraphs read as follows:

> 10. Development of the four (4) lot subdivision where one lot will be used for industrial purposes is inconsistent with surrounding property, will drastically change the rural nature of the surrounding area and will have an adverse impact on the health, safety and welfare of nearby residents and the environment.
>
> 11. The Department failed to consider the adverse impact the proposed subdivision will have on the environment including, but not limited to, an increase in traffic, noise, water pollution, air pollution and the fact that the subdivision is otherwise inconsistent with the surrounding use of land.
>
> * * * * *
>
> 16. The Department and municipality have failed to evaluate this project's consistency with the objectives and policies of the plans and provisions listed at 25 Pa.Code §71.21(a)(5)(i) particularly with regard to Subparagraphs (D), (F), (G), (H), (I), (J), and (K).

Aycock submits that these paragraphs raise land use issues within the exclusive jurisdiction of Warrington Township and beyond the scope of review by DER or this Board.

The seminal case on this point is *Community College of Delaware County v. Fox*, 20 Pa.Cmwlth. 335, 342 A.2d 468 (1975), where it was held, *inter alia*, that neither the Clean Streams Law[1] nor Article I, Section 27,[2] of the Pennsylvania Constitution authorizes DER to usurp municipal powers of planning and zoning. That case involved DER's issuance of a permit for installation of sewer lines, not the approval of an Official Plan revision under the Sewage Facilities Act.[3] That distinction was drawn by the Board in *Township of Heidelberg et al. v. DER et al*, 1977 EHB 266, concluding that, while it may be that a DER

> decision on whether or not to grant a permit for an interceptor should not involve [it] in planning decisions, we believe that the law clearly requires that [DER] address such considerations when it is called upon to review an official plan submission or a revision thereto.
> (1977 EHB 266 at 273)

The Board also recognized that DER's obligations stemming from Article I, Section 27, will involve it in considering local planning matters as part of

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

[2] The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

[3] Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.*

the review process for Official Plan revisions: *Eagles' View Lake, Inc. v. DER et al.*, 1978 EHB 44 at 60.

The validity of this view was apparent when Commonwealth Court held in *Concerned Citizens for Orderly Progress et al. v. Commonwealth, Dept. of Environmental Resources et al.*, 36 Pa.Cmwlth. 192, 387 A.2d 989 (1978), that DER must review local decisions as part of its Article I, Section 27, duties even when considering a permit application under the Clean Streams Law, *supra*. After noting some misunderstanding about the import of the *Fox* decision, *supra*, the Court stated:

> While it is the responsibility of local governmental agencies to deal with planning, zoning and other related functions, it is incumbent upon DER to insure that a proposed project is in conformity with local planning and consistent with statewide supervision of water quality management. Thus, the DER, as trustee of the Commonwealth's public natural resources by virtue of Article I, Section 27 of the Constitution of Pennsylvania, must address the direct impact of issuing such a permit. (387 A.2d 989 at 993-994)

The broad scope of DER's inquiry is revealed in *Pennsylvania Environmental Management Services, Inc. v. Commonwealth, Dept. of Environmental Resources et al.*, 94 Pa.Cmwlth. 182, 503 A.2d 477 (1986), dealing with an application for a landfill permit under the Solid Waste Management Act[4]. In applying Article I, Section 27, to its review of the application, DER was directed to consider the impact of the landfill on (1) the agricultural value of nearby lands, (2) scenic aspects of neighboring

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[4] Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*

residences and businesses, and (3) the adequacy of public roads (at least to the extent necessary to conserve and maintain the existing public natural resources).

Among the stated reasons for appeal, Appellants have raised Article I, Section 27, the provisions of the Sewage Facilities Act, *supra*, and the regulations at 25 Pa.Code Chapters 71-73. Based on the foregoing decisions, it is clear that the contents of paragraphs 10 and 11 can be raised in this appeal. Paragraph 16, challenging the appropriateness of the revision when measured by the provisions of 25 Pa.Code §71.21(a)(5)(i), also is properly raised. In approving or disapproving an Official Plan or a revision, DER is required by 25 Pa.Code §71.32(d) to determine whether §71.21(a)(5)(i) - (iii) has been satisfied. In approving or disapproving an Official Plan revision for new land developments, DER is required by 25 Pa.Code §71.54(f) to consider the requirements of §71.32(d). Thus, by repeated reference the matters contained in §71.21(a)(5)(i) are pertinent to an appeal from the approval of an Official Plan revision.

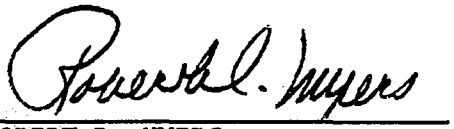
Our holding here is consistent with our prior decision in *Andrews and Glatfelter v. DER et al.*, 1989 EHB 612. We have engaged in an expanded discussion here in the hope of more clearly delineating the appellate decisions mandating our actions. Obviously, there is a fine and indistinct line between considerations that are purely local in nature and under the exclusive jurisdiction of the Township and considerations that take on statewide significance, despite their local nature, and fall within DER's scope of review. We know of no practical method for separating the two before hearing.

ORDER

AND NOW, this 9th day of July, 1991, it is ordered as follows:

1. Aycock's Motion for Partial Summary Judgment is denied.
2. The appeal shall be placed on the list of cases to be scheduled for hearing.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: July 9, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

CENTRE LIME AND STONE COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 88-271-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 11, 1991**
and BELLEFONTE LIME CO., INC., Permittee	:	

OPINION AND ORDER SUR MOTION TO STRIKE AND COMPEL

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to compel answers to interrogatories is denied where the party serving the interrogatories has its own access to that information or has been supplied with the information through discovery in a previous matter. The motion will be granted where the information requested has some relevance to the subject matter on the action, and it would not unreasonably burden the requested party to answer. Where a document is referred to as a means of response to an interrogatory, the answering party must clarify any uncertainties not explained by the document.

OPINION

This involves an appeal brought by Centre Lime and Stone Company, Inc. (Centre) objecting to the Department of Environmental Resources (DER) reissuance of a surface mining permit to Bellefonte Lime Company, Inc. (Bellefonte), for mining in Spring Township, Centre County. Among the grounds cited in the appeal are that the permit should not have been issued because,

unlike the previous permit, the revised permit allows Bellefonte to mine below the water table. Centre believes discharged ground and surface water from Bellefonte's activities will recirculate into Centre's deep mine to result in added pumping costs and danger to Centre's employees in the event of polluted discharge into Centre's mines.

On April 7, 1989, Centre filed its pre-hearing memorandum with the Board. On April 17, 1989, Bellefonte filed a motion to compel Centre to comply with the Board's Pre-Hearing Order No. 1, and requested supplemental discovery. On April 27, 1989, the Board issued an order staying the deadline for filing Bellefonte's responsive pre-hearing memorandum until after resolution of the motion to compel. On February 12, 1990, after a series of responses regarding this motion to compel, the parties submitted a stipulation regarding the completion of discovery and filing of Bellefonte's pre-hearing memorandum. In consideration of this stipulation, the Board issued an order on February 15, 1990, limiting the scope and time for discovery, setting a deadline for Centre to file a new pre-hearing memorandum, and ordering Centre to file supplemental responses to Bellefonte's interrogatory No. 36. Bellefonte withdrew its motion to compel. Subsequently, each party served the other with a second set of interrogatories, and responded in kind. On April 24, 1990, the parties filed another stipulation, setting a deadline for supplemental responses to the interrogatories and requests for production of documents, for any objections, and for filing Centre's revised pre-hearing memorandum. On April 27, 1990, the Board issued an order to the same effect. On May 17, 1990, Bellefonte filed a motion to strike objections of Centre in its supplemental responses to Bellefonte's second set of interrogatories and to compel Centre to answer interrogatories and produce documents (Motion to Strike and Compel). Centre filed its response to the Motion to Strike and

Compel on June 6, 1990.

This opinion and order addresses the Motion to Strike and Compel. In its motion, Bellefonte moves to strike Centre's objections to Interrogatories 4(h), 6, 7, 12, 13 and 14 and moves for full and proper responses and production of documents to Interrogatories 1, 2, 3, 4, 4(a), 4(b), 4(c), 4(d), 4(g), 5, 6, 7, 9, 10, 11, 12, 13 and 14. We will address the interrogatories in groups.[1]

1. Group 1 - Interrogatories 1, 2, 3, 4, 6, 7, 9, 10(a)(c), and 11(a)(c).

These interrogatories address the effect of hydrologic occurrences on Centre's and Bellefonte's property after March 1, 1989. Centre responded to these in part, objecting insofar as they referred to its surface mining operations and requested information regarding occurrences on Bellefonte's own property.[2]

Bellefonte's motion asserts numerous inadequacies in Centre's responses to these interrogatories. We will address these in turn.

> A. Certain terms Centre has used are vague and must be clarified. Centre's description of the hydrologic occurrences on Centre's and Bellefonte's properties are vague and non-specific. Centre should cite specific dates of the hydrologic occurrences, linking them with increased pumping into the Eby sink hole by Bellefonte. Centre must describe the effect and extent and location of water in the deep mines. Bellefonte wants specific dates, water levels and locations. Furthermore, Centre should not have omitted information regarding the effect of the

---

[1] Our grouping of the interrogatories is based upon the arguments of the parties. Some interrogatories are included in two or more groups because more than one argument applies to them.

[2] Centre also objected to answering questions referring to surface water accumulation and discharges on the grounds that they are beyond the scope of this appeal and precluded by res judicata as determined in a related action. These objections are discussed infra.

hydrologic occurrences on Centre's surface mine operations.

Centre argues that its terminology is specific enough, and its descriptions of the hydrologic occurrences are complete. For instance, Bellefonte has been provided records that indicate the water levels in Centre's deep mine back to 1983. Thus, Centre states, Centre's answers explicitly describe the correlation between the water levels and accumulation in the deep mine. Centre argues that it responded as fully as possible to questions regarding Bellefonte's pumping and accumulation of water on Bellefonte's property. Centre also argues that any further answers would be speculative, and besides, Bellefonte obviously has this information. As to Bellefonte's request for information about the hydrologic effects on Centre's surface mining operations, Centre states this is irrelevant because the appeal strictly involves the effect on Centre's deep mining operations.

The rule is that discovery is available regarding any matter, not privileged, which is relevant to the subject matter of the action. Pa. RCP 4003.1. For purposes of discovery, relevance is broadly construed. DER v. Texas Eastern Gas Pipeline Co., Texas Eastern Transmission Corp., 1989 EHB 186, 187. Regardless of relevance, discovery is limited if the request would cause "unreasonable annoyance, embarrassment, burden or expense ... or would require the making of an unreasonable investigation." Pa. RCP 4011(a) and (b).

We will require Centre to more fully and specifically describe the hydrologic accumulations taking place on its property in connection with Bellefonte's pumping into the Eby sink hole, delineating where possible dates, water levels and locations of water in its deep mine to the extent that this information has not been provided in Centre's response to Interrogatory

No. 12.[3] However, we sustain Centre's objections to supplementing its answers to interrogatories concerning pumping amounts and hydrologic accumulations on Bellefonte's property, as that is clearly information to which Bellefonte has its own access.

To the extent that Bellefonte does not understand terminology used by Centre in its responses, some degree of cooperation must exist between the parties in discussing and resolving any interpretive questions. Counsel are directed to attempt to resolve these questions on their own. See New Hanover Township v. DER and New Hanover Corporation, 1988 EHB 838, 843.

Although relevance is broadly construed for purposes of discovery, Bellefonte has not supplied a hint of relevance with regard to its request for information about Centre's surface mining operations. We will, therefore, sustain Centre's objections to supplying information about its surface mining operations.

> B. Centre's answer to interrogatory 2(a) stating that Centre's operation had to shut down lacks an indication of whether mining ever resumed.

Centre responds that, implicit in its answer that it had to shut down its deep mine is that Centre has not been able to economically mine underground because of the water volume. We deem this a full response to Bellefonte's request.

> C. Further clarification is required on Centre's response to a question asking what the effect on Centre's mining operation would have been if Bellefonte had not been pumping. The answer conflicts with Centre's assertion that the closure was due to Bellefonte's pumping. The

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[3] Pa.RCP 4066(b) indicates that submission of documentation in lieu of narrative answer suffices where the documentation provided allows the requesting party to determine the answer it seeks. Interrogatory 12 requests production of, inter alia, all records of Centre's water levels up to the date of Centre's response. Centre produced records from January 1983 to March 19, 1990.

question requires an explanation of what specifically kept Centre from resuming mining.

Centre argues that Bellefonte's question regarding potential effects had no pumping taken place to be speculative, and thus inappropriate. We will not require Centre to speculate as to what the impact would have been had Bellefonte not been pumping into the Eby sink hole.

> D. Centre's statement that water levels continued to rise until April 1989 was not supported by the documentation submitted in regard to another interrogatory, and should be supported.

Centre states that documentation was not supplied in its description that water levels rose until April 1989 because none was requested in that interrogatory. Although Centre's response that water levels rose until April 1990 was in response to an interrogatory and not a request for production of documents, such a request was made elsewhere and any such documentation must be provided.[4]

> E. Where Bellefonte requested a comparison in Centre's mining operations before and after March 1, 1989, Centre's incorporation of its previous answers is unresponsive and must be supplemented. The only fair method of determining the impact of its pumping is to compare such information as water levels and amounts of Centre's pumping before and after March 1, 1989.

Centre responds that it has provided Bellefonte with the information it needs to make comparisons in supplying its pumping records, which include rainfall data and water levels, from 1983 on. Because Bellefonte refers to data on water levels and pumping rates as that necessary for determining its answer here, we find that Centre has provided that information in its answer to Interrogatory 12.

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[4] For instance, Centre's response to Interrogatory 12 incorporated documents only up to March 19, 1991.

2. Group 2 - Interrogatories 12 and 14(e).

Interrogatories 12 and 14(e) request information and documentation prior to March 1, 1989 for ascertaining the causes and effects of the post-March 1, 1989 hydrologic events on Centre's mining operations. Interrogatory 12 requested production of all records dating back to the inception of mining operations of Centre's water levels, pumping rates and amounts of water pumped from Centre's deep or open pit mine. Centre provided records back only to 1983, limiting its response on grounds of relevance and that to request documents all the way back to its beginning breached the stipulation the parties agreed to on February 12, 1990.[5] Bellefonte objected to this cut-off, stating that the shortened period prevents it from ascertaining both causes and effects of the hydrologic occurrences after March 1987. Bellefonte adds that the request is within the stipulation's intent, which was merely to limit the focus of the discovery to determining causes and effects of the period after March 1, 1989, not necessarily to prohibit discovery of documents created before then which help ascertain the causes and effects. Bellefonte submits that documents dating at least back to 1972 should be provided.

Centre responds that this request is burdensome and irrelevant, and is served to harass Centre and delay the litigation. Centre states its 1983 cut-off reasonably provides data for 5 years prior to the issuance of the 1988 amendments to Bellefonte's permit; and Bellefonte has yet to explain why it needs data back through the '60s and '70s in order to ascertain the causes and effects. Centre argues that this violates the stipulation which was aimed at

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[5] The Stipulation and Order of February 15, 1990, permitted discovery relating only to "the hydrologic occurrences since March 1, 1989, and the causes and effects thereof."

limiting the last wave of discovery.

Along the same lines, Interrogatory 14(e) seeks identification and production of all documents relating to water quality data from Centre's deep mines or surface water. Centre responded by incorporating its response to Interrogatory 5.[6] Bellefonte complains that this response limited Centre's response to post-March 1, 1989 information. To the extent that Centre claims that granting a permit to Bellefonte effects Centre's water, Bellefonte argues, records prior to March 1, 1989 are necessary for comparison. Centre responds that it has produced all such documents.

As to the scope of Interrogatory 12, we find that, for purposes of fulfilling Bellefonte's intended comparison, Center has sufficiently complied with the requests in supplying documents dating back five years before the issuance of the permit amendments. Because the language of the stipulation indicates that the parties chose to limit discovery in this case, we find that Interrogatory 12 has been adequately answered. However, for the sake of consistency, we will compel Centre to produce any documents it has from 1983 to March 1989 with respect to Interrogatory 14(e).

3. **Group 3 - Interrogatories 4, 6, 7, 10(d)-(e), 13 and 14(a)-(d).**

These interrogatories seek information regarding the construction and maintenance of Centre's surface water flow control devices, and regarding surface water diversions or discharges from Centre's property onto Bellefonte's property.

Centre, for the most part, objects to these questions on the grounds that such information is irrelevant and that the interrogatories are aimed at

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[6] Interrogatory 5 requests identification of any tests or analysis Centre has of the water involved in any hydrologic occurrences. Centre provided documents dating from March 1989 through June 1989.

addressing the subject matter of an equity action brought before the Centre County Court of Common Pleas, which came to trial on May 19, 1989 (equity action). In its response, Centre incorporated the findings of fact in that case.[7]

Bellefonte argues that the findings of the equity action are an inadequate response to these interrogatories, as they contain no specificity regarding the hydrologic occurrences after March 1, 1989, and do not address sources and amounts of water that entered the Eby sink hole. Bellefonte maintains that the water which flowed into Bellefonte's property in May and June of 1989 emanated from various diversion ditches on Centre's property (as according to the findings of fact in the equity action). This, then is relevant to Bellefonte's case, Bellefonte concludes. Bellefonte adds that a comparison of surface flow controls construction and maintenance before and after March 1, 1989 is relevant to determine the hydrologic effects on these controls.

Centre responds that the information Bellefonte requests in these interrogatories is well known to both parties, and is foreclosed from further litigation by virtue of the judgment in the equity action. The subject of that case was Bellefonte's claim that surface water run-off impermissibly flowed from Centre's property onto Bellefonte's property, and that the run-off was contaminated. After complete discovery, including an exchange of documents and the deposition of representatives from both Bellefonte and Centre, the action was tried on its merits in October of 1989. Centre argues that Bellefonte is merely seeking information that has already been provided

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[7] Bellefonte Lime Co., Inc. v. Centre Lime and Stone Co., Inc., Docket No. 89-1198 (Equity) Court of Common Pleas of Centre County, PA (February 6, 1990).

to Bellefonte in the course of the equity action, and Centre should not be required to provide the same information on repeated occasions. Furthermore, Centre adds, the information is not applicable as it relates to its surface aspect of mining.

Insofar as Bellefonte has the information it requests regarding construction and maintenances of surface flow controls, and discharges of surface water from Centre's property onto Bellefonte's property, we will not compel Centre to again supply the information. We do find that Bellefonte has cited sufficient grounds of relevance for purposes of discovery, and so any information which was not included in discovery relating to the equity action must be supplied by Centre. DER v. Texas Eastern Gas Pipeline Co., et al., supra.

4. Group 4 - Interrogatories 5, 7 and 12.

Finally, Bellefonte complains that, in Centre's responses to Interrogatories 5, 7, and 12, certain documents are difficult to read and understand.

As to Interrogatories 5 and 12, Bellefonte claims that the documents produced by Centre in response are illegible and unclear, and that - under Pa. R.C.P. 4006(b) - Centre must provide a clear copy. Bellefonte states that Centre's offering its files for inspection did not satisfy the request.

We do not agree. Rule 4006(b) provides that, where the answer to an interrogatory may be derived from the requested party's records, a sufficient answer may be to simply specify those documents from which the answer may be ascertained and to open the files for inspection to the requesting party. There is no requirement that copies be provided, let alone clarified. Centre has done more than the rule requires.

As to Interrogatory 7, Bellefonte does not indicate how Centre's

response fails to suffice. Besides, we find this interrogatory redundant of Interrogatories 1 and 4.

ORDER

AND NOW, this 11th day of July, 1991, it is ordered that Bellefonte Lime Company, Inc.'s Motion to Compel Answers to Interrogatories and to Strike Objections is granted in part and denied in part consistent with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: July 11, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES E. WOOD	:	
	:	
v.	:	**EHB Docket No. 90-280-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 11, 1991**
and M & S SANITARY SEWAGE DISPOSAL, INC.	:	
Permittee	:	

OPINION AND ORDER SUR MOTION TO DISMISS

By Terrance J. Fitzpatrick, Member

Synopsis

A motion to dismiss an appeal for the Appellant's failure to prosecute is denied where the Appellant has made some showing of intent to prosecute its case, and where no sanction warnings have yet been issued on the Appellant by the Board.

OPINION

This case involves an appeal brought by James E. Wood (Wood) from the Department of Environmental Resources' (DER) issuance of NPDES Permit No. PA-0062324 to M & S Sanitary Sewage Disposal, Inc. (M&S), Pike County, Pennsylvania. The appeal was filed in skeleton form on July 13, 1990, and was perfected On August 6, 1990.

In accord with normal procedure, the Board issued on August 9, 1990 its Pre-Hearing Order No. 1 which, inter alia, required completion of discovery and the filing of Wood's pre-hearing memorandum on or before

October 23, 1990. Upon a joint request to the Board on October 1, 1990, an extension was granted to December 7, 1990 for completion of discovery. On November 29, 1990, the Board received from Wood a request for a 30 day stay to allow the parties to attempt a settlement. The Board granted an extension to January 7, 1991 for completion of discovery and filing of Wood's pre-hearing memorandum. According to the parties, Wood did not file any discovery until January 4, 1991, and did not answer M&S' discovery request (propounded October 12, 1990) until January 7, 1991.

This Opinion and Order addresses M&S' motion to dismiss, filed on January 22, 1991. M&S moves to dismiss this appeal on grounds that Wood has failed to prosecute the case, evidenced by Wood's failure to respond to M&S' discovery request until January 7, 1991 (well past the 30 day response period); by Wood's failure to initiate any discovery of its own until three days before the pre-hearing memorandum was due; and by Wood's failure to comply with a Board order in neglecting to file a pre-hearing memorandum. M&S adds that the delays in the case have financially prejudiced its operations.[1]

DER responded to the motion on February 4, 1991, concurring with M&S's position. Wood responded on February 13, 1991, arguing that dismissal of the appeal would be too harsh a sanction because Wood's conduct was designed to find a mutually agreeable resolution. Within its memorandum of law, Woods also requested a further extension to February 21, 1991 for filing its pre-hearing memorandum, ostensibly so as to file after receipt of its discovery responses from M&S.

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[1] In its motion to dismiss, M&S also alleges that the appeal fails for lack of standing and because it raises issues beyond the scope of the action appealed, but reserves these issues for consideration at a later time. We will not consider these issues here.

Although this is clearly a case of abuse of discovery and filing deadlines, it is not yet a case of non pros. The Board may dismiss an appeal for lack of prosecution where the appellant demonstrates no intention to either prosecute or otherwise conclude its appeal. T & R Coal v. DER, 1990 EHB 1073. Board precedent indicates that a case will be dismissed where an appellant with the burden of proof demonstrates no willingness to go forward. Allied Steel Products v. DER, 1989 EHB 115. However, the facts before us do not indicate such unwillingness. For instance, Wood did ultimately - if delinquently - answer M&S' discovery request.[2] As well, some indication was given of the parties' attempt to settle, with a reasonable request of 30 days for its completion. Finally, Wood's response to the Motion to Dismiss indicates some willingness to prosecute the appeal.

However, should Wood's failure to submit its pre-hearing memorandum continue, dismissal may be appropriate. The Board hesitates to dismiss an appeal for failure to submit a pre-hearing memorandum before warning the delinquent party of the potential sanctions it faces for noncompliance. We warn Wood now that failure to comply with the following order may result in sanctions, including dismissal, pursuant to 21 Pa.Code §21.124.

As to Wood's belated motion for extension of time, our disposition of the motion to dismiss renders the motion for extension moot.

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[2] We are not here condoning Wood's delay in responding to M & S' discovery request. But M&S could have filed a motion to compel answers to its discovery under PA.RCP 4019. The Board will not grant sanctions for failure to answer discovery where there has been no motion to compel nor order compelling response. See Concerned Residents of the Yough, Inc. (CRY) and County of Westmoreland v. DER and Mill Service, Inc, 1990 EHB 1144.

ORDER

AND NOW, this 11th day of July, 1991, the following is hereby ordered:

1) The Motion to Dismiss filed by M & S Sanitary Sewage Disposal, Inc. on January 22, 1991 is denied;

2) The Motion for Extension of Time filed by James E. Wood on February 13, 1991 is dismissed as moot; and

3) The deadline for filing James E. Wood's pre-hearing memorandum is extended to August 9, 1991. Failure to file on or before this date may result in the imposition of sanctions, including dismissal, pursuant to 25 Pa.Code §21.124.

4) The Appellees' pre-hearing memoranda are due 15 days after receipt of Appellant's pre-hearing memorandum, as set out in Pre-Hearing Order No. 1.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: July 11, 1991

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SECRETARY TO THE BOARD

GRAND CENTRAL SANITARY LANDFILL, INC.	:	
	:	
v.	:	EHB Docket No. 90-506-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 11, 1991

OPINION AND ORDER SUR
MOTION TO DISMISS PETITION FOR SUPERSEDEAS
WITHOUT A HEARING

By Terrance J. Fitzpatrick, Member

Synopsis

The Department of Environmental Resources' (DER) motion to dismiss petition for supersedeas without a hearing is granted, because it is clear that the Appellant is not likely to succeed on the merits of its appeal. Under the solid waste regulations, residual waste may not be disposed of at a municipal waste landfill unless DER has authorized such disposal under Subchapter D of Chapter 273 of the regulations. 25 Pa.Code §273.201(d). This regulation authorized DER to modify a landfill permit to restrict the disposal of residual waste (fuel - contaminated soil) where the landfill had been authorized to dispose of this waste prior to imposition of the Subchapter D requirements.

OPINION

This is an appeal by Grand Central Sanitary Landfill, Inc. (Grand Central) from an action of DER dated October 24, 1990 modifying Grand Central's solid waste disposal permit. In this modification, DER "superseded"

a previous permit modification dated May 17, 1985, authorizing Grand Central to dispose of fuel contaminated soils, to the extent the earlier modification had allowed disposal of soil contaminated with motor oil, waste oil, hydraulic oil, or other organic or inorganic chemicals. At the same time, however, the October 24, 1990 modification authorized Grand Central to dispose of "virgin fuel contaminated soil" - soil contaminated with fuel oil, diesel fuel, aviation fuel, kerosene or gasoline only.

Grand Central filed a petition for supersedeas shortly after it filed its appeal. After DER filed a response to the petition, the parties asked the Board to put the petition on hold while the parties attempted to negotiate a settlement. On May 20, 1991, negotiations having failed, Grand Central filed a motion to reschedule a hearing on its petition. DER then filed a motion to deny the petition without a hearing. This Opinion and Order addresses DER's motion.

In ruling upon a petition for supersedeas, the Board considers the following factors:

> 1) Irreparable harm to the petitioner.
>
> 2) The likelihood of the petitioner prevailing on the merits.
>
> 3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

Section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(d). The Board's regulations provide that the Board may deny a supersedeas without a hearing where the petition fails to state sufficient grounds for granting the petition. 25 Pa.Code §21.77(c)(4).

In the present case, the petition for supersedeas will be denied without a hearing because it is clear that Grand Central is not likely to

succeed on the merits of its appeal. Therefore, we will grant DER's motion to deny the petition without a hearing.

The question presented by the merits of this appeal is whether DER erred in modifying Grand Central's permit to revoke authority to dispose of fuel contaminated soil and to allow disposal of only virgin fuel contaminated soil, as those terms are defined above. We find that DER's modification of Grand Central's permit was authorized by the solid waste regulations. Chapter 273, Subchapter C, of the Department's regulations governs operating requirements for municipal waste landfills. Section 273.201(d) reads:

> No person or municipality may allow special handling waste or residual waste to be disposed at the facility unless the Department has specifically approved the disposal of the waste at the facility, in the permit, under Subchapter D (relating to additional application requirements for special handling and residual wastes).

Under this language, Grand Central was required to obtain authorization under "Subchapter D" prior to disposing of fuel contaminated soil - a residual waste - at its landfill. Subchapter D of Chapter 273 is entitled "Additional Application Requirements for Special Handling and Residual Wastes." Section 273.421 requires that an application to handle, among other things, residual waste include the following information regarding the waste: chemical analysis, leaching analysis, a description of the manufacturing or pollution control process which produced the waste, an evaluation of the compatibility of the waste with the landfill's liner (based on a test method approved, in writing, by DER), and an analysis of alternatives to disposal at a municipal waste landfill - including an explanation of why such disposal is being proposed.

We agree with DER that its October 24, 1991 permit modification was authorized by 25 Pa.Code §273.201(d). Grand Central had been authorized to

dispose of fuel contaminated waste in 1985, prior to the imposition of the Subchapter D application requirements. These requirements are designed to protect the public from the dangers of disposing of industrial-type wastes in landfills designed primarily to handle household-type trash. Nothing in section 273.201(d) suggests that Grand Central is exempt from these requirements simply because it obtained authorization for disposal of fuel contaminated soil prior to the effective date of the regulations.

The arguments raised by Grand Central in its notice of appeal, petition for supersedeas, response to DER's motion to deny petition without hearing, and memorandum of law are unpersuasive. First, Grand Central argues that the permit modification was procedurally flawed because it did not comply with 25 Pa.Code §§271.142(a)(1) (requiring publication in the Pennsylvania Bulletin of notices regarding "major permit modifications") and 271.143 (providing that DER "may" conduct public hearings on major permit modifications). With regard to section 271.142, we agree with DER that its action here was not a "major" permit modification because it restricted, rather than expanded, the types of waste which the landfill could accept. See 25 Pa.Code §271.144)(a)(10). Moreover, it is obvious that the public notice requirement was designed to protect the public; therefore, Grand Central lacks standing to assert this claim. See, Borough of Glendon v. DER, 1990 EHB 1501, 1505-1506. With regard to section 271.143, Grand Central has provided no reason why the word "may" should be construed as mandatory rather than discretionary. In addition, it appears to us that the public comment procedure, like the public notice requirement, is designed to protect the public - not the permit applicant.

Second, Grand Central argues that DER has arbitrarily and unconstitutionally impinged on contracts which were signed in reliance upon the earlier

permit. However, as stated above, the permit modification was necessary to bring Grand Central's permit in line with 25 Pa.Code §273.201(d). The Commonwealth's authority to change its regulations and to impose new requirements to protect the public cannot be defeated by the claim that the new requirements will interfere with existing contracts. See Cianfrani v. Commonwealth, State Employees Retirement Board, 57 Pa. Commw. 143, 426 A.2d 1260 (1981), aff'd, 501 Pa. 189, 460 A.2d 753 (1983).

Third, Grand Central argues that there is no "technical justification" for the permit modification - i.e. the landfill can safely accept fuel contaminated soil. This is not a valid defense to the permit modification. Under section 273.201(d), if Grand Central believes it can safely dispose of fuel contaminated soil, then the proper procedure is to file an application in accord with Subchapter D of Chapter 273.[1]

Finally, we disagree with Grand Central's argument that the permit modification was arbitrary and capricious because it was inconsistent with a prior determination of DER dated June 19, 1990. Some additional background information is necessary to understand this argument. The responsibility for regulation of Grand Central's landfill was recently shifted from DER's Norristown Regional Office to its Wilkes-Barre Regional Office. The permit modification was issued by the Wilkes-Barre Office. Before this shift in responsibility occurred, the Norristown Office sent Grand Central a letter, dated June 19, 1990, regarding DER's policy on fuel contaminated soil. Although the letter is somewhat cryptic, it states that the Department has

---

[1] Grand Central attached affidavits from two of its experts to its petition for supersedeas. Both of these affidavits state opinions that the landfill can safely accept fuel contaminated soil; however, neither affidavit addresses whether the landfill could meet all of the requirements stated in 25 Pa.Code §273.421.

finalized a "policy and procedure" regarding fuel contaminated soil, and that "this will allow you to accept less than 25 tons of fuel contaminated soils resulting from one site clean-up by notifying our office with a written notification within 5 days after verbal notification." A copy of the Department's "Policy and Procedure for the Disposal of Fuel Contaminated Soils" was attached to the letter.

Arguably, the June 19, 1990 letter is inconsistent with the permit modification. The letter does not distinguish between virgin fuel contaminated soil and other fuel contaminated soil, although this distinction is outlined in the DER policy document attached to the letter.[2] However, even if the letter and the permit modification are inconsistent, this does not mean that the permit modification was arbitrary. As we stated above, the permit modification was authorized by the regulations. Moreover, the Board's June 13, 1991 Order asked the parties to submit memoranda of law addressing, first, whether the letter and permit modification were inconsistent, and, second, whether this possible inconsistency provided a legal basis for reversing the permit modification. The arguments which Grand Central submitted in response to the latter question were a rehash of the arguments which we rejected earlier in this Opinion. Therefore, we conclude that while it is at least arguable that the letter and the permit modification were inconsistent, this did not render the permit modification arbitrary and capricious.

It is clear from the above discussion that Grand Central is not likely to succeed on the merits of its appeal. Therefore, we will grant DER's motion to dismiss the petition for supersedeas without a hearing.

---

[2] Section 3 of the policy document states that the directive applies to disposal of "virgin fuel contaminated soils."

ORDER

AND NOW, this 11th day of July, 1991, it is ordered that DER's motion to dismiss Grand Central's petition for supersedeas without a hearing is granted.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: July 11, 1991

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M. DIANE SMITH
SECRETARY TO THE BOA

CONCERNED CITIZENS OF EARL TOWNSHIP, et al.	:	
v.	:	**EHB Docket No. 88-516-M (consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and DELAWARE COUNTY SOLID WASTE AUTHORITY, Permittee	:	**Issued: July 12, 1991**

OPINION AND ORDER
SUR
APPELLANT SZARKO'S EIGHTH MOTION TO COMPEL
AND/OR MOTION IN LIMINE

Robert D. Myers, Member

Synopsis

A motion to compel discovery into post-permit issuance conditions at a landfill is denied when it is not filed until the appeal is ready to be scheduled for hearing. A motion in limine, in the alternative, seeking to prohibit the presentation of evidence on post-permit issuance conditions also is denied since such evidence may be relevant.

OPINION

The discovery period in these consolidated appeals ended on June 1, 1990; but the Board, on motion of Delaware County Solid Waste Authority (DCSWA), authorized expert witness discovery until February 15, 1991. Pre-hearing memoranda, supplemented to cover the expert witness discovery, were filed by Dr. Frank J. Szarko (Szarko) on March 11, 1991 and by DCSWA two weeks later. On June 3, 1991 Szarko filed his Eighth Motion to Compel and/or

Motion in Limine dealing with the discovery and admissibility of post-permit issuance conditions at Colebrookdale Landfill (Landfill). Szarko requests an order (1) ruling that post-permit issuance conditions are relevant, and (2) permitting full discovery into those conditions or, in the alternative, (3) ruling that post-permit issuance conditions are not relevant and (4) prohibiting the introduction of any evidence regarding these conditions. DCSWA has opposed the Motion in its Response filed on June 25, 1991.

Post-permit issuance conditions were the subject of Szarko's Sixth Motion to Compel, filed on June 1, 1990 and withdrawn on July 3, 1990. It was also the subject of a Board Order dated August 23, 1990 granting Szarko's Motion to Compel Robert Keates to answer questions at his deposition. The Order stated, in part

> Szarko's adoption of the objections to DER's issuance of permits for the Colebrookdale Landfill initially raised by Berks County et al., including the specific allegation of past, present and continuing surface water and ground-water pollution resulting from the landfill, is adequate to permit discovery into post-issuance events to determine whether such alleged pollution has continued. Continuance of such alleged pollution could show faulty design or inadequate permit conditions.

Szarko's attempt to use this Order as a device for opening up the subject generally was rebuffed in a Board Opinion and Order issued January 7, 1991. We stated, *inter alia*, the following:

> Szarko misconstrued our August 23, 1990 Order. We authorized Szarko to continue his deposition of Keates by inquiring into matters occurring subsequent to November 16, 1988. We did not authorize any broader reopening of discovery on that subject, partly because we were not asked to do so. Szarko's Sixth Motion to Compel, which sought an overall ruling on the relevance of the post-permit issuance period for discovery purposes, was withdrawn and never refiled. Szarko cannot use the narrow relief afforded by the granting of the Motion to Compel

Keates to launch a general discovery expedition into the subject matter covered by the Sixth Motion to Compel.

On May 13, 1991 Szarko attempted to revive his Sixth Motion to Compel by filing a legal memorandum. By letter dated May 22, 1991 he was advised by the Board that a Motion was necessary. The Eighth Motion to Compel and/or Motion in Limine was filed as a result.

Szarko was on notice as long ago as August 23, 1990 that the Board considered post-permit issuance conditions to be relevant for discovery purposes. Szarko was on notice as long ago as January 7, 1991 that, in order to conduct additional discovery on the subject, he would have to refile his Sixth Motion to Compel or some new motion designed to accomplish the same purpose. Despite these notices, Szarko made no attempt to seek Board permission until May 13, 1991 - 3 months after all discovery had ended and 2 months after Szarko had filed his supplemental pre-hearing memorandum.

To grant the motion now, with the case ready to be scheduled for hearing, would inject more delays into an already protracted proceeding. We will not do so. But neither will we exclude relevant evidence of post-permit issuance conditions.

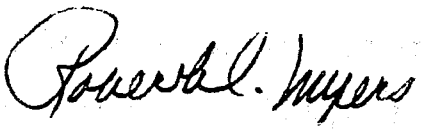
ORDER

AND NOW, this 12th day of July, 1991, it is ordered as follows:

1. Szarko's Eighth Motion to Compel and/or Motion in Limine is denied.

2. These consolidated appeals shall be placed on the list of cases to be scheduled for hearing.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
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DATED: July 12, 1991

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PENNSYLVANIA PUBLIC INTEREST RESEARCH GROUP, INC.	:	
v.	:	**EHB Docket No. 89-173-F**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and STANLEY G. FLAGG & CO., INC., Permittee	:	**Issued: July 16, 1991**

OPINION AND ORDER SUR MOTIONS FOR SUMMARY JUDGMENT, and PARTIAL SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment filed by the Appellant is granted, and a motion for partial summary judgment filed by the Permittee is denied in an appeal from the Department of Environmental Resources' (DER) grant of a National Pollutant Discharge Elimination System (NPDES) permit. DER may not grant a credit to the Permittee for pollutants in the Permittee's intake water where the undisputed facts show that the Permittee polluted the intake water.

OPINION

This is an appeal from DER's issuance of an NPDES permit to Stanley G. Flagg and Company, Inc. (Flagg) on May 18, 1989. Flagg operates a foundry in West Pottsgrove Township, Montgomery County. The appeal was filed on June 21, 1989 by the Pennsylvania Public Interest Research Group, Inc.; the Public Interest Research Group of New Jersey; David Robinson; and Laura Keyes (collectively, "PIRG"). The appeal challenges, among other things, DER's

granting an "intake credit" to Flagg for amounts of zinc contaminating the intake water used by Flagg at the foundry.

Both PIRG and Flagg have filed motions seeking summary judgment on the intake credit issue.[1] The parties also submitted a Joint Appendix, containing 29 Joint Exhibits, which constitute the undisputed facts which the motions are based upon. This Opinion and Order addresses these motions.

NPDES permits are issued pursuant to Section 402 of the Federal Clean Water Act (CWA), 33 USC §1342, and the regulations promulgated by the Environmental Protection Agency (EPA) pursuant to the CWA. DER has been granted authority to administer the NPDES program in Pennsylvania. (See Joint Exhibit 1.) Under DER's regulations at 25 Pa.Code §92.31, the effluent limitations[2] in NPDES permits issued by DER must correspond with those set by EPA in its regulations and with any more stringent requirements of state law. See, Chevron U.S.A., Inc. v. DER, EHB Docket No. 85-410-M (Adjudication issued June 24, 1991).

The question addressed in the parties' motions is whether DER erred in increasing the technology-based effluent limitations contained in Flagg's NPDES permit to account for levels of zinc which are in the intake water which Flagg uses at the foundry. In the jargon of NPDES permits, this type of allowance is known as an "intake credit." Intake credits are governed by 40

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[1] PIRG filed a motion for summary judgment since a ruling in its favor on this issue would lead to sustaining its appeal and reversing DER's grant of the permit. Flagg filed for partial summary judgment because the intake credit issue is not the only issue PIRG raised in its appeal.

[2] "Effluent limitations" are numerical standards governing the amount of various pollutants which may be discharged. Effluent limitations are either technology-based or water quality-based. Technology-based effluent limitations, as the name implies, are based primarily upon the ability of pollution control technology to remove pollutants from a discharge. Water quality-based effluent limitations are designed to protect the designated uses of the receiving stream.

CFR §122.45(g), which reads:

> (g) Pollutants in intake water.
>
> (1) Upon request of the discharger, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the discharger's intake water if:
>
> (i) The applicable effluent limitations and standards contained in 40 CFR Subchapter N specifically provide that they shall be applied on a net basis; or
>
> (ii) The discharger demonstrates that the control system it proposes or uses to meet applicable technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.
>
> (2) Credit for generic pollutants such as biochemical oxygen demand (BOD) or total suspended solids (TSS) should not be granted unless the permittee demonstrates that the constituents of the generic measure in the effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outfall or elsewhere.
>
> (3) Credit shall be granted only to the extent necessary to meet the applicable limitation or standard, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with permit limits.
>
> (4) Credit shall be granted only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The Director may waive this requirement if he finds that no environmental degradation will result.

Both parties contend that they are entitled to summary judgment regarding whether the credit granted by DER satisfies the specific requirements of subsections 1, 3, and 4 (subsection 2 is clearly inapplicable). In addition,

PIRG argues that Flagg is not entitled to an intake credit because Flagg is responsible for the levels of zinc in the intake water.

The Board may grant summary judgment only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Summerhill Borough v. Commonwealth, DER, 34 Pa. Commw. 574, 383 A.2d 1320, 1322 (1978). The Board must read a motion for summary judgment in a light most favorable to the non-moving party. Palisades Residents in Defense of the Environment v. DER, 1988 EHB 8, 10-11.

Evaluating the arguments of the parties and the joint exhibits which have been filed, we agree with PIRG that Flagg is not entitled to an intake credit because Flagg is responsible for the pollutants in the intake water. Therefore, we will not address the other arguments raised by the parties.

In its motion for summary judgment, PIRG argues that the undisputed facts show that Flagg is responsible for the elevated levels of zinc in the groundwater, which Flagg uses as intake water, under the foundry. PIRG points to evidence indicating that Flagg, in the past, maintained waste lagoons on its property, and that Flagg's own consultant concluded that:

> The galvanizing waste lagoons receive between 40,000 and 60,000 gallons of liquid waste per day, a fraction of which evaporates and the remainder of which seeps into the groundwater system. The galvanizing waste lagoons are, therefore, the most obvious major source of the zinc found in the plant water.

(Jt. Exh. 26, p. 25.) PIRG also points to DER's conclusion that Flagg is responsible for contaminants in the groundwater beneath the plant. (Jt. Exh. 22, p. 4.) These facts are important, PIRG asserts, because the entire concept of intake credits is premised on the idea that a discharger should not

be held responsible for circumstances (such as the quality of its intake water) which are beyond its control, citing American Iron and Steel Institute v. EPA, 526 F.2d 1027 (3d Cir. 1975), Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976).

Flagg disagrees. First, it contends that summary judgment on this argument is barred because of disputed facts. Flagg asserts that DER has only concluded that Flagg may be responsible for a portion of the zinc present in Flagg's groundwater supplies. (See, Jt. Exh. 29.) Second, Flagg asserts that these facts are not material, because the source of the pollutants in the groundwater is irrelevant in determining whether an intake credit is warranted. Flagg contends that the cases PIRG cites do not support PIRG's argument. In addition, Flagg argues that 40 CFR §122.45(g) does not address this issue; thus, PIRG is, in effect, attempting to challenge the substance of the regulation.

On the factual question, we find that the undisputed facts demonstrate that Flagg is responsible for the elevated zinc levels in the groundwater it uses in its industrial processes. As PIRG points out, Flagg's own consultant stated that liquid waste from the lagoons seeps into groundwater, and that the waste lagoons are the "most obvious major source of the zinc found in the plant water." (See, Jt. Exh. 26.) In addition, the affidavit of DER employee Patrick J. Devitt cites a 1982 Consent Order between Flagg and DER which provided that Flagg would "conduct a groundwater study and ... initiate ... a groundwater recovery program to mitigate the groundwater contamination caused by Flagg's use of unlined impoundments for industrial waste disposal at the Stowe facility." (Jt. Exh. 22, p. 4.) These statements, contained in joint exhibits submitted by the parties, establish that Flagg's use of unlined impoundments has contaminated the groundwater. The

only fact Flagg relies upon to rebut this is Mr. Devitt's statement at his deposition that it is "possible" that other industrial sources in the area contributed to the groundwater contamination. (Jt. Exh. 29 pp 43-44.) However, aside from the speculative nature of the statement, even if other sources did contribute to the contamination, this would only mean that these other sources are jointly responsible along with Flagg; it would not mean that Flagg is absolved from responsibility. Therefore, the undisputed facts establish that Flagg is responsible for the contamination of groundwater beneath the plant.

Turning to the legal question, we agree with PIRG that Flagg is not entitled to a credit for pollutants in its intake water because Flagg contaminated that water. The rationale for allowing intake credits is that one should not be held responsible for pollution created by others. This rationale was stated clearly in federal court opinions issued before EPA adopted its present intake credit regulation. In American Iron and Steel Institute v. EPA, 526 F.2d 1027 (3d Cir. 1975), the Court stated:

> Petitioners first contend that the limitations should have been established on a net rather than a gross basis. Otherwise, they argue, they would be forced to cleanup water that had already been polluted by other companies ... . We believe these objections have merit ... . Such an adjustment would seem required by due process, since without it a plant could be subjected to heavy penalties because of circumstances beyond its control.

526 F.2d at 1056. The Court remanded the matter to EPA to establish guidelines for making such allowances. Id. Similarly, in Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976), the Court stated:

> It is industry's position that EPA has no jurisdiction under the Act to require removal of any pollutants which enter a plant through its intake stream. We agree ... . [T]he Act

> prohibits only the addition of any pollutant to navigable waters from a point source. Those constituents occurring naturally in the waterways or occurring as a result of other industrial discharges do not constitute an addition of pollutants by a plant through which they pass.

545 F.2d at 1377. Finally, one commentator has explained the intake credit concept as follows:

> The idea, simply put, is to excuse the discharger from the faults of the world outside. If the 'bads', strictly speaking, are passed through without making matters worse, then the discharger is no more responsible than the citizen who successfully excretes from his body pollutants picked up from the environment without blackening his reputation as a polluter.

Rodgers, Environmental Law, Vol. 2, §4.30(A) (1986).

It is abundantly clear that the rationale behind intake credits does not support extending such a credit to Flagg. Flagg polluted the groundwater beneath its plant; it is not the victim of pollution which was caused by others or which occurred naturally. Still, we must uphold DER's grant of an intake credit if this result is compelled by the language of 40 CFR §122.45(g). We find that it is not. The regulation states that a credit shall be granted if the four stated criteria are satisfied. While the language of the regulation does not explicitly state that no credit shall be granted where the discharger is responsible for the pollutants in the intake water, we believe that this requirement is implicit in the regulation itself. Specifically, although this term is not defined in the regulations, it is implicit in the overall context of 40 CFR §122.45(g) that the term "intake water" refers to water coming into the discharger's plant unaffected by the

discharger's activities.[3] Clearly, this was the understanding of the Courts in the opinions cited above, and it must be applied to the language of the regulation as well.

Flagg's argument that an intake credit is mandated by the language of 40 CFR §122.45(g) can be accepted only if that language is wrenched out of the context in which it was written. We decline to accept Flagg's mechanistic construction of the regulation because to do so would sanction a perversion of the fairness rationale underlying the intake credit concept. We believe that regulations, like statutes, should be interpreted in light of their objectives. See, Jaffe, Judicial Review: Questions of Law, 69 Harv. L. Rev. 239 (1955). Moreover, regulations - again, like statutes - should not be interpreted by "placing an emphasis on their particulars which will defeat their obvious purpose." Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 18 (1936).

Accordingly, we grant summary judgment in favor of PIRG.[4]

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[3] If this were not the case, we see nothing to preclude Flagg from drawing intake water directly from its waste lagoons.

[4] With regard to Flagg's argument that other parties have contributed to the zinc contamination in the groundwater, nothing in this Opinion bars DER from granting Flagg a partial credit based upon evidence which establishes the extent to which other parties have, in fact, contributed to the contamination. This statement assumes that DER can make a finding that no environmental degradation will result. See, 40 CFR §122.45(g)(4).

ORDER

AND NOW, this 16th day of July, 1991, it is ordered that:

1) The motion for summary judgment filed by the Pennsylvania Public Interest Research Group, et al. is granted, and the NPDES permit granted by the Department of Environmental Resources to Stanley G. Flagg & Co., Inc. on May 18, 1989 is remanded to the Department for recalculation of the effluent limitations consistent with the above Opinion.

2) The motion for partial summary judgment filed by Stanley G. Flagg & Co., Inc. is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: July 16, 1991

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

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M. DIANE SMITH
SECRETARY TO THE BOARD

PARKER OIL CO.	:	
	:	
v.	:	**EHB Docket No. 91-114-B**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 16, 1991**

OPINION AND ORDER SUR
PETITION FOR ALLOWANCE TO APPEAL
NUNC PRO TUNC

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A petition for allowance to appeal *nunc pro tunc* is denied for failure to demonstrate fraud or breakdown in the operation of the Board or unique and compelling circumstances, and the appeal from the Department of Environmental Resources' (DER) civil penalty assessment is dismissed for lack of jurisdiction, since it was not filed within thirty days as mandated by 25 Pa. Code §21.52(a).

OPINION

Parker Oil Company (Parker) has filed a petition for allowance to appeal *nunc pro tunc* and a notice of appeal with the Board from a civil penalty assessment of one thousand dollars ($1000.00) imposed pursuant to the Storage Tank and Spill Prevention Act, the Act of July 6, 1989, P.L. 169, 35 P.S. §6021.101 *et seq.* Parker, a field distributor of petroleum products, allegedly violated §503(b) of this statute on August 17, 1990, when it

knowingly filled an unregistered, underground storage tank with gasoline.

The civil penalty assessment was received by Parker on December 9, 1990, yet its notice of appeal and petition were not filed with the Board until March 15, 1991. Parker attempts to justify the delay by explaining in its petition that it notified DER immediately upon receipt of the civil penalty assessment, and expressed its objections and position to an unnamed DER employee. The employee allegedly advised Parker that the information would be forwarded to the DER legal office which would respond to Parker directly. Parker asserts that it was awaiting DER's response as the appeal period expired on January 8, 1991. Characterizing these circumstances as "non-negligient happenstance", Parker asserts that its prompt communication with DER evidenced Parker's intent to appeal the civil penalty assessment and that this contact justified an appeal *nunc pro tunc*. Parker adds that allowance of the petition would not prejudice DER since that agency was aware of Parker's objections to the civil penalty assessment, and that denial of its petition would deprive Parker of its fundamental rights of appeal and due process, and administer an unduly harsh penalty upon Parker for its tardiness in filing. Parker did not provide the Board with any legal authority in support of its position.

DER denies these assertions, and adds that Parker has failed to allege fraud or breakdown in Board procedures, or any unique and compelling circumstances that would entitle Parker to the requested relief.

Parker's failure to file its appeal in a timely fashion deprives the Board of jurisdiction to hear the controversy, Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), unless the Board grants Parker's petition. Guidance in evaluating the merits of a petition for allowance to appeal *nunc pro tunc* is provided by the Board's rules of practice and procedure at 25 Pa. Code

§21.53(a):

> (a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc;* the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in the Courts of Common Pleas in the Commonwealth.

It is well settled that "good cause" constitutes fraud or a breakdown in the operation of the Board. Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986); Kerry Coal Company v. DER, 1990 EHB 1206. In addition, an appeal *nunc pro tunc* may be allowed when the delay is caused by "non-negligent happenstance," but only when unique and compelling circumstances are presented, and when the tardy filing is discovered quickly and the party promptly requests leave to appeal *nunc pro tunc.* Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979); C & K Coal Co. v. DER, 112 Pa. Cmwlth. 505, 535 A.2d 745, alloc. denied, 546 A.2d 60 (1988); American States Insurance Co. v. DER, 1990 EHB 338.

When measured against these standards, Parker's arguments are not convincing. It has failed to demonstrate good cause for the delay in filing. Contacting DER regarding the civil penalty assessment and allowing the appeal period to expire while allegedly awaiting a response from DER is insufficient to justify an appeal *nunc pro tunc*, C & K Coal Co. v. DER, *supra*. Similarly, it is insufficient to allege that the adverse party will not be prejudiced by allowance of the petition, Township of Potter v. DER, EHB Docket No. 90-112-F (Opinion issued April 3, 1991), or that denial of its petition would cause undue hardship and constitute a deprivation of due process, Blevins v. DER, 128 Pa. Cmwlth. 533, 563 A.2d 1301 (1989).

Further, these circumstances do not satisfy the criteria of Bass v. Commonwealth, *supra*, as it has been limited by the intermediate appellate

courts. In Re Interest of C. K., 369 Pa. Super 445, 535 A.2d 634 (1987); Guat Gnoh Ho v. Unemployment Compensation Board of Review, 106 Pa. Cmwlth. 154, 525 A.2d 874 (1987). Parker has not presented unique and compelling circumstances for the delay in filing and has failed to demonstrate that it acted promptly to remedy its error when it discovered that it had missed the filing deadline of January 8, 1991. American States Insurance Co., *supra*.

In summary, Parker has not provided the Board with any factual or legal basis, pursuant to 25 Pa. Code §21.53, upon which to grant its petition; as such, the petition must be denied. Since Parker's notice of appeal was not filed in a timely manner as required by 25 Pa. Code §21.52(a), the appeal must be dismissed for lack of jurisdiction.

ORDER

AND NOW, this 16th day of July, 1991, it is ordered that:

1. The petition for allowance to appeal *nunc pro tunc* filed by Parker is denied; and

2. The appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 16, 1991

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Northeastern Region

For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOA

NEW HANOVER CORPORATION	:	**EHB Docket No. 90-225-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, NEW HANOVER TOWNSHIP and THE COUNTY OF MONTGOMERY, Intervenors	:	**Issued:** July 19, 1991

OPINION AND ORDER SUR
MOTION TO QUASH SUBPOENA

By Maxine Woelfling, Chairman

Synopsis

In an appeal of the denial of a solid waste permit modification the applicant-appellant's motion to quash a subpoena directed to counsel who had assisted it in its efforts to obtain the permit is denied. The permit application process before the Department of Environmental Resources (Department) is distinct from the appeal process before the Board and the applicant-appellant's counsel is not protected from discovery where he played an active role in the permit application process.

OPINION

The procedural history of this matter is recounted most recently in the Board's March 21, 1991, opinions granting the petitions to intervene by the County of Montgomery (County) and New Hanover Township (Township) and the Board's June 19, 1991, opinion denying New Hanover Corporation's (Corporation) motion for protective order. The issue presently before the Board for

disposition arises from the Township's attempt to depose Mark Stevens, Esq. concerning conformance of the Corporation's proposed landfill to the requirements of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*, and, more specifically, to the County's solid waste plan. A subpoena was served upon Mr. Stevens by the Township and the Corporation has sought to quash it.

The Corporation asserts in its motion to quash that Mr. Stevens "served as counsel for NHC in its efforts to obtain its permit modification..." and that he "continues to counsel NHC regarding the instant appeal, including having assisted in the preparation of the notice of appeal and providing legal advice regarding the litigation." While the Corporation admits that it indicated in its responses to the Department's interrogatories that it may call Mr. Stevens as a witness to authenticate a document, it now asserts that his testimony for that purpose is no longer necessary. The Corporation maintains that the information sought to be elicited from Mr. Stevens in the deposition is either privileged or protected from discovery under Pa.R.C.P. No. 4003.3. In the alternative, the Corporation contends that Mr. Stevens is a legal expert and that the Township has not demonstrated why it is now necessary or appropriate to depose him, as is required by Pa.R.C.P. No. 4003.5.

In opposing the Corporation's motion, the Township argues that the Corporation indicated in its response to Interrogatory No. 11 of the Department's interrogatories that Mr. Stevens is to be a fact witness and that it did not limit the scope of his testimony to merely authenticating a document. As further support for deposing Mr. Stevens, the Township asserts that James Marinari stated in his May 31, 1991, deposition that Mr. Stevens was the "grand coordinator" of the permitting and planning issues. The Township also

points out that Mr. Stevens did not enter an appearance in this appeal until after he was subpoenaed. Finally, the Township contends that its right to depose Mr. Stevens is not dependent on whether the Corporation intends to call him as a witness.

The County has also filed a response opposing the Corporation's motion for reasons similar to those advanced by the Township.[1]

The relevant rule, Pa.R.C.P. No. 4003.3, provides in pertinent part that:

> Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his attorney... The discovery shall not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes or summaries, legal research or legal theories....

The note accompanying the rule explains that while the rule was intended to keep an attorney's files free from examination by the opposing party, it did not, in all circumstances, preclude discovery of materials prepared by an attorney.

The issue to be decided here is whether the opinions of counsel prepared for and utilized by the Corporation in its efforts to secure a permit modification from the Department are insulated from discovery in litigation ensuing from the denial of the permit modification. Based upon our decision in Robert L. Snyder *et al.* v. DER, 1980 EHB 373, we conclude that they are not.

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[1] The County has also sought to depose Mr. Stevens, Hershel J. Richman, Esq. and the custodian of records of Cohen, Shapiro, Polisher, Shiekman and Cohen.

In Snyder the Department sought to depose the two attorneys representing the appellant coal company, and the appellant objected on the grounds of attorney-client privilege. In overruling the objections the Board held that:

> Here, however, the DER has a legitimate purpose as Sable and Lampl have been listed as witnesses by the Coal Co. in its pre-hearing memorandum. Thus, they apparently have knowledge of facts separate from any gained through an attorney-client communication.
>
> 1980 EHB at 375.

An analogous situation is presented in this case. Mr. Stevens is identified as a fact witness in the Corporation's answers to the Department's interrogatories, and Mr. Marinari, in his deposition, describes the active role played by Mr. Stevens in the Corporation's attempts to secure the permit modification from the Department. Based on these circumstances, we cannot conclude that Mr. Stevens should not be subject to deposition concerning his role in the permit application process.[2]

Furthermore, in allowing Mr. Stevens' deposition, we must also recognize the distinction between the process to obtain a permit from the Department and the process of contesting the Department's decision before the Board. The two processes are not one and the same, as the Corporation urges us, but are separate processes, the former administrative in nature, the latter quasi-judicial in nature. As a result, the protections which flow to counsel's role in each process differ. In addition, if we were to adopt the Corporation's argument, we would be, in essence, declaring that every permit

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[2] The situation presented herein is analogous to those instances where discovery of an attorney's opinion has been permitted where that opinion is a relevant issue in the proceeding. See, e.g., Little v. Allstate Ins. Co., 16 D&C 3d 110 (1980), and GOODRICH-AMRAM 2d §4003.3:2.

application filed with the Department will result in litigation before the Board, which is not the case.[3]

O R D E R

AND NOW, this 19th day of July, 1991, it is ordered that New Hanover Corporation's motion to quash the subpoena issued to Mark Stevens, Esq. is denied. The deposition shall proceed at a date and time mutually agreeable to the parties.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: July 19, 1991

cc: See following page.

[3] The Corporation's claim that Mr. Stevens is an expert who can only be deposed in accordance with Pa.R.C.P. No. 4003.5 is also rejected in light of the Corporation's identification of Mr. Stevens as a fact witness in its response to the Department's interrogatories.

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M. DIANE SMITH
SECRETARY TO THE BOA

EDWARD DAVAILUS, *et al.*	:	
	:	
v.	:	**EHB Docket No. 88-407-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 22, 1991**

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

By Terrance J. Fitzpatrick, Member

Synopsis

The Department of Environmental Resources' (DER) denial of a permit application, filed under the Dam Safety and Encroachments Act, to allow extraction of peat from wetlands is affirmed. Although DER committed a procedural error by failing to consult with the applicant to examine ways to mitigate the environmental harm of the project, this error was harmless because the evidence did not indicate that the damage the project would cause to fish and wildlife could have been eliminated or mitigated. In addition, the Board affirms DER's restoration order (as modified by a Stipulation) requiring the applicant to restore the site to its condition as of April 6, 1984, the date DER issued a letter which effectively revoked a mining permit previously granted to the applicant. The applicant's argument that the areas involved were not wetlands as of 1984, because they were drained before that date, lacks merit because the applicant did not show that the areas would no longer support vegetation typically adapted to life in saturated soil conditions. Finally, the Board affirms the presiding Board Member's decision

to strike a supplement to the Appellant's pre-hearing memorandum.

INTRODUCTION

This Adjudication involves an appeal by Edward and Pauline Davailus and Davailus Enterprises, Inc. (Davailus) from an "Order and Permit Denial" issued by the Department of Environmental Resources (DER) on August 30, 1988. The controversy involves wetlands (peat bogs) on the Davailus site - a 256 acre tract in Covington Township, Lackawanna County. DER denied an application by Davailus filed pursuant to the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §693.1 *et seq.* to extract peat from the wetlands. At the same time, DER concluded that Davailus had already conducted illegal activities in the wetlands; thus, DER ordered Davailus to restore the site to its condition prior to the beginning of activities.[1]

Five days of hearings were held on July 16 - 20, 1990. A total of eight witnesses testified, and numerous exhibits were submitted by each party. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Appellants are Edward and Pauline Davailus and Davailus Enterprises, Inc. Edward and Pauline Davailus are owners of a tract of land of approximately 256 acres located between Pennsylvania Route 435 and Interstate 380 in Covington Township, Lackawanna County. Davailus Enterprises, Inc. is a Pennsylvania corporation.

2. The Appellee is the Department of Environmental Resources, the executive agency with the duty to administer and enforce the Dam Safety and Encroachments Act; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as*

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[1] DER has since stipulated that Davailus must restore the site to its condition as of April 6, 1984. See Finding of Fact 26.

amended, 35 P.S. §691.1 *et seq.*; Section 1917-A of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17, and the regulations promulgated under these laws.

3. The Davailus site consists of 256 acres. The site contains wetlands, and a stream called Meadowbrook runs through the site (Stipulation 3).

4. On September 18, 1987, Davailus submitted Permit Application No. E 35-118 to the Department to excavate peat from 45 acres of wetlands on the site (Stip. 11).

5. DER denied the permit and issued the restoration order on August 30, 1988 (Stip. 12).

6. DER denied the permit based upon a belief that the project would have a negative impact on Meadowbrook and the wetlands. Moreover, DER determined that the project would not provide public benefits which would out-weigh the environmental harm (Order and Permit Denial, paragraphs I, J, K).

7. Richard Shannon, a water pollution biologist for DER, was the person within DER who was primarily responsible for the review of the Davailus application (Transcript 191, 204, 251-252).

8. Mr. Shannon outlined the following types of environmental harm from the project in both his testimony and in the "Record of Decision" (Exh. C-39) which he prepared prior to the permit denial:

> 1. Impact to stream (Meadowbrook) and aquatic life:
>
> a) The project will cause siltation downstream of the work area (Exh. C-39, T. 272-279).
>
> b) The removal of vegetation and creation of an open water pond will decrease the

site's ability to buffer pollutants (Exh. C-39, T. 279-284).

c) The ponded water will increase water temperature downstream, harming Meadowbrook[2] (Exh. C-39, T. 284-288).

d) Peat is acidic, and mining of the peat will decrease the pH of Meadowbrook (Exh. C-39, T. 288-292).

2. Impacts to wetlands:

a) Elimination of 45 acres of vegetated wetlands (Exh. C-39, T. 295).

b) Elimination of fish and wildlife habitat (Exh. C-39, T. 295-301).

c) Elimination of water quality enhancement capability of the area (Exh. C-39, T. 307).

d) Reduction of flood storage capability of the area (Exh. C-39, T. 308-312).

e) Alteration of groundwater hydrology on the site and in the surrounding area (Exh. C-39, T. 313-319).

9. Mr. Davailus intends to remove peat from the site and to create lakes as amenities for a housing development (T. 72-77, 96-100, 141-142). His plans call for restoring 70% of the wetland area as lakes, and 30% as wetlands (T. 303).

10. The wetlands on Davailus's site serve the function of "food chain production" and serve as a habitat for aquatic and land species (T. 132).

11. DER did not consider whether engineering solutions or best management practices could alleviate its concerns regarding siltation (T. 276), thermal impacts (T. 287-288), lowering of pH in Meadowbrook (T. 289-290), and loss of flood storage capacity (T. 311-312).

12. After DER concluded that the project would have a significant

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[2] Meadowbrook is classified as a cold water fishery in DER's regulations at 25 Pa. Code Chapter 93 (Stip. 4).

environmental impact, DER did not consult with Davailus to examine ways to reduce environmental harm to a minimum (T. 278, 284, 288, 290, 292-293, 308, 312, 476-477, 544-547).

13. DER's concern over erosion and siltation could be adequately addressed by adopting standard engineering techniques for mining operations, such as installing vegetated buffer strips, vegetated channels, silt fences, and detention ponds, and by reducing the slope of channel walls (T. 347, 420, 436-437, 818, 820-822). The Davailus erosion and sedimentation control plan was approved by the Lackawanna County Soil and Conservation Service as satisfying 25 Pa.Code §102.1 *et seq.* (T. 348, Exh. A-6).

14. DER's concern that the project could lower the pH of Meadowbrook was speculative (T. 288, 426, 828-829, 844). Moreover, this concern could be adequately addressed through monitoring and standard practices such as aeration, and using lime dispensers (T. 353, 426-427, 829).

15. Concerns that creation of a lake will raise water temperatures downstream can, theoretically, be addressed by drawing water from the bottom of the lake after the lake stratifies during the warmer months (T. 827-828, 436-437). It is unclear whether such a solution would work on the Davailus site, however, because the water might have to be pumped from the bottom of the lake (T. 903-906).

16. There is insufficient data to determine whether peat removal would affect groundwater hydrology in areas surrounding the site (T. 432).

17. It is unclear what effect the project would have on flooding downstream on Meadowbrook in light of the fact that the 45 acres of wetlands proposed to be mined constitute only 3% of the watershed of Meadowbrook, and in light of the possible implementation of engineering solutions such as retention basins (T. 312, 431, 830).

18. Both wetlands and lakes can filter pollutants from water draining into them (T. 279-282, 666, 824-825). There is insufficient information in the record to indicate whether replacing the wetlands with 70% open water and 30% wetlands would have an impact on the buffering ability of the site.

19. The wetlands on the Davailus site have a high degree of diversity of plant species (T. 679).

20. The conversion of wetlands to open water has an adverse environmental impact because of the relative scarcity of wetlands habitat in Pennsylvania (T. 667).

21. Open water habitat is abundant in the Poconos (T. 713).

22. Vegetated wetlands constitute less than 2% (420,000 acres) of the Commonwealth's land mass. From 1959-1979, the Commonwealth lost 20,000 acres of wetlands to various types of development (T. 665-667).

23. It is not necessary to see an animal species on a site to know whether it is likely to use that site. A person educated and experienced in the subject can determine this likelihood from the type of habitat present (T,. 555-556, 710-711).

24. There are other wetlands in the vicinity of the Davailus site which wildlife could migrate to, but in evaluating the effect of the project on wildlife, the cumulative impact of piecemeal habitat losses must be considered (T. 714-715).

25. The reduction of wildlife habitat ultimately affects the number of animals because animals, unlike humans, do not tolerate living in crowded conditions (T. 874, 887-888).

26. Although DER's Order required restoration to conditions which existed prior to the beginning of activities, DER has since stipulated that Davailus must restore the wetlands and streams to their conditions as of April

6, 1984 (Stip. 13, 14).

27. Davailus's procedure for mining peat was to clear vegetation, drain the water from the area by excavating a main drainage ditch and lateral ditches, disc the peat (in order to dry it), push the peat into stockpiles, and process it in the processing plant (T. 32-34).

28. The main drainage ditch running from Areas I and II (as listed on Exh. A-51) was dug in 1969, and the lateral drainage ditches were dug by 1970 (T. 30).

29. Davailus mined peat from Areas I and II until approximately 1976 (T. 34).

30. The main drainage ditch and lateral drainage ditches in Areas VII and VIII were excavated by 1981-1982 (T. 42-44).

31. Davailus began to remove peat from Area VII in 1981-1982, and continued to remove peat from Area VII after April 6, 1984 (T. 43-45).

32. DER's letter of April 6, 1984 (Exh. C-18) implicitly revoked Davailus's mining permit because it informed him that peat extraction would no longer be regulated as surface mining, that the bonds he posted would be returned to him, and that he was required to obtain a permit under the Dam Safety and Encroachments Act.

33. A map which Davailus submitted with his permit application in 1987 identified Areas VII and VIII as wetlands (Exh. A-51).

DISCUSSION

The DER decision which is the subject of this appeal actually constitutes two separate actions - a denial of a permit and a restoration order. Davailus bears the burden of proving that DER erred in denying his permit application. 25 Pa.Code §21.101(c)(1). DER bears the burden of proving that the restoration order was lawful. 25 Pa.Code §21.101(b)(3).

The history of Davailus's actions on the site and of his dealings with DER are important to both the permit denial and the restoration order. Davailus purchased the site in 1965 with the intention of mining peat (T. 20-21). In 1969, he dug the main drainage ditch from Areas I and II (as listed on Exh. A-51) to Area V (FOF 28). He dug the lateral drainage ditches in Areas I and II in 1970, and mined peat from those areas until approximately 1976 (FOF 28, 29). By 1981-1982, Davailus had excavated both the main drainage ditch and lateral drainage ditches in Areas VII and VIII (FOF 30). He began removing peat from Area VII in 1981-1982, and he continued to remove peat from this Area until 1987 or 1988[3] (FOF 31).

In 1977, DER granted Davailus a surface mining permit to remove peat from his site (Exh. C-2, T. 50). Representatives from the DER Bureau of Surface Mine Reclamation visited the Davailus site until 1983-1984 (T. 51). In April of 1984, DER sent a letter to Davailus informing him of a "Departmental policy decision" that peat moss extraction did not constitute surface mining as defined in the Surface Mining Conservation and Reclamation Act[4] (Exh. C-18). Instead, the letter stated that Mr. Davailus was required to obtain a permit under the Dam Safety and Encroachment Act from the Bureau of Dams and Waterway Management. The letter concluded: "we encourage you to contact the Bureau of Dams and Waterway Management ... as soon as possible to insure that you hold all the necessary permits to conduct your operation." The 1984 letter was followed by additional letters over the next two years,

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[3] DER contends that Davailus continued to mine peat from Area VII through the end of 1988. (DER Main Brief, p. 59.) Davailus contends that he ceased activities in 1987 (T. 111-112). As we will explain in Part 3 of this Opinion, it is not necessary for us to resolve this dispute.

[4] Act of November 30, 1971, P.L. 554, No. 147, *as amended*, 52 P.S. §1396.2 *et seq.*

reminding Mr. Davailus that he did not have the required permit, and threatening legal action (Exh. C-6, C-13, C-17, T. 164-168). In February 1986, Davailus submitted an application - or what he intended as an application - to DER (T. 55). On May 21, 1986, DER sent Davailus a letter stating that the submission did not constitute an application and listing the types of information which would have to be submitted (Exh. A-24). Davailus submitted an administratively complete application in September 1987 (T. 61). This application was denied by DER on August 30, 1988, and DER issued the restoration order on the same date.

1. DER's Motion to Strike.

Before discussing the substantive issues, we must address Davailus's argument that the presiding Board Member erred in granting DER's motion to strike Davailus's supplement to his pre-hearing memorandum. Davailus filed this supplement roughly two weeks before the hearing, seeking to add the following contentions of law to his pre-hearing memorandum:

> B. CONTENTIONS OF LAW:
>
> 6. The Order and Permit Denial by PaDER was arbitrary and capricious inasmuch as:
>
> [(a) through (g) were listed in the Pre-Hearing Memorandum]
>
> (h) There were no reasonable and/or understandable regulations by [sic] which Davailus could objectively comply to obtain a permit.
>
> (i) The Dam Safety and Encroachment Act regulations do not give reasonable notice of what minimum standards are expected to be met by the applicant in order to obtain a permit.
>
> (j) The Dam Safety and Encroachment Act regulations set forth unreasonable standards or fails [sic] to establish any objective standards for the applicant to meet.

(k) The permit denial was based upon information obtained by PaDER to which Davailus was not given an opportunity to rebut.

(l) The permit denial was an abuse of the police power in that the denial was not reasonably related to a public purpose and was unduly oppressive on the applicant.

(m) Davailus has not been afforded equal protection of the laws since other similarly situated peat extraction sites have been permitted under identical regulations.

DER filed a motion to strike the supplement, arguing that the new contentions of law should be struck because they were not raised in the notice of appeal, citing Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Commw. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). At the hearing, after listening to argument, the presiding Board Member granted DER's motion to the extent that the supplement raised contentions not raised in the notice of appeal. To the extent Davailus felt any of the contentions in the Supplement could be traced to the notice of appeal, Davailus could seek admission of such evidence and DER could object, and the issue would be resolved at that time (T. 5-12).

Davailus argues in its post-hearing brief that the motion to strike should have been denied. Davailus contends that matters not raised in the notice of appeal are not waived if those matters are raised in the pre-hearing memorandum, or in a supplement to the pre-hearing memorandum, citing Allegheny Ludlum Steel Corp. v. DER, 1987 EHB 946. Alternatively, Davailus argues that good cause exists to amend the notice of appeal, because Davailus obtained discovery from DER which led to the supplemental contentions of law. Finally, Davailus contends that allowing the supplement would not have unfairly disadvantaged DER.

Evaluating these arguments, we will affirm the presiding Board Member's granting of the motion to strike. Davailus correctly cites Board precedent stating that "[m]atters not raised in a notice of appeal need not be waived if they are raised in the appellant's pre-hearing memorandum." Allegheny Ludlum Steel Corp. v. DER, 1987 EHB 946, 947. However, these precedents are plainly inconsistent with Commonwealth Court's ruling that "a decision to allow a party to amend an appeal to include new grounds ... is analogous to a decision to allow an agency appeal nunc pro tunc," and that the Board "need not grant the petition absent a showing of good cause." Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Commw. 78, 509 A.2d 877, 885-886 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). The Board has followed the Game Commission holding. See, NGK Metals Corp. v. DER, 1990 EHB 376. If the Board may only allow a notice of appeal to be amended upon a showing of good cause, then surely the Board may not allow Davailus to do an end-run around this process and to raise new grounds in a supplement to his pre-hearing memorandum. Commonwealth Court made it clear in Game Commission that whatever procedural device is used to attempt to raise new grounds for the appeal after the 30-day appeal period, its "substantive character" is an appeal nunc pro tunc. 509 A.2d at 885.

Davailus's alternative argument that good cause exists to consider its supplement must also fail. Davailus has not attempted to amend his notice of appeal. More importantly, Davailus did not state in his notice of appeal that he reserved the right to add new grounds after discovery. Such a reservation of rights is necessary where an appellant claims that good cause exists due to information gathered in discovery. Game Commission, 509 A.2d at 886, NGK, 1990 EHB at 379.

Finally, the mere fact that DER may not have been disadvantaged by

the supplement to Davailus's pre-hearing memorandum does not constitute good cause for allowing new objections to be raised. The Board has held that lack of prejudice is not a valid reason for allowing an appeal to be filed nunc pro tunc. Township of Potter v. DER, EHB Docket No. 90-112-F (April 3, 1991). As stated above, adding new reasons for an appeal after expiration of the appeal period is analogous to requesting leave to appeal nunc pro tunc.

In summary, the Board affirms the Board Member's decision at the hearing to grant the motion to strike.

2. The Permit Denial.

As stated above, the burden of proof on this issue lies with Davailus. 25 Pa.Code §21.101(c)(1).

Davailus first argues that DER failed to follow the procedure set out in its regulations in that it did not request additional information from Davailus regarding the specific types of environmental harm DER found the project would cause (See FOF 8). Davailus contends that the regulations at 25 Pa.Code §§105.15(b), 105.16(a), and 105.17 all impose a duty upon DER to request additional information prior to denying an application. Unless DER requests additional information, Davailus asserts, the applicant must guess what types of studies or engineering proposals he should submit that might alleviate DER's concerns.

In the alternative, Davailus argues that the evidence submitted at the hearing before the Board warrants granting the application. Davailus asserts that the forms of environmental harm feared by DER either will not materialize, or they could be abated by engineering solutions and best management practices. In addition, Davailus contends that the public benefits from the project outweigh any environmental harm. Therefore, Davailus argues that his application should be granted, conditioned upon his implementing the

engineering solutions and best management practices he addressed at the hearing.

DER argues that its denial of Davailus's permit application was justified. DER first argues that it followed the procedures mandated by its regulations by informing Mr. Davailus at various meetings what DER's concerns were, and by inviting him to provide evidence regarding alternatives to the project, mitigation of environmental harm, and benefits from the project. Therefore, DER reasons, it was Davailus's responsibility to come forward with additional information or proposals regarding the application.

DER also contends that the evidence supported its denial of the permit. DER asserts the evidence indicates that the project will eliminate 45 acres of high quality wetland and stream habitat, eliminate fish and wildlife habitat, eliminate the flood storage capability of the area, cause significant erosion and sedimentation, raise the temperature and lower the pH of Meadowbrook, and damage the area's ability to buffer pollutants. With regard to the testimony of Davailus's experts that many or all of the environmental concerns could be abated by implementation of engineering solutions or best management practices, DER contends that Davailus has not submitted any concrete proposals to DER or the Board. In the absence of specific proposals, DER claims that the record does not support granting the application.

Addressing these arguments, we conclude that DER did not follow the procedure established in the wetlands regulations. In its argument, Davailus cites 25 Pa.Code §§105.15(b), 105.16(a), and 105.17. Of these, we think the most directly relevant section is 25 Pa.Code §105.16(a), which provides:

> **§105.16. Environmental social and economic balancing.**
>
> (a) The determination of whether the potential for significant environmental harm exists will be made by the Department after consultation with

> the applicant and other concerned governmental agencies. If the Department determines that there may be a significant impact on natural scenic, historic or aesthetic values of the environment, the Department will consult with the applicant to examine ways to reduce the environmental harm to a minimum. If, after consideration of mitigation measures, the Department finds that significant environmental harm will occur, the Department will evaluate the public social and economic benefits of the project to determine whether the harm outweighs the benefits.
>
> (emphasis supplied).

DER contends that it satisfied the underscored language because its representatives met with Mr. Davailus on numerous occasions from 1985 through 1988, expressed concern over the environmental harm, and invited Davailus to provide evidence of mitigation, alternatives, and project justification. (DER Main Brief, pp 48-49, DER Reply Brief, p. 5.) The evidence shows that Mr. Shannon of DER and representatives of various state and federal agencies met with and corresponded with Mr. Davailus on numerous occasions. For example, Mr. Shannon, along with representatives of the U.S. Army Corps of Engineers and the Environmental Protection Agency, met with Mr. Davailus and his consultants at the site on December 16, 1987 (T. 247). Mr. Shannon recalled that each of the agencies expressed concerns, but he did not recall discussing each of the concerns which led DER to deny the application (T. 247-249). Other evidence cited by DER includes letters from the U.S. Fish and Wildlife Service and the Pennsylvania Fish Commission to the U.S. Army Corps of Engineers; both of the letters object to the project due to its effect on fish and wildlife habitat (Exh. C-36, C-37). Copies of these letters were sent to Davailus by the Corps of Engineers (Exh. C-49).

None of this evidence satisfies DER's duty, if it determines significant environmental harm will occur, to "... consult with the applicant

to examine ways to reduce the environmental harm to a minimum" 25 Pa.Code §105.16(a). In order to satisfy this regulation, it was necessary for DER to inform the applicant of the specific types of environmental harm which were feared, and to discuss what solutions, if any, might be considered adequate to address these concerns. The record is clear that DER failed to initiate this type of discussion with Davailus.

Davailus is correct in arguing that unless DER outlines the specific types of environmental harm which are feared and consults with the applicant regarding ways to reduce this harm, the applicant must guess what type of studies or engineering proposals he should submit. The applicant must choose between submitting additional studies and proposals, with no idea whether these submissions will satisfy DER or even address the same concerns DER has, or risk having his application denied on the basis that the project - as proposed - will cause significant environmental harm. Mr. Davailus testified that he spent over $40,000 to have his application prepared (T. 961). DER's approach would make the application process even more costly.

Having determined that DER committed a procedural error by failing to consult with the applicant regarding ways to reduce environmental harm to a minimum, we must determine whether Davailus's application might have been granted had DER followed the correct procedure. In other words, if DER consulted with Davailus and the environmental harm had been reduced to a minimum, would the environmental impact still have been too great to grant the application? Based upon the record, we conclude that DER's failure to consult with Davailus was a harmless procedural error, because Davailus could not adequately mitigate the impact of the project on fish and wildlife which use the wetlands.

Of the various types of environmental harm DER alleges the project

will cause, the evidence indicates that DER's concern over erosion and siltation could have been alleviated through standard engineering practices and solutions such as vegetated buffer strips, vegetated channels, reducing the slope of channel walls, silt fences, and detention ponds (T. 347, 820-822). Erosion and siltation are common concerns in mining cases, and there is nothing to indicate that this particular site presents problems which cannot be solved by standard practices.[5] DER's concern that the project could lower the pH of Meadowbrook was not based on experience from other sites or on hard data; moreover, Davailus could monitor the pH and, if necessary, aerate the water and use lime dispensers (FOF 14). DER's concern over the effect of the lakes on the downstream temperature of Meadowbrook might have been solved by pumping water from the bottom of the lakes, although we are not certain that this engineering solution would have been practical here (FOF 15). DER's concern over the loss of flood storage capacity due to replacing the wetlands with lakes may have been overstated since the 45 acres of wetlands constitute only 3% of the watershed of Meadowbrook (FOF 17). Furthermore, this concern might be remedied through engineering solutions such as retention basins (Id.). Finally, concerns over the effects of the project on the buffering ability of the site and on the groundwater hydrology of surrounding areas might have been adequately addressed by the collection and submission of additional data and information (FOF 16, 18).

If the above types of environmental harm were the only ones at issue here, we would remand this matter to DER to address those concerns which we

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[5] DER relies on testimony that Davailus did not, in the past, use practices which would prevent erosion (T. 273, 676-677, 696-697). But there is no evidence that DER ever attempted to hold Davailus to a higher standard. Davailus's past practices, deficient though they may have been, do not preclude granting Davailus a permit on the condition that he implement standard practices to prevent erosion and siltation.

have indicated might, possibly, be alleviated through additional information, studies, or engineering proposals. Instead, we uphold DER's denial of the permit because there is no persuasive evidence that Davailus could have done anything to eliminate or adequately mitigate the effect of the project on fish and wildlife.

Under the regulations, wetlands which provide habitat for fish and wildlife are regarded as "important wetlands"[6] 25 Pa.Code §105.17(a)(1). There is no question that Davailus's wetlands serve as fish and wildlife habitat (FOF 10, T. 428). Edward W. Perry of the U.S. Fish and Wildlife Service explained how eliminating wetlands habitat harms fish and wildlife. Wetlands are relatively scarce - they occupy only 2% of the Commonwealth's land mass - but they serve as food, cover, and nesting sites for over 500 species of mammals, songbirds, hawks, owls, reptiles, and amphibians (T. 664-665). Loss of wetlands adversely affects species which use wetlands because it crowds them into smaller spaces, and animals do not tolerate crowded conditions (FOF 25). Thus, elimination of wetlands ultimately decreases the populations of fish and animals which use wetlands (Id.).

Davailus argues that the project will not destroy fish and wildlife habitat because, after mining, the site will be restored to a combination of open-water (70%) and wetlands (30%) (FOF 9). Davailus, citing the testimony of his expert, Dr. James J. Talbot, contends that open-water habitat also supports fish and wildlife, and that open-water habitat is more diverse than

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[6] The label "important wetlands" is somewhat misleading - it implies that these wetlands are somehow superior to ordinary wetlands. But a wetland is classified as important if it fulfills any of the functions listed in 15 Pa.Code §105.17(a), and the functions listed in that section are those which are commonly recited as functions of wetlands. See "Wetlands Protection: A Handbook for Local Officials" at pp 3-6 (DER publication issued May, 1990). Perhaps the point is that all wetlands are important, rather than that some wetlands are more important than others.

wetlands habitat (T. 428). We agree, however, with Mr. Perry's testimony that conversion of wetlands to open water constitutes an adverse environmental impact because species which thrive in open water habitat are more common in Pennsylvania, due to the fact that Pennsylvania is a relatively water rich state, whereas the amount of wetlands are a limiting factor for species which need wetlands habitat (T. 666-667). In other words, wetlands habitat may be considered more valuable because it is more scarce.[7]

We must next consider whether the damage to fish and wildlife from the project will be outweighed by the public benefits of the project. The wetlands regulations provide:

> No permit will be granted for work in or within 300 feet of an important wetlands or otherwise affecting any important wetlands unless the applicant demonstrates and the Department concludes, that the public benefits of the project outweigh the damage to the wetlands resource and that the project is necessary to realize public benefits.

25 Pa.Code §105.17(b). As we will explain below, Davailus did not prove that public benefits from the project outweigh the environmental harm.

Davailus provided very little evidence of public benefits. Davailus points out that the peat which he wished to extract can be used for fuel or horticultural purposes (T. 332). Davailus contends that DER sought to list Davailus in a directory of mineral resources of the Commonwealth (T. 86-88,

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[7] Wetlands are a distinct type of eco-system, and their rapid disappearance at the hands of man may be viewed by some as raising ethical concerns which are separate from any utilitarian advantage that wetlands may provide to us. See Aldo Leopold, "A Sand County Almanac" (Oxford Univ. Press, 1987) pp. 201-226 ("The Land Ethic").

333), and that there is demand for peat (Exh. A-2).[8] This evidence lacks specificity and does not support a finding that the project provides public benefits which outweigh harm to the environment. Davailus did not introduce evidence regarding employment generated by the project or the amount of money infused into the local economy. See Big B Mining Co. v. DER, 1987 EHB 815, 844, affirmed, 123 Pa. Commw. 591, 554 A.2d 1002 (1989). Furthermore, of the types of public benefits listed in 25 Pa.Code §105.16(b), the only one which seems to apply here is "development of energy resources." To the extent peat is used as a fuel, it could qualify as an energy resource. However, Davailus did not submit any evidence to prove how widely peat is used as a fuel, as opposed to how widely it is used for horticultural purposes. The bare fact that peat can be, and sometimes is, used as a fuel does not by itself justify a finding that it provides significant public benefits.

In summary, DER's denial of Davailus's permit application was warranted. Although DER violated its regulations by failing to consult with Davailus to examine ways to minimize environmental harm, we conclude that this was a harmless procedural error because Davailus did not show that he could have eliminated the harm the project would cause to fish and wildlife habitat. In addition, Davailus did not show that the project will create public benefits which would outweigh the harm to fish and wildlife habitat.

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[8] The parties have vigorously disputed whether the primary purpose of the project is to extract peat or to create lakes as amenities for a housing development. Davailus had stated in a letter to DER that housing development was the primary purpose (Exh. C-18); however, he testified that his primary purpose was peat extraction (T. 141-142). Clearly, Davailus intends to pursue both goals, so we do not see the relevance of characterizing one goal as primary and the other as secondary. Moreover, our resolution of this dispute is unimportant since the only evidence of public benefits which Davailus submitted was in connection with peat extraction.

3. The Restoration Order.

DER bears the burden of proving that the restoration order was lawfully issued. 25 Pa.Code §21.101(b)(3)

DER argues that its restoration order is valid because Davailus mined peat and engaged in related activities in wetlands illegally between 1984 and 1988. DER contends that Davailus's authority to extract peat was effectively terminated by a DER letter dated April 6, 1984 (Exh. C-5), which stated that peat extraction was no longer considered "surface mining," that surface mining permits no longer applied to peat extraction, and that he was required to obtain an encroachment permit pursuant to the Dam Safety and Encroachments Act. DER further argues that Davailus continued his activities at the site through 1988, contrary to Mr. Davailus's assertion that he ceased operations in July, 1987. Thus, DER contends that Davailus must restore the site to its condition as of April 6, 1984.[9]

Davailus contends that DER erred in issuing the restoration order. Davailus argues that his permit was granted under SMCRA, and that the permit could only be revoked by an order of DER. See 52 P.S. §1396.4c. Davailus contends that DER never revoked the permit; therefore, it is still valid. Davailus also argues that, since the term of the permit was until work was completed at the site, that the Due Process clause barred DER from revoking the permit unless it compensated Davailus. Finally, Davailus argues that the restoration order is invalid because Davailus did not encroach on wetlands after April 6, 1984. Davailus contends that the drainage ditches were all dug prior to 1984 (See FOF 28, 30), and that excavation of peat after an area has been drained does not constitute an encroachment in that it does not change

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[9] See footnote 1, above.

the course, current, or cross-section of a body of water. See 25 Pa.Code §105.1 (definition of "encroachment").

Evaluating these arguments, we will affirm the restoration order, although not for the precise reasons advanced by DER.

DER argues that the validity of its restoration order hinges on the conclusion that its April 6, 1984 letter rendered Davailus's operations illegal after that date. This letter provided:

> A recent Departmental policy decision has been made that peat moss extraction is not "surface mining" as defined in the Surface Mining Conservation and Reclamation Act (P.L. 1198, Act 418). Therefore, peat operations will no longer be required to obtain surface mining permits or surface operators licenses.
>
> While the Bureau of Mining and Reclamation will no longer be permitting or regulating peat extraction operations, you are required to obtain an encroachment permit for activities in streams and wetlands from the Bureau of Dams and Waterway Management under the Dam Safety and Encroachment Act (P.L. 1375, No. 325) and Chapter 105 (Dam Safety and Waterway Management) of the Department's Rules and Regulations.
>
> The Bureau of Mining and Reclamation will be returning any reclamation bonds which you posted with your peat surface mining permit.
>
> We encourage you to contact the Bureau of Dams and Waterway Management, Division of Waterways and Stormwater Management, P.O. Box 2357, Harrisburg, PA 17120, (717) 787-6826, as soon as possible to insure that you hold all the necessary permits to conduct your operation.
>
> Sincerely,
> /s/
> Ernest F. Giovannitti, Director
> Bureau of Mining and Reclamation

Although the question is a close one, we believe this letter constituted a revocation of Davailus's mining permit. The letter informs Davailus that his site will be regulated under a different statute and by a

different bureau, that he must file a new application to obtain the necessary permit, and - perhaps most significantly - that any reclamation bonds which he had posted would be returned to him. While the letter does not expressly state that the permit is revoked, it has this effect because it makes it clear that the mining permit no longer authorizes the activity. Therefore, Davailus's argument that his mining permit is still valid is unpersuasive.[10]

We also disagree with Davailus's argument that, under the Due Process clause, DER could only revoke the mining permit if it compensated Davailus. The mining permit was revoked because of a policy change, later codified by a statutory change,[11] which shifted peat extraction from DER's mining program to its wetlands program. Davailus is arguing that his pre-existing mining permit renders him immune from these changes, unless he is compensated. However, the granting of a permit under the environmental laws does not create a legitimate expectation that the permittee will be beyond the reach of new policies or statutory requirements for the duration of the permit. See generally Commonwealth v. Barnes and Tucker Co., 455 Pa. 392, 319 A.2d 871, 884-885 (1974).

Finally, Davailus's contention that his activities after April 1984, did not constitute encroachments lacks merit. The term "encroachment" is defined in the regulations as a structure or activity which changes the "cross-section of a ... body of water," 25 Pa.Code §105.1. The term "body of

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[10] If we were to agree with Davailus's argument that his mining permit is still valid, then DER's denial of the permit under the DSEA would be irrelevant. It is strange that Davailus would spend $40,000 (T. 961) in an attempt to secure a permit which he now claims he does not really need.

[11] In December of 1984, the General Assembly approved the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal SMCRA), Act of December 19, 1984, P.L. 1093, No. 219, 52 P.S. §3301 *et seq.* Section 3 of the Act, 52 P.S. §3303, specifically states that peat is not to be considered a "mineral" under the Act.

water" is defined to include wetlands. *ID.* Therefore, Davailus's argument that his activities did not constitute encroachments, because the areas had previously been drained, is really an argument that these areas did not constitute wetlands as of April, 1984.

We disagree with Davailus's argument for two reasons. First, the fact that Davailus excavated drainage ditches does not necessarily mean that the areas ceased to be wetlands. The term "wetlands" is defined in the regulations as:

> Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions ... .

25 Pa.Code §105.1. Under this definition, even if an area had been drained, it could still qualify as wetlands until it no longer supported vegetation adapted for life in saturated conditions.[12] Davailus did not demonstrate that any of the areas which had been drained would no longer support wetlands-type vegetation after 1984. Davailus attempted to pry admissions out of Mr. Perry on this point. Mr. Perry stated that Area VII was "substantially dewatered," and that Davailus's excavation of drainage ditches had an adverse effect on Area VIII (T. 752, 763). However, Mr. Perry stated that he did not examine the vegetation in Area VIII to see if it was showing signs of distress, and that he did not know how long it would take for drainage to affect the vegetation (T. 763-764). Thus, the evidence does not support a

---

[12] It may seem paradoxical to say that an area which has been drained of water could still qualify as a "body of water" (a wetlands). However, the definition of "wetlands" in the regulations does not require water to be present at any given time, it only requires that an area be saturated frequently enough to support wetlands-type vegetation. Thus, until that vegetation dies, a drained area is still a wetlands.

finding that the areas were drained to such an extent that they would no longer support wetlands-type vegetation as of 1984.

Second, Davailus's argument that these areas were no longer wetlands as of 1984 contradicts some of his own evidence. Although he did not presume to be an expert, Mr. Davailus admitted that the areas identified in his application were wetlands (T. 131-132). In addition, a map Davailus placed into evidence identifies Area VII as "PW - Peat Mine Wetlands (Little or no vegetation)," and Area VIII as consisting of "SW - Shrub Wetlands," "FW - Forested Wetlands," and "HW - Herbaceous Wetlands," (Exh. A-51). Finally, Davailus's argument that these areas are not wetlands is difficult to reconcile with his filing an application in 1987 seeking permission to extract peat from the areas.

We find that DER's restoration order is lawful, despite our misgivings regarding the reasons DER advances in support of it. First, we are not certain of the reasoning underlying DER's stipulation that Davailus should restore the site to its condition as of April 6, 1984 (Stip. 14), when DER's order had required restoration of the site to its condition prior to the beginning of activities. While DER contends that Davailus's operations became illegal as of April 6, 1984, we do not view restoration as a form of punishment. Rather, it is a normal requirement for various activities regulated under the environmental laws. See, e.g. SMCRA, 52 P.S. §1396.4(a)(2), Noncoal SMCRA, 52 P.S. §3307(c). In addition, we disagree with DER's conclusion that Davailus's operation became "illegal" as of April 6, 1984. DER's letter did not say how DER would view Davailus's operation as of that date. This was an obvious question, and DER's failure to address it had the effect of casting Davailus's operation into a regulatory limbo. This was both unfair and administratively sloppy, and, in light of the letter's silence

on the question, we would interpret the letter to allow for a reasonable transition period.[13]

Despite these misgivings, we will uphold the requirement that Davailus restore the site to its condition as of April, 1984. As we stated above, we do not view restoration as hinging upon a finding of illegality. In addition, while it may have been possible for DER to order restoration for Davailus's activities prior to 1984, we will not require DER to do so because of the complexities and competing equities present in this case.[14]

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding.

2. An appellant may only raise objections not listed in its notice of appeal when he shows good cause to justify amending the notice of appeal. Pennsylvania Game Commission v. Commonwealth, DER 97 Pa. Commw. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

3. An appellant may request permission to amend his notice of appeal when discovery reveals additional objections, but only if the appellant reserved the right in his notice of appeal to add additional objections after discovery. Game Commission, supra.

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[13] The Board has stated that it is improper for DER to announce a policy change in an Order which puts an affected party out of business. Baumgardner v. DER, 1988 EHB 786, 793-794.

[14] Our decision here affirms DER's order (as modified by the Stipulation) that Davailus must restore the site to its condition as of April 6, 1984; however, we are not deciding what Davailus must do to comply with that order. Although there was some evidence introduced regarding what Davailus did at the site after April of 1984, the evidence was not comprehensive. Therefore, we need not resolve the dispute between the parties regarding whether Davailus ceased operations in 1987 or 1988.

4. In reviewing an application to conduct activities in wetlands, when DER determines that the activity may have a significant impact on the environment, DER must consult with the applicant to examine ways to reduce environmental harm to a minimum. 25 Pa.Code §105.16(a). This regulation implicitly requires DER to tell the applicant what types of environmental harm it finds the project will cause, and to discuss what, if any, steps the applicant may take to reduce the harm to acceptable levels.

5. An application to conduct activities in wetlands must be denied when the project will have a harmful effect on fish and wildlife which use the wetlands, and when the public benefits of the project do not outweigh the harmful effect.

6. DER's letter dated April 6, 1984 had the implicit effect of revoking Davailus's mining permit because it informed him that the mining permit no longer authorized him to extract peat, and that his reclamation bonds would be returned.

7. DER's revocation of Davailus's mining permit without providing compensation did not violate Davailus's right to Due Process of Law.

8. Under the definition of "wetlands" in 25 Pa.Code §105.1, an area need only be saturated at a frequency which will support a prevalence of vegetation typically adapted for life in saturated soil conditions. Thus, an area is still a wetlands even though it has been drained so long as it continues to support this type of vegetation.

9. DER's order (as modified by Stipulation 14) requiring Davailus to restore the site to its condition as of April 6, 1984 was lawful and a reasonable exercise of DER's discretion.

ORDER

AND NOW, this 22nd day of July, 1991, it is ordered that:

1) Board Member Fitzpatrick's granting of DER's motion to strike Davailus's supplement to its pre-hearing memorandum is affirmed.

2) DER's denial of Davailus's permit application is affirmed.

3) DER's order (as modified by Stipulation 14) that Davailus must restore the site to its condition as of April 6, 1984 is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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ROBERT D. MYERS
Administrative Law Judge
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TERRANCE J. FITZPATRICK
Administrative Law Judge
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RICHARD S. EHMANN
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DATED: July 22, 1991

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SECRETARY TO THE BOARD

BETHLEHEM STEEL CORPORATION	:	
	:	
	:	
v.	:	**EHB Docket No. 90-049-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 23, 1991**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

The Board grants a Motion for Summary Judgment (treated as a Motion to Sustain Appeal) filed by Appellant in an appeal challenging DER's rescission of permission to treat two coke oven batteries as a single unit for monitoring and reporting. In granting the Motion, the Board rejects DER's interpretation of "coke oven battery" in 25 Pa.Code §121.1 and holds that the identification of existing batteries does not have definitional significance. While operating conditions may have changed, DER (which has the burden of proof and of proceeding) cannot make out a prima facie case on the issue because of sanctions prohibiting it from presenting its case in chief.

OPINION

This proceeding was begun on January 26, 1990 when Bethlehem Steel Corporation (Appellant) filed a Notice of Appeal from a December 27, 1989 letter from the Department of Environmental Resources (DER) rescinding permission to treat coke oven batteries Nos. 2 and 3 as one battery for

monitoring and reporting. The permission, granted on August 27, 1985, pertained to coke oven batteries at Appellant's plant in Bethlehem, Northampton County.

Appellant filed its pre-hearing memorandum on May 16, 1990. When DER's pre-hearing memorandum was not filed by the due date of May 31, 1990, the Board, on June 7, 1990, issued a Rule on DER to show cause by June 27, 1990 why sanctions should not be imposed. The Rule specifically stated that filing of the pre-hearing memorandum by the return date would discharge the Rule. After DER made no filing by June 27, 1990, the Board, on July 6, 1990, issued an Order imposing sanctions prohibiting DER from presenting its case in chief. DER's request for reconsideration was denied on July 17, 1990.

On November 21, 1990 Appellant filed a Motion for Summary Judgment to which DER filed a response on December 17, 1990. Appellant filed a reply on December 27, 1990. In its Motion Appellant argues that, since DER has the burden of proving the reasonableness of its rescission action but is prohibited from presenting its case in chief, summary judgment should be entered for Appellant. DER acknowledges that it bears the burden of proof and the burden of proceeding but argues that these burdens shift to Appellant upon a showing that DER's action was mandated by the regulations at 25 Pa.Code §121.1 and §123.44[1]

"Coke oven battery" is defined in 25 Pa. Code §121.1 as follows:

> *Coke oven battery* - A jointly operated group of slot-type coke ovens, the operation of which results in the destructive distillation of coal by the indirect application of heat to separate

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[1] Reference is also made to the Pennsylvania State Implementation Plan (SIP) at 40 CFR Subpart NN, §52.2020(c)(19), but since the plan revisions cited there are part of DER's regulations dealing with coke oven batteries, including the two provisions specifically cited by DER, the SIP has no independent significance to this decision.

the gaseous and liquid distillates from the carbon residue and includes coal preparation, coal charging, coking, separation and cleaning of the distillate, coke pushing, hot coke transfer and coke quenching. A coke oven battery is a single source for the purpose of this article and shall include but not be limited to the following, when present: the ovens; coal preheaters; underfiring systems; waste heat stack; offtake piping; flues; closed charging systems; door hoods; and operating equipment including larry cars, jumper pipes, pusher machines, door machines, mud trucks and quench cars associated with the operation of a battery. Existing batteries are identified as follows:

Operator	Plant	Identifying Symbol
Bethlehem Steel	Bethlehem	#2, #3, #5, "A"
	Franklin	#18
Crucible Steel	Midland	"A"
Jones & Laughlin Steel	Aliquippa	A-1, A-4, A-5
Keystone Coke Co.	Conshohocken	#3, #4
Koppers Company	Erie	#1
United States Steel	Fairless	#1, #2
Wheeling-Pittsburgh	Monessen	#1

25 Pa.Code §123.44 imposes comprehensive limitations on emissions of visible fugitive air contaminants from coke oven batteries.

Appellant's batteries Nos. 2 and 3 are identified as separate batteries in the list of existing batteries appended to the definition quoted above. DER gave permission to Appellant in 1985 to treat the batteries as one unit for monitoring purposes in light of Appellant's representations that they were being operated "as a single battery," were "served by a single crew operating a single set of moving equipment, one larry car, one pusher, one door machine, one quench car."[2]

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[2] The quoted language is from Appellant's June 14, 1985 letter to DER requesting permission to treat the batteries as one unit. The letter is attached to the Motion as exhibit C.

It is apparent from this 1985 action that DER interpreted the regulatory definition to hinge on the joint operation of the batteries. The fact that the batteries were identified as separate units in the list of existing batteries was not preclusive. In its December 27, 1989 letter rescinding the permission, DER simply states that batteries Nos. 2 and 3 "are defined as separate sources in 25 Pa.Code 121.1". This enigmatic statement could reflect an effort to justify the rescission because of some change in operation or because of the manner in which the batteries are identified on the list of existing batteries. Other evidence presented to us does not clarify DER's position.

There is no evidence that the batteries are no longer operated as one unit. There is some suggestion that low production rates (that extend the coking time) which may have been considered by DER in 1985 may have improved by 1987; but there is nothing to indicate what they were in 1989 when the rescission was issued. Nor is there any satisfactory evidence to show the connection, if any, between joint operation and the rate of production. If DER's 1989 rescission is based on changed operations, the evidence at this stage of the proceedings is insufficient to make out a prima facie case. Since DER is prohibited from presenting a case in chief, it cannot remedy this insufficiency.

In its response to the Motion and its supporting memorandum of law, DER also appears to take the position that, since batteries Nos. 2 and 3 are identified separately as existing batteries in the regulatory definition, they could not be operated as one unit for monitoring purposes without a change in the regulations. Since no change was made, the permission granted in 1985 was unlawful and properly rescinded in 1989. To give effect to this argument we would have to conclude that the identification of existing batteries falling

within the scope of the definition of "coke oven battery" has definitional significance of its own, so that, even if a battery met all the other terms of the definition, it could not be considered a coke oven battery because of its absence from the list.

The identification of existing batteries was incorporated in the definition when it was first inserted in 25 Pa.Code §121.1 in 1977 (7 Pa.B 2251, August 13, 1977). Added at the same time was a series of provisions in Chapter 127 that have since been removed. §127.41 provided for the abatement of coke oven battery emissions; §§127.42 - 127.51 set up a comprehensive procedure whereby owners of existing batteries could ask for, and DER could grant, time deferments for bringing emissions into compliance; and §127.52 dealt with the effect of outstanding air pollution abatement orders on existing batteries. Also adopted were §123.44(a)(1) setting specific charging limitations for existing batteries; and §129.15(b), dealing with pushing operations at existing batteries. These latter two provisions remain in the regulations basically unchanged. The only change in the identification of existing batteries was made in 1979 (9 Pa.B 1447, April 28, 1979), some 20 months after the initial list was adopted. No changes have been made in the 12 years that have expired since then.

We are convinced that the existing batteries were identified in the regulations only because they were subjected to specific treatment in the provisions discussed above. The most significant treatment, undoubtedly, was the opportunity for deferring compliance with emission limitations under the procedure set out in Chapter 127. Identification of the batteries entitled to request deferral had obvious importance until 1983 when the provisions were removed from the regulations (13 Pa.B 2478, August 13, 1983). That circumstance probably explains why the identification list has not been

changed since and apparently is quite inaccurate today.[3] While existing batteries are still subject to specific provisions in §123.44(a)(1) and §129.15(b), the precise identification of the batteries is not as critical to those sections as it was for the deferral provisions formerly a part of Chapter 127.

We conclude that the identification of Appellant's batteries Nos. 2 and 3 as separate batteries in 25 Pa.Code §121.1 is not controlling. DER's 1985 action permitting Appellant to treat them as a single battery for monitoring and reporting did not require a change in the regulations. The permission could legally be granted on the basis of the joint operation of the batteries as one unit.

Of the two possible positions advanced by DER to justify its action, one depends on an erroneous interpretation of 25 Pa.Code §121.1 which we have rejected, and the other depends on evidence of changed operating conditions which DER is prohibited from presenting. Since the latter position could be viewed as involving a genuine issue of material fact, summary judgment is not technically appropriate: R.C.P. No. 1035. However, since DER cannot make out a prima facie case on the factual issue, it would be senseless to proceed to a hearing. Accordingly, we will treat the Motion as one to sustain the appeal and grant it.

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[3] The affidavit of Charles Luthar, attached to the Motion as exhibit J, states that, of the 13 batteries identified in the regulations in addition to the 2 involved here, only 3 are still operating. Of those 3, 2 are operated by entities different from those shown on the list. In addition, there are batteries currently operating that are not shown on the list. DER has not challenged this evidence by counter-affidavits which are permitted by R.C.P. 1035(b) and which would not be barred by the sanctions.

ORDER

AND NOW, this 23rd day of July, 1991, it is ordered that Appellant's Motion for Summary Judgment, treated as a Motion to Sustain its Appeal, is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 23, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Norman Matlock, Esq.
Southeast Region
For Appellant:
Nicholas M. Kouletsis, Esq.
John W. Carroll, Esq.
Harrisburg, PA
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M. DIANE SMITH
SECRETARY TO THE BOARD

MCDONALD LAND & MINING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 91-173-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 25, 1991**

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

While mine operators are strictly liable for pollutional discharges which arise within their permit areas and discharge into the waters of the Commonwealth pursuant to §315(a) of the Clean Streams Law, 35 P.S. §691.315(a), the Board cannot grant the Department of Environmental Resources' ("DER") Motion for Summary Judgment so as to hold a mine operator liable for seeps arising within its permit area where DER has yet to show the seeps to be reaching any waters of the Commonwealth.

OPINION

On April 30, 1991, McDonald Land & Mining Co., Inc., ("McDonald") filed a notice of appeal with this Board from Compliance Order ("C.O.") No. 914017 issued to it by DER on April 1, 1991. The C.O. states that McDonald is in violation of 25 Pa. Code §87.102(a) at its mine site covered by its Surface Mining Permit ("SMP") No. 17860128, located in Ferguson Township, Clearfield County, and requires it to collect and treat mine drainage which

DER says is present at three points on the mine site. On July 5, 1991, we received DER's Motion for Summary Judgment and supporting memorandum of law. McDonald filed its Answer in Opposition to DER's Motion and accompanying brief on July 19, 1991.

The parties agree that McDonald's mine site, known as the Schrot site, is covered by SMP No. 17860128 which DER issued to McDonald. For purposes of this motion, McDonald does not challenge the pollutional nature of the seeps identified in the C.O. DER's motion claims that each of the three seeps is located within the area covered by SMP No. 17860128 and it has attached affidavits of two DER employees to support this claim. While McDonald admits the seeps are on its SMP area, it denies that any of the seeps flow from the area covered by its SMP, and, instead, it avers that all three seeps are dissipated within the SMP area by either evaporation or absorption.

In its motion, DER correctly asserts case law establishes that a mine operator is strictly liable for any unauthorized discharges which flow from the area covered by its SMP pursuant to §315(a) of the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315(a). DER then urges that since the "discharges" are located within McDonald's SMP area, McDonald is liable for them and summary judgment should be granted in DER's favor.

In response, McDonald argues that DER has not shown that the seeps flow into a stream or other waters of the Commonwealth. McDonald has attached to its response the affidavits of two of its employees, stating: the first seep has no perceptible flow, but consists of puddles of water lying in depressions along and at the end of a ditch, and these puddles are either evaporated or dissipated and disappear after travelling a distance of 85 feet

from the end of the ditch; the second seep flows at a rate of .20 gallons of water per minute for a distance of 83 feet and then either evaporates or dissipates into the surface soils; and the third seep comes out of a pipe, with a flow of .11 gallons per minute, and forms a wet area of approximately 33 feet by 82 feet, after which it dissipates or is absorbed into the nearby surface soils.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). The Board must view a motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

Section 315(a) of the CSL provides: "No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department." The Commonwealth Court has explained that under §315(a), the operator of a mine site from which polluted waters are discharged into waters of the Commonwealth is strictly liable for the polluted waters seeping from its mine site. Thompson & Phillips Clay Co. v. DER, ___ Pa. Cmwlth. ____, 582 A.2d 1162 (1990).

In Thompson, as well as in all of the cases cited by DER, there was no question as to whether the seeps involved were discharging into the ground or surface waters of the Commonwealth. See Bologna Mining Co. v. DER, 1989 EHB 270; Benjamin Coal Co. v. DER, 1987 EHB 402; Commonwealth v. Barnes &

Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977), appeal dismissed, 434 U.S. 807, 98 S.Ct. 38, 54 L.Ed. 2d 65 (1978). Here, however, McDonald has presented affidavits to show that the seeps addressed by the C.O. do not discharge into surface waters groundwaters of the Commonwealth. The affidavits attached to DER's motion do not present any information to the contrary. Since DER's motion and attachments do not show that seeps identified in the C.O. discharge into waters of the Commonwealth in violation of §315(a), DER has not shown sufficient undisputed material facts to allow us to sustain its motion. Accordingly, we deny DER's Motion for Summary Judgment.

O R D E R

AND NOW, this 25th day of July, 1991, it is ordered that DER's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 25, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Western Region
For Appellant:
Carl A. Belin, Jr., Esq.
Clearfield, PA

med

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M. DIANE SMITH
SECRETARY TO THE BOARD

MCDONALD LAND & MINING COMPANY, INC. and SKY HAVEN COAL, INC.	:	
v.	:	EHB Docket No. 89-096-MJ (Consolidated)
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 29, 1991

OPINION AND ORDER SUR PETITION TO REOPEN RECORD

By Joseph N. Mack, Member

Synopsis

A petition to reopen the record for the purpose of presenting additional evidence after the hearing has closed but before an adjudication is issued is governed by 1 Pa.Code §35.231. Where the petitioner fails to demonstrate that circumstances have changed, that with due diligence the evidence could not have been presented at the time of hearing, or that the evidence is such as would compel a different outcome, the petition will be denied.

OPINION

This matter was initiated with the filing of appeals by McDonald Land & Mining Company, Inc. ("McDonald") and Sky Haven Coal Company ("Sky Haven") on November 17, 1989 and December 12, 1989, respectively, challenging compliance orders issued by the Department of Environmental Resources ("DER")

in connection with acid mine drainage allegedly found at a mine site located in Lawrence Township, Clearfield County. The appeals were consolidated on January 23, 1990.

A hearing was held on this matter on October 23-24, 1990, and January 28-29, 1991. Post-hearing and reply briefs have been submitted by the parties. An adjudication is pending.

On June 21, 1991, McDonald filed a Petition to Reopen the Record alleging that new evidence warranted a reopening of the record. McDonald asserts that the evidence which it seeks to introduce will show that a seep designated as "2-C" has completely dried and no longer evidences any signs of a seep, and that another seep designated as "1-B" has moved 76.32 feet east. McDonald contends that this information is relevant to evidence regarding the recharge area and to the impoundment thesis advanced by DER in this appeal.

Petitions to reopen the record for the purpose of supplementing it with additional evidence after the hearing has closed but before an adjudication has issued are governed by §35.231 of the General Rules of Administrative Practice & Procedure, 1 Pa.Code §31.1 *et seq.*, at §35.231. Lower Providence Township v. DER, 1986 EHB 391, 392. Paragraph (a) of that section provides as follows:

> (a) *Petition to reopen.* After the conclusion of a hearing in a proceeding or adjournment thereof *sine die*, a participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. The petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

The decision to reopen a record is within the discretion of the administrative agency. Lower Providence, supra at 393. Before the Board may reopen the record, the petitioner must demonstrate that circumstances have changed or new evidence has become available, that the petitioner could not with due diligence have presented the evidence at hearing, and, finally, that the evidence is such as would likely compel a different result in the case. Id.

Both Sky Haven and DER filed objections to the Petition to Reopen. Each contends that McDonald's evidence with respect to seep 2-C is consistent with the evidence presented at the hearing and does not constitute "new evidence." They further argue that McDonald fails to establish the significance of the evidence it seeks to introduce regarding seep 1-B.

We concur with the arguments presented by DER and Sky Haven. As to seep 2-C, McDonald states in its petition that the testimony at hearing was that this seep had become a wet area but that there was no longer any water flowing over the ground. McDonald wishes to reopen the record to present evidence showing that the seep is now completely dry. The only basis asserted by McDonald for this allegedly new evidence is that certain McDonald personnel "who have been visiting the site since the hearings have noticed that the seep designated as '2-C' has completely dried up and there is no longer any evidence of any seep...at the present time." (emphasis added). This information does not appear to significantly alter or supplement the testimony given at hearing as to the absence of water flowing at the seep. Moreover, McDonald fails to address the possible impact that lack of precipitation may have had on water flow at the seep. McDonald has not shown that this allegedly new evidence is such as would compel a different outcome in this matter, and it is insufficient to justify a reopening of the record.

As to the alleged movement of seep 1-B to the east, nowhere in its petition has McDonald alleged that this information was not available at the time of hearing. Nor has McDonald demonstrated the significance of this information, other than to assert that it is "highly relevant" as to evidence regarding the recharge area of the seep or DER's "impoundment" thesis. Finally, McDonald does not demonstrate that this allegedly new evidence will in any way affect the outcome of this appeal. As noted in Lower Providence, supra at 394, if we were to allow the record to be reopened simply on the generation of more information, we would be unable to conclude any matter.

In conclusion, because McDonald has failed to meet the criteria necessary to justify reopening the record in this matter, its petition must be denied.

ORDER

AND NOW, this 29th day of July, 1991, McDonald's Petition to Reopen Record is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 29, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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Central Region
For McDonald Land & Mining Co.:
Carl A. Belin, Jr., Esq.
Clearfield, PA
For Sky Haven Coal, Inc.:
Ann B. Wood, Esq.
Clearfield, PA

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M. DIANE SMITH
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NEW HANOVER TOWNSHIP	:	**EHB Docket No. 88-119-W**
and PARADISE WATCH DOGS	:	**(Consolidated Docket)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
NEW HANOVER CORPORATION, Permittee	:	**Issued:** July 30, 1991

OPINION AND ORDER SUR
NEW HANOVER CORPORATION'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

A motion for partial summary judgment by a landfill permittee is granted in part and denied in part.

Where the Department of Environmental Resources (Department) does not publish notice of its decision to waive encroachments permitting requirements under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.* (DSEA) in the Pennsylvania Bulletin, the appeal period for a third party appellant challenging that waiver will run from the date it receives actual notice of the Department's action. Because appellant received actual notice of the Department's decision in June, 1987, and did not file its appeal of the waiver until March 29, 1988, its appeal of the waiver is untimely and must be dismissed. However, where the Department

subsequently modifies the waiver letter to include wetlands activities and it is not clear when the third party appellant received actual notice of that action, that portion of the appeal will not be dismissed as untimely.

The permittee is entitled to summary judgment on the issue of whether the Department's notice of a request for water quality certification for the landfill was an abuse of discretion because it was erroneous and misleading. The appellant was not misled by the error, advised the Department of it, and continued to actively participate in the review process.

Partial summary judgment is granted to the permittee with regard to appellant's claim that the Department committed an abuse of discretion by not prolmulgating written guidelines for water quality certifications under §401 of the Clean Water Act, 33 U.S.C. §1241. The Department has a written policy which conforms to the relevant federal law and regulations. Similarly, the permittee is entitled to partial summary judgment regarding the appellant's claim that the Department's water quality certification was an abuse of discretion because the Department should have undertaken its own wetlands delineation and because the wetlands delineation was erroneous. The Department's role is to certify as to the water quality effects; the appellant's concerns regarding the federal wetlands delineation are more properly raised in the federal district court.

The permittee is entitled to partial summary judgment on the appellant's claim that the Department violated Article I, §27 of the Pennsylvania Constitution by issuing the landfill permit under the solid waste regulations then in effect when new regulations would come into effect a month after the issuance of the permit. The regulations which are in effect at the time the Department makes its decision are the applicable regulations.

Partial summary judgment is granted to permittee with respect to appellant's claim that the landfill will discharge to a stocked trout stream where there is no dispute that the stream is not stocked.

Appellant's claim that the Department abused its discretion by not specifying in the solid waste permit what provisions of the new municipal waste regulations would be applicable to permittee is dismissed because the Department has no duty to do so.

Under §504 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.504 (SWMA), the Department is neither required to adopt the recommendations of a host municipality nor allow the host municipality the opportunity to comment on the Department's override justification before the Department's decision becomes final. Accordingly, the permittee is entitled to partial summary judgment on these issues.

Partial summary judgment in the permittee's favor is granted with regard to the proximity of the diversion ditches to the receiving stream and whether a passive gas venting system was appropriate where the appellant does not dispute the relevant facts and the ditches and gas venting system are not inconsistent with the solid waste regulations. Appellant's claim that the Department abused its discretion in not assessing how replacement water supplies will be affected by contamination from the landfill is dismissed as speculative. Partial summary judgment is granted to the permittee with respect to appellant's claim that the solid waste permit violated the SWMA because it did not incorporate a field testing requirement for the liner; the permit incorporates the Department's review comments which impose this requirement.

The Department did not abuse its discretion, in light of the language of §503 of the SWMA, by not requiring a corporation which operated an incinerator for two of the principals of the permittee and which also had an option to purchase the permittee's stock, to complete a compliance history module. Partial summary judgment in the permittee's favor is granted on this issue.

Partial summary judgment is granted to the permittee with regard to allegations that the leachate treatment plant is inadequate. The design and operation of the treatment plant is regulated under §308 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.308 (Clean Streams Law), and that permit is not before the Board in this appeal.

All other parts of the permittee's motion are denied because of disputed issues of material fact.

OPINION

This motion for partial summary judgment arises from a March 29, 1988, appeal by New Hanover Township (Township) challenging the Department's March 1, 1988, issuance of Solid Waste Permit No. 101385, National Pollutant Discharge Elimination System (NPDES) Permit PA 0052345, and a water quality certification to New Hanover Corporation (Corporation). The Township also challenged the Department's waiver of permit requirements under the DSEA, and its failure to require permits under certain other statutes administered by the Department.[1] These approvals by the Department authorized the

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[1] The Township's appeal was consolidated with Paradise Watch Dogs' appeals of the solid waste permit, the NPDES permit, and the water quality certification at Docket Nos. 88-126-W, 88-127-W, and 88-128-W, respectively. Both the Township and the Paradise Watch Dogs appealed the Department's December 24, 1988, issuance of another water quality certification to the Corporation. Those appeals, which were filed at Docket Nos. 89-017-W and 89-020-W, were consolidated at Docket No. 88-119-W.

construction and operation by the Corporation of a municipal waste landfill in New Hanover Township, Montgomery County.

On March 9, 1989, the Corporation filed a motion for partial summary judgment, claiming that despite voluminous document production and numerous depositions, there is no evidence to support the numerous contentions raised in the Township's appeal. The motion then addressed the contentions in the Township's appeal on a paragraph-by-paragraph basis.

The Township filed a memorandum of law and supporting exhibits in response to the Corporation's motion on June 5, 1989. Disputing the timing of the Corporation's motion, the Township also asserted that partial summary judgment in the Corporation's favor was inappropriate due to numerous disputed material facts.

The Department did not respond to the Corporation's motion and Paradise Watch Dogs joined in the Township's response.[2]

The Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320, 1322 (1978); Edward J. and Patricia B. Lynch v. DER, 1990 EHB 388. Such a motion may be filed at any point in the course of the proceedings, so long as it does not delay the hearing. In ruling on a motion for summary judgment, the Board is

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[2] Paradise Watch Dogs filed a separate motion for summary judgment which was denied at 1990 EHB 1570. The Township also requested the opportunity for oral argument on the motion. That motion was denied by order of June 8, 1989, because the Township failed to present any justification for its request. As is apparent from the length and complexity of the Corporation's motion and the Township's response, oral argument will do nothing more than confuse the issues even further.

required to view it in the light most favorable to the non-moving party, Thompson and Phillips Clay Company, Inc. v. DER, 1990 EHB 105.

For the reasons which follow, the Corporation's motion is granted in part and denied in part.

I. DAM SAFETY AND ENCROACHMENTS ACT PERMIT WAIVER

Paragraph 7 of the Township's notice of appeal challenges, *inter alia*, the Department's waiver of permitting requirements under the DSEA. The Corporation has moved for partial summary judgment on this issue, contending that because the Township received notice of the Department's decision to waive the permit requirements and did not file an appeal until March 29, 1988, the Township's appeal was untimely and, therefore, the Board was without jurisdiction to hear it.

The Township responds that the Department's February 2, 1987, letter was not a final action, since the waiver, by virtue of the Department's so-called permit coordination policy, did not become final until March 1, 1988, when all the approvals for the project were issued by the Department. Subsequent changes in position by the Department (Township Ex. K and L), the Township argues, are indicative that the Department had not reached a final decision on the DSEA waiver.[3]

The Department's February 2, 1987, letter (Corporation Ex. 4) waived permitting requirements under the DSEA for activities described in the Corporation's September 5, 1986, letter to M. U. Farooq of the Bureau of Dams and Waterways Management (Corporation Ex. 14), as supplemented by information

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[3] The Township also cites as support for its position, a March 30, 1989, letter from Lawrence Lunsk of the Department. This letter, however, deals with issues relating to the re-permitting of this facility, and, therefore, as we have previously ruled in this matter, is not relevant to the instant appeal.

submitted to the Department on September 25, 1986. These letters, in turn, were prompted by a November 14, 1985, application by the Corporation for a permit pursuant to the DSEA to relocate a stormwater swale and construct a sedimentation basin in or adjacent to an unnamed tributary to Swamp Creek (Corporation Ex. 13). The encroachments described in the permit application were redesigned and, as a result, the Department waived its permit requirement under the DSEA.

The issue then becomes when the Township received notice of the Department's decision. The Township retained Mr. Slap as counsel on or about April 6, 1987 (Corporation Ex. 5), and Mr. Slap was advised in a June 5, 1987, letter from Leon T. Gonshor, the Director of the Norristown Regional Office, of the waiver of the DSEA permit (Corporation Ex. 6). Thus, the Township, through its counsel, was advised of the waiver on or about June 5, 1987.

However, the matter does not end here, for, in response to a request from the Department, the U.S. Army Corps of Engineers (Army Corps) performed a site visit to ascertain if the proposed landfill would impact any wetlands (Corporation Ex. 18). Although the Army Corps initially determined that no wetlands would be impacted, another site visit occurred on February 12, 1987, and the Army Corps concluded that a small area of wetlands on the eastern portion of the site would be impacted; so long as the area was less than an acre, it would fall under the Army Corps' nationwide permits (Corporation Ex. 20 and 23). In any event, the Corporation was still required to obtain a water quality certification from the state under §401 of the Clean Water Act, 33 U.S.C. §1341 (Corporation Ex. 24).

Upon receipt of the Corporation's §401 certification request, the Bureau of Water Quality Management (BWQM) solicited input from the Bureau of Dams and Waterways Management (BDWM); the BDWM advised the BWQM that a permit

was required under the DSEA and that the Corporation had not applied for it (Township Ex. K).[4] The BWQM then advised the Corporation to secure such a permit (Township Ex. L). Thereafter, the BDWM clarified its February 2, 1987, waiver in a November 12, 1987, memorandum to the BWQM, noting that the waiver also applied to the "deminimus wetland encroachment" (Corporation Ex. 26). But, there is nothing in the Corporation's motion which would indicate when the Township received notice of the Department's November 12, 1987, waiver clarification.

The Board has no jurisdiction over appeals which are not timely filed, Joseph Rostosky v. Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1978). In the case of third party appeals, the Commonwealth Court held in Lower Allen Citizens Action Group v. Department of Environmental Resources and Hempt Bros, Inc., 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), that the 30 day appeal period begins to run upon publication of notice of the Department's action in the Pennsylvania Bulletin. As we pointed out in Paradise Watch Dogs v. DER and James, John, and Albert Marinari, 1988 EHB 1138,

> the Commonwealth Court did not address the situation where the Department failed to publish notice of its action in the Bulletin. Although certain regulatory programs have requirements that notice of Department actions be published in the Pennsylvania Bulletin (e.g., 25 Pa. Code §86.39(b) for coal mining permits), the majority do not, and the Department's publication of its actions in the Pennsylvania Bulletin is merely policy....
>
> 1988 EHB at 1139-1140.

Under §7(d) of the DSEA, the Department is obligated to publish notice of the issuance of general permits in the Pennsylvania Bulletin; the

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[4] This assertion by the BDWM was apparently erroneous.

regulations adopted pursuant to the DSEA require the Department to publish notice of receipt of a permit application and notice of issuance of the permit in the Pennsylvania Bulletin, 25 Pa. Code §105.19. There are no publication requirements relating to permit waivers.

Since there are no publication requirements for permit waivers, we believe that the appeal period runs from the date the Township received actual notice of the waiver, which in the case of the February 2, 1987, waiver, was on or about June 5, 1987, when the Township's counsel received notice, a material fact which is not disputed by the Township. Obviously, then, the filing of an appeal of the waiver of the DSEA permit for the swale relocation and sediment basins on March 29, 1988, was untimely and must be dismissed. But, since there is nothing to establish when the Township received notice of the Department's November 12, 1987, memorandum extending the waiver to the wetlands activities on the landfill site, we cannot hold the appeal untimely in that respect.

Consequently, the Corporation's motion for summary judgment must be granted as it relates to the encroachments covered by the permit waiver and denied as it relates to the wetlands activities covered by the waiver. Paragraphs 7 and 73 through 76 of the Township's appeal are dismissed as they relate to the retention basins and stream relocations.

II. EROSION AND SEDIMENTATION CONTROL PERMIT

The Township asserts in Paragraph 7 of its notice of appeal that the Department should have required the Corporation to secure an erosion and sediment control permit under 25 Pa. Code §102.1 *et seq.* The Corporation asserts that since it will construct its pads in succession, with each disturbing less than 25 acres and becoming stabilized before a contiguous parcel is disturbed (Deposition of Richard Bodner, pp. 96-99), it falls within

the permit exemptions in 25 Pa. Code §102.31(a)(3) and (4)[5] and is, therefore, entitled to judgment as a matter of law. The Township responds that a genuine dispute exists as to whether the Corporation's cell-by-cell construction plan is feasible, citing the deposition of William Fleming which states that, "it is likely that the entire site, including wetlands and floodplain areas will be disturbed by construction." (Township Ex. D, ¶ 23). Another expert, Richard Mabry, testified that, "the only way they could bring specifically and exclusively those small pad areas up to final grade (Pad one or Pad one and a half) is to have an impossibly steep interim slope." (Township Ex. F, pp.161-172).

After reviewing the Bodner deposition, we must conclude that a material issue of fact remains regarding how much acreage will be disturbed at any one time; Mr. Bodner did not perform any calculations of total acreage to be affected. As a result, the Corporation's motion for summary judgment on this issue is denied.

III. FLOODPLAIN MANAGEMENT ACT PERMIT

The Corporation also attacks the Township's contention in Paragraph 7 of its appeal that a permit was required under the Floodplain Management Act, the Act of October 4, 1978, P.L. 851, as amended, 32 P.S. §679.101 *et seq.* (FPMA). It contends that its activities do not fall within the category of activities regulated by the Department pursuant to §302 of the FPMA, since it is not a governmental unit, public utility, the Commonwealth, or a political subdivision. The Township, on the other hand, reads the FPMA more broadly,

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[5] An erosion and sediment control permit is not required if an activity disturbs less than 25 acres, or if an activity involving more than 25 acres is subdivided into parcels of less than 25 acres, earth moving is undertaken on non-contiguous parcels and the parcels are stabilized before contiguous parcels are disturbed.

asserting that the Department has authority to regulate any person or entity proposing to place an obstruction in the 100-year floodplain. Neither party's interpretation of the FPMA is persuasive.

Section 302(a) of the FPMA provides that the Department has exclusive jurisdiction under the FPMA to regulate

> (1) any obstruction otherwise regulated under the Water Obstructions Act;[6]
>
> (2) any flood control project constructed, owned or maintained by a governmental unit;
>
> (3) any highway or other obstruction, constructed, owned, or maintained by the Commonwealth or a political subdivision thereof; or
>
> (4) any obstruction owned or maintained by a person engaged in the rendering of a public utility service.

Furthermore, §302(b) prohibits the construction, modification, removal, destruction or abandonment of an obstruction in a floodplain without a permit from the Department. The regulations promulgated by the Environmental Quality Board to implement the FPMA provide at 25 Pa. Code §106.11 that a written permit from the Department is required to "construct, modify, remove, destroy or abandon a highway obstruction or obstruction in a floodplain...." While the Township suggests the definition of "person" is the key to interpreting this section, we believe that the definitions of "highway obstruction" and "obstruction" are critical to interpreting this regulation. The definitions of these terms in 25 Pa. Code §106.1, consistent with the language of §302(a) of the FPMA, refer to the Commonwealth, political subdivisions, or public utilities. However, the key concept for our purposes is the language in §302(a)(1) that the Department has exclusive jurisdiction to regulate

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[6] The Water Obstructions Act was repealed by the DSEA.

obstructions otherwise regulated under the DSEA, the successor to the Water Obstructions Act. The regulations promulgated pursuant to the DSEA at 25 Pa. Code §105.3 provide, in pertinent part, that:

> The following structures or activities are regulated pursuant to the act and section 302 of the Flood Plain Management Act (32 P.S. §679.302):
>
> * * * * *
>
> (4) All water obstructions and encroachments, other than dams, located in, along, or across or projecting into any watercourse, floodway, or body of water, whether temporary or permanent.

Thus, water obstructions placed in the floodway[7] are jointly regulated under the DSEA and the FPMA; those obstructions in the floodplain outside of the floodway do not require permits from the Department unless they are constructed, owned, or maintained by the Commonwealth, a political subdivision, a governmental unit, or a public utility.

Here, we have no facts which would establish whether any obstructions exist which are subject to regulation under the FPMA. Consequently, the Corporation's motion for partial summary judgment on this issue must be denied.[8]

IV. SECTION 401 WATER QUALITY CERTIFICATION

The Township argues in Paragraphs 13 through 26 of its notice of appeal that the Department's issuance of the §401 water quality

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[7] "Floodway" is defined in 25 Pa. Code §105.1 as: "The channel of the watercourse and those portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood...."

[8] It may well be that the water obstructions authorized by the permit waiver discussed, *supra*, are jointly regulated under the FPMA and the DSEA.

certification[9] was an abuse of discretion because it was not in accordance with applicable law and violative of Article I, §27 of the Pennsylvania Constitution. The Township also contends that the Department's notice of the request for certification in the Pennsylvania Bulletin was erroneous and misleading because the wetlands acreage to be disturbed was incorrect, that the Department failed to adopt guidelines for §401 certifications, and that the Department failed to make an independent assessment of the effect of the landfill on wetlands, both from the standpoint of construction and operation. The Corporation has moved for summary judgment on all of these issues, and we will address them separately.

A. Publication of the Request for Certification

The notice of request for certification at issue here reads, in pertinent part:

> ...Project is for the construction of a sanitary landfill on the site of 107 acre farm in New Hanover Township, Montgomery County. 0.68 acres of a total of 0.38 acres of wetlands will be disturbed during the construction of the 57 acre sanitary landfill and its associated stormwater detention basin....

The Township alleges that the notice was erroneous and misleading and that the refusal to publish the notice with corrected information was misfeasance.

The Corporation argues that it is entitled to summary judgment on this issue because the Township was not misled by the error and, indeed, advised the Department of it and continued to participate in the review process (Township Ex. 23). The Township argues that the failure to correct the notice was not harmless error and that it misled the public and

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[9] A certification under §401 of the Clean Water Act, 33 U.S.C. §1341, was required by the Army Corps for the Corporation's proposed activities in the wetlands which were regulated under §404 of the Clean Water Act. 33 U.S.C. §1344.

potentially deterred it from participating in the comment process. It concludes by asserting that summary judgment on this issue is inappropriate because there is a dispute as to the adequacy of the notice.

There is no dispute that the notice contained an error; the dispute concerns the legal effect of that error. It is clear that the publication error did not mislead or deter the Township (Township Ex. 23). While the Township argues that the public was misled by the error, the Township has no standing to assert the general interest of the Commonwealth's citizens in assuring that the law is followed, William Penn Parking Garage, Inc. v. Pittsburgh, 464 Pa. 168, 346 A.2d 26 (1975). Furthermore, we find no support for the Township's assertion that the certification is vitiated by the erroneous notice and must conclude, given the Township's subsequent active participation in the process, that the publication inaccuracy was harmless procedural error, Edward Davailus *et al.* v. DER, EHB Docket No. 88-407-F (Adjudication issued July 22, 1991). The Corporation's motion for partial summary judgment will be granted with respect to Paragraphs 15, 16, 17, and 18.

B. Failure to Promulgate Guidelines or Regulations Regarding §401 Certifications

In Paragraphs 19 and 20 of its notice of appeal, the Township contends that the Department violated the Clean Water Act by failing to promulgate written guidelines and regulations for performing a §401 certification, and that this failure is an abuse of discretion because it makes it impossible for the public to know the factors the Department considers in its evaluation.

The Corporation contends that it is entitled to judgment as a matter of law on these issues because the Clean Water Act does not require any such promulgation and that the Department's policy and procedure manual does

provide a written guideline for preparing a §401 certification (Corporation Ex. 12).

The Township responds that the Department's manual limits its evaluation to whether there is compliance with state law. Accordingly, the Township concludes that the Department, in following its manual, failed to make a proper evaluation as required by §401 and that a material issue exists as to whether the Department was in compliance with both §401 of the Clean Water Act and its own guidelines in the policy and procedure manual.

The Township does not cite us to any authority in the Clean Water Act supporting the proposition that states are required to promulgate guidelines or regulations relating to §401 certifications. Indeed, §401(a)(1) of the Clean Water Act, 33 U.S.C. §1341(a), only requires the state to, "establish procedures for public notice of all applications for certification...and to the extent it deems appropriate procedures for public hearings in connection with specific applications...." No additional public notice requirements are imposed on states in the implementing federal regulations at 40 CFR. §121.1 *et seq.*

Similarly, there are no requirements in either §401 of the Clean Water Act or 40 CFR §121.1 *et seq.* that the state adopt regulations setting forth how the certification request will be evaluated. There is a simple reason for this - federal law and federal regulations, which are binding on the states, as well as all citizens, define these obligations. Section 401(a)(1) of the Clean Water Act requires that any applicant for a federal license or permit to conduct any activity which may result in a discharge into navigable waters obtain a certification from the state that the discharge

complies with §§301, 302, 303, 306, and 307 of the Clean Water Act, 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317.[10] The contents of the certifications are defined in 40 CFR §121.2.[11]

Nor does the Township dispute that the Department has a written policy and procedure regarding §401 certifications (Township Ex. 12). Rather, the Township attacks the content of the policy:

> While the above-quoted material facially requests DER to take the appropriate steps to determine whether a Section 401 certification is warranted, the four examples which follow in that

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[10] These sections of the Clean Water Act relate to technology-based effluent limitations, federally adopted water quality standards, state water quality standards, new source standards, and toxics, respectively.

[11] That regulation provides that:

> (a) A certification made by a certifying agency shall include the following:
> (1) The name and address of the applicant;
> (2) A statement that the certifying agency has either (i) examined the application made by the applicant to the licensing or permitting agency (specifically identifying the number or code affixed to such application) and bases its certification upon an evaluation of the information contained in such application which is relevant to water quality considerations, or (ii) examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement described in subparagraph (3) of this paragraph;
> (3) A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;
> (4) A statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge or the activity; and
> (5) Such other information as the certifying agency may determine to be appropriate.
> (b) The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.

> document appear to limit DER's evaluation merely to an examination of whether there is compliance with state law....
>
> (Township brief, p. 21)

The Township has overlooked the first portion of the quotation

> The Regional Planning Section will review the request for certification, evaluate its impact on water quality and determine its compliance with state requirements.
>
> (Township Ex. 12, pp. 6-7, ¶ E) (emphasis added)

We fail to see how this quoted portion is not in accordance with federal requirements.

Finally, the Township contends that partial summary judgment with regard to this issue cannot be granted to the Corporation "Because New Hanover Corporation contends that DER's evaluation was in accordance with both Section 401 and DER's policy and procedure, a material issue exists as to the accuracy of those contentions." However, the issue relates to the contentions in Paragraphs 19 and 20 of the Township's notice of appeal that the Department failed to promulgate guidelines and that failure, in the abstract, was an abuse of discretion. This issue is purely legal and, on the basis of the foregoing discussion, we must conclude that the Corporation is entitled to partial summary judgment on Paragraphs 19 and 20 of the Township's notice of appeal.

C. Failure to Conduct an Independent Wetlands Delineation in the Course of Evaluating the §401 Certification Request

In Paragraphs 21 through 23 of its notice of appeal the Township asserts that the Department knew more wetlands were involved than stated in the §401 certification or notice in the Pennsylvania Bulletin and failed to undertake an independent wetlands delineation, instead relying on the Army Corps' delineation; as a result, the Township concludes the Department's

issuance of the §401 certification was arbitrary, capricious, and an abuse of discretion.

The Corporation has moved for partial summary judgment on this issue, arguing that the Department properly relied on the Army Corps' wetlands delineation, that the Department conducted its own careful evaluation of wetlands, and that the Department imposed a contingency in the solid waste permit and §401 certification in the event that it was found in New Hanover Township v. United States Army Corps of Engineers, C.A. No. 87-7262 (E.D.Pa.) that the delineation was incorrect.

The Township's response to this portion of the Corporation's motion is a rambling and disjointed attack on the accuracy of the wetlands delineation, as well as the Army Corps' application of Nationwide General Permit No. 26 to the Corporation and the Department's waiver of permit requirements under the DSEA. While the Township argues that the Department abused its discretion in relying on the Army Corps' delineation, it, again, provides no legal basis for this argument.

By casting aside both parties' verbiage on the accuracy of the wetlands delineation, we get to the real issue - i.e., what is the Department being asked to do when it receives a request for certification under §401 of the Clean Water Act? The law is not complicated - the Department is being asked to certify that any discharge resulting from an activity regulated by the federal government (here, the Army Corps) will comply with §§301, 302, 303, 306, and 307 of the Clean Water Act. The Department is not being requested to step into the shoes of the Army Corps and pass upon the Corporation's application for a permit under §404 of the Clean Water Act, 33 U.S.C. §1344. We made this point abundantly clear in City of Harrisburg v. DER, 1988 EHB 925, 942-943, and City of Harrisburg v. DER and Pennsylvania

Fish Commission, 1989 EHB 365, 368-369 (reconsideration). And, our view of the law was affirmed by the Commonwealth Court in Comm., Dept. of Environmental Resources v. City of Harrisburg, 133 Pa. Cmwlth. 577, 578 A.2d 563 (1990), allocatur denied, ___ Pa. ___, 588 A.2d 586 (1991).[12]

If the Township contests the wetlands delineation, its challenge to the §401 certification is not the appropriate place to do so. It must challenge, as it has done, the Army Corps' delineation in federal district court. Since this is a legal issue and it is clear, as a matter of law, that the Department is not required to perform a wetlands delineation when it evaluates a request for §401 certification from the Army Corps, we will grant the Corporation's motion with respect to Paragraphs 21 through 23 of the Township's notice of appeal.[13]

D. Violation of Article I, §27 of the Pennsylvania Constitution

Paragraph 26 of the Township's notice of appeal contends that the Department's issuance of the §401 certification was violative of Article I, §27 of the Pennsylvania Constitution, particularly in light of the pending federal litigation by the Township against the Army Corps. The Corporation has moved for summary judgment on this issue and other Township claims relating to the Environmental Rights Amendment, and we will address this issue, *infra*.

V. ARTICLE I, §27 CLAIMS

Paragraphs 27 through 45 of the Township's notice of appeal raise a number of challenges to whether the Department's issuance of the solid waste permit, the NPDES permit, the DSEA waivers, and the §401 certification were in

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[12] Interestingly, neither party cited these decisions in its memorandum of law.

[13] This does not affect the Township's wetlands arguments under the DSEA.

accordance with its responsibilities under Article I, §27 of the Pennsylvania Constitution. The Corporation has moved for summary judgment on all of these paragraphs, asserting that the Department properly applied the three-prong test articulated in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd 468 Pa. 226, 361 A.2d 263 (1976):

> 1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> 2. Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> 3. Does the environmental harm which will result from the [activity to be permitted] so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

The Township, while arguing that the Payne test is the appropriate standard, disagrees as to whether the Department's actions were in conformance with one or more of the criteria.

A. Water Quality Certification

Paragraph 26 of the Township's notice of appeal generally asserts that the §401 certification was violative of Article I, §27, while Paragraph 28 contends that it was violative of the amendment because it was not in accordance with §401 of the Clean Water Act. The Corporation contends that the Department strictly complied with all the relevant law. We will not attempt to summarize the Township's disorganized and unresponsive arguments on this issue.[14] In any event, summary judgment on this issue must be denied,

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[14] The Township apparently takes the view that each of the Department actions is subsumed in all the other actions and, therefore, all legal and factual arguments are applicable to each action.

since there appear to be material facts in dispute regarding whether the Department evaluated the effect of operation of the activities subject to the Army Corps' permit on water quality and whether the activity was, in fact, in compliance with applicable water quality requirements in §401(a)(1) of the Clean Water Act. The Corporation's motion for summary judgment with regard to Paragraphs 26 and 28 of the Township's notice of appeal is denied.

B. NPDES Permit

The Township contends in Paragraph 29 of its notice of appeal that the Department violated the Environmental Rights Amendment by issuing the Corporation's NPDES permit in violation of the Clean Streams Law, the Clean Water Act, the Delaware River Basin Compact and the relevant regulations. The Corporation has moved for summary judgment on this paragraph, asserting that because the Department followed its own procedures for issuing NPDES permits and, in any event, was not bound by Delaware River Basin Commission (DRBC) regulations, it is entitled to judgment as a matter of law.

The Township responds generally that the Department's water quality staff did not follow its own regulations, guidance and procedures in performing the water quality modeling, citing the Graves and Keenan Report (Township Ex. B, p.9). Page 12 of the Graves and Keenan Report summarizes the reasons that the DER dissolved oxygen (dO) sag analysis is invalid; Dr. Keenan contends the Department acted arbitrarily and capriciously by failing to incorporate recommendations of the DRBC and the United States Fish and Wildlife Service (USF&WS) and by failing to adhere to its Toxic Management Strategy in several key respects.

Obviously, there are issues of material fact concerning the water quality modeling and resultant effluent limitations, and summary judgment cannot be granted on the issue of whether the Department complied with the

Clean Streams Law and the Clean Water Act in issuing the Corporation's NPDES permit. As for the Corporation's assertions regarding the binding legal effect of DRBC regulations and guidelines, which are founded on the legal opinion of one E. Dale Wismer, Chief, Permits Section of the U.S. Environmental Protection Agency's Region III, Mr. Wismer's interpretation, assuming it has any import, appears to conflict with the language of 25 Pa. Code §§92.31(g) and (h).[15] The Corporation's motion must be denied with respect to Paragraph 29 of the Township's notice of appeal.

C. Solid Waste Permit

1. Applicability of April, 1988 Municipal Waste Management Regulations

The Township asserts in Paragraph 31 of its notice of appeal that the Department violated Article I, §27 by issuing the Corporation's permit when new solid waste regulations (i.e., the April 9, 1988, municipal waste management regulations) were pending. Similarly, in Paragraphs 42 and 43 of the notice of appeal, the Township contends that the Department, in "rushing" to permit the Corporation's landfill under the old solid waste management regulations, violated the public trust, disregarded its mission, and committed malfeasance, all in contravention of Article I, §27.

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[15] NPDES permits must assure that the proposed discharge will be in compliance with any more stringent limitation established pursuant to any other federal law or regulation (25 Pa. Code §92.31(g)) or any other state law or regulation (25 Pa. Code §92.31(h). The Delaware River Basin Compact was adopted by Pennsylvania (Act of July 7, 1961, P.L. 518, as amended, 32 P.S. §815.101 *et seq.*) and the United States Congress (P.L. 87-328). Section 5.2 of the Compact empowers the DRBC to classify waters of the basin and adopt waste treatment standards, while under §5.3 of the Compact the signatory states covenant to control pollution of the waters of the basin in accordance with the Compact. Thus, it would appear that the DRBC treatment standards are established according to both state and federal law and thus, under 25 Pa. Code §§92.31(g) and (h), must be incorporated in NPDES permits where more stringent than Pennsylvania requirements.

The Corporation has moved for summary judgment, contending that the then-pending regulations were unenforceable. In response to the Corporation's argument, the Township avers only that the newly proposed regulations were well known to the Department and that by failing to impose all necessary protective provisions, the Department violated its statutory and constitutional duty.

The Department is bound to apply the regulations which were in effect at the time it made its decision on the Corporation's permit application.[16] R&P Services, Inc. v. Commonwealth of Pennsylvania, Department of Revenue, 116 Pa. Cmwlth. 230, 541 A.2d 432 (1988). Furthermore, whether the Department was in a "bizarre and unprincipled rush" to issue the Corporation's permit under the old regulations is irrelevant, if the Department otherwise acted lawfully.

Because the Department applied the relevant regulations to the Corporation's permit application, it cannot have violated the first prong of the Payne test and the Corporation's motion for summary judgment on Paragraphs 31, 42, and 43 of the Township's notice of appeal must be granted.

2. Whether the site is appropriate for a landfill

Paragraphs 32 through 34 of the Township's notice of appeal challenge the Department's action in approving the solid waste permit application as violative of Article I, §27 because the proposed site is inappropriate for a landfill. The Corporation has moved for summary judgment with regard to

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[16] During the course of discovery the Township attempted to obtain an admission concerning whether the solid waste permit application was reviewed under the April, 1988, municipal waste regulations. The Department objected and, in denying the Township's motion to compel, the Board held that the new municipal waste management regulations were not relevant. 1988 EHB 812, 824.

Paragraph 34(e), wherein the Township alleges that the site is inappropriate because the landfill will discharge leachate to Swamp Creek, "a high quality stocked trout stream."

The Township responded to this contention in footnote eight of its memorandum of law in opposition to the Corporation's motion with unsupported allegations concerning whether Swamp Creek was a stocked trout stream and whether it maintained an indigenous wild brown trout population above Bechtelsville. The Township also counters that Swamp Creek is classified as TSF (Trout Stocking) at 25 Pa. Code §93.9.

Exhibit 32 to the Corporation's motion, which is not properly disputed by the Township, is a letter from Michael L. Kauffman, Area Fisheries Manager of the Pennsylvania Fish Commission (Commission), to Anita B. John, the Township's Manager. Mr. Kauffman advises Ms. John that the Commission stocks no streams in New Hanover Township. Since this material fact is undisputed by the Township, summary judgment will be granted to the Corporation on Paragraph 34(e) of the Township's notice of appeal to the extent the Township contends Swamp Creek is a stocked trout stream.

3. Module 9 review

In Paragraph 35 of its notice of appeal the Township alleges the Department failed to require a complete and accurate Module 9 from the Corporation, failed to properly evaluate it, and failed to require the Corporation to submit a Module 9(b). In moving for summary judgment, the Corporation contends that the Module 9 was complete and subjected to full review by the Department, citing the deposition testimony of Larry Lunsk (Corporation Ex. 33). It also argued that no Module 9(b) review is required without a determination of unavoidable harm, which was not established here.

In responding to the Corporation's motion the Township states, "With regard to Module 9, Richard Bodner, P.E., admitted in his deposition that there were errors in the applicant's Module 9 submission." This statement is followed by a general reference to Mr. Bodner's deposition (Township Ex. KK) and a statement that "The wetlands evaluation in the Module 9 was simply wrong. See March 30, 1988 letter of Lawrence H. Lunsk (Exhibit "J"), ¶ 61h." The Township then goes on to declare:

> Evidence on this and other Module 9 issues will be introduced at the hearing. This will include DER's failure to perform a Module 9(B) review. The reports of Steven Jones, Ph.D., Richard Mabry, P.E., William Fleming, P.E. and Drs. Graves and Keenan show that the record of unavoidable harm is extremely strong in this case. There is certainly no basis in the record to dismiss New Hanover Township's Module 9(B) claim on summary judgment.
>
> (Township Memorandum of Law, p.42)

It is obvious from these arguments that the Township misapprehends the nature of its responsibility in responding to a summary judgment motion.

While we are required to read a motion for summary judgment in a light most favorable to the non-moving party, that does not relieve the non-moving party of its obligation to set forth specific facts, by affidavit or other properly supported means, to demonstrate the existence of genuine issues of material fact. If the non-moving party fails to respond or fails to specifically and properly respond, summary judgment will be entered against it. Thompson & Phillips Clay Company, Inc., *supra*.

Here, the Township has failed to specifically dispute the Corporation's contentions regarding Module 9. It has cited us to no specific part of Mr. Bodner's deposition. Contrary to its representation in its memorandum of law, Paragraph 61h of Exhibit J to the Lunsk deposition does not

relate to wetlands issues - it relates to traffic impact analysis. Moreover, Exhibit J does not even relate to the Corporation's landfill permit which is at issue in this appeal; it is a thirty-page comment letter relating to the Corporation's re-permitting application under the 1988 municipal waste regulations. Finally, the fact that the Township will present evidence on Module 9 issues at the hearing on the merits does not operate to defeat a summary judgment motion on Module 9. The purpose of summary judgment is to avoid unnecessary hearings where material facts are not in dispute and the law is clear.

Despite the Township's utter failure to properly respond to this portion of the Corporation's motion, we cannot grant summary judgment to the Corporation on Paragraphs 35 through 37 of the Township's notice of appeal. The Corporation's motion is based on Corporation Exhibit 33, a portion of the deposition testimony of Lawrence Lunsk, and we cannot conclude, after reviewing that excerpt, that a complete and accurate Module 9 was submitted by the Corporation, that the Department properly evaluated it, and that a Module 9(B) was unnecessary.

D. DSEA Permit, FPMA Permit and Erosion and Sediment Control Permit

Paragraph 38 of the Township's notice of appeal asserts that the Department violated Article I, §27 by not requiring DSEA, FPMA, and erosion and sediment control permits. Consistent with its motion for summary judgment on the underlying permit issues, the Corporation has moved for summary judgment on the Article I, §27 aspects of the Department's actions in this regard. In accordance with our denial of the Corporation's motion with regard to Paragraphs 7 and 73 through 76, we will deny the Corporation's motion for summary judgment regarding Paragraph 38 of the Township's notice of appeal.

E. Environmental Master Plan

The Township contends in Paragraph 44 of its notice of appeal that the Department violated Article I, §27 of the Pennsylvania Constitution by taking actions which were inconsistent with various provisions of the Environmental Master Plan. In moving for summary judgment on this issue the Corporation argues that the Department's actions adhered to the Master Plan and that, even if they didn't, the Master Plan was only to provide an overall context for decision making. The Corporation cited nothing in support of its contentions.

The Township does not dispute the Corporation's characterization of the legal effect of the Master Plan, but rather alleges that the Board should weigh evidence concerning various environmental values and amenities more heavily if it demonstrates that the Department's actions violated the portions of the Master Plan dealing with these amenities.

Since the Corporation has provided us with nothing but its own statement concerning the Department's consideration of the Master Plan, we cannot conclude that there are no material disputed facts regarding the Department's consideration of the Master Plan, and accordingly, summary judgment on this issue will be denied.

F. Department Response to Comments

In Paragraph 45 of its notice of appeal the Township alleges the Department violated Article I, §27 by failing to adequately respond to comments of Montgomery County (County), the Township, citizens and others.

In moving for summary judgment on this issue, the Corporation cites a chronology of correspondence between the Department and various commentaries

(Corporation Ex. 2) and argues the Department did respond, but that the Township did not like the response.[17]

While it is not disputed that the Department received numerous comments, we cannot, after an examination of Corporation Exhibit 2, conclude that the Department's response was adequate. That is a question of material fact which remains for a hearing on the merits. Summary judgment on Paragraph 45 of the Township's notice of appeal will be denied.

VI. SOLID WASTE MANAGEMENT ACT ISSUES

Paragraphs 49, 50, 51, 64, and 65 of the Township's notice of appeal challenge the Department's action in issuing the solid waste permit as an abuse of discretion because the Department failed to apply the April, 1988 municipal waste management regulations to the Corporation (Paragraphs 49-51), failed to condition the Corporation's permit with requirements relating to an alleged hospital waste incinerator on the site or apply the new regulations to the incinerator (Paragraph 64), and failed to advise the Corporation what provisions of the new regulations applied to re-permitting the landfill (Paragraph 65).

The Corporation has moved for summary judgment on these paragraphs of the notice of appeal for the same reasons as it sought summary judgment on Paragraph 31 of the notice of appeal. In addition, although the Corporation argues that the new municipal waste management regulations were inapplicable, the Corporation had agreed to additional requirements similar to those in the then-pending regulations. The Township did not specifically address the Corporation's motion regarding Paragraphs 49, 50, 51, 64, and 65.

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[17] The Township's response to this portion of the Corporation's motion did not address the issue but, rather, indulged in literary characterization of the Corporation's argument.

We will grant the Corporation's motion with regard to Paragraphs 49-51 for the same reason we granted its motion with regard to Paragraph 31 - the Department is bound to apply the regulations in effect at the time it makes its decision. With regard to Paragraph 64, which concerns a hospital incinerator allegedly on the site, we will grant summary judgment to the Corporation on the issue that the Department should have imposed the new infectious waste regulations on the incinerator. However, we cannot conclude that the failure of the Department to address the fate of the incinerator in a landfill permit for the same site was not an abuse of discretion. Finally, with regard to Paragraph 65 of the Township's notice of appeal, it is not arbitrary and capricious for the Department not to specify in this solid waste permit what provisions of the new municipal waste regulations would be applicable to the Corporation's re-permitting application under those regulations. The Department has no duty to do so, and the Corporation, as well as the public, is charged with constructive knowledge of the regulations once they are published in the Pennsylvania Bulletin.

The Corporation's motion will be granted with regard to Paragraphs 49, 50, 51, and 65 and granted with respect to the Township's claim in Paragraph 64 that the Department should have imposed the new infectious waste regulations on the incinerator when it issued the Corporation's landfill permit.

A. **Montgomery County Solid Waste Management Plan**

Paragraph 52 of the Township's notice of appeal claims that the landfill permit violated the SWMA because the landfill was contrary to and not included in the County Solid Waste Management Plan (Plan). Similarly,

Paragraph 53 claims that the Department violated the SWMA by not cooperating with the County and local governments to effectuate the Plan and failing to emphasize area-wide planning in its decision-making process.

The Corporation has moved for summary judgment contending that,[18] at the time of the permit issuance, the plan had not been officially adopted and, therefore, the Department had no duty to consider it.

The Township responded that the landfill is contrary to and not included in the Plan and that the status of the Plan is an issue that will be the subject of testimony in the hearing on the merits.

The Corporation does not support its contention that the Plan had not been adopted at the time of the issuance of the solid waste permit, and the Township contests the Corporation's characterization of the status of the Plan and the Department's consideration of area-wide planning in the permitting process. As a result, we cannot conclude that there are no disputed material facts and must deny summary judgment on this issue.

B. Review of the Solid Waste Permit Application by Montgomery County and the Township

The Township contends in Paragraphs 54 and 55 of its notice of appeal that the Department was arbitrary and capricious in deciding to override the recommendations of the County and host municipality, in failing to publish its override decision, and in not allowing the County and host municipality 60 days to respond to the override decision.

The Corporation argues in its motion that the Department is not required to adopt the recommendations of a County or host municipality, that

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[18] The Corporation's motion for summary judgment on this issue erroneously refers to Paragraph 55 of the Township's notice of appeal; that paragraph challenges the Department's override of the recommendation of the County and the host municipality.

it did publish its override decision in the Pennsylvania Bulletin, and that §504 of the SWMA refers to a 60-day response period for review of the application and not to a review of the override decision.

The Township responded by reiterating its contentions regarding the Department's obligation under §504 of the SWMA to allow the County and the Township 60 days to comment upon the Department's override decision. It also contended that the Department's decision to issue the permit in the face of strenuous local government objections (Corporation Ex. 2, 66) was an abuse of discretion.

We find no support for the Township's view that the Department must adopt the recommendations of the County or host municipality, that the Department must publish its override decision in the Pennsylvania Bulletin prior to issuance of the solid waste management permit, or that the Department must provide the County or host municipality a 60-day period in which to comment upon the override justification. Indeed, the language of the SWMA compels a contrary conclusion.

Section 504 of the SWMA provides that:

> Application for a permit shall be reviewed by the appropriate county, county planning agency or county health department where they exist and the host municipality, and they may recommend to the department conditions upon, revisions to, or disapproval of the permit only if specific cause is identified. In such case the department shall be required to publish in the Pennsylvania Bulletin its justification for overriding the county's recommendations. If the department does not receive comments within 60 days, the county shall be deemed to have waived its right to review.
>
> (emphasis added)

Admittedly, the grammar and structure of this statutory provision may leave a lot to be desired. However, the 60 day comment period referred to in §504

refers to comment upon the permit application,[19] since the only right of review in §504 relates to review of the permit application. Furthermore, §504 does not require the Department to accept the comments and recommendations of the host municipality or county, Charles Bichler *et al.* v. DER, 1989 EHB 36, nor does it direct the Department to publish its override justification in the Pennsylvania Bulletin prior to issuing the solid waste management permit. Obviously, there must be a point at which the give and take among the Department, affected local governments, the permit applicant, and the public ends and a decision is reached by the Department.

Since the Department did publish its override justification in the Pennsylvania Bulletin (Corporation Ex. 34) and was neither required to do so prior to issuing the permit nor required to provide Montgomery County or the Township with a 60 day period in which to comment on the Department's justification, we will grant the Corporation's motion for partial summary judgment with regard to Paragraph 54 of the Township's notice of appeal. But, we will deny the motion with regard to Paragraph 55 because a determination of whether the Department abused its discretion in rejecting the comments and recommendations of the County and the Township requires the resolution of outstanding issues of material fact.

C. Adequacy of Bonding

The Corporation has moved for summary judgment on the Township's claim in Paragraph 56 of its notice of appeal that the amount and term of the post-closure bond for the landfill is inadequate. In support of this

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[19] Similarly, the 60 day comment period in §1905-A(b)(2) of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-5(b)(2), refers only to a 60 day period between a municipality's receipt of notice of a solid waste permit application and final Department action on the application.

contention the Corporation alleges that the bond is adequate because it is nearly 30 times the statutory minimum of $10,000 in §505(a) of the SWMA and because the Corporation will be required to update the bond within 90 days of the promulgation of the new municipal waste regulations.

The Township responds that the bond is grossly inadequate, citing the affidavit of Mr. Fleming (Township Ex. D at 4-5) and the March 30, 1989, letter of Lawrence Lunsk which we will disregard for the reasons stated earlier. The Fleming affidavit expressed doubts about the adequacy of financial assurances for the landfill based on the life expectancy of the landfill.

Section 505 of the SWMA provides in pertinent part that:

> ... The amount of the bond required shall be in an amount determined by the secretary based upon the total estimated cost to the Commonwealth of completing final closure according to the permit granted to such facility and such measures as are necessary to prevent adverse effects upon the environment; such measures include but are not limited to satisfactory monitoring, post-closure care, and remedial measures. The bond amount shall reflect the additional cost to the Commonwealth which may be entailed by being required to bring personnel and equipment to the site. All permits shall be bonded for at least $10,000. Liability under such bond shall be for the duration of the operation, and for a period of up to ten full years after final closure of the permit site.

Thus, the calculation of a bond amount involves factual considerations, including the type of facility, its expected life, type of monitoring and remedial measures, and size of the facility. The mere fact that the bond amount exceeds the statutory minimum or will be re-evaluated in light of new regulations is of little consequence. Because the Township has raised issues

of material fact regarding the adequacy of the bond, we must deny the Corporation's motion as it relates to Paragraph 56 of the Township's notice of appeal.

D. Manipulation of the Groundwater Table

The Corporation has moved for summary judgment concerning the Township's contention in Paragraph 57 of its notice of appeal that the Department acted arbitrarily and capriciously in issuing a permit that does not clearly prohibit artificial manipulation of the regional groundwater table by soil drains. The Corporation asserts that this is a false issue, since the permit requires the landfill to be redesigned to eliminate underdrains and, therefore, obviate the need for groundwater manipulation (Permit Condition No. 4).

The Township responds that it is not clear from the permit that no underdrains will be included in the final design and that if the Corporation will commit to this position in writing, the Township will withdraw the issue from its appeal.

Condition No. 4 of the permit reads:

> No waste may be disposed at this facility until the Department has approved a complete application for permit modification under Section 271.111 of the municipal waste management regulations that were approved by the Environmental Quality Board on December 15, 1987. The operator may not construct the liner system for this facility, including any aspect of the soil drain or underdrain system set forth in the application, until the Department has approved a complete application for permit modification under Section 271.111 of the municipal waste management regulations that were approved by the Environmental Quality Board on December 15, 1987.

We agree with the Township that it is not clear from a reading of Condition No. 4 that the solid waste permit clearly prohibits groundwater manipulation. Since the Corporation has not provided us with any other support for its argument, we must deny its motion with regard to Paragraph 57 of the Township's notice of appeal because of disputed material facts.

E. Characterization of Groundwater Flow

The Corporation asserts that it is entitled to summary judgment with regard to the Township's contention in Paragraph 58 of its notice of appeal that the Department failed to adequately characterize groundwater flow in the vicinity of the landfill. In support of this argument the Corporation generally states that its Phase I Permit Application provided such data in the form of pump tests and water level monitoring.

The Township, in response to the Corporation's argument, cites a letter from William F. Beers, Project Manager for Roy F. Weston, Inc., to Alan Magan of Browning-Ferris Industries (BFI), which states that "The groundwater model for the site was not well documented in the report and this model is what the flow model is based upon." (Township Ex. OO). The affidavit of Mr. Fleming (Township Ex. D), which the Township cites without specific reference, agreed with Beers and expressed Mr. Flemings' belief that the Department needed more information to characterize groundwater, especially as it relates to contamination of nearby schools (Township Ex. FF, 137-144)

Since the Corporation has provided us with nothing more than a general reference to the permit application and the Township's references to affidavits and depositions certainly put into question the accuracy of characterization of groundwater flow, we must deny the motion for summary judgment on this issue.

F. Technical Requirements Under the SWMA and the Regulations Adopted Thereunder

Paragraph 59 of the Township's notice of appeal contains 20 subparagraphs challenging the various alleged technical deficiencies in the solid waste permit. The Corporation has moved for summary judgment on 15 of the subparagraphs, and we will address them separately.

1. Subparagraph (a), setback distances

The Township asserts in its notice of appeal that the setback distances in the permit are inadequate. The Corporation argues that the setback distances comport with 25 Pa. Code §75.21(a) which required that "A twenty-five foot (25') zone shall be established upon which no solid waste shall be deposited adjacent to perimeter property lines unless otherwise approved by the Department."

The Township replies with the affidavit of Mr. Fleming (Township Ex. D, p.7), who contends that landfill facilities are located less than 100 feet from the property line and that the landfill could not meet the requirements of the April, 1988, municipal waste management regulations.

We will deny the Corporation's motion, for we cannot find that it is entitled to judgment as a matter of law. The language of §75.21(s) gives the Department discretion to set another setback distance, and we cannot conclude that the Department did not abuse its discretion here.

2. Subparagraph (b), sideslopes and grades

The Township complains in Paragraph 59(b) of its notice of appeal that sideslope requirements were not met. The Corporation asserts in its motion for summary judgment that the permitted landfill design met the applicable sideslope requirements in 25 Pa. Code §75.24(c). The Township responds to the motion by arguing that the permit substantially modified the

application, thereby rendering the application irrelevant for determining 1) compliance with then-existing regulations and 2) slope stability. The Township generally cites the Fleming affidavit (Township Ex. D) and the Mabry report (Township Ex. C). The Mabry report discusses several slope stability mechanisms that could affect the landfill (downslope creep, lateral creep, massive landslides), concluding that without certain data, analyses of slope stability mechanisms involving on-site soils are questionable (Township Ex. C, pp 3-4).

We will deny the Corporation's motion with regard to Paragraph 59(b) of the Township's notice of appeal. The Fleming affidavit and Mabry report raise disputed issues of material fact.

3. Subparagraph (c), adequacy of soil drain systems

The Township challenges the adequacy and propriety of the soil drain system in Paragraph 59(c) of its notice of appeal, while the Corporation argues in its motion for summary judgment that this is not an issue since Condition No. 4 of the solid waste permit prohibits the use of soil drains. In responding to the Corporation's motion, the Township raises the same arguments as it did with respect to Paragraph 57, and we will deny the motion with regard to this subparagraph for the same reasons we denied the motion with respect to Paragraph 57 of the notice of appeal.

4. Subparagraph (d), location of diversion ditches

In Paragraph 59(d) of its notice of appeal the Township asserts that the proximity of the diversion ditches to Swamp Creek poses a contamination problem. The Corporation's motion for summary judgment contends that there are no facts of record to support the Township's assertion and that there are requirements in the regulations relating to the placement of diversion ditches. The Township's response to the motion cites only the Department's

March 30, 1989, letter commenting on the Corporation's re-permitting application. Because we have previously ruled that the March 30, 1989, letter is irrelevant, the Township has brought forth nothing to dispute the Corporation's contention, and because there are no regulations applicable to diversion ditch location, we will grant the Corporation's motion for summary judgment regarding Paragraph 59(d).

5. Subparagraph (e), gas venting system

The Township contends in Paragraph 59(e) of its notice of appeal that the passive gas venting system should not have been permitted because of its proximity to residences. The Corporation argues in the motion that this system complies with 25 Pa. Code §75.24(c). The Township, in responding to the motion, cites only the Fleming affidavit with no specific page reference. We can find no reference in the Fleming affidavit (Township Ex. D) to this issue. Since the Township must come forth with specific facts to contest the Corporation's assertion, Thompson and Phillips Clay Company, *supra*, and since 25 Pa. Code §75.24(c)(2)(xxiv) does not prohibit the Corporation's gas venting system, summary judgment will be granted in the Corporation's favor on Paragraph 59(e) of the Township's notice of appeal.

6. Subparagraph (f), soil quantity and quality

In Paragraph 59(f) of its notice of appeal, the Township alleges that the on-site soil quantity and quality is inadequate. In moving for summary judgment the Corporation argues that soil quantity and quality are relevant only to the soil requirements dictated by the redesign pursuant to Permit Condition No. 4 and that compliance with that permit condition is not relevant to this appeal according to the Board's September 22, 1988, order. The Township counters that soil data submitted with the original application is not relevant to the permit because the permit changed the landfill's

configuration and that both the Fleming affidavit and the Mabry report discuss these facts.

A review of the Mabry report (Township Ex. C) leads us to conclude that there are disputed issues of material fact concerning the soils. Specifically, page 2 of the Mabry report contains the following passage:

> The original proposal for the landfill was based upon excavating the soils from the site to expose the rock formation, installing a drainage system to lower the ground water, and placing the liner subbase directly on the rock. This proposal was rejected by the DER and the current revised design was submitted which leaves the site soils in place and requires fill to be placed at several locations on the site to obtain the required separation from the ground water. As a result, the geotechnical engineering aspects of these in place and imported soils and their affect on the landfill must be considered. The necessity for this is introduced in the applicant's responses to the DER letter of April 16, 1986 where the materials overlying the intact rock were described as having experienced downslope creep. There was no further consideration given to downslope creep since, in the landfill design then presented, the affected materials were to be removed. Although the landfill design has been changed to leave the soils in place, consideration of the soil conditions commensurate with the safety and environmental issues associated with the landfill has not as yet been accomplished.

Because of this, we will deny the Corporation's motion with regard to Paragraph 59(f) of the notice of appeal.

7. Subparagraph (g), the generic waste amendment

The Township alleges in Paragraph 59(g) of its notice of appeal that the "generic waste amendment concerning sludges is inadequate and improper." Since neither party has cited us to the relevant portion of the solid waste permit, we cannot evaluate arguments concerning whether summary judgment in the Corporation's favor is appropriate on this issue.

8. Subparagraph (h), sizing of leachate holding tanks and adequacy of lagoons

Paragraph 59(h) of the Township's notice of appeal challenges the alleged failure of the permit to specify the size of the leachate holding tanks and asserts that the leachate lagoons are inadequate and improper. The Corporation argues that it is entitled to summary judgment on this issue because it provided all the documentation required by 25 Pa. Code §75.25(o)(7) (Corporation Ex. 36, Sheet 9 of 11; Corporation Ex. 39). The Corporation further argues that there is no regulation requiring the exact configuration of the holding tanks to be defined and that, in any event, this will be addressed in the water quality management Part II permit process (Corporation Ex. 40).

The Township's only response was to refer to the Department's March 30, 1989, letter on the Corporation's re-permitting application.

Despite the Township's failure to specifically address this assertion, we cannot conclude, as a matter of law, that the Corporation is entitled to summary judgment. While it is true that 25 Pa. Code §75.25(o)(7) requires an applicant merely to submit "Documentation insuring the proper treatment and disposal of all leachate collected...," there are other provisions which lend support to the Township's contentions - i.e., 25 Pa. Code §§75.25(o)(1), 75.25(o)(3), and 75.25(o)(4). As a result, we cannot conclude that the Corporation is entitled to judgment as a matter of law on Paragraph 59(h) of the notice of appeal.

9. Subparagraph (i), adequacy of soil base

The Corporation has moved for summary judgment on the Township's contentions in Paragraph 59(i) that the landfill soil base cannot adequately bear the load unless there is excavation to bedrock. The Corporation supports

its motion by contending that this is a re-permitting issue because, pursuant to Condition No. 4 of the Permit, the elimination of soil drains will change its plans to excavate to bedrock. Consistent with our ruling on Paragraph 57, which dealt with Condition No. 4, we will deny summary judgment with regard to Paragraph 59(i) of the notice of appeal.

10. Subparagraph (l), long-term effects of reduced groundwater recharge

In Paragraph 59(l) of its notice of appeal the Township asserts that the Department failed to adequately study the effects reduced groundwater recharge would have on surface waters, groundwater, and water supplies. The Corporation argues that it is entitled to summary judgment because the Department was not required by either the SWMA or the relevant regulations to perform such an assessment and that even if it were, the Department had properly assessed the effects. In support of this latter argument, the Corporation cites the deposition of Jeff Peffer (N.T. 102-114), the Department's July 17, 1985, review letter (Corporation Ex. 41), and the Department's inclusion of Condition No. 9 in the solid waste permit.[20]

In responding to the motion, the Township references the affidavit of Steven Jones, Ph.D. (Township Ex. A) and the Lunsk letter of March 30, 1989 (Township Ex. J), maintaining there are geological fact issues and that the Department was precipitous, premature, and unreasonable in issuing the permit before considering the effect on the water table.

Although we will disregard Mr. Lunsk's March 30, 1989, letter and the Township has not cited us to a specific portion of Dr. Jones' affidavit, our review of this affidavit leads us to the conclusion that there are disputed

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[20] This condition required detailed monitoring of private wells and mandated water supply replacement in the event of degradation.

issues of material fact regarding groundwater recharge and that, therefore, summary judgment is inappropriate.

11. Subparagraph (m), sizing of diversion ditches

The Township asserts in Paragraph 59(m) of its notice of appeal that the diversion ditches were not sized adequately to prevent downstream flooding. The Corporation has moved for summary judgment, contending that the diversion ditches were sized in accordance with 25 Pa. Code §§75.24(c)(2)(i) and 75.24(c)(2)(xxii). The Township opposes the motion on the grounds that the ditches were part of the DSEA permit waiver and the Department's March 30, 1989, letter commenting on the Corporation's re-permitting application established that there were problems with the sizing of the diversion ditches.

A mere statement by the Corporation that the diversion ditches met the requirements of 25 Pa. Code §§75.24(c)(2)(i) and 75.24(c)(2)(xxii) does not provide a basis for grant of summary judgment on this issue and, accordingly, the Corporation's motion will be denied.

12. Subparagraph (p), groundwater table and monitoring

The Corporation argues that it is entitled to summary judgment on the Township's contention in Paragraph 59(p) of its notice of appeal that the Department abused its discretion in not requiring a water level/pressure sensor to monitor the underdrains. The Corporation contends that this is irrelevant, since the permit requires the elimination of the underdrains. The Township disputes the Corporation's interpretation of the permit, citing its argument in opposition to the motion for summary judgment with regard to Paragraph 59(c).

We will deny the Corporation's motion for summary judgment here for the same reason it was denied with respect to Paragraph 59(c).

13. Subparagraph (q), effect of groundwater contamination on replacement water supplies

The Corporation asserts that it is entitled to summary judgment regarding the Township's claims in Paragraph 59(q) that the Department abused its discretion in not assessing how replacement water supplies would be affected by groundwater contamination, especially in the bedrock aquifer. As support for its argument, the Corporation cites Condition No. 9 of the permit, which prescribes water supply sources and points out that this condition goes beyond regulatory requirements. In opposition to the Corporation's motion, the Township presents the affidavit and deposition of Mr. Fleming (Township Ex. D) wherein he expresses his concern over the ability of the Corporation to obtain replacement water supplies. The Township also refers to the Department's March 30, 1989, comment letter on the Corporation's re-permitting application to support its opposition.

It is not our responsibility to wade through a 128 page deposition and an affidavit to find support for a party's argument. Furthermore, as the Corporation points out in its memorandum of law in support of its motion, this claim is purely hypothetical. We fail to see how the Department can determine what the effect of groundwater contamination will be on a replacement water supply when it is purely speculative what the replacement water supplies will be, much less what the effect of any groundwater contamination will be on them. For these reasons we grant the Corporation's motion with regard to Paragraph 59(q) of the notice of appeal.

14. Subparagraph (s), disposal of unacceptable soils

The Township argues in Paragraph 59(s) of its notice of appeal that the issuance of the permit violated the SWMA because it did not address the disposal of unacceptable soils. The Corporation has moved for summary

judgment on this issue, asserting that Condition No. 4 of the permit precludes disposal of on-site soil, adding that only when the landfill is redesigned will it be clear whether or not soils from the site will be unacceptable. The Township contends that the Corporation's claims are not obvious from a reading of the permit and the issues of excavation, storage, and disposal of on-site soils were an issue in the original permit application and, therefore, cannot be termed a re-permitting issue. We agree with the Township that this issue is not resolved by a reading of the language of Permit Condition No. 4 and, therefore, deny summary judgment.

15. Subparagraph (t), field testing of drains and liner

The Corporation has moved for summary judgment regarding the Township's contention in Paragraph 59(t) of its notice of appeal that the permit violated the SWMA in that it failed to incorporate a requirement that the Corporation field test the liner and the drains before accepting waste. In support of its argument the Corporation asserts that the permit incorporates the Department's September 30, 1987, review letter (Page 3 of the permit). It also cites page Li-6 of the narrative, which sets forth a procedure for air testing of all field seams, and the requirement that seam coupons be taken at the rate of one coupon per 500 feet of seam (Corporation Ex. 42). The Township responds by arguing that field seams and seam coupons relate to the liner system and not the drains and cites as support the March 30, 1989, Lunsk letter regarding the re-permitting application.

After reviewing Corporation Exhibit 42, we conclude that the response letter does address the liner and not the drains. Accordingly, a factual dispute remains regarding testing of the drain system and summary judgment can be granted only with regard to the liner.

G. Compliance History - Module 10

In Paragraph 60 of the notice of appeal the Township asserts that the Department violated the SWMA and abused its discretion by not requiring a complete Module from the Corporation - i.e., a Module 10[21] which disclosed violations at a hospital incinerator on the site which is owned by the Marinari brothers. Similarly, the Township alleges in Paragraph 61 that the Department abused its discretion by not requiring the Corporation to disclose the interests of BFI and by failing to have BFI prepare a Module 10. The Corporation argues that it should be granted summary judgment regarding both paragraphs because at the time the permit was issued the Department did not require compliance history information for "related parties" and that, even if it did, BFI, which has an option to purchase the stock of the Corporation, is not a related party.

The Township contends the Marinaris were "interested parties" since they own the land on which the landfill will be built and that a question of fact remains as to whether the Marinari brothers and BFI have an interest in the proposed facility or are "business associates, contractors, subcontractors, agents and landowners" of the proposed facility (Form C Instruction Sheet for Module 10, Corporation Ex. 43, defining "related parties"). The Township also states that BFI is a "contractor" to the Marinaris in operating the infectious waste incinerator and BFI has an "interest" in the landfill, as indicated in the Marinari deposition (Township Ex. QQ, pp. 5-8, 17-20, 42-45).

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[21] This module details an applicant's compliance history so that the Department may discharge its responsibilities under §§503(c) and 503(d) of the SWMA.

There is nothing in the 1977 version of the solid waste management regulations dealing with compliance history.[22] However, §75.22(a)(1) of those regulations required that in submitting an application for operation of a solid waste disposal facility "The data and information...shall be that data and information categorized on the module form which shall be provided by the Department to the applicant...." In addition, §75.22(d) mandates that a permit not be issued unless the applicant has satisfied the requirements of the relevant statutes and regulations. Thus, even if the regulations and the application modules did not specifically address compliance history, the Department was still required to undertake the analysis mandated by §§503(c) and (d) before a permit could be issued. And, if the modules and regulations were inconsistent with §503, the statutory provision would take precedence.

Section 503(c) of the SWMA provides:

> In carrying out the provisions of this act, the department may deny...any permit or license if it finds that the applicant, permittee or licensee has failed or continued to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the "Air Pollution Control Act," and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of

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[22] Obviously because the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, as amended, the predecessor to the SWMA, contained no provisions comparable to §§503(c) and (d) of the SWMA.

> the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations. In the case of a corporate applicant, permittee or licensee, the department may deny the issuance of a license or permit if it finds that a principal of the corporation was a principal of another corporation which committed past violations of this act.
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> (emphasis added, footnotes omitted)

In addition, §503(d) states that:

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

Thus, under §503(c), the Department could deny a permit to the Corporation if the Corporation was in violation, as defined in §503(c), or if any of the principals of the Corporation were principals of another corporation which had, in the past, committed violations of the SWMA. And, under §503(d), the Department could not issue a permit to the Corporation, or independent contractors or agents who would operate under the permit, unless it was demonstrated that the unlawful conduct had been corrected.

With regard to the Township's claims in Paragraph 60 in its notice of appeal, we must conclude that there are issues of material fact regarding violations of the SWMA by the Marinaris, who are principals of the

Corporation. It is impossible to determine whether the Marinaris operated the hospital incinerator as individuals, partners, or a corporation, and, in the case of the corporation, whether the Marinaris were principals. Thus, we cannot conclude, as a matter of law, that the Department properly discharged its obligations under §§503(c) and (d) with regard to the Corporation and the Marinaris and summary judgment with regard to Paragraph 60 is denied.

Regarding the alleged interests of BFI, we have previously held in ruling on a motion for joinder and motion for protective order at 1988 EHB 812, 816-817 that the Corporation's negotiations with BFI regarding a stock option agreement were irrelevant. And, we cannot now see how the stock option agreement brings BFI within the ambit of §503(d) of the SWMA. Moreover, the fact that BFI allegedly operates the hospital incinerator for the Marinari Brothers (Township Ex. QQ) does not bring BFI within the scope of either §§503(c) or (d). As a result, the Corporation's motion with regard to Paragraph 61 is granted.

H. Incinerator Proximity

The Township in Paragraph 62 of its notice of appeal contends that the Department violated the SWMA and Article I, §27 of the Pennsylvania Constitution by issuing a permit for a landfill that will be on top of an incinerator. Similarly, in Paragraph 63 the Township alleges that the permit application does not address the fate of the incinerator now existing on the site of the landfill. In moving for summary judgment, the Corporation maintains this is not an issue since the Phase I application provided that when landfill construction overtakes the incinerator, the incinerator will be moved (Corporation Ex. 46).

The Township responds that the Department did not have sufficient data on this issue to allow a permit, again citing the March 30, 1989, Lunsk

letter commenting on the Corporation's re-permitting application which is not relevant to this appeal.

Our reading of Corporation Exhibit 46, which is an excerpt from the permit application's operational narrative, as well as an excerpt from what appears to be the deposition of an unidentified individual, does not lead us to the conclusion that the Corporation is entitled to summary judgment on Paragraphs 62 and 63 of the Township's notice of appeal.

I. Height and Slope Limitations

The Township challenges the height and slope provisions of the permit as an abuse of discretion in Paragraphs 66 and 67 of its notice of appeal. The Corporation's motion for summary judgment disputes the Township's contentions as speculation and declares that final height and slope limitations will be determined in a redesign of the landfill, as required by Condition No. 4.

The Township alleges the Department had no documents, plans or drawings that indicated the Corporation could meet the height and slope limitations in the Permit. The Township cites generally to the opinions of its experts, Fleming and Mabry, as support, but gives no exhibit number or page number.

While the Township has again utterly failed to specifically dispute the Corporation's allegations, summary judgment is not appropriate here because of our earlier ruling regarding Condition No. 4.

J. Wetlands Review

Paragraph 69 of the Township's notice of appeal contends that the Department violated the SWMA in failing to ascertain whether the Corporation could comply with the requirements of the DSEA regarding wetlands. Consistent with our earlier rulings on the DSEA/wetlands issues, we will deny the

Corporation's motion for summary judgment on Paragraph 69 of the notice of appeal.

VII. NPDES PERMIT

A. Additional Discharges

In Paragraphs 79 through 81 of its notice of appeal, the Township contends that in addition to discharge from the leachate treatment plant, one or more discrete discharge points are proposed from the landfill witness system and soil drains into a tributary of Swamp Creek; that those discharges may discharge pollutants into the waters of the Commonwealth; and that the Department violated the Clean Streams Law by not requiring these discharges to be permitted.

The Corporation's motion for summary judgment asserts that Condition No. 4 does not permit soil drains since re-permitting under the new regulations is required prior to landfilling. In any event, the Corporation argues that the solid waste permit provides that any discharge from the landfill witness system will go to tanks from which water will be directed to the on-site leachate treatment plant (Corporation Ex. 47, Phase II, Narrative at p.2 and Erosion and Sediment Control Plan at p. E5-2, E5-3).

The Township in reply reiterates its argument that without written assurance that there will be no soil drains, the issue remains in dispute and summary judgment cannot be granted.

Irrespective of Condition No. 4, it is clear from an examination of Corporation Exhibit 47 that any discharges on site will be directed to the leachate treatment plant. Since all discharges into the waters of the Commonwealth from the landfill will be through the leachate treatment plant

and the discharge from that plant is permitted, the Corporation is entitled to summary judgment on Paragraphs 79 through 81 of the Township's notice of appeal.

B. Adequacy of Leachate Treatment Plant

The Township contends in Paragraphs 82 through 85 of its notice of appeal that the leachate treatment plant is inadequate and that the Department was arbitrary and capricious to issue the permit without proper documentation showing the proposed plant could be built and would be adequate.

The Corporation's motion for summary judgment asserts that it demonstrated to the Department the adequacy of its treatment plant and cites the testimony of a Township supervisor (Corporation Ex. 50), as well as supporting documents, drawings and data (Corporation Ex. 49). The Township generally cites Dr. Graves' report in opposing the Corporation's motion.

We will grant summary judgment in the Corporation's favor on these paragraphs, but for the reasons put forth by the Corporation in support of its motion regarding Paragraphs 93, 94, 95, and 96 of the Township's notice of appeal, all of which relate to alleged deficiencies in the leachate treatment plant. Most simply put, issues relating to the design and operation of the leachate treatment plant are properly considered in the permitting process under §308 of the Clean Streams Law, which requires that a permit be obtained to construct and operate an industrial waste treatment plant.[23] That permit is not before the Board in this proceeding, and, consequently, we will grant summary judgment in the Corporation's favor regarding Paragraphs 82 through 85 and 93 through 96 of the Township's notice of appeal.

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[23] We are not unaware that 25 Pa. Code §75.25(o)(7) requires a permit applicant to submit "Documentation insuring the proper treatment and disposal of all leachate collected...." However, this requirement does not negate the permitting process under the Clean Streams Law.

C. Adequacy of the Effluent Limitations

Paragraph 86 of the Township's notice of appeal, like Paragraph 34(e), alleges that the Department abused its discretion in permitting a landfill with a discharge to Swamp Creek, "a high quality stocked trout stream...." We will grant summary judgment to the Corporation regarding Paragraph 86 of the Township's notice of appeal, consistent with our ruling on Paragraph 34(e).

In Paragraphs 87 and 88 of its notice of appeal the Township contends that the effluent limits and monitoring requirements in the NPDES permit are inadequate to meet water quality standards of the Commonwealth and the DRBC.

The Corporation's motion for summary judgment with respect to these paragraphs argues that there is no requirement for the Department to follow the guidelines of the DRBC (Corporation Ex. 29, at pp. 114-117; Corporation Ex. 52,) and the Department employed its standard procedures for developing effluent limits (Corporation Ex. 29, at 27-46, 49, 53, 54-62, 69-95, 134-137, 153-157, 234-257, 272-280, 317-325).

The Township reiterates the arguments it made in opposition to the Corporation's motion for summary judgment regarding Paragraph 29, especially Dr. Keenan's report. Dr. Keenan, in his deposition, states that it is clear that Wentzel did not follow recommended procedures in a number of respects. Specifically, in stream modeling, he did not follow the methods in a document titled, "Simplified Method for Determining Point Source Effluent Limitations" (Township Ex. I, beginning on p.83).

There are obviously disputed material facts sufficient to defeat the Corporation's motion for summary judgment regarding Paragraphs 87 and 88 of the notice of appeal.

D. Adequacy of the Waste Load Allocation

In Paragraph 89 of its notice of appeal the Township contends that the Department failed to adequately prepare a waste load allocation which would assure that the discharge would not violate the applicable water quality standards. The Corporation asserts in its motion for summary judgment that the Department used its standard procedures to prepare the allocation, citing, *inter alia*, the deposition of Joe Ghabin (Corporation Ex. 53). In opposing the motion the Township refers generally to Dr. Keenan's deposition.

Neither party cites specific exhibit pages and the exhibits cited are each over 100 pages long. Since references to wasteload allocation are not readily apparent in these documents the Board will spend no further time reading through them and will instead deny the motion for summary judgment with regard to Paragraph 89 of the notice of appeal.

E. Alleged Degradation of Swamp Creek

Paragraphs 90 and 91 of the Township's notice of appeal allege, respectively, that a discharge in accordance with the effluent limitations established in the NPDES permit will degrade Swamp Creek and that the Department has not otherwise taken action to abate pollution in Swamp Creek. Given our ruling on Paragraphs 87 through 89, the Corporation's motion for summary judgment regarding these paragraphs must be denied, for the determination of whether Swamp Creek will be degraded is dependent upon whether the effluent limitations were properly calculated.[24]

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[24] We fail to see how the Department's failure to take action against other sources of discharge to Swamp Creek, as alleged by the Township in Paragraphs 91 and 92 of its notice of appeal, is in any way relevant to the propriety of the issuance of the NPDES permit. But, since the Corporation has not moved for summary judgment on this basis, we need not decide the issue.

F. Recommendations of USF&WS

The Township asserts in Paragraphs 97 and 98 of its notice of appeal that the Department abused its discretion in not adopting the recommendations of the USF&WS regarding monitoring of priority pollutants and conduct of bioassays. In moving for summary judgment the Corporation contends that the Department was not bound by the USF&WS's recommendations. The Township cited Dr. Keenan's report (Township Ex. B) in opposing the motion.

While the Department is not bound to accept the recommendations of the USF&WS, it does have broad power under the Clean Streams Law to condition permits to protect the waters of the Commonwealth. Given the issues raised by Dr. Keenan's report, we cannot conclude, as a matter of law, that the Department did not abuse its discretion in not adopting the recommendations of the USF&WS.

Finally, Paragraph 99 of the Township's notice of appeal argues that the Department abused its discretion in not incorporating the DRBC's effluent limitation for zinc in the NPDES permit. The Corporation's motion for summary judgment on this issue alleges that the Department is not bound by the DRBC recommendation. We will deny summary judgment on Paragraph 99 for the same reason it was denied on Paragraph 29 of the notice of appeal.

O R D E R

AND NOW, this 30th day of July , 1991, it is ordered that:

1) New Hanover Corporation's motion for partial summary judgment regarding Paragraphs 7, 15-23, 31, 34(e), 42, 43, 49-51, 54, 59(d), 59(e), 59(q), 61, 64, 65, 73-76, 79-86, and 93-96 of New Hanover Township's notice of appeal is granted, to the extent set forth in the foregoing opinion;

2) New Hanover Corporation's motion for partial summary judgment is denied in all other respects;

3) New Hanover Township's appeal is dismissed with respect to the contentions set forth in Paragraphs 7, 15-23, 31, 34(e), 42, 43, 49-51, 54, 59(d), 59(e), 59(q), 61, 64, 65, 73-76, 79-86, and 93-96 of its notice of appeal, to the extent set forth in the foregoing opinion; and

4) A pre-hearing conference will be scheduled to discuss hearing dates and submission of pre-hearing memoranda.

ENVIRONMENTAL HEARING BOARD

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Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 30, 1991

cc: See following page.

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M. DIANE SMITH
SECRETARY TO THE BOARD

FRANCONIA TOWNSHIP	:	
	:	
V.	:	**EHB Docket No. 89-284-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 30, 1991**
and EMMONS CORPORATION, Intervenor	:	

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

The Board grants appellant's motion for summary judgment. A private request for a plan revision is not deemed approved where the Department of Environmental Resources (Department) fails to act within 120 days after receipt of county planning commission comments. Where revised regulations become effective between the submission of a private request for revision of a township's official sewage facilities plan and the Department's decision on the request, the Department's decision must comport with the revised regulations. The Board will construe 25 Pa. Code §71.14(c) as requiring subdivision approval under Article V of the Municipalities Planning Code, the Act of July 31, 1968, P.L. 835, as amended, 53 P.S. §10501 *et seq.* (Municipalities Planning Code) where the reference to Article VI in the regulation is an obvious clerical error. Under 25 Pa. Code §71.14(c), the

Department does not have the authority to consider a private request to revise an official plan involving the subdivision of land where the subdivision has not received prior approval under the municipal or county planning codes.

OPINION

This matter was initiated by the filing of a notice of appeal with the Board by Franconia Township ("Franconia") on August 28, 1989. Franconia appealed from an August 1, 1989, order issued by the Department which directed Franconia to revise its official sewage facilities plan ("official plan") to provide for a proposed development of thirty-five residential dwelling units. Emmons Corporation ("Emmons"), owner of the property where the development would be located, had requested Franconia to revise its official plan to incorporate the installation of a package sewage treatment plant to serve the proposed development, and Franconia refused to revise its plan.

Franconia's notice of appeal asserts generally that the Department's order requiring the plan revision violates §5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act), and the requirements of the Department's implementing regulations governing private requests at 25 Pa. Code §71.1 *et seq.* The notice of appeal also contends that the Department's order was untimely.

The Board granted Emmons' petition to intervene on January 18, 1990.

On August 13, 1990, Franconia filed a motion for summary judgment, maintaining that the Department's action was untimely and asserting that the Emmons request did not comport with the Department's revised regulations governing private requests for revisions to official plans. Emmons filed its response on October 4, 1990, arguing that the failure of the Department to act within the prescribed time amounted to a deemed approval. As for the

regulations governing the evaluation of private requests, Emmons contends that the original regulations, and not the revised ones, applied to the Department's review of its request.

Consistent with its policy regarding third party appeals, the Department advised the Board on December 15, 1989, that it did not intend to actively participate in the litigation. On January 30, 1991, however, the Department was ordered to submit a memorandum of law concerning whether, under 25 Pa.Code §71.14(f), private requests to revise official plans are deemed approved if the Department fails to render a decision within 120 days after receiving comments from the county planning commission.

Upon discovery of a discrepancy in language in 25 Pa. Code §71.14(c), the Board, on April 25, 1991, ordered the parties to submit a memorandum of law on the issue of whether 25 Pa. Code §71.14(c) requires subdivision approval or zoning approval in light of its reference to Article VI of the Municipalities Planning Code.[1] Franconia asserted in its June 3, 1991, memorandum of law that the reference to Article VI of the Municipalities Planning Code was a mistake in light of the intent of the Environmental

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[1] 25 Pa. Code §71.14(c) provides:

> (c) No private request to revise an official plan because of the subdivision of land will be considered by the Department unless the subdivision has received prior approval under municipal or county planning codes being implemented through Article VI of the Pennsylvania Municipalities Planning Code (53 P.S. §§ 10601-10619).

(emphasis supplied). The discrepancy referred to above arises from the fact that the language of the section refers to subdivision approval, while Article VI of the Municipalities Planning Code deals with zoning ordinances. Thus, the question arises whether Section 71.14(c) requires subdivision approval or zoning approval as a prerequisite to the Department's consideration of a private request to revise an official plan.

Quality Board in adopting the regulation. Franconia further contended that even if 25 Pa. Code §71.14(c) were not interpreted as it suggests, the Board must still grant judgment in its favor, since the Franconia subdivision ordinance incorporates Franconia's zoning ordinance and, therefore, Franconia's disapproval of Emmons' subdivision constitutes disapproval under Article VI of the Municipalities Planning Code. Emmons' May 20, 1991, memorandum of law and the Department's June 6, 1991, memorandum of law both re-iterated their contentions that 25 Pa. Code §71.14(c) was inapplicable to Emmons' private request; the Department's memorandum also urges that the reference in §71.14(c) to Article VI was correct.

When ruling upon a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Board must read the motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

The undisputed material facts are these. Emmons submitted a private request for revision to the Franconia official plan sometime between June 29, 1988 and July 21, 1988.[2] (Franconia's motion for summary judgment, ¶3(A)(2); Emmons' response ¶3(A)(2)). On August 12, 1988, Franconia responded to the Department by letter. (Franconia's motion for summary judgment, ¶3(A)(3); Emmons' response, ¶3(A)(3)). On October 25, 1988, the Montgomery County Planning Commission wrote to the Franconia Manager, giving its recommendation

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[2] Paragraph 3(A)(1) of Franconia's motion for summary judgment lists the date as June 29, 1990. However, the affidavit cited in that paragraph and the dates of subsequent correspondence make it clear that the date should have read June 29, 1988.

regarding the Emmons request. (Franconia's motion for summary judgment, ¶3(A)(4); Emmons' response, ¶3(A)(4)). On June 10, 1989, revisions of the regulations governing private requests to revise official plans went into effect. On August 1, 1989, the Department issued the order which is the subject of this appeal. (Franconia's motion for summary judgment, ¶3(A)(5); Emmons' response, ¶3(A)(5)). Franconia's Board of Supervisors denied Emmons' request for subdivision approval on June 11, 1990 (Franconia's motion for summary judgment, §3(C)(1), Franconia's Exhibit A-5).

We will first examine Franconia's assertion that it is entitled to judgment as a matter of law because the Department's action was untimely. It is undisputed that the Department did not take action on Emmons' request within 120 days of its receipt of comments from the Montgomery County Planning Commission, as was required by 25 Pa. Code §71.14(f),[3] but the legal import of this failure to take timely action is another matter. Recently, in S.A. Kile Associates v. DER and Richland Township, EHB Docket No. 90-223-F (Opinion issued May 28, 1991), we rejected the appellant's contention that the Department's failure to act on its private request within 120 days, as mandated by 25 Pa. Code §71.14, constituted a deemed approval of that request. We noted, citing D'Amico v. Board of Supervisors of Alsace Township, 106 Pa. Cmwlth. 411, 526 A.2d 479 (1987), that for the remedy of deemed approval to occur, there must be explicit language to that effect in either the Sewage Facilities Act or 25 Pa. Code §71.14. Consequently, the Department cannot

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[3] The predecessor regulation, 25 Pa. Code §71.17(d), required the Department to take action within 60 days of the receipt of such comments. Because the Department's action was untimely under both former §71.17(d) and current §71.14(f), it is irrelevant which regulation was applicable.

have been deemed to approve the private request for issuance of an order to Franconia to revise its official plan, since neither the Sewage Facilities Act nor 25 Pa. Code §71.14 provides for such a remedy.

But, it does not follow that Franconia is entitled to judgment as a matter of law on this issue, for the statute and the regulation are similarly silent on whether a failure to timely act constitutes a deemed disapproval or deprives the Department of its authority to take action on the private request. As a result, we cannot hold that Franconia is entitled to judgment as a matter of law on the issue of whether the Department's failure to timely act upon Emmons' private request deprived the Department of authority to act.

Whether Franconia is entitled to judgment as a matter of law on the issue of Emmons' failure to secure municipal subdivision approval initially depends on which regulations apply - those in effect on June 10, 1989, the date the revised §71.14 became effective, or those in effect prior to June 10, 1989. The Commonwealth Court decided a case involving similar circumstances in R & P Services, Inc. v. Commonwealth of Pennsylvania, Department of Revenue, 116 Pa. Cmwlth. 230, 541 A.2d 432 (1988), wherein the Department of Revenue, acting pursuant to a regulation which became effective after R&P's application was submitted, revoked R&P's cigarette stamping agency and wholesaler dealer licenses due to delinquent sales taxes. The Commonwealth Court held that the regulations which were in effect at the time the Department of Revenue made its decision controlled. Here, then, since the revised regulations became effective between the request for Department action and the Department's decision on that request, the Department's decision must comport with the revised regulations, particularly §71.14(c) in this case.

Since the Department was required to evaluate whether Emmons' request complied with the requirements of §71.14(c), the question now becomes whether

Emmons' subdivision "received prior approval under municipal or county planning codes being implemented through Article VI of the Pennsylvania Municipalities Planning Code." As was noted above, the Board discovered a discrepancy in the language of this provision; although §71.14(c) refers to approval under codes being implemented through Article VI of the Municipalities Planning Code, that article addresses the enactment, amendment, and repeal of zoning ordinances and contains no requirements that subdivisions be approved.

In its second memorandum of law the Department contends, based on its experience in dealing with proposed sewage facilities plan revisions, that this reference to Article VI does not create a discrepancy. While we are ordinarily required to accord deference to the Department's interpretation of regulations it administers, we are not required to do so when the Department's interpretation is plainly erroneous, County of Schuylkill v. DER and City of Lebanon Water Authority, 1989 EHB 1241, 1267. After examining Article VI of the Municipalities Planning Code, it is apparent that the Department's interpretation of §71.14(c) is, in fact, plainly erroneous, as it is founded on a misinterpretation of the Municipalities Planning Code.

It is Article V of the Municipalities Planning Code, and not Article VI, which empowers municipalities to regulate subdivision and land development. Thus, the reference in §71.14(c) to Article VI is a clerical error. The Pennsylvania Supreme Court held in Lancaster County v. Frey, 128 Pa. 593, 18 A. 478 (1889) that "the courts may correct an error even in an act of assembly when, as it is written, it involves a manifest absurdity and the error is plain and obvious." Such is the case here, and the Board will

construe §71.14(c) as requiring prior subdivision approval under municipal or county planning codes adapted pursuant to Article V of the Municipalities Planning Code.[4]

Because the Emmons' subdivision did not receive prior approval from Franconia and was not even disapproved until nearly a year after the Department's issuance of the order to Franconia, the Department should not have considered the Emmons request to revise the official plan, and Franconia is entitled to judgment as a matter of law on this issue.[5] In light of this

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[4] The Department argues that "preliminary zoning approval" is what was envisioned by 25 Pa. Code §71.14(c) because

> since prior sewage facilities approval by the Department is usually a condition of detailed subdivision approval by a municipality, to interpret Section 71.14(c) as requiring prior detailed subdivision approval before the Department can consider a private request would create a 'Catch-22' from which a developer could never escape. It is much more likely that the EQB was referring to the conceptual zoning approval discussed above which occurs very early in the planning process.

It is obvious that the Environmental Quality Board in enacting 25 Pa. Code §71.14(c) was trying to avoid the opposite situation - i.e. where a developer received sewage facilities planning approval from the Department, but not subdivision approval from the municipality. The preamble to the final regulations states at 19 Pa.B. 2429 (June 10, 1989) that a provision was added to §71.14(c) "which requires local approval of subdivision before the Department considers a private request to revise an official plan. This assures that local land use decisions have been made prior to sewage facilities planning." (Emphasis added)

[5] Applying §71.14(c) as revised does not, as Emmons contends, amount to giving that provision retroactive effect. "Where no vested right or contractual obligation is involved, ... a regulation is not impermissibly construed retroactively when applied to a condition existing on the effective date, even though the condition results from events which occurred prior to that date." R & P Services, 116 Pa. Cmwlth. 230, 541 A.2d 432 at 435, citing Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867 (1957). A right, however, is not vested unless it is fixed and without condition, Ashbourne School v. Department of Education, 43 Pa. Cmwlth. 593, 403 A.2d 161 (1979), footnote continued

ruling it is unnecessary to consider Franconia's other arguments regarding the infirmities of Emmons' private request.

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continued footnote
and any right Emmons had, to have Franconia revise the official plan, was conditioned upon the outcome of the Department's review of Emmons' request.

ORDER

AND NOW, this 30th day of July, 1991, it is ordered that the motion for summary judgment filed by Franconia Township is granted, and its appeal is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
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JOSEPH N. MACK
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DATED: July 30, 1991

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M. DIANE SMIT
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THE FLORENCE MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-077-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: July 30, 1991**

OPINION AND ORDER SUR
DER'S ALTERNATIVE MOTIONS TO LIMIT ISSUES
TREATED AS A MOTION FOR PARTIAL SUMMARY JUDGMENT
AND A MOTION IN LIMINE

By: Richard S. Ehmann, Member

Synopsis

In an appeal by a permittee of the Department of Environmental Resources' ("DER") issuance to it of a Coal Mining Activity Permit ("CMAP"), DER's first Motion to Limit Issues, based on the doctrine of administrative finality, is treated as a Motion for Partial Summary Judgment because it seeks to dispose of the appellant's issues rather than to limit the evidence which the appellant may present at the hearing. DER's Motion is denied because questions as to the extent to which the appellant's CMAP is a continuation of its previously-issued CMAP and whether the prior CMAP covered the same acreage which is covered by its CMAP are at issue, so DER has not shown it is entitled to summary judgment as a matter of law.

The Board will not grant a dispositive motion to limit issues so as to preclude evidence concerning issues raised by the appellant based on the assertion that the written conditions in this CMAP are identical to conditions

contained in the prior CMAP. Under the reasoning in Bethlehem Steel Corporation v. Commonwealth, DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978), and Richards v. DER, 1990 EHB 382, where circumstances at the mine site on which the initial CMAP was issued are alleged to have changed between the time of issuance of the first CMAP and the second CMAP, the appellant cannot be foreclosed from challenging DER's review of the latter-issued CMAP.

Finally, DER's Alternative Motion to Limit Issues is a motion in limine seeking to preclude appellant from presenting currently undisclosed expert testimony regarding the effluent limitations imposed by its CMAP. We deny DER's Motion at this time because there is still time for the appellant to reveal its expert and expert report to DER and for DER to depose the expert, but we mandate that appellant do so immediately.

OPINION

On February 25, 1991, The Florence Mining Company ("Florence") filed an appeal with this Board from DER's January 25, 1991 issuance of CMAP 32871301 to Florence for the company's Heshbon Mine, a bituminous underground coal mine located in West Wheatfield Township, Indiana County. Florence and DER filed their pre-hearing memoranda on May 16, 1991 and May 29, 1991, respectively. On May 29, 1991, DER filed its first Motion to Limit Issues and supporting brief and affidavit. We then scheduled this matter for a hearing to be held on September 3-6, 1991. Subsequently, on June 14, 1991, DER filed a second Motion to Limit Issues which it said it wished us to consider only if we do not grant the first motion. Florence filed its Objections to DER's first Motion to Limit Issues and New Matter, along with a brief, on June 18, 1991. On June 18, 1991, we received a letter from DER which indicated that DER had agreed to withdraw its first motion with regard to standard conditions in

Sections B and C of Florence's CMAP and that DER would be issuing an administrative order superseding those conditions. DER's letter further stated that DER is still seeking a ruling on its first motion with regard to paragraphs 7(a), 7(o), 7(p), 7(r), and 7(t) of Florence's notice of appeal and that its second motion would be unaffected by the administrative order.[1] We received Florence's Objections to DER's second motion and an accompanying brief on July 5, 1991. On July 12, 1991, we received DER's Reply to Florence's Brief in Opposition to DER's first motion. In view of DER's partial withdrawal of its first motion, we herein address only the remaining issues regarding that motion.

This Opinion and Order considers both of DER's motions. We have addressed them jointly rather than in serial opinions because of the need for us to clarify the distinction between dispositive and non-dispositive motions.

DER's motions allege and Florence admits the following facts. On September 9, 1987, DER issued CMAP 32871301 ("1987 CMAP") to Florence for its Heshbon Mine and Florence timely filed an appeal of the 1987 CMAP with the Board. The Board issued an Order on April 11, 1988 which dismissed that appeal as a sanction for Florence's failure to prosecute. Subsequently, on January 25, 1991, DER issued CMAP 32871301 ("1991 CMAP") to Florence for the Heshbon Mine.

A comparison of the 1987 and 1991 CMAPS shows the 1987 CMAP had a surface area of 63 acres and a subsurface area of 576 acres, whereas the 1991 CMAP has a surface area of 63.6 acres and a subsurface area of 1314 acres.

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[1]Initially, DER's first motion had sought to limit the issues raised by paragraphs 7(a), 7(b)-7(n), 7(o), 7(r), 7(s), and portions of 7(p) and 7(t) of Florence's notice of appeal.

Paragraph 7(a) of Florence's notice of appeal challenges effluent limitations contained in the 1991 CMAP; 7(o) attacks the 1991 CMAP's incorporation of certain regulations; 7(p) and 7(r) challenge bonding requirements of the 1991 CMAP; and 7(t) attacks monitoring, sampling, reporting, and recordkeeping requirements of the 1991 CMAP.

DER's First Motion To Limit Issues

In its first motion and brief, DER contends Florence is precluded by the doctrine of administrative finality and the prohibition of collateral attacks from making the challenges in paragraphs 7(a), (o), (p), (r), and (t). In support of this argument, DER places reliance upon Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320, cert. denied, 434 U.S. 969 (1977); Schuylkill Township Civic Association v. DER, EHB Docket No. 90-541-E (Opinion issued March 27, 1991); Richards v. DER, 1990 EHB 382; and Capwell v. DER, 1987 EHB 174. DER further cites Antrim Mining, Inc. v. DER, 1988 EHB 105; Genovese v. DER, 1988 EHB 422; and Pittsburgh Coal and Coke, Inc. v. DER, et al., 1986 EHB 704.

The Supreme Court's decision in Wheeling-Pittsburgh, *supra*, involved a situation where Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pittsburgh") had sought from DER and was granted a variance from DER's regulations (in the form of a variance order). DER later initiated enforcement proceedings against Wheeling-Pittsburgh, asserting that it had not complied with DER's variance order. The Court held that Wheeling-Pittsburgh, having failed to seek review of DER's order, could not attack the validity or content of either the variance or the underlying regulations in the enforcement proceeding. In Schuylkill, *supra*, we ruled on the permittee's motion for summary judgment. We decided the only issues properly before us were the deletion of a condition

from the amended permit involved therein and DER's procedure in issuing the amended permit. Upon the permittee's motion for summary judgment or, in the alternative, to limit issues, in Richards, *supra*, we ruled that the appellants' failure to appeal both DER's initial issuance of a surface mining permit ("SMP") and its subsequent transfer of that SMP to another miner did not foreclose their appeal of DER's renewal of the permit because, if issues of the type designated in 25 Pa. Code §86.55(f) (dealing with permit renewals) had arisen since transfer of the SMP to the permittee, the appellants must be given an opportunity to challenge them. We further determined that even though the appellants could not, in general, challenge renewal using evidence which was available prior to transfer, they could introduce such evidence for certain purposes. Antrim involved a DER motion for partial summary judgment based on a collateral attack argument; Genovese involved a DER motion for summary judgment based on the theories of collateral attack and administrative finality; and Pittsburgh Coal involved a collateral attack argument in a motion to dismiss brought by the permittee and intervenors in that appeal. Aside from Capwell, we were not ruling solely on a motion to limit issues in any of the cases cited by DER.

Although we granted DER's motion to limit the issues in Capwell, we did so because it was clear that the issues raised attacked DER's prior denial of the Capwell's permit application, the appeal of which the Capwells had failed to prosecute. We reject DER's contention that our holding in Capwell requires us to prohibit Florence from raising issues in this appeal which are identical to issues raised in Florence's 1987 appeal since our decision in Capwell did not turn on the issues in the Capwell's appeal being identical to those raised in their previous appeal.

In Kennametal, Inc. v. DER, 1990 EHB 1453, which DER has not cited, DER motioned for both summary judgment and to limit issues based upon the doctrine of administrative finality. After denying summary judgment, we examined DER's motion to limit issues, explaining that it was a motion in limine. We stated:

> A motion *in limine* is a pre-trial motion designed to exclude evidence which is potentially inflammatory, prejudicial, without probative value, or irrelevant, Ianelli and Ianelli, Trial Handbook for Pennsylvania Lawyers, §2.15 (2 ed. 1990). The judge has wide discretion to make or refuse to make advance rulings, Cleary, McCormick on Evidence §52 (3d ed. 1984)....

Kennametal at 1455. We then explored the issues individually to determine the extent to which it would be appropriate to allow Kennametal to raise them.

Our review of DER's motion leads us to conclude that what DER is seeking here is a *de facto* partial summary judgment rather than the barring of certain evidence at the hearing on the merits. We did not articulate the difference between a motion for summary judgment and a motion to limit issues in Richards, where we denied summary judgment and then examined the evidence in ruling on the motion to limit issues.[2] Our granting of a party's motion in limine requires the decision of only one Board Member, whereas for us to grant a motion which finally disposes of an issue, such as a motion for summary judgment or for judgment on the pleadings, at least a majority of the Board's Members must agree to grant judgment. In the present motion, DER is not seeking to preclude a piece or type of evidence's admission while allowing other evidence on that issue to come in, but, rather, is requesting that we

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[2]We did, however, address the difference between the two motions in Willowbrook Mining Company v. DER, EHB Docket No. 90-346-E (Opinion issued April 1, 1991), and perhaps misled DER as to when a motion to limit issues (a motion in limine) is appropriate.

find in its favor on most of the issues raised by Florence's notice of appeal with such a finding precluding further consideration of those issues. In such a circumstance, it would be inappropriate for us to disregard the dispositive effect which our granting of DER's motion would have merely because it is called a motion to limit issues as opposed to a motion for summary judgment. We thus must look beyond the title DER has chosen to give its motion and treat it as a motion for at least partial summary judgment.

In Kennametal, we observed that the Board may grant summary judgment where the pleadings, depositions, and other discovery materials on file with the Board, as well as affidavits, show that there are no issues of material fact and where the moving party is entitled to judgment as a matter of law.

In its brief, Florence contends that its appeal is not from a renewed or reissued permit but is from a new CMAP, based upon 25 Pa. Code §§86.52(d) and 86.55(b). These regulations provide with regard to CMAP revisions and renewals that the addition of acreage to the operation shall be considered as an application for a new permit.[3] DER's Motion and Reply fail to assess the impact of these regulations on Florence's 1991 CMAP, and none of the cases cited by DER addresses this matter. Although Florence refers to its 1991 CMAP in its notice of appeal as a reissued permit, DER is bound by its regulations as to whether the 1991 CMAP is a reissued permit or a new permit. County of Schuylkill, et al. v. DER, et al., 1989 EHB 1241. DER's motion and attachments do not show that the 1991 CMAP is a reissued permit as to all of the Heshbon Mine site. It is unclear from DER's motion and attachments

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[3]Section 86.52(d) states insignificant boundary correction as an exception to this provision but, at this stage of this proceeding, that does not appear to be the case here.

whether the 63 acres of surface area and 576 acres of the 1987 CMAP are, in fact, included in the 1991 CMAP's acreage or whether some of this original acreage was deleted and other acreage substituted in its place. Consequently, DER has not made the showings required to be entitled to partial summary judgment and we must deny its motion.

In addition, we agree with Florence as to the applicability of Bethlehem Steel Corporation v. Commonwealth, DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978), in which the Commonwealth Court rejected the Wheeling-Pittsburgh doctrine under the facts of that case, recognizing that technology and information is constantly changing. Changes in or information on volume and quality of Florence's discharges may impact the degree of treatment required for discharges from the mine and, where significant changes occur, it is inappropriate for DER to fail to analyze such changes and the impact they have on discharge limitations. (Alternatively, if DER did consider any data on volume and quality of the discharge submitted by Florence and retained the same effluent limitations, Florence must have the opportunity to show, if it can, the erroneousness of DER's conclusions based thereon.)

Under our reasoning in Richards, there are issues involved in this appeal which Florence could not have raised in a challenge of its 1987 CMAP. Every issue raised in Florence's notice of appeal which is challenged by DER's motion is raised as to the .6 acres of new surface area and the 738 acres of new subsurface area (collectively, "new acreage"). Moreover, where a 576 acre mine becomes a more than 1300 acre mine, DER must consider the cumulative impact of the new acreage and the original acreage on its decisions reflected in the 1987 CMAP. We have not been shown that DER properly evaluated these cumulative impacts but information pertaining to cumulative effects was not

previously before DER. Also, as to the original acreage, Florence's objectic asserts that in issuing its 1987 CMAP, DER relied on estimates of water flow volume and water quality and now actual flow volumes and water quality analyses were submitted with its 1991 CMAP application showing circumstances different from those assumed from the estimates used to issue the 1987 CMAP. Such new data necessitated DER's reconsideration of the 1987 CMAP's effluent limitations.

Even limiting our discussion of the doctrine of administrative finality t Wheeling-Pittsburgh, Bethlehem, and Richards, it is clear that DER is urging we have before us a Wheeling-Pittsburgh scenario, where no changes were asserted to have occurred in conditions between the time of DER's order and the subsequent enforcement proceedings, while Florence argues we have a Bethlehem-type situation because of the changes to its permitted mine site. I would be inappropriate for us to limit the issues to broadly foreclose review of DER's action in issuing the 1991 CMAP under these circumstances.

DER's Second Motion To Limit Issues

In its second motion, DER asks that Florence be precluded from challengin its CMAP's effluent limitations or any other matters raised in paragraph 7(a) of its notice of appeal. In paragraph 7(a), Florence objects to the imposition of the effluent limitations for its Outfall 002 because these limits are more stringent than those required by 25 Pa. Code §89.52 and 40 C.F.R. §434, because they are not necessary to meet the water quality criteri of 25 Pa. Code Chapter 93, and because DER failed to consider the immediate and long-range economic impact of the effluent limitations on the Commonwealt and its citizens. DER's motion is based on Florence's responses to DER's interrogatories, in which Florence indicated that it had not retained a

consultant to study the water quality criteria matter and that it might retain an expert to study the issue of the effluent limitations for Outfall 002. DER further correctly asserts that in its interrogatory responses, Florence did not identify any expert who would testify with regard to the effluent limits, that discovery has closed without any request for an extension, and that Florence's pre-hearing memorandum does not identify any expert witness who will testify as to the effluent limitations. As DER observes, however, Florence states in its pre-hearing memorandum that it may also call an additional expert to testify concerning the effluent limitations. DER asserts that it will be prejudiced if Florence is permitted to challenge the effluent limitations because DER does not know the basis for Florence's contention that the effluent limitations are overly stringent and it is unable to prepare a defense to such a challenge.

In its Objections to DER's motion, Florence states that it has not yet decided to call its expert and, if it decides to call the expert, it must supplement its discovery responses under Pa. R.C.P. 4003.5(b) and move for leave to supplement or amend its pre-hearing memorandum.

DER has entitled its motion as one to limit issues, but it seeks to bar testimony which is prejudicial to it in the same fashion as a party might if it sought a sanction's imposition on Florence pursuant to our power under 25 Pa. Code §21.124. This is an appropriate function for a motion in limine as reflected in the language quoted above from our decision in Kennametal. The position DER advances is that Florence's expert and the basis for his testimony must be disclosed, and, upon Florence's failure to disclose this information, its expert must be barred from testifying.

We have previously ruled that a party cannot delay identifying its expert until the eleventh hour. Midway Sewerage Authority v. DER, 1990 EHB 1554. The opposing party (here DER) must be accorded time to discover the basis for the conclusions in an expert's report and to prepare to rebut the expert's testimony. While we are loath to bar a party from presenting relevant evidence, we cannot overlook the prejudice which would result to the opposing party by our permitting an undisclosed expert to testify. However, the hearing on the merits of this appeal is not scheduled to occur until five weeks from now, so there is still time to allow DER to depose Florence's expert and prepare rebuttal expert testimony. Florence must provide DER with its expert's identity and that expert's report and provide DER a timely opportunity to depose him (if it shall so desire and shall seek Board authorization to do so). Upon Florence's failure to comply with the Order below, should DER so request, Florence will be barred from offering expert testimony regarding its CMAP's effluent limitations. Until that time, DER's Motion to Limit Issues, is denied.

O R D E R

AND NOW, this 30th day of July, 1991 it is ordered that DER's First Motio to Limit Issues, treated as a Motion for Partial Summary Judgment, is denied. It is further ordered that DER's Alternative Motion to Limit Issues, is denied, but:

1. Florence must provide DER with the name of its expert witness on the issue of the effluent limitations for Florence's Outfall 002 contained in its CMAP and with that expert's report by August 7, 1991.

2. Should DER desire to depose this expert and be granted leave to do so, Florence must provide DER with an opportunity to depose its expert before August 23, 1991, at a date and time to be selected by counsel for DER; and

3. Upon failure of Florence to comply with this Order and a further motion by DER, sanctions will be imposed on Florence, including Florence being barred form offering expert testimony regarding the effluent limitations imposed in the 1991 CMAP as to the discharge from Outfall 002.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 30, 1991

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M. DIANE SMITH
SECRETARY TO THE BOA

MCKEES ROCKS FORGING, INC.	:	
	:	
v.	:	EHB Docket No. 90-310-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 1, 1991

OPINION AND ORDER
SUR DEPARTMENT OF ENVIRONMENTAL RESOURCES'
MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

DER's motion for summary judgment on the question of the appellant's liability for groundwater contamination under §316 of the Clean Streams Law is denied where the facts supporting the motion show that groundwater contamination may have existed at the site under the former landowner, but do not conclusively establish that any contamination existed at the time the notice of violation and order, which are the subjects of this appeal, were issued to the appellant. However, the appellant is precluded from arguing that DER has impermissibly delegated its duty of determining the source of the groundwater contamination since this issue was not raised in either of its notices of appeal.

OPINION

This matter originated with the filing of a notice of appeal on July 26, 1990 by McKees Rocks Forging, Inc. ("McKees Rocks") challenging a "notice of violation" issued by the Department of Environmental Resources ("DER") on June 27, 1990. The notice of violation stated that DER was aware of groundwater contamination beneath McKees Rocks' wheel and axle plant located in McKees Rocks, Allegheny County, and required McKees Rocks to submit to DER a site investigation and remediation plan for its facility.

Initially, there was a question as to whether the notice of violation was an appealable action. However, before this question was reached, DER issued an order on November 28, 1990 ordering McKees Rocks to perform a groundwater assessment of its property and to submit to DER a groundwater cleanup plan. The order was issued pursuant to, *inter alia*, §316 of the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, §691.316; the Solid Waste Management Act ("SWMA") Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; §1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and Article I, Section 27 of the Constitution of Pennsylvania. McKees Rocks appealed the order on December 27, 1990 at EHB Docket No. 90-569-MJ, which appeal was consolidated with the earlier appeal at Docket No. 90-310-MJ on February 4, 1991.

On January 25, 1991, McKees Rocks filed a Third Party Claim against USX Corporation ("USX"), the former owner of the site, and Century America Corporation ("Century") seeking to join USX and Century as third-party defendants. The Third Party Claim was dismissed by the Board on March 15, 1991 in an Opinion and Order which stated that the Board did not have the

power to compel the joinder of third parties. (See Opinion and Order of March 15, 1991, EHB Docket No. 90-310-MJ).

Subsequently, on April 5, 1991, McKees Rocks filed a Motion to Dismiss DER's November 28, 1990 order for failure to join an indispensable party. This too was denied as an improper procedural vehicle for dismissal of DER's order. (See Opinion and Order of May 1, 1991, EHB Docket No. 90-310-MJ).

The matter now before the Board is a motion for summary judgment and supporting brief filed by DER on May 17, 1991. In its motion, DER asserts that there are no material facts in dispute and that McKees Rocks' challenges to the notice of violation and order are legally insufficient. In support of its motion, DER has provided the affidavit of DER Water Quality Specialist Patricia L. Miller, who had conducted sampling at McKees Rocks' facility and who issued the aforesaid notice of violation. DER also relies on the depositions of various individuals who currently hold or formerly held positions with either McKees Rocks or United States Steel ("USS"), a division of USX. On June 14, 1991, McKees Rocks filed a response which raises numerous arguments and contends that various facts and issues of law are in dispute which precludes the granting of summary judgment. Together with its response, McKees Rocks has provided supporting affidavits as well as portions of deposition testimony. On July 5, 1991, DER filed a reply addressing the arguments raised in McKees Rocks' response.

Summary judgment may be rendered where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Pa.R.C.P. 1035(b); Summerhill Borough v. Commonwealth, DER, 34 Pa.Cmwlth. 574, 383 A.2d 1320 (1978). All doubts must be resolved against the moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

Section 316 of CSL

DER's order of November 28, 1990 cited various provisions of the CSL, and primarily §316 of that Act. 35 P.S. §691.316. Section 316 provides in pertinent part as follows:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department...

DER asserts that the facts show that McKees Rocks owns a facility under which the groundwater is contaminated, which DER contends is sufficient to establish liability under §316. In response, McKees Rocks argues that a showing of causation is required before liability will attach under §316, and that DER has failed to show any causation between McKees Rocks and the alleged contamination. Rather, McKees Rocks asserts, any contamination which may exist at the site is attributable to the former owner, USX. McKees Rocks argues that since there is no evidence showing Mckees Rocks to be the cause of any alleged contamination at its site, it cannot be held liable under §316.

McKees Rocks is incorrect in its position. Recent decisions of this Board and the courts clearly hold that fault is not a prerequisite for liability under §316. National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980); Western Pennsylvania Water Co. v. Commonwealth, DER, 127 Pa.Cmwlth. 26, 560 A.2d 905 (1989), aff'd per curiam, ___ Pa ___, 586 A.2d 1372 (1991); Commonwealth, DER v. PBS Coals, Inc., 112

Pa.Cmwlth. 1, 534 A.2d 1130 (1987), petition for allowance of appeal denied, 551 A.2d 218 (1988); Carbon/Graphite Group v. DER, EHB Docket No. 90-524-E (Opinion and Order issued February 19, 1991). It is firmly established that an owner or occupier of property may be held responsible for the cleanup of a polluting condition on its property regardless of whether the owner or occupier caused or contributed to the pollution. *Id.* Therefore, McKees Rocks' argument with respect to causation under §316 of the CSL must fail.

However, in order for DER to be entitled to summary judgment, the pleadings, affidavits, and depositions on file must clearly demonstrate not only that McKees Rocks is the owner of the site in question but also that pollution exists on the site. This last has not been done. While the deposition testimony and the affidavit of Ms. Miller indicate that groundwater contamination existed at the site when it was owned by USX and when it was acquired by McKees Rocks in January 1989, they say nothing about whether contamination existed at the time the notice of violation and order were issued in July and November 1990. Ms. Miller's affidavit, in relevant part, simply states, "On January 18, 1989, I sampled a discharge at McKees Rocks Forging as part of a wasteload Allocation Screening program. The analysis from this sample showed organic contaminants." The results of Ms. Miller's sampling are attached to her affidavit. However, a sampling taken in January 1989 is not a sufficient basis on which to grant summary judgment on an order charging McKees Rocks with groundwater contamination and cleanup nearly two years later.

We note that the November 1990 order states in paragraph D that McKees Rocks leased the facility from USX from July 1986 until January 1989. However, even if DER can show that McKees Rocks was an occupier of the site

prior to acquiring it in January 1989 and that groundwater contamination existed at that time, that does not establish that groundwater contamination continued to exist subsequent to McKees Rocks acquiring the property and at the time the order was issued. Moreover, DER's order and motion refer to both "MRF" [i.e. McKees Rocks] and "old MRF", which appears to have been McKees Rocks' predecessor, and it is not clear which company may have leased the site at the time the earlier groundwater contamination existed. Likewise, we can find nothing in the deposition testimony clearly establishing that groundwater contamination existed at McKees Rocks' facility at the time the June 1990 notice of violation and November 1990 order were issued. It is true that attached to the deposition of Justin Modic, plant manager of the McKees Rocks facility, are copies of discharge monitoring reports ("DMR's") from what appears to read "7-1-87" through "7-31-90." (Deposition of Justin Modic, Exhibit 8) However, these reports, and in particular those from 1990, are not discussed in detail nor with sufficient clarity in Mr. Modic's deposition as to provide a basis for summary judgment.

In its reply, DER notes that a December 1989 letter written to Ms. Miller by Mr. Modic in his capacity as plant manager states in relevant part, "The ground water under the plant is contaminated with 1,2-transdichlorothylene (sic) and other contaminates (sic)..." (Deposition of Justin Modic, Exhibit 5). However, an affidavit signed by Mr. Modic, filed by McKees Rocks in conjunction with its response, states that Mr. Modic has no personal knowledge of any contamination of groundwater under the facility, and that any information he has of the alleged contamination is based on what he was told by DER and USX personnel. This raises some doubt as to the weight to be placed on Mr. Modic's December 1989 letter. Moreover, DER has not

established that in his position as plant manager Mr. Modic is an agent of the company authorized to make statements on its behalf. C & L Enterprises, Inc. and Carol Rodgers v. DER, EHB Docket No. 86-626-MJ (Adjudication issued April 2, 1991), footnote 3. Furthermore, the deposition testimony of Mr. Modic relied on by DER in its motion and reply does not firmly establish that groundwater contamination is or was present at the site but, rather, reveals some degree of hesitancy and uncertainty on Mr. Modic's part.

Only when all material questions of fact have been resolved is summary judgment appropriate. Cratty, Gower and Hyduke, Inc. v. DER, EHB Docket No. 91-029-E (Opinion and Order sur DER's Motion for Summary Judgment issued June 19, 1991). In the present case, although the deposition testimony, DMR's and affidavits supplied by DER provide strong evidence of groundwater contamination, nevertheless, not all questions and doubts have been clearly resolved. Where any doubt exists, it must be resolved against the moving party, in this case DER. Penoyer, supra. Thus, DER has not provided a sufficient basis for the grant of summary judgment.

McKees Rocks raises several other arguments in its response which need not be addressed at this time since DER's motion for summary judgment is being denied.

Issue Preclusion

In its motion, DER also contends that McKees Rocks' pre-hearing memorandum raises several arguments not raised in either of its notices of appeal. These may be summarized as follows:

Paragraph 4 - DER's enforcement of its statutes and regulations has provided a special privilege and immunity to USX.

Paragraph 5 - McKees Rocks cannot be required to expend its own funds to identify the source of any alleged groundwater contamination because that would constitute an impermissible delegation of DER's duty.

Paragraph 6 - DER has not proven that some degree of environmental damage or pollution is taking place and that McKees Rocks is the source.

Paragraph 7 - DER has not shown that McKees Rocks knew of the alleged polluting condition. Further, DER engaged in affirmative conduct, including acts of omission or commission, that indicated an intent to adopt the condition.

Paragraph 8 - DER has not established that McKees Rocks is the source of the alleged pollution.

As DER correctly notes, issues not included in a party's notice of appeal may not be raised later in the proceeding, unless good cause is shown for allowing them to be raised at a later date. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989); J. C. Brush v. DER, 1990 EHB 1521.

As to paragraphs 6 and 8 noted above, these are clearly covered in both of McKees Rocks' notices of appeal which argue that McKees Rocks is not the source of any contamination which may exist at its site.

Paragraph 7 of the pre-hearing memorandum, above, states that DER has not proven McKees Rocks was aware of any contamination. This argument is raised in McKees Rocks' appeal of the November 1990 order which challenges finding "L" of the order which states that McKees Rocks was aware of the alleged groundwater contamination when it purchased the site. Paragraph 7 of the pre-hearing memorandum also states that DER's conduct, by omission or

commission, indicated intent to adopt the condition. This was also raised in McKees Rocks' notice of appeal of the November 1990 order, wherein McKees Rocks argued that DER knew of the alleged contamination as early as December 1983 yet took no action against the then owner or other responsible party.

As to paragraph 4 of the pre-hearing memorandum, regarding special privilege and immunity, this is covered in both notices of appeal which assert that DER's enforcement in this matter has been selective, arbitrary, and capricious.

Finally, paragraph 5 of the pre-hearing memorandum states that McKees Rocks cannot be required to expend its funds to identify the source of the groundwater contamination since this would amount to an impermissible delegation of DER's duty. This argument was raised nowhere in McKees Rocks' notices of appeal. Nor has good cause been shown for allowing it to be raised at this time. Because it was not raised in McKees Rocks' notices of appeal, it is deemed to have been waived, and McKees Rocks is precluded from asserting it at this time. Game Commission, supra.

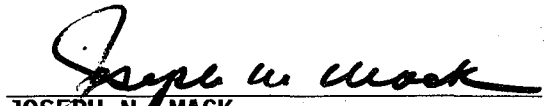
Conclusion

In conclusion, since questions of material fact remain, DER's motion for summary judgment must be denied. However, McKees Rocks shall be precluded from raising any arguments concerning impermissible delegation of duty by DER since this was not raised in its notices of appeal.

O R D E R

AND NOW, this 1st day of August, 1991, it is ordered that DER's motion for summary judgment is denied. It is further ordered that McKees Rocks is precluded from raising any argument concerning the delegation of DER's duties since this argument was not preserved in either of McKees Rocks' notices of appeal.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 1, 1991

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M. DIANE SMITH
SECRETARY TO THE BO

WESLEY H. YOUNG, CAROLE O. YOUNG AND JAMES AU	:	
v.	:	**EHB Docket No. 91-120-B**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 1, 1991**

OPINION AND ORDER SUR PETITIONS TO INTERVENE

Thomas M. Ballaron, Hearing Examiner

Synopsis

A municipality's petition to intervene in an appeal filed by a developer from the Department of Environmental Resources' (DER) refusal to order the municipality to revise its official plan pursuant to the developer's private request is granted. The municipality has an interest in the underlying appeal which will not be adequately represented by DER, and the municipality can offer evidence at trial which will assist the Board in resolving the underlying appeal. However, a petition to intervene filed by a planning commission is denied for failure to establish a direct, immediate, or substantial interest in the appeal. The planning commission, as a subordinate advisory agency of the municipalities which created it, does not have an interest separate and distinct from the interests of the municipality.

OPINION

On March 22, 1991, Wesley H. and Carole O. Young and James Au (Appellants) filed a notice of appeal with the Board from DER's denial of their private request to order Harris Township, Centre County (Township) to revise its official sewage disposal plan. The Appellants, intending to develop a parcel of land within the Township, submitted the private request to DER pursuant to §5 of the Sewage Facilities Act (SFA), the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750 *et seq.* and 25 Pa. Code §71.14. The Appellants contended that the Township had unreasonably refused to accept the Appellants' planning module and revise the official plan accordingly. DER evaluated the Appellants' private request pursuant to 25 Pa. Code §71.14 and found that the Appellants' parcel was outside of the five and ten year proposed sewer service area, 25 Pa. Code §71.21(a)(3), set forth in the Township's revised official plan which had been approved by DER on March 12, 1990. As a result, DER concluded that inclusion of the Appellants' parcel was not consistent with the sewage planning policies and decisions of the Township, and on February 21, 1991, DER declined to order the Township to revise its official plan.

In their appeal of DER's action, the Appellants contended that the agency's decision overlooked the fact that the Township's exclusion of the Appellants' parcel from the five and ten year proposed sewer service area was not based on considerations of growth and land use, but rather on the Township's alleged efforts to impede the Appellants' development of their land. The Appellants argued that DER's failure to compel the Township to revise its official plan improperly involved DER in local land use issues, was arbitrary, capricious and confiscatory, and would, therefore, cause the Appellants to suffer irreparable harm.

Both the Township and the Centre Regional Planning Commission (Commission) filed petitions to intervene on May 28, 1991. In its petition, the Township alleged that it was entitled to intervene in order to refute the allegations made by the Appellant and in order to defend its official plan. The Township also alleged that its decision to deny the Appellants' planning module was at issue. Consequently, its interest would not be adequately represented by the current parties, because the Township was better able to explain and defend the official plan. In addition, the Township averred that it was entitled to intervene, because it had been threatened by the Appellants with a federal lawsuit regarding this matter and was involved in two additional actions filed by the Appellants in the Centre County Court of Common Pleas. The Township asserted that it would present evidence to the Board regarding the importance of the official plan and documentation illustrating the reasons for the Township's refusal of the Appellants' planning module.

The Commission asserted that it was entitled to intervene, essentially because it participated in the formation of the official plan and in the review and denial of the Appellants' planning module. In addition, the Commission asserted that reversal of DER's decision would have a serious and deleterious effect on the official plan and the entire region that it covered. Further, the Commission contended that it was in the best position to demonstrate the importance of the official plan to the Board, and, in this regard, its interests were not adequately represented by the current parties. The Commission indicated that it would present the official plan at trial, as well as evidence regarding its preparation and its importance to the Centre County region.

DER responded to the petitions on June 11, 1991, and indicated that

it had no objection to intervention by either the Township or the Commission. However, on June 10, 1991, the Appellants filed answers to both petitions and raised several objections.

The Appellants principally objected to the Township's petition on the grounds that involvement in potential or on-going litigation among the same parties is not a basis for intervention. The Appellants also noted that it was DER's action which was under appeal not the decision of the Township and that the Township's proposed evidence would be redundant, since the official plan was already in DER's possession.

Similarly, the Appellants objected to intervention by the Commission, since the proposed evidence listed in its petition was not relevant to the Board's review of DER's action. In addition, the Appellants contended that the Commission lacked standing to intervene, since it was only advisory board and not a legal entity.

Intervention in any case pending before the Board is governed by 25 Pa. Code §21.62. It is well settled that intervention is discretionary with the Board and that the proposed intervenor has the burden of showing a direct, immediate, and substantial interest in the outcome of the litigation. Keystone Sanitation, Inc. v. DER, 1989 EHB 1287. In ruling on a petition to intervene, the Board will evaluate the proposed intervenor's relevant interest in the issues being litigated, whether that interest is adequately represented by the existing parties, and whether the proposed intervenor can offer relevant evidence at trial. New Hanover Corporation v. DER, 1990 EHB 1177. In addition, the Board will deny intervention if it will overly broaden the scope of the original appeal or result in a multiplicity of arguments or confusion of the issues. City of Harrisburg v. DER, 1988 EHB 946.

Applying these standards, the petition to intervene filed by the

Township must be granted. However, the petition filed by the Commission does not satisfy the criteria imposed by 25 Pa. Code §21.62 and, therefore, must be denied.

The Township's petition will be considered initially. To determine whether the prospective intervenor has a relevant interest, the asserted interest must be measured against the backdrop of the specific issues presented for resolution in the underlying appeal. New Hanover Corporation v. DER, *supra*. The issue in the present appeal is whether DER abused its authority or acted in an arbitrary or capricious manner by refusing the Appellants' private request to order the Township to revise its official plan. Lynch v. DER, 1990 EHB 388; Lathrop Township Board of Supervisors v. DER, 1979 EHB 259. From the Township's petition, it is evident that its primary interest in seeking intervention is to defend and preserve its official plan. According to the notice of appeal, to which DER's denial of February 21, 1991, was attached, the latest revision of the official plan was jointly assembled by the six municipalities of the region and approved by DER on March 12, 1990. An order from DER pursuant to §5(b) of the SFA which compells the Township to revise its official plan to incorporate Appellants' development in the sewer service area could impose unanticipated financial burdens upon the Township and require it to revise its priorities. This certainly demonstrates the Township's relevant interest in the proceedings.

This potential impact also illustrates the manner in which the Township's interest differs from DER's interest. The Township's role is defined by §5(a) of the SFA and 25 Pa. Code §71.11 which makes a municipality primarily responsible for providing sewage services within its jurisdiction. It is required to ensure adequate service in response to present demand and to adequately plan for future growth and development. Lake Adventure Community

Association v. DER, 1990 EHB 895. In contrast, DER's role is much broader; its primary role is to protect the environment. In this capacity, and pursuant to §10 of the SFA and 25 Pa. Code §71.13, DER will oversee the municipality's planning process to ensure compliance with the SFA. DER refrains from taking a direct role in the planning process, but it will order a municipality to revise its official plan if DER determines that the official plan is inadequate to meet the needs of the municipality. Lynch v. DER, 90 EHB 388; Lathrop Township Board of Supervisors v. DER, 1979 EHB 259. Because the interests of the Township and DER are separate and distinct under the SFA, DER is unable to adequately represent the interests of the Township in the underlying appeal.

It is also apparent from the Township's petition that the nature of the evidence which it has offered to present at trial will assist the Board in resolving the underlying appeal without broadening the scope of the appeal or clouding the issues. The Township is able to produce evidence relating specifically to its reasons for choosing to develop sewage services in the municipality in the manner set forth in the official plan and its subsequent reasons for denying the Appellants' planning module.

Focusing next upon the petition filed by the Commission, it is evident that it has failed to articulate any direct, immediate, or substantial interest in the present appeal that would give it grounds to intervene. The Commission is a "planning agency" formed by the six municipalities (the governing body) of the region pursuant to the Municipalities Planning Code, the Act of July 31, 1968, P.L. 805, as reenacted and amended, December 21, 1988, P.L. 1329, 53 P.S. §10101 *et seq.* (MPC)

The scope of authority and the range of duties of a planning agency are set forth in the MPC and generally involve preparing recommendations for

the governing body on subjects it designates for study. The Commission, as a subordinate, advisory agency of the municipalities which created it, has no independent authority or responsibilities. Eldred Township Planning Commission v. DER and Eastern Industries, Inc., 1986 EHB 626. Therefore, in the underlying appeal, the Commission's general assertions, regarding the importance of the official plan and the consequences to the entire region if DER's decision is reversed, are not sufficient to demonstrate a relevant interest separate and distinct from the interests of the Township. Since the interests of the Commission and the Township are identical, the Commission has no grounds upon which to base intervention. As a result, its petition must be denied.

ORDER

AND NOW this 1st day of August, 1991, it is ordered that the petition to intervene filed by Harris Township is granted; it is further ordered that the petition to intervene filed by the Centre Regional Planning Commission is denied. The caption henceforth shall read as follows:

WESLEY H. YOUNG, CAROLE O. YOUNG AND JAMES AU	:	
v.	:	**EHB Docket No. 91-120-B**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and HARRIS TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD

THOMAS M. BALLARON
Hearing Examiner

DATED: August 1, 1991

cc: **Bureau of Litigation**
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Scott Thistle, Esq.
Central Region
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For Intervenor:
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M. DIANE SMITH
SECRETARY TO THE BO

N & L COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 88-353-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 2, 1991**

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

By Terrance J. Fitzpatrick, Member

Synopsis

The Department of Environmental Resources' (DER) calculation of a civil penalty of $750 per day for failure to abate a violation is affirmed. DER was not required to consider that the operator was constrained from complying by "circumstances beyond its control" because the Surface Mining Act requires the assessment of a penalty of at least $750 per day when the violation involves the failure to correct a violation for which an abatement or cessation order has already been issued, regardless of wilfulness of the violation. Oral assurances on the part of a DER official that the fine would be "abated" do not constitute grounds for estoppel where DER imposed the minimum penalty allowed by statute.

INTRODUCTION

This adjudication involves an appeal by N & L Coal Company (N & L) from a civil penalty assessed by DER on August 11, 1988. The $23,550 penalty was assessed for N & L's alleged failure to prevent accumulation of water in its Centralia Strip Mine, Columbia County, failure to install water treatment

facilities at the mine site, and failure to comply with a DER order. In its appeal, N & L argues that its independent contractor, Cracker Coal Company (Cracker), prevented N & L from complying with the DER order by blocking access to the mining property, and that the landowner, Girard Estate (Girard), had withdrawn its permission for N & L to be on the site. Therefore, N & L argues that the portion of the civil penalty assessed for failure to comply with the compliance order - $22,500 - is unreasonable.

A hearing on the merits was held on July 2, 1990. DER presented testimony by mine conservation inspector George Lokitis and compliance specialist Earl Fraley. N & L presented testimony by John Briel, a partner in N & L Coal Company, and by Joseph Kleeman. After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The Appellant in this proceeding is N & L Coal Company, a partnership consisting of Harold Travis and John Briel with a business address of 724 Center Street, Ashland, Pennsylvania.

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the agency authorized to administer and enforce the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987 as amended, 35 P.S. §§691.1 *et seq*; the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198 as amended, 52 P.S. §§1396.1 *et seq*; 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.

3. N & L is the owner, operator and permittee of the Centralia Strip Mine (mine), an anthracite strip mine, in Conyngham Township, Columbia County, Pennsylvania. (Stipulation - "Stip." - pg. 2 para. 3.)

4. N & L is authorized by Surface Mining Operator's License No.

2-01303 to conduct surface coal mining in Pennsylvania (Stip. pg. 2, para. 5).

5. All surface coal mining activities at the mine are conducted pursuant to permit No. SMP19753004, issued to N & L on August 25, 1986 (Stip. pg. 2 para. 6).

6. In its approved mining plan, N & L stated it would construct and maintain water treatment ponds (Stip. pg. 2, para. 7).

7. The surface mining permit requires N & L to design, construct and maintain water treatment facilities to treat any water which may accumulate in the mine (Stip pg. 2, para. 8).

8. N & L had authorized Cracker Coal Company to conduct mining activity as an independent contractor at the mine under the surface mining permit (Transcript - "T" - 49-50).

9. Cracker discontinued its mining operations as of 1985 or 1986. From that time through the summer of 1987, no mining work was done at the site (T. 25, 51).

10. In 1985, N & L ordered Cracker off the site because Cracker was not paying royalties, but Cracker refused to leave (T. 51).

11. As of or before May 27, 1987, N & L and/or Cracker caused or allowed a safety hazard at the mine site by causing or allowing water to accumulate in the pit area (Stip. p. 3, para. 11; T. 26).

12. Before N & L could pump the impounded water from the mine, water treatment ponds would have to be constructed to ensure that the mine discharge would meet applicable water quality standards (T. 13).

13. Neither Cracker nor N & L had constructed treatment ponds as of May 27, 1987 (Stip. pg. 3, para. 12).

14. N & L was first aware that it was receiving Notices of Violation regarding the impoundment in the latter part of 1986 (T. 68).

15. Approximately 30 or 35 days before May 27, 1987, DER sent a Notice of Violation to N & L regarding the impoundment (T. 12).

16. On May 27, 1987, DER sent to N & L by certified mail compliance order 87-P-091-S, which addressed the allowance of the accumulation and the failure to construct treatment facilities. The order directed N & L to submit a surface mining permit module and to correct the condition by June 2, 1987 (Stip. pg. 3, para. 13, 14; Commonwealth Exhibit - "Commw. Ex." D).

17. N & L and Cracker failed to comply with compliance order 87-P-091-S by June 2, 1987 (Stip. pg. 3, para. 15).

18. On June 8, 1987, DER sent to N & L by certified mail compliance order 87-P-097-S, which directed N & L to immediately cease all mining activities and to immediately comply with compliance order 87-P-091-S (Stip. pg. 3, para. 16, 17; Commw. Ex. E).

19. By letter dated June 24, 1987, DER notified N & L of a proposed civil penalty assessment in the amount of $1,050 for the violations described in compliance order 87-P-091-S (T. 3S; Commw. Ex. F).

20. Access to the mine via the main gate was blocked during the summer of 1987 because Cracker had, early in 1987, locked and blocked the gate with large boulders (T. 20, 21, 52 and 53).

21. During the summer of 1987, mine inspector George Lokitis (Lokitis) gained access to the mine property by traversing an old mountain road through other property to an abandoned railroad bed, because the main entrance to the mine was blocked (T. 20, 22).

22. Since September 5, 1985, N & L has had from the landowner of the mine site, Girard, an irrevocable right to enter the mine for purposes of, inter alia, conducting reclamation or abatement activities (T. 31, Commw. Ex. C).

23. Because royalties were not being paid on the mine site, Girard cancelled its September 10, 1985 lease agreement with N & L in April, 1987 (Appellant's Exhibit - "App. Ex." - 1). As a result, N & L believed it could not access the mine site without Girard's consent (T. 50, 55-57, App. Ex. 4).

24. When N & L explained to a DER official at the Pottsville Office that N & L's lease with Girard was cancelled, N & L was told that its fines would be abated until the access problem was resolved (T. 68-69).

25. In August, 1987, N & L received written notice from Girard that N & L could access the property for purposes of complying with DER's order (T. 56, App. Ex. 2). Girard gave oral permission to enter the site before N & L's receipt of the written consent (T. 58).

26. Upon receiving oral consent by Girard for access to the mine property, N & L hired Joseph Kleeman to clear the gate and build the treatment ponds (T. 58).

27. Sometime between Lokitis' August and September 1987 inspections, N & L complied with the DER compliance orders (T. 18, 40).

28. DER determined the amount of the civil penalty as follows:

> a. Eight hundred and forty dollars ($840) for allowing water to accumulate in the pit;
>
> b. Two hundred and ten dollars ($210) for failing to construct treatment ponds;
>
> c. Twenty-two thousand and five hundred dollars ($22,500) for failing to comply with the compliance orders from June 8, 1987 to August 11, 1987.

(Stip. p.3, para. 18.)

29. In calculating the civil penalty for N & L's non-compliance with 87-P-091-S, DER capped the period of non-compliance at 30 days and assessed the statutory minimum of seven hundred and fifty dollars ($750) per day of

non-compliance (T. 36).

DISCUSSION

The issue in this case is whether DER acted reasonably in assessing a $22,500 civil penalty for N & L's delay in complying with a compliance order requiring N & L to construct water treatment ponds to abate accumulated water in its mine pit. The disputed portion of the penalty was assessed pursuant to Section 18.4 of the Surface Mining, Conservation and Reclamation Act (SMCRA), the Act of May 31, 1965, P.L. 1198, as amended, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law (CSL), the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b). DER bears the burden of proof in this appeal. 25 Pa.Code §21.101(b)(1).

DER initially issued a compliance order on May 27, 1987, requiring N & L to submit a surface mining permit module and begin constructing the ponds immediately, with completion due June 2, 1987 (FOF 16). When, upon inspection, the work was not completed by June 8, 1987, DER issued a second compliance order, requiring cessation of all mining activities and immediate compliance with the first order, and listing the abatement date as overdue (FOF 18; Commw. Ex. e). Sometime between DER's August, 1987 and September, 1987 inspections, N & L complied with the May 27, 1987 order (FOF 26). On August 11, 1988, DER issued a civil penalty based on the violation of the May 27, 1987 and June 8, 1987 compliance orders. That civil penalty is the basis of this appeal.

The dispute in this case centers on the $22,500 DER assessed for N & L's delay in complying with the May 27, 1987 and June 8, 1987 compliance

orders.[1] N & L contends that this part of the penalty is unreasonable and an abuse of DER's discretion because N & L's failure to comply with the abatement orders was not a wilful violation, but was due to circumstances beyond its control. Cracker had locked and blocked the main entrance to the mine property (FOF 20). To access the property for inspection, DER inspector Lokitis hiked in via an old mountain road and an abandoned railroad bed (FOF 21). N & L added that it understood, as of April, 1987, that it no longer had the legal right to enter the property because the lease agreement between Girard and N & L had been cancelled (FOF 23). Finally, N & L argued that, in the context of some of its meetings with DER officials, N & L had been told that any fine would be abated because of Cracker's actions (FOF 24).

We find that DER has shown that it properly assessed the civil penalty. Section 1396.22 of SMCRA states, in relevant part:

> "... In determining the amount of the civil penalty the department shall consider the wilfulness of the violation, damage or injury to the lands or to the waters of the Commonwealth or their uses, cost of restoration and other relevant factors. If the violation leads to the issuance of a cessation order, a civil penalty shall be assessed. If the violation involves the failure to correct, within the period prescribed for its correction, a violation for which a cessation order, other abatement order or notice of violation has been issued, a civil penalty of not less than seven hundred fifty dollars ($750) shall be assessed for each day the violation continues beyond the period prescribed for its protection."

52 P.S. §1396.22 (emphasis added). This language, and the similar provisions of CSL §605(b)(3) and 25 Pa.Code §86.194(c), make clear that DER is bound to impose a minimum penalty of $750 per day for failure to comply with an

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[1] N & L does not dispute DER's assessment of $1,050 going to the violations themselves.

abatement or cessation order, regardless of whether wilfulness, environmental harm, etc. are present. Thus, N & L's claim that the $750 per day penalty was unreasonable because N & L's non-compliance was not wilful is not persuasive.[2]

Finally, N & L's argument that the fine is unreasonable because Mr. Dieterle told Mr. Briel that the fine would be "abated" is unpersuasive. Although N & L neglected to elaborate on this argument, it appears to be based on an estoppel theory. The defense of estoppel may be asserted against the Commonwealth in appropriate cases. See e.g. Chrin Brothers v. DER, 1989 EHB 875, 887. The defense fails here, however, because Mr. Briel did not explain whether DER's promise to "abate" the civil penalty, within the context of the conversation, meant that DER would not impose any civil penalty, or only that DER would consider N & L's difficulties as a mitigating circumstance in calculating the amount of the civil penalty. "Abate" can mean either "to put an end to" or "to reduce in degree or intensity: make less esp. by way of relief." Webster's Ninth New Collegiate Dictionary, p. 43. To the extent "abate" might have meant "reduce," we note again that DER imposed the minimum daily penalty, and also that DER capped the period of non-compliance at 30 days. Thus, we find that N & L did not meet its burden of establishing the affirmative defense of estoppel. See, Aloe Coal Co. v. DER, 1990 EHB 737, 750-751.

We find that DER has shown that the above cited law establishes that the $750 per day civil penalty assessed on N & L was reasonable. Therefore,

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[2] We note that this does not leave N & L without a remedy. As DER alluded to in its brief, its contractor is jointly and severally liable for violations due to the actions of the contractor. 25 Pa.Code §86.1 (defining "operator"). N & L cannot avoid the civil penalty, but may have a remedy in a court of equity. See, Kaites v. DER, 1985 EHB 625, 637 [reversed on other grounds, Kaites v. DER, 108 Pa. Commw. 269, 529 A.2d 1148 (1987)].

we will not address the other arguments proffered in DER's brief.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding.

2. DER bears the burden of proving that it was justified in assessing N & L a penalty of $750 per day for 30 days while N & L was out of compliance with two DER orders. 25 Pa.Code §21.101(b)(1).

3. Regardless of the wilfulness of the violation, DER must assess a minimum civil penalty of $750 per day if the violation involves the failure to correct, within the period prescribed for its correction, a violation for which a cessation or other abatement order has been issued. 52 P.S. 1396.22.

4. DER met its burden of proving that the $22,500 which it assessed for N & L's failure to comply with DER's orders was reasonable.

5. N & L failed to prove that DER should be estopped from assessing a civil penalty.

ORDER

AND NOW, this 2nd day of August, 1991, it is ordered that the appeal filed by N & L Coal Company is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 2, 1991

cc: Bureau of Litigation
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M. DIANE SMITH
SECRETARY TO THE BOA

MONTGOMERY COUNTY	:	
	:	
v.	:	EHB Docket No. 91-053-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
WHEELABRATOR POTTSTOWN, INC., Intervenor	:	
and BERKS COUNTY, Permittee	:	Issued: August 2, 1991

OPINION AND ORDER
SUR MOTION FOR STAY OF PROCEEDINGS
FILED ON BEHALF OF WHEELABRATOR POTTSTOWN, INC.

By Richard S. Ehmann, Member

Synopsis

Where the Commonwealth Court has issued an order staying one of two consolidated appeals at the request of a person denied intervention, the Board is without authority to act on a second Motion for Stay filed with the Board by a party in the consolidated proceedings, but upon unconsolidating the two appeals, the Board may address the merits of the motion as it pertains to the second as yet unstayed appeal.

A Motion for Stay of Proceedings must be denied, even where consented to in part by the other parties to the proceeding, where the movant fails to show he is entitled to a stay under the four-pronged test set forth in Pennsylvania Public Utility Commission v. Process Gas Users Group, 502 Pa. 545, 467 A.2d 805 (1983).

OPINION

The numbers of opinions written in this appeal and that of Clements Waste Service, Inc., et al. v. DER, et al., EHB Docket No. 91-075-E (hereinafter "the Clements appeal"), with which it was consolidated until recently, are such that a recitation of a procedural history of these matters could begin to swell to approach a novella in length. This history will not be reported here except as needed to make this opinion coherent.

At issue in this appeal is DER's conditional approval of Berks County's Municipal Waste Management Plan ("the Plan"). Montgomery County ("Montgomery") challenged that approval by appeal to this Board. Montgomery's appeal was focused on the portion of the Plan calling for Berks County's use of a facility for a resource recovery operation which Wheelabrator Pottstown, Inc. proposed to build in Montgomery County. Thereafter, we consolidated the instant appeal with the Clements appeal, which also challenged the Plan. While we denied requests to intervene by three different parties in the Clements appeal and denied intervention by two of these same parties in the instant appeal, we did allow Wheelabrator Pottstown, Inc. (the third of these same three parties) to intervene in the instant proceeding.

Before us now is Wheelabrator Pottstown, Inc.'s ("WPI") Motion for Stay of Proceedings. We received it on July 15, 1991. It recites that on July 5, 1991, WPI sought a review by Commonwealth Court of our opinion denying WPI intervenor status in the Clements appeal. It does not recite, but we learned approximately simultaneously with our receipt of WPI's Motion, that on July 8, 1991, the Commonwealth Court had issued an order at No. 1086 C.D. 1991 of its docket staying the Clements appeal, but, at No. 1087 C.D. 1991, had refused a stay of the instant proceeding sought by Browning-Ferris, Inc.

(which was seeking judicial review of our denial of its requests to intervene in each of these two appeals).

WPI's motion recites that it seeks a stay from us because it is seeking judicial review of our denial of its petition to intervene in the Clements appeal. It also asserts that the Commonwealth Court decided Stapleton v. Berks County, et al., No. 2218 C.D. 1990 on June 24, 1990 and, in so doing, issued an order enjoining Berks County from executing or performing its contract with WPI. The motion next recites that WPI, which is a party in Stapleton, and Berks County have both petitioned Commonwealth Court for reargument in Stapleton. The motion then asks for a stay of this proceeding pending the Commonwealth Court's decision on these two reargument requests.

After receipt of WPI's Motion and the Commonwealth Court's Order, and on July 16, 1991, we issued an Order unconsolidating the Clements appeal and the instant appeal.

Thereafter, we received the responses of the parties to WPI's Motion.[1] DER opposes the Board's granting a stay of the Clements appeal because Commonwealth Court has already stayed that proceeding, but, because of Stapleton, supports a stay of the instant matter. Clements, not being a party in the instant proceeding because of the unconsolidation, takes no position on it. As to its stayed proceeding, Clements argues that we lack authority to stay it because of the Commonwealth Court's Order and thus we must deny WPI's Motion or, alternatively, WPI's Motion should be denied as moot based on the

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[1]Since the Board's letter requesting responses was sent out while these two matters were still consolidated, we will set forth the responses of each party in both appeals.

Commonwealth Court's Order.[2] By letter dated July 17, 1991, Berks has advised us that it does not oppose a stay based on Stapleton. On July 17, 1991, we also received a response from Montgomery County. It, too, does not oppose a stay based on Stapleton.

As noted above, we lack authority to stay the Clements appeal. If the matters had remained consolidated, we also could not have granted a stay of the consolidated appeals because Commonwealth Court's Order had already stayed the Clements appeal and thus stripped us of authority to act in regard thereto except as authorized under Pa. R.A.P. 1701. Moreover, leaving the two appeals consolidated would leave a cloud over all Board actions taken in the instant appeal.

Because the appeals are unconsolidated, The Board is free to rule on WPI's Motion as it pertains to this appeal. We deny the motion insofar as it seeks a stay of the instant appeal by Montgomery because of WPI's decision to challenge before Commonwealth Court our decision denying its intervention in the Clements appeal. While the two matters were consolidated, such a stay request may have held merit because of the consolidation, but we need not decide that issue now since it is rendered moot by the unconsolidation of the appeal.

Nothing in WPI's Motion addresses a stay of the instant Montgomery appeal after unconsolidation based on WPI's request for appellate review of this Board's denial of WPI's petition for intervention in the Clements appeal. Everything in WPI's Motion, other than WPI's Stapleton arguments, is directed

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[2]By letter dated July 31, 1991, we advised counsel for parties in the Clements appeal that in light of the Commonwealth Court's Order of July 8, 1991 staying the Clements appeal, at this time we lacked any authority to act on WPI's request to stay that proceeding.

to injury to WPI if the Clements appeal moves forward without WPI as an intervenor. Accordingly, under the standards in Pennsylvania. Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983), WPI's Motion fails to show cause to stay the Montgomery appeal based on that Petition for Review.

The last issue before us is whether, under the Process Gas factors, WPI has made an adequate showing for a stay of this appeal based on the Commonwealth Court's decision in Stapleton. In its Motion, WPI asserts that if the ruling contained in the Commonwealth Court's opinion stands after reargument, it may moot this appeal, that a stay pending reargument prevents the unnecessary expenditure of resources, and a stay continues the status quo without harm to the parties.

Under Process Gas, to show grounds for a stay, the movant must: 1) make a strong showing that he is likely to prevail on the merits; 2) show that without the requested relief, he will suffer irreparable harm; 3) show that issuance of a stay will not substantially harm other interested parties in the proceedings; and 4) show issuance of a stay will not adversely affect the public interest. Process Gas at ___, 469 A.2d 808, 809.

The consent of the parties to stay based on Stapleton we will treat as satisfying the third factor. The Motion avers that the Plan is not implemented and that municipal waste from Berks County is currently being disposed of as if the Plan were not adopted. This averment is not contested by the other parties. We will couple this uncontested averment with the consents to a stay to assume the public interest will not be adversely affected by a stay. Certainly, we have no information to the contrary.

Unfortunately, in this post-"unconsolidation" situation, we have no showing of irreparable harm to WPI if the Montgomery appeal goes forward. Further, WPI has not even attempted to show it is likely to prevail in its application to Commonwealth Court for reargument en banc, let alone that it will prevail if reargument is granted. A request to grant a stay because to do so is a judicious use of the Board's resources and those of the parties does not rise to such a Process Gas showing. Thus, we must deny the Motion.

Nevertheless, while we deny this motion for a stay, we recognize the merit of certain of the contentions raised by WPI as to Stapleton and reargument in terms of a continuance of the proceeding without a stay. Accordingly, we enter the following Order.

O R D E R

AND NOW, this 2nd day of August, 1991, it is ordered that WPI's Motion for Stay of Proceedings pending a decision on its application to the Commonwealth court for reargument en banc is denied. It is further ordered that as to a stay of this appeal because of WPI's Petition for Review filed in Commonwealth Court as to denial of intervention in the Clements appeal, WPI's Motion is denied. Finally, however, it is ordered that all deadlines for completion of activities by the parties in the instant proceeding relating to discovery and the filing of Pre-Hearing Memorandum are postponed forty-five (45) days and WPI is directed to file a written status report with this Board by September 2, 1991 as to the status of WPI's request for reargument en banc, now pending before the Commonwealth Court.

EHB Docket No. 91-053-E

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 2, 1991

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SECRETARY TO THE BOARD

PENNSYLVANIA MINES CORPORATION	:	
	:	
v.	:	EHB Docket No. 91-247-E
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 2, 1991

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

By: Richard S. Ehmann, Member

Synopsis

After a hearing on a Petition For Supersedeas, there appears to be sufficient legal authority for DER, under the BCMA and in light of DER's adjudicatory authority, to issue an order setting a guideline for the new technology's operation and a second order suspending the technology's use when the guideline is not followed.

While Petitioner has shown it is irreparably harmed by compliance with DER's Order because it was forced to idle a section of its mine, it has failed to show either a likelihood of success on the merits or a lack of injury to the public or a party if supersedeas is granted. Mine personnel are the public for purposes of this text in the circumstance where DER's orders relate to new technology and mining methodologies in underground coal mining at this preliminary stage of this proceeding. DER's responsibility to review technology and methodology appear to include the authority to condition this

approval through guidelines for the equipment's operation. Accordingly, pursuant to Petitioner's failure to meet the tests for supersedeas set forth in 25 Pa. Code §21.78, the Petition must be denied.

Background

On June 17, 1991, acting under instructions from his supervisor, Joseph Ardini ("Ardini") issued a Compliance Order ("CO-1") to Greenwich Collieries, a "subsidiary" of Pennsylvania Mines Corporation, hereinafter jointly ("PMC"). The order directs PMC to include in PMC's guidelines for proper operation of scrubber-equipped continuous mining equipment at its Greenwich Collieries No. 2 Mine (located in Greene Township, Indiana County) a sentence providing: "The minimum amount of air before start-up and the amount during scrubber operations must be verified by a certified mine official." Ardini, who is a Mine Inspector in the Bureau of Deep Mine Safety of the Department of Environmental Resources ("DER"), issued this order for DER pursuant to sections 118, 121 and 123 of the Bituminous Coal Mine Act of 1961, the Act of July 17, 1961, P.L. 659, No. 339, as amended, 52 P.S. 701-101 *et seq.* ("BCMA") and Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17.

On June 18, 1991, Ardini returned to the Greenwich Collieries No. 2 Mine and, after learning that PMC would not amend its guidelines as ordered in CO-1, issued a second Compliance Order (CO-2) to PMC on DER's behalf and pursuant to the same statutory authority. CO-2 revokes DER's tentative approval of use of these scrubber miners at the No. 2 mine. This order also recites that PMC has violated Section 702 of the Bituminous Coal Mine Act *supra*, 52 P.S. §701-702.

As is obvious from the fact of this opinion's preparation, PMC appealed to this Board on June 21, 1991 from issuance of both CO-1 and CO-2.

The appeals were accompanied by PMC's Petition for Supersedeas and Motion to Consolidate. The two appeals were assigned Docket Nos. 91-247-E and 91-248-E respectively and were consolidated by our Order dated June 28, 1991 at the instant docket number.

That order also directed DER to file its response to PMC's Petition by July 5, 1991 and scheduled a hearing on that Petition for July 8, 1991. After the filing of DER's response and the holding of this hearing, both parties filed their Post-Hearing briefs with us by July 23, 1991 as directed.

In its Petition For Supersedeas, PMC asserts that DER is without legal authority to require the provision for air monitoring in PMC's guidelines for scrubber miner use because DER is without authority to require these guidelines. PMC also asserts that DER has approved scrubber miner use and that DER cannot rely on Section 702 for authority to act because it does not mandate submittal of plans or guidelines to DER but merely encourages new technology's use so long as it provides protection of persons equal to or better than that mandated elsewhere in the BCMA and there is no allegation or foundation for an allegation that this new technology does not provide at least equal protection. The Petition then asserts PMC is likely to prevail on the merits, and PMC is irreparably harmed because it is not operating the scrubber portion of its mining machines and has had to cease production in one section of its mine. PMC then alleges no harm to the public but says it need not get into this issue in any case because DER lacked threshold authority on which to act. PMC concludes no injury to the public or the miners will occur and that it has operated scrubber miners ("SMs") for three years at this mine under tentative approvals by DER, which approvals did not require this air monitoring, and under Federal Mine Safety and Health Administrative ("MSHA") approvals which do not contain the disputed provision.

In response, DER argues that we cannot grant supersedeas under 25 Pa. Code §21.78 where injury to public health, safety or welfare exists and that such injury is threatened here if PMC uses an SM but does not comply with CO-1 while using it. DER asserts PMC cannot show irreparable harm because it need only do the air monitoring using the certified personnel already in its employ to be authorized to use the SM. Next, DER argues PMC is unlikely to prevail on the merits because DER has clear statutory authority to require equipment be used in a way to protect health and safety and to require plans to show any new ventilation concepts protect persons and property in a fashion at least equal to the requirements of the BCMA. Finally, DER asserts if SM equipment is used without the air monitoring being done, there is a likelihood of public injury. DER concludes that the Petition must be denied because PMC cannot meet any of the prongs of the three-pronged test for whether supersedeas can be granted.

The Evidence

Factually, the evidence offered us shows that in 1987, PMC, through Greenwich Collieries, began exploring the use of scrubber miner technology in the deep mining of coal in Pennsylvania.[1] While such technology was in use elsewhere in the coal industry, this was the first attempt to use it in this state.

According to the evidence, in the deep or underground mining of coal, as opposed to the surface mining of coal, ventilation of the face of the coal seam is critical for several reasons. In the mining of bituminous coal and particularly the mining of coal at the No. 2 mine, sufficient fresh air must

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[1]Counsel for both parties and their witnesses deserve the acknowledgment of the well above average jobs they did in presenting their evidence in brief but very lucid fashion.

continuously circulate across the face of the coal seam to dilute the methane gas released during the mining of this seam.[2] Methane is explosive when the air in the mine contains from five to fifteen percent methane. Ventilation is also critical for the control of coal dust generated by mining the coal. Not only is this dust the cause of pneumoconiosis or "black lung" in the people who work in these mines, but sufficient quantities of airborne dust will also propagate explosions and fires. Further, the mixture of dust and methane may reduce the percentage of methane necessary for a fire to as little as 1% methane in the mine's air.

The type of ventilation used in coal mines until the advent of SM equipment is known as exhaust ventilation. The type of ventilation which is used with an SM is known as blowing ventilation.

Exhaust ventilation works on a premise similar to that of a vacuum cleaner or the common exhaust fan found in many homes. Air is pulled into the mine through an intake entry, across the coal face, through the air return entry and exhausted out of the mine. Direction of air is controlled through solid stoppings placed in the cross cuts, less permanent canvas checks, more permeable run through checks (both placed in cross cuts) and brattice cloths or line canvas which channel this air at the coal face.[3]

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[2]The No. 2 Mine mines a portion of a seam of coal which contains above average quantities of methane, some of which will occasionally "jet" from the face of the coal. As a result, the No. 2 mine is known as gassy mine.

[3]To facilitate an understanding of the two different types of ventilations involved here, we have prepared a diagram similar to that which is Joint Exhibit 1. It is not to scale but is attached as a part of this footnote. The reader should understand in this diagram that in a blowing ventilation situation the line canvas (identified as #2) at the right of the diagram is removed and moved to the next succeeding cut's location (identified as the first #3) after completion of the first cut in the coal face and cuts are (footnote continued)

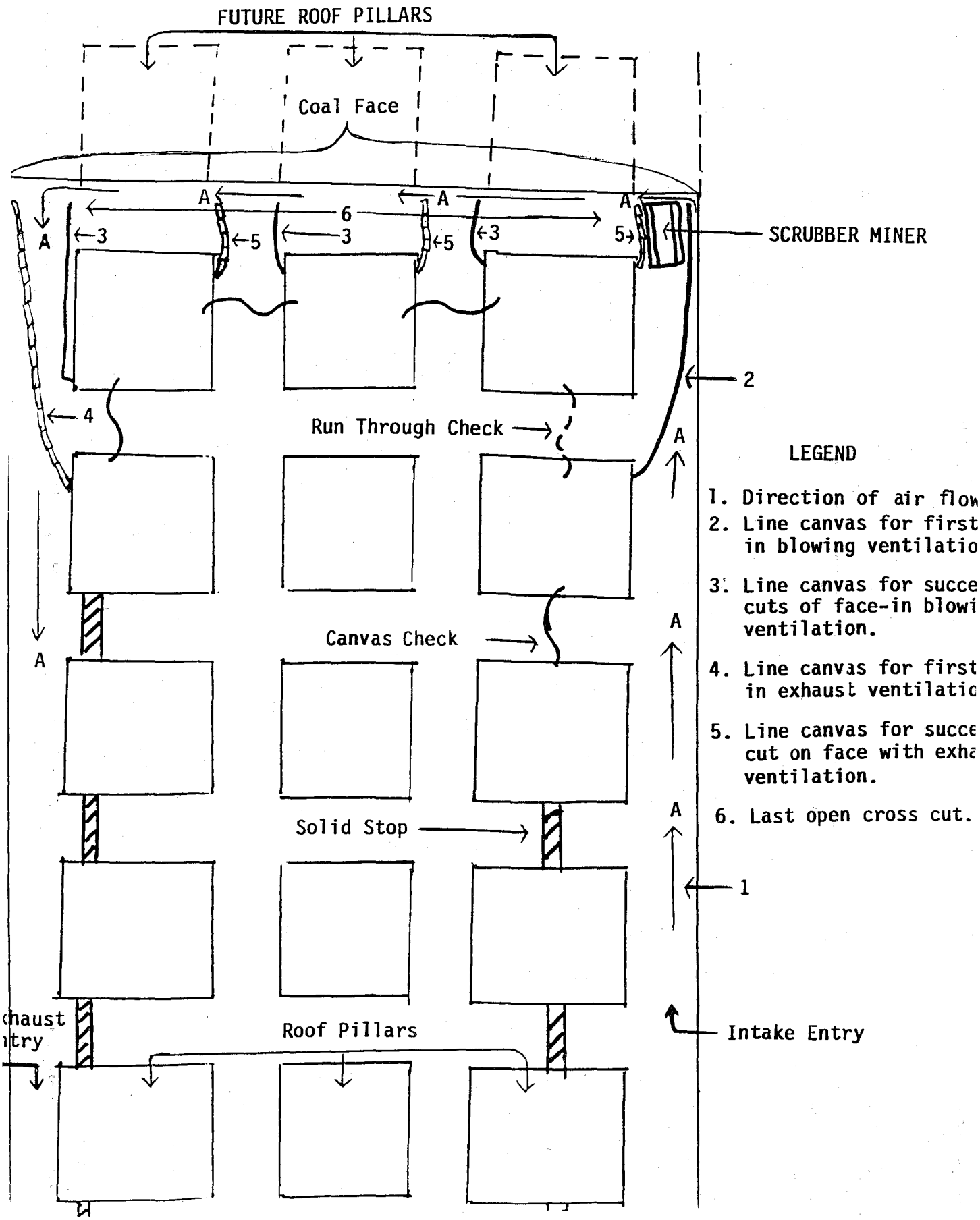
Blowing ventilation is the opposite of exhaust ventilation and works on a principle like a garden hose with the line canvas set up to effectively spray the air pushed into the mine across the face at the location where the continuous mining machine is currently making a cut. Air movement is channeled using the same types of channeling devices.

Blowing ventilation more effectively dilutes methane but it generates more airborne dust; thus, until the advent of scrubber technology, it was unused. Scrubber technology is, in effect, an add-on to the same type of the continuous mining machine used with exhaust ventilation. In essence, with this technology and blowing ventilation, the continuous miner operates with vacuum cleaners attached to it to suck in the dust created by the machine's operation in a blowing ventilation environment, and the dust taken into the machine is conveyed in duct work to water sprays which wash or scrub significant volumes of the dust from the air before returning the air to the mine.

The testimony at the hearing left it undisputed that properly operated SM equipment in a blowing ventilation environment control methane and dust better than operation of a mine on exhaust ventilation. Moreover, it is clear this SM equipment is also more productive. In exhaust ventilation, the depth of the allowable cut into the coal face before the canvas must be adjusted and the machine must be moved is significantly less than the allowable depth of cut with SM equipment in a blowing ventilation situation.

(continued footnote)
taken moving from right to left. In exhaust ventilation, the cuts are taken from left to right, with the line canvas being moved from cut to succeeding cut. In this diagram, mining is proceeding toward the top of the page. Cuts are being taken in a way to create the next series of pillars. After the cuts are taken which create the sides of the pillar, the continuous miner makes the cuts which create the pillar's fourth side and thus a portion of the next open cross cut. Upon completion of that cross cut, the process repeats itself.

(Continued footnote #3)



Since no coal is produced in the time a continuous mining machine is moved and the line canvas is reset, and it must be moved more often in an exhaust ventilation operation because of the short cuts, it is obvious from a production standpoint that SM technology is much preferable by mining companies.

The limitation on an SM's use in a mine arises from the operational efficiency limits of the scrubber technology. When too little air is blown across the coal face there is inadequate methane dilution. When there is too much air blown across the face the scrubbers cannot suck it all in and the dust created by equipment operation and made airborne by the blowing ventilation reaches the mine personnel operating the equipment. Thus, it is necessary to regulate the volume of air at the face to within a range above and below the manufacturer's rated capacity of the scrubbing equipment.[4]

PMC contends that through its current air volume measuring program, scrubber maintenance, and visual observation by the equipment operators, it can ensure the proper operation of the SM at this mine. DER has disagreed. This disagreement surfaced when PMC submitted its request to DER for permanent approval of use of SMs at the No. 2 mine (DER's prior approval of SMs at this mine in 1988 was a tentative approval only). Despite several meetings between representatives of DER and PMC, at least in part over air monitoring at the face, the parties could not resolve their differences on this issue. PMC's request for permanent approval of SMs at the No. 2 mine took the form of a set

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[4]Much of the coal dust adversely affecting the health of coal miners is invisible to the naked eye.

of proposed guidelines for operation of the SM equipment but they did not include the air monitoring sought by DER.[5] As a result, DER issued CO-1 to PMC which provided:

> Your permanent approval-scrubber miners proposal dated 4-18-91, is satisfactory, except for paragraph B. You are hereby ordered to include the following statement to be placed after the sentence "...utilizing a single canvas." "The minimum amount of air before start up and amount during scrubber operations must be verified by a certified official."[6]

DER says this means that two measurements of air volume at the end of the line canvas are taken on each cut. One is taken prior to commencing operation of the SM and one during the SM's operation.

Such a measurement takes about two minutes and consists of reading a vaned anemometer for air velocity and then, knowing the size of the opening between the canvas and the wall of the mine, making the simple calculation of the air volume.

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[5]According to the testimony, DER had previously appointed a Commission under the BCMA which had proposed a set of guidelines for use of SMs in Pennsylvania. The Commission consisted of coal company representatives, union representatives and DER staff. It recommended guidelines which called for air volume control at the coal face. DER adopted these guidelines in 1989 but they have been revised since then, to clarify points contained therein.

[6]With this sentence inserted into paragraph B it reads:

B. The minimum volume of air maintained at the end of the line brattice before scrubber start up shall be 4,500 cfm for all miners rated at 4,000 cfm capacity and 5,000 cfm for all miners rated at 6,000 cfm capacity or greater. The operating range behind the line canvas for scrubbers rated at 4,000 cfm will be 4,500 cfm to 6,000 cfm and scrubbers rated at 6,000 cfm will be 5,000 cfm to 8,000 cfm when utilizing a single canvas. The minimum amount of air before start up and amount during scrubber operations must be verified by a certified mine official. A plate shall be attached to each miner by the manufacturer stating the rated capacity of each scrubber.

DER's inspector Ardini returned to PMC's No. 2 Mine the day after serving CO-1 on PMC's representatives. Upon learning that PMC would not comply with CO-1 and at the instruction of his superiors within DER's mine safety program, he issued CO-2. CO-2 provides:

> Failure to submit the necessary scrubber miner guidelines as required under Section 702 of the Bituminous Mining Law, your tentative approval to operate scrubber-miners at Greenwich Collierjes [sic] South No. 2 and 580 Portal is revoked.[7]

Discussion

Having laid this framework, we now must turn to the supersedeas issues themselves. Each party is correct as to its pronouncement of the portion of the law governing supersedeas which it announces. Citing The Carbon/Graphite Group, Inc. v. DER, EHB Docket No. 90-524-E (Opinion issued February 19, 1991), F.A.W. Associates v. DER, 1990 EHB 1791, and 25 Pa. Code §21.78(a), DER is correct that a petitioner bears the burden of showing: (a) it is likely to prevail on the merits of its appeal; (b) it is irreparably harmed if supersedeas is not granted; and (c) the public or other parties are not likely to be harmed if supersedeas is granted. This must be done by offering a case showing a reasonable probability of success.

In review of Petitions for Supersedeas, we generally conduct a balancing test amongst these factors. Joseph Kaczor v. DER, EHB Docket No. 91-191-E (Opinion issued May 30, 1991). Where a party fails to show one of these factors however, its petition must be denied. Bethayres Reclamation Corporation v. DER, et al., EHB Docket No. 91-008-W (Opinion issued May 22, 1991).

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[7]The No. 2 mine is large enough that it is operated for PMC as if it were two separate mines known as South No. 2 or South and 580 Portal or 580.

As DER further points out, our rule at 25 Pa. Code §21.78(b) bars our issuance of supersedeas in cases where pollution or injury to public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.[8] See Chambers Development Company et al. v. DER et al., 1988 EHB 68, affirmed, 118 Pa. Cmwlth. 97, 545 A.2d 404 (1988). However, as pointed out by PMC, we have also held in Kaczor and elsewhere that we never reach the balancing and review of these factors where DER lacked authority to take the challenged action. Obviously, if DER lacked authority to act, then even if there was harm to the public health, safety and welfare during the supersedeas period, Section 21.78(b) would not bar our entering an order granting supersedeas.

Turning to the factors, Section 21.78(a) first, the testimony showed that there was no irreparable harm to PMC from the issuance of CO-1 because PMC's own witness admitted it knew it had 24 hours after the service of CO-1 in which the *status quo* would not change and in which it could make up its mind as to whether or not to comply with CO-1. When CO-2 was issued, however, the company was faced with two options. One was to switch back to exhaust ventilation (while turning off the scrubber equipment) and the other was to do the air monitoring required in CO-1 while getting DER to rescind CO-2. PMC elected the former option, and, in so doing, was forced to idle one section of its No. 2 mine because it could not maintain an adequate amount of air at the face with PMC's existing air-moving equipment used in an exhaust ventilation mode. Testimony on behalf of PMC was to the effect that the certified

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[8]DER stipulated at the hearing there was no harm to the environment being caused by PMC's non-compliance with these orders, but it contends that there will be injury or potential injury to the public health, safety and welfare if supersedeas is granted.

personnel employed at its mine were too few in number to perform all their required duties (safety inspections of various types mandated by state and federal law and management functions) plus this addition monitoring so PMC would have to hire up to nine new certified persons to conduct this air volume monitoring.

DER did not attempt to rebut this testimony directly, nor did it state in the record that it would rescind CO-2 if PMC agreed to do this monitoring. It offered evidence as to the short duration of the test.[9] It also established that about 50 certified personnel are employed at the No. 2 mine (divided approximately equally amongst three shifts). Further, its evidence showed that the Rochester and Pittsburgh Coal Company ("R&P") which operates the No. 2 mine for PMC, operates its own mines using SM technology and complies with DER's requirements as to air volume monitoring at its own mines without hiring additional certified personnel.[10]

This evidence does weigh against the credibility of PMC's witnesses insofar as they assert PMC's need to hire additional personnel, but it does nothing to destroy PMC's assertion that as to CO-2, it complied therewith and has suffered irreparable harm by being forced to switch back to exhaust ventilation because in so doing it had to idle one section of the No. 2 mine. Such a loss in production of coal has a direct impact on the company's "bottom

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[9]This evidence was countered at least in part by PMC's showing of the number of cuts per machine per shift and the number of these SMs on use in various sections of the No. 2 mine.

[10]According to the testimony, not only at R&P's own mines, but also at the mines of all other companies using SM technology in Pennsylvania (except PMC's operation), the mining companies are complying with these air volume monitoring requirements.

line". Since we have no evidence showing this to be only a minor impact on production, it is enough impact to constitute irreparable harm. Globe Disposal Company et al. v. DER, 1986 EHB 891; McDonald Land and Mining Company, Inc. v. DER, EHB Docket No. 90-464-E (Opinion issued January 31, 1991).

Next, we turn to the question of injury to a party or the public if supersedeas is granted. DER did not contend that DER would be hurt if supersedeas were granted but, both as to 25 Section 21.78(a)(3) and 21.78(b), it contends that the miners may be hurt if we supersede CO-1 and CO-2, thus allowing R&P to operate PMC's mine for PMC in the fashion it has in the past, i.e., without air volume monitoring at the end of the line canvas before and during each cut.

PMC represents that it has used SMs for three years at this mine without this monitoring and that its program of air measurement in the last open cut observation and equipment maintenance is adequate as a safeguard. However, while saying at one point the readings have never been required previously and have not been taken (page 12), PMC's brief also says on page 14 that air volume readings are taken behind the line curtain several times per shift (though not with the frequency DER seeks).

The testimony on this hearing established that as to ventilation, we are concerned with methane dilution and dust control. It established that while measurement of air volume in the last open cut shows the amount of air available, this is not necessarily the amount of air at the face and the only way to measure air volume at the face accurately is by mechanical readings at the end of the line canvas. It appears reasonable to assume that while the air volume in the last open cross cut might be close to equal to the volume of

air at the end of the line canvas when the SM is in the location shown in the footnote three diagram, the further the miner progresses into a cut on the face and away from this open cross cut (for example, when it is cutting through what will become the next open cross cut), the less reliable this measurement will be in a blowing ventilation situation. But this is an assumption, and, when asked, PMC's Paul Enedy said there had never been a study of the correlation between air quantity in the last open cut and air quantity at the face. The testimony from one of PMC's own witness shows, moreover, that with blowing ventilation and using an SM, a cut might be forty feet deep (from the canvas), while without scrubbers[11] and using exhaust ventilation, the cut's depth could not be more than 20 feet long. Thus, this doubling of distance suggests at this preliminary stage that the air monitoring in the last open cross cut could be adequate in exhaust ventilation circumstances but perhaps inadequate in the more dusty blowing ventilation circumstance. When this variation in circumstance is coupled with the testimony about the increased dust in blowing ventilation, that too much air may overpower a scrubber's ability to perform, putting dust back on the mine personnel, that this dust causes health problems and that the type of dust which causes problems is invisible to the naked eye, it appears that injury to the miners by a grant of supersedeas is a real possibility.

Moreover, the argument that there has been no monitoring in the past three years so PMC need not start it now is not convincing. As the testimony came in, it told a story of PMC seeking use of this technology in Pennsylvania and asking DER for an approval thereof. DER gave what was called by all the

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[11]PMC's Paul Enedy testified scrubbers cannot be used with exhaust ventilation.

witnesses testifying on this point a "tentative approval." This tentative approval might more accurately have been called preliminary approval, indeed a preliminary approval which caused the No. 2 Mine to be the laboratory/incubator for this technology's Pennsylvania development and refinement to the point it is going into wide scale use in Pennsylvania. But tentative approval apparently is not and was not considered by the parties to be permanent approval, so, while information was gathered on SM operation which allowed permanent and tentative approvals for its use elsewhere (all with air monitoring), it was not sought for the No. 2 mine until more recently.[12] Obviously during this three year incubation of the technology, knowledge on operation of SMs was developed. There is no testimony showing it was not DER's intent to require air volume monitoring at some time after the incubation period ended; indeed, the opposite inference is reasonable from the evidence in the record. The incubation period appears to have been necessary to produce the guidelines now including the air volume monitoring. Thus, it is reasonable that air volume monitoring was not required back when the first SM unit was initially brought to the coal face, and the fact that air volume monitoring has not been mandated until recently accounts for nothing.

The same lack of merit applies to PMC's contention that there is no DER allegation that this technology and ventilation coupling does not provide at least equal protection to the older mining methodology. The testimony from witnesses both for PMC and DER is that this technology and blowing ventilation are superior, but it appears that the superiority was limited to when the

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[12]According to the testimony, there was one PMC request for tentative approval which DER gave, but submissions and several resubmissions of PMC's one request for permanent approval. That request for permanent approval appears to be approved but only as modified by CO-1.

technology worked properly. There was no testimony that even improperly operated SM technology and blowing ventilation were superior to exhaust ventilation and miners without scrubbers. DER's position throughout the hearing was PMC must comply with CO-1 to ensure at least equal protection of the miners.

Insofar as the public, the average resident of Harrisburg, Erie, Philadelphia, or Pittsburgh sitting in his home or office, it is clear granting supersedeas to PMC will not injure public health, safety or welfare. However, the public here are the members of the Commonwealth's citizenry who are exposed to the condition, i.e., the men and women down in the mine with the continuous mining machinery. Gabriel Elias, et al. v. DER, 1972 EHB 176, affirmed in part and modified in part, 10 Pa. Cmwlth. 489, 312 A.2d 486 (1973). These miners are the public and their health and welfare appear to be more likely to be injured or threatened with injury if air volume monitoring does not occur. Accordingly, under 25 Pa. Code §21.78(a)(3) and (b), we cannot grant supersedeas to PMC as to CO-1.

As to CO-2, however, 25 Pa. Code §21.78(c) authorizes the Board to grant a conditional supersedeas. CO-2 stops the use of SM equipment at the No. 2 Mine but it does so because of PMC's non-compliance with CO-1. Thus, we might still grant supersedeas of CO-2 by conditioning it with compliance by PMC with CO-1.

This being true, we must pass on to the third factor, i.e., PMC's likelihood of prevailing on the merits. On this issue, PMC contends DER lacks authority: (a) to issue these orders, (b) to require submittal of these plans,

(c) to amend that Act through guidelines or enforce guidelines as mandatory requirements, or (d) to issue these orders based on the circumstances as existed on June 17 and 18, 1991.

DER issued its orders "[p]ursuant to Sections 118, 121, 123" of the Bituminous Coal Mine Act and Section 1917-A of the Administrative Code. Section 118 (52 P.S. §701-118) deals with the authority of electrical inspectors to inspect the electrical system in the mine and issue such orders as are necessary to remedy defects therein or prohibit the operation thereof. Section 121 (52 P.S. §701-121) relates to Mine Inspectors and their right to inspect mines, to initiate proceedings against persons violating the act, to have a commission immediately appointed to review any dangerous conditions found by the inspector in mines (with the commission's right to order the condition's termination), and an inspector's right to withdraw workmen from a mine because of dangerous conditions which he finds to exist. The inspections by the mine inspector deal at least in part with the number of cubic feet of air in circulation, 52 P.S. §701-119. Section 123 (52 P.S. §701-123) also vests mine inspectors with discretion in carrying out their duties, so, when an inspector makes a decision in writing, it may be appealed to the Secretary of DER by the mining company. Finally, Section 1917-A of the Administrative Code of 1929 (71 P.S. §510-17) empowers DER to protect the people of the Commonwealth from other nuisances, including any condition which is declared a nuisance by any law administered by DER through the examination of nuisances or questions affecting the security of life or health and the issuance of orders to abate nuisances, including those detrimental to public health.

In review of the BCMA, we start out by observing that in 1987 a member of this Board observed that this act is inartfully drawn and antiquated

in language. BethEnergy Mines, Inc. v. DER, 1987 EHB 567. What was true then is true now. These language problems have produced a series of Board opinions, all of which seem to begin by interpreting what is said by sections of the act. This is where this opinion now turns as well.

The intent of this statute is spelled out in its title and that is the protection of the health and safety of those employed in and around bituminous coal mines. 71 P.S. §701-101. That the statute is meant to deal with ventilation issues, including a air quantity, is evident beginning in the definitions section of that act at the definition of mine to include "the shafts, slopes ... connected with excavations ... which excavations are ventilated by one general air current" .... 71 P.S. §701-103. Thereafter, beginning at Section 221 (71 P.S. §701-221), the act starts to address ventilation concerns and requires that the mine foreman keep watch over "the ventilating apparatus, the ventilation, airways, travelingways and shall see that all stoppings along airways are properly built." The mine foreman must see to proper cut throughs and their closure as "required by the mine inspector, so that the ventilating current can be conducted in sufficient quantity through the last cut-through to the face of each room and entry." The foreman must measure air current at the intake and exhaust entries and in the last open cut and in the entry beyond the last room every twenty-four hours.[13] In addition to many other requirements in section 221, Subsection (f) (§701-221(f)) bars endangering persons by allowing the presence of explosive gas and requires the mine be kept free of standing gas. The foreman

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[13]In "mechanical mines" infers some mines were not even mechanical when this law was written, thus giving further evidence to this statute's antiquity.

is also required to ensure adequate ventilation to present accumulation of gas or coal dust or both in the mine. Thus, this section makes it clear that DER's inspectors may issue directives to the company on ventilation issues.

Subsequently, after various sections outline the duties of the assistant foreman, examiners and superintendent to see the mine is safe, Subchapter G of Article II of this statute turns to ventilation generally and imposes ventilation requirements on the operators of mines, mandating that they furnish a constant and adequate supply of pure air sufficient to dilute flammable gases (52 P.S. §701-242(a)). Sections 243 through 250 (52 P.S. §§701-243 through 701-250) thereafter spell out specific but non-exclusive requirements with regard to ventilation. Gateway Coal Co. v. DER, 4 Pa. Cmwlth. 442, 399 A.2d 802 (1979). Subchapter H of Article II then turns to controlling coal dust by requiring removal of dangerous accumulation of fine dry coal dust or its neutralization, and dry and dusty operating areas are to have their dust kept down either by one of the enumerated methods or by a method okayed by DER (emphasis added). Section 285 (52 P.S. §701-285) then provides:

> Men exposed for short periods to gas, dust, fume, and mist inhalation hazards shall wear approved respiratory equipment. When exposure is for prolonged periods, dust shall be controlled by the use of approved dust collectors, or water or other approved methods. (emphasis added)

Cumulatively, these statute sections point out the intention of the legislature to control the amount of ventilation and to regulate methane and dust so as to adequately protect the health and safety of miners. They also show DER is to approve methods of methane and dust control proposed by the mine operators.

What then of new technology in mines? As to new electric technology, it is dealt with in Section 334 (52 P.S. §701-334). This section is not before the Board here, however, as the issues presented to us here do not deal with this new technology and provisions of this act as they pertain to electricity in bituminous coal mines except in the most general sense, i.e., the SM is run by electricity, as is the ventilation system.

Section 702 (52 P.S. §701-702) is before us, however, and applies:

> Nothing in this act shall be construed to prevent the adoption or use by any operator of new machinery, equipment, tools, supplies, devices, methods and processes, if such new machinery, equipment, tools, supplies, devices, methods and processes accord protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of this act.

Read not in a vacuum but with the other cited sections, it clearly requires DER to allow adoption of new technology, mining methods, and mining processes such as those at issue here, but only as long as the new processes, methods or technology protects the miners from coal dust and methane dangers as well as the methods for protection from these hazards, spelled out in the statute. The testimony here establishes SM technology and ventilation via the blowing methodology protects miners from coal dust and methane as well as or better than continuous mining equipment and exhaust ventilation, provided the SM equipment is properly operated. It appears that DER can make a strong case that proper operation requires the volume of air at the face be controlled to within certain ranges above or below the rated capacity of the SM. To ensure this, DER has required measurement of the air prior to and during operations of the SM at the face (end of the line canvas). The testimony offered so far establishes both that air volume be measured at the face, since this is the

only place it may be measured accurately in regard to this combination of blowing ventilation and SM operation, and that adequate (but not too much) air at the face is of particular importance here. Measurement in the last open cut was not shown to be more reasonable by PMC at the supersedeas hearing in light of this new ventilation method and new technology. The evidence offered so far and this statute thus suggests that DER could require submittal by PMC of a plan showing operation of SM technology with blowing ventilation and that DER's approval thereof might be conditioned through a series of guidelines for equipment operation, just as DER's approval of proposals in other programs is frequently not absolute but is given via conditions imposed in permits. If DER could not condition its approval, the only other options are either absolute approval or rejection, and conditional approval is the far more reasonable approach. DER does not, at this time, appear to be amending the Act through guidelines because the Act gives it the power to approve ventilation and dust control proposal and the power to approve a new technology or mining methodology <u>if</u> it is as good at protecting health and safety. If DER may approve new technology or methodology, there appears to be no good reason it may not do so conditionally.

Likewise, we must reject PMC's suggestion that DER may not enforce guidelines as mandatory. If DER cannot be sure to have its guidelines followed by the mining company, it follows that DER cannot ensure the new technology is not as safe or safer for the employees of the company down in those mines; in turn, it appears that under Section 285 of the BCMA that DER's only option is rejection of the SM technology just as it did through CO-2.

PMC has not shown us that DER lacks the statutory authority to take these actions here. Reading this statute as a whole, Section 1917-A, and

Bethlehem Mines Corporation v. DER, 1983 EHB 296 (citing Commonwealth DER v. Butler County Mushroom Farm, et al., 499 Pa. 509, 454 A.2d 1 (1982)), it appears a strong argument exists that DER has the authority to act as it has in imposing these monitoring requirements. It has acted in an adjudicatory fashion in issuing these orders, and, with miner safety and health in the balance, we refuse to say at this point that DER is not so authorized. Bethlehem Mines, *supra*, at 303.

Because PMC has not shown DER lacks authority and because it appears that a case may be made for conditional approval of new technology (and on the applicant's rejection of the conditions, a rejection of the technology), PMC has failed to demonstrate a likelihood it will prevail on the merits of this appeal.[14] Accordingly, we cannot grant its Petition For Supersedeas, but must enter the following order.

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[14]At the hearing on the Petition, PMC asked that the Board take judicial notice of allegations in an Answer filed on behalf of DER in Pennsylvania Coal Association v. Commonwealth, DER, No. 82 M.D. 1990, a declaratory judgment's action pending before the Commonwealth Court. DER objected and we advised the parties to brief this issue. PMC cites us to 25 Pa. Code §21.109 and says we should take official notice of the pleadings based thereon. DER argues we may not take judicial notice of them, citing Naffah v. City Deposit Bank, 339 Pa. 157, 13 A.2d 63 (1940), and other cases. The doctrine of official notice, though broader than judicial notice, does not allow us to take the notice sought by PMC. Falasco v. Commonwealth, Probation and Parole Board, 104 Pa. Cmwlth. 321, 521 A.2d 991 (1987). This is especially true where we are not asked to notice a fact or even that an Answer was filed, but that certain allegations were made therein. Moreover, this Answer is just that a series of mixed legal and factual allegations responding to allegations in the Petition For Review. Further, the allegations in DER's Answer were made on issues different from those before us. In short, we did not take notice of this Answer and even if we had taken notice of it, it would not have changed the outcome.

ORDER

AND NOW, this 2nd day of August, 1991, the Petition For Supersedeas filed on behalf of PMC is denied for the reasons set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 2, 1991

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Diana J. Stares, Esq.
Western Region

For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOA

GANZER SAND & GRAVEL, INC.	:	
	:	
v.	:	**EHB Docket No. 89-585-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 5, 1991**

OPINION AND ORDER
SUR MOTION FOR AMENDMENT OF ORDER
TO PERMIT INTERLOCUTORY APPEAL

By Joseph N. Mack, Member

Synopsis

An order of the Board will not be amended to permit an interlocutory appeal where the Motion for Amendment to Permit Interlocutory Appeal was not timely filed in compliance with 1 Pa.Code §35.225(a).

OPINION

The history of this appeal has been completely detailed in two previous Board opinions both dealing with summary judgment and found at this docket number dated March 20, 1991 and June 13, 1991 and, therefore, that history will not be detailed here.

The motion filed by the appellant (Ganzer) here is to have the Board amend its most recent order, to wit, the order of June 13, 1991, to insert language to the effect that the "Order and Opinion involves a controlling question of law as to which there is a substantial ground for difference of

opinion and an immediate appeal may materially advance the ultimate termination of the matter." This motion was filed by Ganzer on July 5, 1991. The Board notified the Commonwealth of Pennsylvania, Department of Environmental Resources (DER or Department) of the motion, and the Department responded on July 17, 1991.

DER in its response points out, first, that the motion to certify a controlling question of law is governed by 1 Pa.Code §35.225(a), which specifically limits the time period for filing such a motion to a 10-day period following the issue of the (Board) order and, second, that the Board order does not involve a controlling question of law upon which there exists a significant difference of opinion.

As DER has pointed out, the Board has no rule of practice or procedure governing the present situation; however, the Board does have at 25 Pa.Code §21.1(c) a provision that reads as follows:

> Except where inconsistent herewith, the general rules of administrative practice and procedure shall be applicable...

The general rule as provided at 1 Pa.Code §35.225(a) is as follows:

> ...when the agency head has made an order which is not a final order, a participant may by motion request that the agency head find, and include the finding in the order by amendment, that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order under 42 Pa.C.S. §702 (relating to interlocutory order) may materially advance the ultimate termination of the matter. The motion shall be filed within 10 days after service of the order, and shall be subject to §35.179 (relating to objections to motions). Unless the agency head acts within 30 days after the filing of the motion, the motion shall be deemed denied.

This rule applies to Board proceedings because the Board's Rules contain no provisions that supersede or are inconsistent with 1 Pa.Code §35.225(a). City of Harrisburg v. DER, 1989 EHB 373; In Re: Texas Eastern Gas Pipeline Company Litigation, 1989 EHB 281.

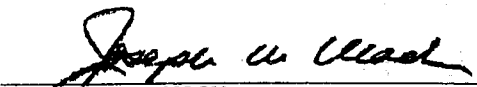
The Board issued its Opinion and Order in the within matter on June 13, 1991. The petition requesting certification was not filed until July 2, 1991, substantially more than 10 days afterward. On this basis alone, the motion may be denied. See City of Harrisburg and Texas Eastern, supra.

Because the motion is being denied on the basis of untimeliness, we need not address the further issue of whether this involves a controlling question of law upon which substantial difference of opinion exists. The following order is entered:

O R D E R

AND NOW, this 5th day of August, 1991, the motion of the appellant Ganzer Sand and Gravel, Inc. for an amendment of order to permit interlocutory appeal is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 5, 1991

cc: **Bureau of Litigation**
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rm

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M. DIANE SMITH
SECRETARY TO THE BOARD

PENNSYLVANIA STATE UNIVERSITY	:	
	:	
v.	:	**EHB Docket No. 90-237-MR**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 7, 1991**

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

By Robert D. Myers, Member

Syllabus:

The Board denies consolidated appeals complaining that DER letters informing the applicant that permits were denied failed to list the specific deficiencies. The Board holds that no statute or regulation requires DER to list deficiencies in the denial letters. As a public agency, DER is obligated to specify deficiencies in a permit application when requested by the applicant. DER fulfilled this obligation.

Procedural History

These four consolidated appeals were all initiated on June 13, 1990 seeking review of May 17, 1990 actions by the Department of Environmental Resources (DER) denying permit applications filed by Pennsylvania State University (PSU) for the agricultural utilization of sewage sludge on lands in the townships of Ferguson (90-237-MR), Benner (90-238-MR), College (90-239-MR) and Patton (90-240-MR) in Centre County. The appeals were consolidated at docket number 90-237-MR on December 17, 1990.

A hearing was held in Harrisburg on January 22, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board. DER was represented by legal counsel; PSU by its Manager of Utility Systems Engineering, a professional engineer. Both parties presented evidence. Post-hearing briefs were made optional by the ruling of the Administrative Law Judge. PSU elected not to file; DER filed on February 27, 1991.

The record consists of the pleadings, a hearing transcript of 54 pages and 33 exhibits. After a full and complete review of the record, we make the following.

FINDINGS OF FACT

1. PSU is a Pennsylvania corporation with its principal place of business at University Park, Centre County (Exhibit Nos. 1, 9, 16 and 24).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the regulations adopted pursuant to said statutes.

3. On or about December 16, 1988 PSU filed with DER separate applications for municipal waste permits for the agricultural utilization of sewage sludge on lands in the Townships of Ferguson, Benner, College and Patton in Centre County (Exhibits Nos. 1, 9, 16 and 24).

4. On November 1, 2 and 13, 1989 DER issued letters to PSU, following a thorough review of the applications. The letters contained a list of items requiring correction or clarification preceded by a narrative expressing DER's concern about phosphorus levels and the need for a nutrient

management plan justifying continued nutrient loading on the fields (N.T. 23-24; Exhibits Nos. 2, 10, 17 and 25).

5. A meeting was held between representatives of PSU and DER on November 22, 1989 at which the applications were discussed. It was agreed, *inter alia*, that DER would review the soil test results and indicate the fields where phosphorus levels could possibly justify the issuance of permits (N.T. 26-27; Exhibits Nos. 3, 11, 18 and 26).

6. On January 19, 1990 DER issued letters to PSU detailing the results of its review of the soil tests and stating which fields possibly could and could not be approved for additional use. PSU was requested to inform DER by February 2, 1990 of its preliminary decision whether to withdraw from the applications those fields deemed unsuitable by DER. PSU was reminded that, for any fields remaining in the applications, it would have to supply the information requested in the letters of November 1, 2 and 13, 1989 (Exhibits Nos. 4, 12, 19 and 27).

7. On January 29, 1990 PSU informed DER of its decision to continue seeking approval for all fields. The letters stated that PSU would respond to the November 1, 2 and 13, 1989 letters, in part, by March 15, 1990 and that the remaining items would be addressed after DER completed its technical review of the applications (Exhibits Nos. 5, 13, 20 and 28).

8. On March 15, 1990 PSU informed DER that it could not adequately respond to the comments by March 15 and requested an extension of time until April 20, 1990 (Exhibits Nos. 6, 14, 21 and 29).

9. On April 19, 1990 PSU responded, in part, to the DER comments in the November 1, 2 and 13, 1989 letters (Exhibits Nos. 7, 22 and 30).

10. Considering the responses inadequate, DER issued letters on May 17, 1990 denying the applications (N.T. 41; Exhibits Nos. 8, 15, 23 and 31).

11. The denial letters characterized the applications as "still grossly deficient" but did not specify the deficiencies (N.T. 5; Exhibits Nos. 8, 15, 23 and 31).

12. On June 14, 1990, at PSU's request, representatives of PSU and DER met and discussed reasons for the denials (N.T. 31-33, 43).

13. Prior to the hearing (apparently on or about December 27, 1990) DER issued a letter to PSU detailing deficiencies in the applications and raising issues not mentioned previously (N.T. 7,10).

DISCUSSION

PSU, appealing DER's refusal to issue the permits, has the burden of proof: 25 Pa. Code §21.101(c)(1). Accordingly, it must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion: 25 Pa. Code §21.101(a).

At the hearing it became clear that PSU is not asking the Board to reverse DER's actions and direct issuance of the permits. PSU's representative stated repeatedly the sentiments expressed in this excerpt from page 9 of the transcript:

> I am not asking at this point that these applications be approved and that permits be issued on that basis. I am asking that [DER] provide specific reasons why applications are denied and an understanding of those things as to why they are denied.

Following this statement, the presiding Administrative Law Judge discussed with representatives of both parties the Board's limited jurisdiction, questioning whether the Board could give PSU the relief requested. DER's response was that the specific reasons for denial had already been communicated to PSU orally and in writing. PSU argued that the reasons given raised new matters not previously addressed, and expressed its

concern that additional matters may be raised in the future. Attempts to resolve the dispute having failed, the Administrative Law Judge resumed the hearing.

DER's denial of the permits is not in issue - only the manner in which the denial was communicated. PSU's representative candidly admitted that he knew of no statute or regulation mandating that DER specify in the denial letter the defects in an application. Our research likewise has uncovered no such provision applicable to this type of permit.

Nonetheless, we are of the opinion that DER, as a public regulatory agency, has an obligation (whether explicit or implicit) to furnish to a permit applicant, upon request, the specific reasons for denial. That was done in connection with PSU's applications at the June 14, 1990 meeting and in the December 27, 1990 letter. The fact that DER may have raised new issues not previously mentioned and the possibility that DER may raise additional issues in the future is of no significance. DER has the statutory power and regulatory authority to demand whatever additional information it deems necessary right up to the date of permit issuance (see, for example, section 502(g) of the SWMA, 35 P.S. §6018.502(g)). The applicant has the option, at any point in the process, to inform DER that it will not provide any additional information and desires its application to be adjudged in its existing condition: *Robert D. and Elizabeth L. Crowley v. DER*, 1989 EHB 44 at 52.

PSU has failed to show that DER acted unlawfully or abused its discretion in the manner in which it communicated the permit denials to PSU. Accordingly, its appeal must be rejected.

Conclusions of Law

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

2. PSU has the burden of proof.

3. PSU challenges only the manner in which DER communicated the permit denials to PSU.

4. DER has an obligation to furnish to a permit applicant, upon request, the specific reasons for permit denials.

5. DER fulfilled its obligation to PSU in this respect.

ORDER

AND NOW, this 7th day of August, 1991, it is ordered that the consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 7, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BO

ALTOONA CITY AUTHORITY	:	
	:	
v.	:	EHB Docket No. 90-570-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 8, 1991

OPINION AND ORDER
SUR MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS

By Joseph N. Mack, Member

Synopsis

A motion for partial judgment on the pleadings filed by the Department of Environmental Resources ("DER") is granted in part and denied in part. Judgment on the pleadings may not be granted with respect to issues raised by the Altoona City Authority ("the Authority") concerning the Clean Streams Law and equitable estoppel and certain issues related to the Hazardous Sites Cleanup Act ("HSCA") because material questions of fact remain and the law is not clearly in favor of DER. Judgment on the pleadings is granted to DER with respect to the Authority's argument that DER failed to consider the economic impact of the order on the Authority's ability to fund various local projects where DER is under no obligation to consider the economic effect of its order on the party to whom the order is issued. Finally, a paragraph in DER's order dealing with enforcement action under the

HSCA is invalid as a matter of law, and judgment on the pleadings is granted to the Authority on this issue.

OPINION

This matter was initiated with the December 27, 1990 filing of a notice of appeal by the Authority, seeking review of a November 26, 1990 order ("the order") of DER concerning the cleanup of two waste disposal pits located on the site of the Easterly Sewage Treatment Plant ("ESTP"), Blair County, Pennsylvania, which is currently operated by the Authority. According to DER's order, the waste pits had been constructed at the ESTP site as early as 1953 and had been used throughout the 1950's and 1960's for disposal of hazardous and industrial waste. The Authority is under a 1989 consent decree with DER and the federal Environmental Protection Agency to construct certain improvements at the ESTP. The Authority began construction work in the summer of 1989 and in August 1989 notified DER of the existence of the two pits. DER conducted a preliminary investigation from August through November 1989 and determined that discharges from the waste pits had caused groundwater contamination and threatened to pollute a nearby river. DER's order of November 26, 1990 required the Authority to take measures to clean up the site.

The matter currently before the Board is a Motion for Partial Judgment on the Pleadings filed by DER on April 19, 1991. In its motion, DER asserts that the Authority has raised several "baseless grounds" in its appeal for which DER should be granted judgment on the pleadings. On May 9, 1991, the Authority filed a brief in opposition to DER's motion, arguing that the issues raised in its notice of appeal involve legitimate questions of law and that judgment on the pleadings is not warranted.

A motion for judgment on the pleadings may be granted when there are no material facts in dispute and a hearing is pointless because the law on the issue is clear. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303. In ruling upon a motion for judgment on the pleadings, the Board will treat all facts pleaded by the non-moving party as true. Id.

We will separately review each of the issues raised in DER's motion for partial judgment on the pleadings:

Hazardous Sites Cleanup Act

The arguments raised in paragraphs 2, 7, 10, 13, 15, and 17 of the Authority's notice of appeal are based on provisions of the Hazardous Sites Cleanup Act ("HSCA"), Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 et seq. DER argues that since its order was not based on the HSCA, but, rather, was issued pursuant to the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., and section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, any arguments based on the HSCA are not relevant to this appeal. DER acknowledges that sections of the HSCA are cited in the order, but states that these references are merely to explain work which has already been performed at the site. Specifically, the introductory material in the order states that DER's preliminary investigation at the site was conducted pursuant to its authority under section 501(a) of the HSCA, 35 P.S. §6020.501(a), and that DER undertook interim response action pursuant to sections 501(a) and 505(b) of the HSCA, 35 P.S. §§6020.501(a) and 6020.505(b), consisting of excavation of waste pits and removal of contaminated materials to a lined impoundment constructed by DER at the site. The order itself states that it is issued pursuant to sections 316 and 610 of the CSL, 35 P.S. §§691.316 and 691.610,

and section 1917-A of the Administrative Code, 71 P.S. §510-17. However, the final paragraph of the order states that DER "may consider this ORDER an 'administrative enforcement action' as referenced in section 1301 of the Hazardous Sites Cleanup Act, 35 P.S. §6020.1301" and that DER "reserves its rights to deem any failure of the Authority to comply with this ORDER to be a failure to comply with an 'administrative enforcement action' as referenced in section 1301, and, therefore, to proceed in any way [DER] deems appropriate under the Hazardous Sites Cleanup Act to remediate the release of a hazardous substance or contaminant or take any other action."

The Authority has raised six separate arguments relating to the HSCA in its notice of appeal. Three of those arguments relate to whether the HSCA is applicable to this situation, with the Authority contending that it is not within the definition of "responsible person" in the HSCA (paragraph 15), that it is not responsible for the property under section 701(b)(1) of the HSCA, 35 P.S. §6020.701(b), because it acquired the property in lieu of condemnation (paragraph 7), and that DER is barred from applying the HSCA retroactively to the Authority, as the alleged violative conduct occurred prior to the effective date of the statute (paragraph 17). The three remaining arguments relating to the HSCA question address the manner in which it was applied by DER, with the Authority asserting that because DER's interim response actions at the site were improper its order was improper because it continued these actions (paragraph 2), that DER should initiate enforcement action against the persons responsible for conditions at the site because the Authority is financially unable to comply with the order (paragraph 10), and that DER has

violated section 502 of the HSCA by placing the site on its priority list sooner than 120 days after advising the Authority of the listing (paragraph 13).

In its response to DER's motion for partial judgment on the pleadings, the Authority argues, "Under Section 1301, if the Authority does not comply with the order, the DER may proceed to use any provision of HSCA in a response or cleanup action. Thus, HSCA is relevant to the extent that the Authority must preserve its defenses under HSCA."

To the extent that the Authority seeks to challenge DER's authority to take enforcement action against the Authority under the HSCA, this issue is premature and not ripe for adjudication, since DER has not taken any action against the Authority pursuant to the HSCA. However, the Authority also argues that it is preserving its defenses under the HSCA. This is a similar situation to that in Raymark Industries, Inc. v. DER, 1990 EHB 1165. In that case, DER's order was issued pursuant to various provisions of the CSL, the Administrative Code, and the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., but, like the order issued to the Authority, contained a paragraph stating that any failure of the appellants to comply with the order would constitute a failure to comply with an "enforcement action" for purposes of section 1301 of the HSCA, 35 P.S. §6020.1301. The Board noted that by including this paragraph in the order, "DER has issued a command and has not 'merely provided notice' of the 'possible' consequences of failure to comply with the...Order." The Board further noted as follows:

> In light of motions practice before the Board, we could easily envision a scenario in which DER would issue a subsequent order under HSCA to the Raymarks and, when the Raymarks appeal, DER would

> argue certain of their grounds for appeal are foreclosed by a failure to challenge this "notice" in this Order. When DER inserts a provision like this in its Order, it must recognize that it is not sending someone a mere notice of a possible future consequence.
>
> Raymark, supra, at 1173-74

Moreover, the Board went on to state as follows:

> [N]o authority for DER's predetermination that a particular order is an enforcement action for purposes of §1301 of HSCA [footnote omitted] can be found in any of the acts cited in the 1990 Order...We conclude that the law is clear that DER was without authority to include [the paragraph in question] in its Order and the paragraph is invalid as a matter of law.
>
> Raymark, supra, at 1174

On that basis, the Board granted partial judgment on the pleadings to the Raymarks. Based on the holding of Raymark, we conclude that the provision regarding the HSCA included in DER's order in the present case is invalid as a matter of law, and judgment on this issue is granted in favor of the Authority and against DER. See Bensalem Township School District v. Commonwealth, 518 Pa. 581, 544 A.2d 1318 (1988). (Judgment on the pleadings pursuant to Pa.R.C.P. 1034 may be granted in favor of the non-moving party.)

Finally, the Authority also asserts that the HSCA is relevant to this appeal because the interim measures taken by DER prior to issuance of the order, i.e. cleanup action performed at the site, were done pursuant to the HSCA. The Authority asserts that to the extent DER's actions may have exacerbated the contamination at the site, or that the Authority is to continue with such cleanup actions, it should not be precluded from questioning the reasonableness or propriety of those actions under the HSCA. Because the order was issued pursuant to the CSL, the Authority is precluded

from arguing that it was not an appropriate exercise of DER's authority under the HSCA to issue the order. However, to the extent the Authority is arguing that the actions required to be taken by it under the order violate the HSCA, subjecting the Authority to future prosecution under the HSCA, the Authority will not be precluded from introducing evidence thereon, and, therefore, DER's motion for judgment on the pleadings is denied with respect to this issue.

Clean Streams Law

The Authority's notice of appeal sets forth three arguments relating to section 316 of the CSL, 35 P.S. §691.316.

First, the Authority argues that even if it is the owner of the land upon which the site is located, it is not responsible for the presence of any contaminants allegedly migrating from the site. It further contends that it is not an "occupier" of the site under section 316 because its presence at the site is compelled by a federal court order requiring it to construct certain improvements at the site (paragraph 7). Secondly, the Authority asserts that it is not responsible for any alleged contamination at the site since any such contamination was caused by the "unforeseeable tortious conduct of a third party over whom the Authority exercised no control" (paragraph 8). Similarly, it alleges that it is not responsible for any alleged contamination at the site because it did not begin to use the site until after waste had been placed in the pits by a third party (paragraph 9).

DER argues that "[i]t has been well established that the Department has the authority to order a landowner to clean up a pollution condition located on the landowner's property, regardless of fault," and cites National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980) in support of its position. The Authority, on the other hand, asserts that DER

is mistaken in its position that "the CSL provides for strict liability of an innocent landowner." The Authority acknowledges two recent cases which support the argument of strict liability under the CSL, Western Pennsylvania Water Co. v. Commonwealth, DER, 127 Pa. Cmwlth. 26, 560 A.2d 905 (1989), aff'd per curiam, ___ Pa. ___, 586 A.2d 1372 (1991), and Commonwealth, DER v. PBS Coals, Inc., 112 Pa. Cmwlth. 1, 534 A.2d 1130 (1987), appeal denied, 551 A.2d 218 (1988), but argues that "these decisions do not overrule prior contrary authority and are insufficient to establish that the law is clear as to whether fault is sometimes a prerequisite to liability under CSL." However, contrary to the Authority's argument, National Wood Preservers, Western Pennsylvania Water, and PBS Coals, supra, do establish that fault is not a prerequisite for liability under section 316 of the CSL and that an owner or occupier of property may be held liable for contamination on his or her property even if he or she did not cause or contribute to it. Prior case law to the contrary is of questionable continuing validity in light of these decisions. See Carbon/Graphite Group, Inc. v. DER, EHB Docket No. 90-524-E (Opinion and Order issued February 19, 1991), slip op. at p. 12.

However, before liability may attach under section 316, it is necessary to establish that the allegedly responsible party is an "owner" or "occupier." Although DER's order indicates that the Authority "owns and operates" the ESTP, this fact has not been clearly established. Paragraph 7 of the Authority's notice of appeal begins, "If the Authority is the owner of the land upon which the Site is located..." (Emphasis added.) Moreover, DER's own motion does not appear clear on this issue, in that the last paragraph on page 11 begins, "If the Authority is the landowner, which the Department maintains it is..." (Emphasis added.) Since some doubt remains on this

question, judgment on the pleadings may not be granted on the issue of the Authority's liability under section 316 of the CSL, 35 P.S. §691.316.

Economic Impact

Paragraphs 10 and 18 of the Authority's notice of appeal argue that DER abused its discretion by failing to consider the economic impact of its order. The Authority contends that if it is forced to comply with the order, there will be a severe financial impact on other projects being undertaken by the Authority for purposes of improving health, safety, and welfare. In response, DER asserts that it was under no obligation to consider the economic impact of its order on the Authority.

Section 5(a) of the CSL, 35 P.S. §691.5(a), sets forth various factors which DER is to consider in taking action pursuant to the CSL. It requires that DER, "in adopting rules and regulations, in establishing policy and priorities, in issuing orders and permits, and in taking any other action pursuant to [the CSL], shall...consider, where applicable,...[t]he immediate and long-range economic impact upon the Commonwealth and its citizens."

Examining this provision of the CSL, the Commonwealth Court in Commonwealth, DER v. Borough of Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974), stated that prior to DER issuing an order pursuant to the CSL, it must consider, inter alia, the immediate and long-range economic impact of that order upon the Commonwealth and its citizens. Id. at 351, 330 A.2d at 299. In further explaining this provision, the Pennsylvania Supreme Court in Mathies Coal Co. v. Commonwealth, DER, 522 Pa. 7, 559 A.2d 506 (1989), held that the "economic impact" which must be considered under section 5(a) of the CSL "relates to the impact on the community and public at large," not the party to whom the order is directed. Id. at ___, 559 A.2d at 511. See also

Kidder Township v. Commonwealth, DER, 41 Pa.Cmwlth. 376, 399 A.2d 799 (1979) (Although Township's contention that it did not have sufficient money to construct the facility described in its permit could prove to be a defense to a contempt citation for failure to obey DER's order, it was not a defense on the merits of the order.)

DER argues that the Authority is asserting that DER did not consider the economic and financial impact of the order on the Authority itself, which is not the intent of section 5(a). In its appeal, the Authority states that if it is required to comply with DER's order, "there will be a severe adverse financial impact on other projects currently being undertaken by the Authority to improve the health, safety and welfare of the people of the Commonwealth." Although this may appear to involve the general public, it is primarily concerned with how the order will impact on the Authority's ability to fund various projects. As noted in Ramey Borough v. Commonwealth, DER, 466 Pa. 45, 351 A.2d 613 (1976), "[n]othing in the [CSL] limits the DER to issuing orders only to municipalities which can afford to take the corrective measures necessary." Id. at ___, 351 A.2d at 614. Since DER was under no obligation to consider the economic impact of the order on the Authority, this portion of the Authority's appeal must fail. Therefore, judgment on the pleadings is warranted with respect to this issue and is granted in favor of DER.

Equitable Estoppel

In paragraphs 4 and 5 of the notice of appeal, the Authority argues that at the time DER issued the permit for construction of the ESTP, it was aware of the two waste pits on the site and had knowledge that construction would include excavation in the area of the pits. The Authority asserts that

DER acted improperly in issuing the permit, given the potential for causing a release from the pits, and in not requiring remediation of the site at that time, and, therefore, should be estopped from now ordering the Authority to remediate the site. DER counters, first of all, that the argument of estoppel is not available against an agency performing its statutory duties and responsibilities, citing F.A.W. Associates v. DER, 1990 EHB 1791. Secondly, DER argues, even if this argument were available, the Authority has not pleaded that it detrimentally relied on any material misrepresentations which may have been made by DER. To this, the Authority responds that equitable estoppel may be asserted against a government agency to prevent it from depriving a person of a reasonable expectation when it knew or should have known that the person would rely upon the agency's representation. Secondly, the Authority asserts that its appeal makes the claim that it relied to its detriment on DER's issuance of the permit for construction of the ESTP and DER's inactivity with respect to the site after it had knowledge of the contamination. The Authority also asserts that DER represented in 1989 that it would fund clean-up of the site, that DER knew the Authority would rely on this representation, and that the Authority did in fact rely on it to its detriment.

It is true, as DER asserts, that a governmental agency may not be estopped from performing its statutory duties and responsibilities. Commonwealth, DER v. Philadelphia Suburban Water Co., ___ Pa. Cmwlth. ___, 581 A.2d 984, (1990); Lackawanna Refuse Removal, Inc. v. Commonwealth, DER, 65 Pa. Cmwlth. 372, 442 A.2d 423, 426 (1982); F.A.W. Associates, supra, at 1795-1796. Where an agency's representatives may have been lax or negligent in carrying out their duties in the past, that cannot act to estop the agency

from enforcing the law. F.A.W. Associates, at 1796. However, it is also true, as the Authority argues, that in certain cases equitable estoppel has been applied against a government agency. Yurick v. Commonwealth, 130 Pa. Cmwlth. 487, 568 A.2d 985, 989 (1989); Commonwealth, Department of Public Welfare v. Soffer, 118 Pa. Cmwlth. 180, 544 A.2d 1109 (1988).

In this case, in essence, the Authority is arguing that since DER issued the permit to the Authority for construction of the ESTP, knowing that two waste pits existed on the site and aware of the potential for a release from the pits, it should be estopped from now requiring the Authority to remediate the site. The Authority also claims that in 1989 DER had advised the Authority that DER would remediate the contamination at the site, and that the Authority, in reliance thereon, assisted DER with its efforts.

To the extent the Authority is arguing that DER is estopped from ordering clean-up of the site now because it failed to do so when the ESTP was constructed, that argument must fail, since an agency may not be estopped from performing its statutory duties and responsibilities. F.A.W., supra. However, it is impossible at this point to determine whether any part of the remainder of the Authority's claim of estoppel has any merit since several material questions of fact remain. Until these questions of fact are resolved, judgment on the pleadings may not be granted with respect to this issue.

Statute of Limitations, Laches, and Constitutional Arguments

In its notice of appeal, the Authority also made certain arguments based on laches, statute of limitations, and constitutional grounds. In

paragraph 16 of its brief in opposition to DER's motion for partial judgment on the pleadings, the Authority withdraws each of these arguments as bases for its appeal. Therefore, we need not further address them.

O R D E R

AND NOW, this 8th day of August, 1991, upon consideration of the Motion for Partial Judgment on the Pleadings, filed by the Department of Environmental Resources, the Motion is granted in part and denied in part, as set forth herein.

ENVIRONMENTAL HEARING BOARD

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Chairman

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ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
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Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 8, 1991

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M. DIANE SMIT
SECRETARY TO THE E

NEW HANOVER CORPORATION	:	**EHB Docket No. 90-225-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
NEW HANOVER TOWNSHIP and THE COUNTY OF	:	
MONTGOMERY, Intervenors	:	
NEW HANOVER CORPORATION	:	**EHB Docket No. 90-558-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and THE COUNTY OF MONTGOMERY, Permittee	:	**Issued:** August 9, 1991

OPINION AND ORDER SUR NEW HANOVER CORPORATION'S MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER

By Maxine Woelfling, Chairman

Synopsis

A motion to quash subpoenae duces tecum and a motion for protective order are denied. Where attorneys played an integral part in an appellant's attempt to obtain a solid waste permit, they are not immune from discovery. A party is entitled to inquire into the nature of the relationship between the appellant and a non-party where that relationship is relevant to the issue of whether appellant is estopped from making certain challenges in its appeal.

OPINION

This opinion concerns yet another discovery dispute in the New Hanover Corporation's (Corporation) appeal of the Department of Environmental Resources' (Department) denial of the Corporation's application for re-permitting its proposed municipal waste landfill in New Hanover Township, Montgomery

County. The County of Montgomery (County), an intervenor herein, served subpoenae duces tecum on the custodian of records of the law firm of Cohen, Shapiro, Polisher, Shiekman and Cohen (Cohen, Shapiro) and Hershel J. Richman, Esq. and Mark A. Stevens, Esq. of the firm. The Corporation then moved to quash the subpoenae and obtain a protective order, and the County opposed the motion.[1]

The subpoenae issued to the custodian of records of Cohen, Shapiro and Mr. Richman are identical; the subpoena issued to Mr. Stevens contains an additional paragraph.[2] Each paragraph of the subpoenae duces tecum will be addressed individually.

Paragraph 1 of the subpoenae requires the production of documents concerning "review, analysis, or monitoring of Montgomery County's municipal waste planning activities by NHC, ... by you or Cohen, Shapiro on behalf of NHC...." Paragraph 6 of Mr. Stevens' subpoena requires the production of documents relating to the Corporation's response to Comment 84 of the Department's January 16, 1990, letter commenting on the Corporation's re-permitting application. The Corporation contends that such information is protected by the attorney/client privilege, while the County asserts, citing the Board's July 19, 1991, opinion at Docket No. 90-225-W denying New Hanover Township's motion to quash a subpoena directed to Mr. Stevens, that Cohen, Shapiro and Messrs. Richman and Stevens are not insulated from discovery where

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[1] The subpoenae sought information regarding the Corporation, Browning-Ferris Industries of Eastern Pennsylvania, Inc., and Browning-Ferris, Inc. (collectively, BFI). BFI also filed a motion for protective order with regard to these three subpoenae and several others; that motion will be disposed of separately.

[2] These paragraphs are in the part of the subpoena entitled "III. Documents to be Produced."

they played an active role in the Corporation's efforts to secure the permit at issue herein. The reasoning of the July 19, 1991, opinion is equally applicable here, and the Corporation's motion to quash with regard to Paragraph 1 of the three subpoenae and Paragraph 6 of Mr. Stevens' subpoena will be denied.

Paragraph 2 of the subpoenae requires the production of documents relating to services performed by Cohen, Shapiro or Messrs. Richman and Stevens on behalf of BFI in Browning-Ferris, Inc. *et al.* v. County of Montgomery *et al.*, C.A. No. 90-3258 (E.D. Pa. 1990) (federal litigation). Since BFI has filed a separate motion for protective order, this paragraph of the subpoenae duces tecum will be addressed in the ruling on BFI's motion.

Paragraph 3 of the subpoenae demands documents relating to legal services performed by Cohen, Shapiro or Messrs. Richman and Stevens on behalf of the Corporation in regard to the challenge of the County's solid waste planning efforts. The Corporation asserts that such information is protected by the attorney/client privilege, is irrelevant, and unduly burdensome. On the other hand, the County argues that the information is not privileged and that it is necessary to ascertain the nature of the Corporation's relationship with BFI and whether the Corporation is estopped from challenging the County solid waste plan by virtue of the consent order entered in the federal litigation. In general, the Corporation's relationship to BFI is relevant to a determination of whether it is estopped by the federal consent order from contesting the County plan. But production of documents is complicated by the fact that there are four challenges to the County's planning efforts - the Corporation's appeals at Docket Nos. 90-225-W and 90-558-W, its action in the Montgomery County Court of Common Pleas at No. 90-10866, and BFI's federal litigation - and some materials prepared by Cohen, Shapiro and Messrs. Richman

and Stevens - e.g., those related to the common pleas court and federal court actions - may be protected from disclosure by the attorney/client privilege. The motion for protective order will be denied, but the Corporation may raise the issue of privilege with regard to particular documents.

Paragraph 4 of the subpoenae requests all documents relating to the Conditional Agreements between the Corporation and BFI; "Conditional Agreements" are defined to encompass the May, 1987 real estate and stock purchase agreements between BFI and the Corporation. Citing the Board's opinions in Docket No. 88-119-W[3] at 1988 EHB 812, 813-816 and 1988 EHB 1168, the Corporation asserts that such information is irrelevant, of a sensitive commercial nature, and would be burdensome to produce.[4] Nonetheless, the Corporation has offered to produce them subject to a confidentiality agreement. The County asserts that discovery of this information is relevant to determining the relationship between the Corporation and BFI and, therefore, to the issue of whether the Corporation is estopped from challenging the County plan by virtue of the federal consent order. In addition, the County contends that such information is relevant to the issue of whether the Corporation's landfill is an "existing facility" under §502(c) of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.502(c), commonly referred to as Act 101.[5]

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[3] This appeal involves New Hanover Township and Paradise Watch Dogs' challenge to the Department's 1988 issuance of a solid waste permit to the Corporation.

[4] The Corporation never explained why it would be burdensome to produce such documents. Bald assertions of burdensomeness are not sufficient to support a motion for protective order.

[5] Section 502(c) contains a number of criteria relating to defining an existing facility for purposes of inclusion in a county solid waste plan.

More specifically, the County states that if BFI's failure to proceed under the Agreements is due to BFI's belief that NHC does not hold a permit, its understanding should be considered by the Board in determining whether the Corporation possessed a permit for purposes of §502(c) of Act 101. Whether BFI exercised or failed to exercise the option in the Conditional Agreements because of its interpretation of whether the Corporation possessed a permit is not relevant to the Board's disposition of this issue. However, the Conditional Agreements may be relevant for purposes of ascertaining the Corporation's relationship with BFI and whether it is estopped from questioning the validity of the County plan as a result of the federal consent order.[6] Consequently, the Corporation's motion for protective order will be denied with regard to Paragraph 4. The parties are instructed to prepare a confidentiality agreement for purposes of preventing the disclosure of any sensitive commercial information.

Finally, Paragraph 5 of the subpoenae duces tecum asks for

> All documents that refer to, relate to, or otherwise concern the terms or conditions of legal representation by you or by Cohen, Shapiro of NHC or BFI from October 1, 1988 through the present, including, but not limited to: invoices; detailed time reports; fee arrangements or fee agreements; notes, minutes, or summaries of management, administrative, or committee meetings at which the representation of BFI and/or NHC was discussed.

The Corporation argues that such information is irrelevant, requires the production of privileged material, and is unreasonably and unnecessarily burdensome. The County alleges, *inter alia*, that such information is relevant

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[6] Obviously, this issue was not addressed in the 1988 rulings at Docket No. 88-119-W, for the County plan had neither been approved nor been the subject of challenges in state and federal courts.

because it will assist in ascertaining the nature of the relationship between BFI and the Corporation and, therefore, relate to whether the Corporation is estopped from challenging the County plan by the federal consent order. Additionally, the County contends that such information is not privileged, for it is more in the nature of business records than attorney work product. Once more, the County is entitled to discover these materials, as they are relevant to the issue of whether the Corporation is collaterally estopped from challenging the County plan.

O R D E R

AND NOW, this 9th day of August, 1991, it is ordered that New Hanover Corporation's motion to quash and motion for protective order are denied in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: August 9, 1991

cc: See following page.

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M. DIANE SMITH
SECRETARY TO THE BOARD

WARD I. DRAN :
:
v. : **EHB Docket No. 90-295-E**
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: August 13, 1991**

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

By: Richard S. Ehmann, Member

Synopsis

Ward I. Dran's appeal which challenges the Department of Environmental Resources' ("DER") disapproval of the Buckhill Subdivision Planning Module is dismissed. DER acted on the Planning Module 61 days following its receipt of the submission. DER was not under an obligation to act on the Planning Module within 15 days of its receipt of the submission merely because the outdated Planning Module form which the Township gave Dran contained language stating that the submission would be deemed approved if DER did not act on it within 15 days. DER was also under no obligation to act within 60 days of its receipt of the Planning Module since the submission did not meet the requirements of 25 Pa. Code §71.55. DER's action was timely under the terms of §5(e) of the Sewage Facilities Act, 35 P.S. §750.5(e). Dran's argument that DER's disapproval of the Planning Module constituted a taking of his property, in violation of his rights under the 5th amendment of the U.S. Constitution, is waived by his failure to raise it in his notice of appeal and, further, is unsupported by evidence. Finally, Dran's argument that DER failed to comply with 25 Pa. Code §72.43(c) by not ordering the Township and

its sewage enforcement officer to rescind their approval of the Planning Module was likewise not raised in Dran's notice of appeal nor was evidence presented thereon at the hearing on the merits.

Background

By letter dated June 15, 1990, Tim V. Dreier, DER's Acting Regional Water Quality Manager, wrote to the Amwell Township Board of Supervisors on behalf of DER. Dreier's letter stated DER was disapproving the Buckhill Subdivision Planning Module ("Planning Module") pursuant to Section 5(d)(3) of the Sewage Facility Act, ("SFA"), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5(d)(3), because it did not contain adequate documentation required by 25 Pa. Code §71.55(a)(2) showing that the soil and site conditions at the proposed subdivision are generally suitable for on-lot sewage disposal systems. Dreier's letter explained that DER had previously requested the submission of adequate percolation ("perc") testing and additional information and that since DER had not received this information, it was acting on the information before it.

On July 19, 1990, Ward I. Dran, *pro se*, appealed DER's refusal to approve the Planning Module to this Board. Thereafter, the parties undertook some discovery and filed their respective pre-hearing memoranda. On November 23, 1990, DER filed a Motion For Summary Judgment which we denied as untimely under Pa R.C.P. 1035. On December 31, 1990, DER filed a Motion For Reconsideration and Continuance seeking a review of our Order denying its Motion. We denied DER's Motion for Reconsideration and Continuance on January 2, 1991 because of the interlocutory nature of our Order and the lack of exceptional circumstances which would warrant its reconsideration.

Also, on December 31, 1990, DER filed a Motion in Limine and a supporting brief, to which Dran filed objections on January 3, 1991, immediately prior to

the commencement of the hearing on the merits. After entertaining oral argument by both parties, we sustained DER's motion in part. Testimony was taken and evidence was received from both sides on January 3 and 4, 1991. On February 20, 1991, we received Dran's post-hearing brief. We then received the transcripts of the hearing from the Court Reporter on March 15, 1991. By an Order issued March 18, 1991, we directed DER to file its post-hearing brief with us by April 19, 1991 and we later granted DER's unopposed Motion for Extension of Time, directing DER to file its brief on or before May 3, 1991, with any reply brief from Dran to be filed by May 14, 1991. DER's post-hearing brief was filed on May 3, 1991. Dran did not file a reply brief. Throughout these proceedings, Dran has chosen to remain without counsel.

Because a party is deemed to have abandoned all arguments not raised in its post-hearing brief, we will address only those issues raised by the parties's post-hearing briefs. Mr. and Mrs. John Korgeski v. DER, et al., EHB Docket No. 86-562-W (Adjudication issued June 13, 1991).

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The appellant is Ward I. Dran ("Dran"), an individual who resides at 103 Maid Marion Lane, McMurray, PA 15317. (N.T. 31; Notice of Appeal)[1]

2. The appellee is DER, the agency with the duty and authority to administer and enforce the Clean Streams Law ("CSL"), Act of June 22, 1937,

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[1]References to pages in the transcript of the hearing held on January 3 and 4, 1991, will be "N.T.-". References to the stipulated Board Exhibits will be "B-". References to the parties' Joint Stipulation of Fact and Statement of Legal Issues will be "Stip.". References to Dran's exhibits will be "A-".

P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the SFA, 35 P.S. §750.1 *et seq.*; and the rules and regulations promulgated thereunder. (Stip. Paragraph E-1)

3. Dran is employed as a professional land surveyor. (N.T. 31; A-1)

4. Sometime around December of 1989, Dran conducted a preliminary survey of property he and his wife owned in order to lay out lots he proposed to subdivide on that tract. (N.T. 31, 33; A-2)

5. Dran's proposed Buckhill Subdivision is located on approximately 20.755 acres of land in Amwell Township, Washington County, on the north side of Township Road ("TR") 359 and the west side of Legislative Route ("LR") 62089 at the intersection of TR 359 and LR 62089, with one lot of the subdivision east of LR 62089 at that intersection. (Stip. Paragraph E-3)

6. The six lots contained in the Buckhill Subdivision are Lots 1, 2, 4, 5, 6, and 7. (Stip. Paragraph E-4; B-3A) Proposed Lot 3 was eliminated from the Subdivision Plan and Lots 2 and 4 were expanded to encompass the area originally designated for Lot 3. (N.T. 54)

7. Lots 1, 2, 4, 5, 6, and 7 will have houses located on them. (B-4 through B-9)

8. On January 3, 1990, Dran purchased six applications for sewage disposal system permits from Amwell Township ("the Township"). (N.T. 33; A-3) The Township advised Dran the he should contact the Township Sewage Enforcement Officer ("SEO"), Edward Stavovy, and that trenches would have to be dug on the tract. (N.T. 34)

9. As an SEO, Stavovy is certified by DER but is employed by the Township, not DER. (N.T. 82)

10. As an SEO Stavovy must conduct deep pit tests on the proposed lots to determine the type of system which can be used (i.e., in-ground or sand mound)

and perc tests to determine whether sewage liquids will percolate through the soils at the proper rate. (N.T. 80)

11. Stavovy must first conduct the deep pit test and decide where the absorption area for the system will be located on a particular lot. (N.T. 85) He then performs the perc tests, a procedural description of which follows. Six holes must be dug in each proposed absorption area; the holes must be 6 to 10 inches in diameter, with their depth determined by the type of system contemplated, i.e., in-ground or sand mound. Next, the holes are scarified and cleaned out and gravel is placed at the bottom of the holes. Water, at a minimum depth of 12 inches is added to the holes and left for 8 to 24 hours for the initial pre-soak. Then a final pre-soak is done whereby the water is adjusted to 6 inches and allowed to stand for 30 minutes, with a reading then taken. The water is readjusted and allowed to stand for another 30 minutes and a final reading is taken. The SEO then takes the required measurements until he has 8 readings in each hole or a stabilized rate of drop is obtained. (N.T. 85-87)

12. On January 27, 1990, Dran, Larry Schriver (a local contractor), and Stavovy met at the site of the proposed subdivision so that Schriver could dig trenches and Stavovy could perform deep pit tests. (N.T. 34-35, 63)

13. Schriver dug a total of fourteen trenches, two on each of seven proposed lots. (N.T. 35; B-3B)

14. Stavovy examined the soil in the trenches on each of the seven proposed lots. (N.T. 35, 37, 41, 45-47, 54)

15. Upon his preliminary examination, Stavovy concluded the following as to the proposed lots:

> a) Lot 1 was suitable for a "shallow permit" seepage bed septic tank sewage disposal system (N.T. 35-40, 63; B-4);

b) Lot 2 was suitable for an elevated sand mound septic tank sewage disposal system (N.T. 46; B-5);
c) Lot 4 was suitable for an elevated sand mound septic tank sewage disposal system (N.T. 45, 54; B-6);
d) Lot 5 was suitable for an elevated sand mound septic tank sewage disposal system at the front of the lot and a standard trench septic tank system at the rear of the lot (N.T. 41-42, 45; B-7);
e) Lot 6 was suitable for a "shallow permit" standard trench septic tank sewage disposal system (N.T. 46-47; B-8);
f) Lot 7 was suitable for a "shallow permit" standard trench septic tank sewage disposal system (N.T. 48; B-9).

16. Stavovy instructed Dran to dig six twenty-inch-deep holes on each lot for the lots which were determined to require an elevated sand mound system and to dig the holes twenty-four inches deep on the lots where the sewage system was determined to be in ground and to haul water to the holes. (N.T. 48-49)

17. On February 3 and 4, 1990, Dran dug six holes on each proposed lot for the perc tests and hauled water to each hole. (Stip. Paragraph E-8; N.T. 49-50, 64) Dran did not pre-soak any of the test holes on any of the lots because he did not know when the perc tests were going to be done. (Stip. Paragraph E-9)

18. On February 5, 1990, Dran contacted Stavovy to let him know that he could conduct his tests on the site. (N.T. 50, 64)

19. Between February 5, 1990 and April 16, 1990 Stavovy did not communicate with Dran. (Stip. Paragraph E-6)

20. On or about April 10, 1990, Stavovy performed a site investigation and perc test on each lot of the Buckhill Subdivision. (Stip. Paragraph E-5)

21. Stavovy did not initially pre-soak fill any test hole before he performed the perc tests. (Stip. Paragraph E-10)

22. Immediately before each perc test, Stavovy placed water in the test hole but he did not readjust the water every 30 minutes for an hour to maintain a minimum of 6 inches of water over the gravel on the bottom of the test hole. (Stip. Paragraph E-11)

23. Stavovy did not obtain a stabilized rate of drop:

a. at any of the six percolation test holes on Lot 1;
b. at five of the six percolation test holes on Lot 2;
c. at one of the six percolation test holes on Lot 4;
d. at any of the percolation test holes on Lot 5;
e. at any of the six percolation test holes on Lot 6;
f. at three of the six percolation test holes on Lot 7. (Stip. Paragraph E-12)

24. Stavovy obtained only four measurement readings for every perc hole tested on the proposed Buckhill Subdivision. (Stip. Paragraph E-13)

25. Dran admits Stavovy did not properly conduct the perc tests on the Buckhill Subdivision site. (N.T. 73)

26. Sometime shortly after April 10, 1990, Township personnel informed Dran that Stavovy had performed tests on the property and that he needed to submit a notarized Planning Module form. (N.T. 50)

27. Shortly after April 10, 1990, Dran received from the Township a form entitled "Planning Module For Land Development, Component I", which is form ER-HCE-116: Rev-75. (N.T. 50, 52, 164; B-1)

28. Printed as part of form ER-HCE-116: Rev-75 is the following language: "[t]his proposed plan supplement/revision shall be deemed approved provided that no additional information has been requested, or objections raised by DER to the municipality within 15 days after receipt by DER at the proper county office, and provided further that all information is complete, true and correct." (B-1)

29. Form ER-HCE-116: Rev-75 was outdated at the time the Township gave it to Dran to prepare for the subdivision. (N.T. 125)

30. Norma English, a DER Water Quality Specialist, testified that in a March 1990 training session, DER instructed the Township to use new planning module forms for anyone requesting new planning modules, but during a six week grace period, DER would accept submittals on the old forms because the submittals would have been in development when the form switch occurred. (N.T. 76-77, 124-125)

31. English testified that an interim planning module form existed between form ER-HCE-116: Rev-75 and the "new" planning module form and that the planning module form which the Township should have given Dran did not contain the 15 day deemed approval language. (N.T. 124-126)

32. Milton Lauch, DER's Chief of On Lot Systems and Alternate Technology, Bureau of Water Quality Management, testified that Form ER-HCE-116: Rev-75 was in use at a time when the regulations placed a 45 day time limit on DER for review of proposed "Supplements" and that, as an administrative process, DER had placed the 15 day time limit on "Supplements" that proposed 10 lots. (N.T. 157, 164-165)

33. Lauch testified that in the summer of 1989, DER made a state-wide mailing to all municipalities to inform them that the regulations had changed. These mailings included a copy of the final rule making preamble from the Environmental Quality Board action, with the changes to the time limits regarding the 60 day review period for "exceptions to revisions" of planning modules highlighted. (N.T. 166)

34. Lauch further testified that the Township was instructed that DER would continue to accept the existing planning module forms with the

understanding that the time period for DER review contained in the new regulations would apply. (N.T. 179)

35. After completing the Planning Module and having it notarized on April 16, 1990, Dran returned it to the Township. (N.T. 50, 52, 68)

36. On April 17, 1990, the Township approved the Buckhill Subdivision Plan as a "Supplement" to its Official Plan. (B-2A)[2]

37. On April 19, 1990, DER received the Planning Module submission for the proposed Buckhill Subdivision, consisting of Joint Stipulation Exhibits 1, 2A, 2B, 3A and 4 through 9 inclusive. (Stip. Paragraph E-14)

38. When DER receives a planning module, its personnel first conduct a completeness review to make sure the module contains the necessary items and later conduct a technical review to determine if the SEO correctly performed his tests. (N.T. 79, 83)

39. On April 27, 1990, DER determined that the Planning Module was complete. (Stip. Paragraph E-15)

40. On May 3, 1990, Dran requested the Buckhill Subdivision Plan from the Township and had it recorded by the County Recorder's Office. (N.T. 53; B-3C)

41. In conducting her technical review of the planning module, English discovered that Stavovy had taken only four readings for each test hole and that the readings generally did not show a stabilized rate of drop. (N.T. 88)

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[2]The Township checked the box on Form ER-HCC-116: Rev-75 next to language printed on the form stating that the planning module and any appended material constitutes a "Supplement" to the municipality's Official Plan in accordance with Chapter 71 of 25 Pa. Code. See B-2A. Section 71.15 of 25 Pa. Code, which provided for "Supplements" to Official Plans, was reserved on June 9, 1989, effective June 10, 1989, and the current version of the regulations does not provide for "Supplements" to Official Plans.

42. On or about May 10, 1990, English sent a letter to the Township Board of Supervisors, with a copy to Dran, requesting additional information. (Stip. Paragraph E-16; B-11)

43. On or about June 19, 1990, DER's Acting Regional Water Quality Manager, Tim V. Dreier, sent the letter to the Township Board of Supervisors which generated this appeal. (Stip. Paragraph E-17; B-12)

44. English is an expert in testing for soil suitability for on-lot disposal of sewage and, as part of her duties at DER, English oversees and reviews the performance of SEOs. (Stip. Paragraph D-2; N.T. 81)

45. English visited the proposed Buckhill Subdivision site on two occasions: June 7, 1990 and November 27 or 28, 1990. (N.T. 99)

46. On her second visit to the site, English located the holes where the perc tests had been performed. On Lot 1, English found a limiting zone of between 4 and 5 inches and on Lot 2, English found a limiting zone of 14 inches, whereas Stavovy had reported a limiting zone of 72 inches on Lot 1 and 28 inches on Lot 2. (N.T. 99; B-4, B-5)

47. English opined that with limiting zones at the depths she determined, Lots 1 and 2 would be unsuitable for on-site sewage disposal. (N.T. 99)

DISCUSSION

The first issue with which we are faced in this appeal is which party bears the burden of proof. The parties have stipulated that Dran has the burden of proof. (Stip. Paragraph F-1) We agree that under 25 Pa. Code §21.101(c)(1), Dran bears the burden and he must prove his challenge by a preponderance of the evidence.

Timeliness of DER's Action

Dran first contends that DER's disapproval was made more than 15 days after the submission of the Planning Module to DER resulting in its "deemed

approval" under the terms stated on the planning module form which he submitted. Dran urges DER had an obligation to notify him that it needed additional information and more tests on the Buckhill Subdivision within 15 days of its receipt of the Planning Module. If this argument does not succeed, Dran further argues that under §71.55 of 25 Pa. Code, a deemed approval of the Planning Module occurred when DER did not respond within 60 days after its receipt of the Planning Module. In the alternative, Dran contends that because the Planning Module was submitted pursuant to §71.55 as an "exception to the requirement to revise", DER had an obligation to determine that §71.55 did not apply to the Planning Module within 60 days of its receipt of the submission.

Section 5(a) of the SFA, 35 P.S. §750.5(a), requires each municipality to submit to DER an Official Plan for sewage services for areas within its jurisdiction and from time to time submit revisions thereto as required by DER rules and regulations. Section 5(a) further provides that revisions shall conform to section 5(d) and DER rules and regulations.[3]

DER's regulations dealing with the administration of the sewage facilities program are found at 25 Pa. Code Chapter 71, which was amended on June 9, 1989 and effective June 10, 1989. Section 71.51 provides that a municipality shall revise its official plan when a new subdivision is proposed, except as provided by §71.55 "Exceptions to the requirement to revise the official plan for new land development." Section 71.55 outlines when a municipality need not revise its Official Plan. By its terms, §71.55 is applicable when DER determines the proposal is for the use of individual on-lot sewage systems serving detached single family dwelling units in a subdivision of ten lots or

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[3]Section 5(d)(3), the section under which DER denied the Planning Module, requires an Official Plan to provide for adequate sewage treatment facilities.

less and, *inter alia*, the subdivision has been determined to have soils and site conditions which are generally suitable for on-lot sewage disposal systems under §71.62. Section 71.62 requires soil profiles and a sufficient number of perc tests to show the soils and geology of the proposed site are generally suitable for the systems. Section §71.55 (d) states:

> Proposals qualifying under this section shall be considered adequate if the Department does not respond within 60 days of the Department's receipt of the properly completed and submitted components of the Department's sewage facilities planning module along with proper written documentation and the sewage facility planning module meets the requirements of this chapter.

At the merits hearing, the Board instructed the parties to address in their post-hearing briefs the impact of §5(e) of the SFA, 35 P.S. §750.5(e), on Dran's arguments. Section 5(e) was amended by Act 26 on July 1, 1989, which was effective 90 days thereafter, i.e., September 29, 1989. This section now states:

> (e) The department is hereby authorized to approve or disapprove official plans for sewage systems submitted in accordance with this act within one year of date of submission and revisions of official plans within such lesser time as the regulations shall stipulate, except that <u>the department shall approve or disapprove revisions constituting residential subdivision plans within ninety days of the date of a complete submission, for the period of one year from the effective date of this amendatory act</u>, and within sixty days of the date of a complete submission thereafter. The department shall determine if a submission is complete within ten working days of its receipt.

35 P.S. §750.5(e) (emphasis supplied).

In compliance with our request, Dran argues in his post-hearing brief "[e]xceptions to the requirement to revise Official Plans are proposals that fit into the Official Plan and do not change the plan and are not revisions

within the meaning of revisions intended under Section 5(e)." He contends the Planning Module was submitted pursuant to §71.55 and is not subject to the requirements of §5(e).

DER responds that §71.55 is inapplicable here because the soils of the Buckhill Subdivision have not been determined to be generally suitable for on-lot sewage disposal systems. DER takes the position that the Planning Module was a revision subject to §5(e). It argues that because the Buckhill Subdivision plan was a residential subdivision plan under the definition provided by §2 of the SFA, 35 P.S. 750.2,[4] and it was submitted during the one year period following the effective date of Act 26, DER had 90 days after the date the submission was determined to be complete within which to issue its disapproval.

We first reject Dran's contention that the terms of the Planning Module form gave rise to a deemed approval of the submission when DER did not respond within 15 days of its receipt thereof or that DER was in any way obligated to request the additional testing and information within that 15 day period. As we have found in our Findings of Fact, the Township provided Dran with an outdated Planning Module, even though it had been instructed by DER that new regulations were in place regarding DER's review of planning module submissions and that new forms should be given to those requesting planning modules. The Board's precedent states that DER, as well as the regulated public, is bound by the regulations in effect at the time of its decision. Borough of Ford City v. DER, EHB Docket No. 90-014-MJ (Opinion issued February

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[4]"Residential subdivision plan" is a subdivision in which at least two-thirds of the proposed daily sewage flows will be generated by residential uses. "Subdivision" is the division or redivision of a lot, tract or other parcel of land into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines. 35 P.S. §750.2.

7, 1991); County of Schuylkill, et al. v. DER, et al., 1989 EHB 1241. Nowhere in DER's regulations at Chapter 71 of 25 Pa. Code governing its review of planning modules is there a requirement that DER review planning modules within 15 days. Thus, no right arose in favor of Dran vis à vis DER by virtue of his being given an out-of-date form by the Township. DER was under no obligation to notify Dran within 15 days of its receipt of the Planning Module that it needed additional information.

Next, we have found that Stavovy incorrectly determined the limiting zones on Lots 1 and 2 to be acceptable. It is also clear to us that Stavovy did not properly perform the perc tests on any of the lots at the site, and Dran even admitted this in his testimony. We thus agree with DER that because the soils and site conditions of the Buckhill Subdivision have not been determined to be generally suitable for on-lot sewage disposal systems under §71.62 of 25 Pa. Code, §71.55 cannot be utilized for the Planning Module. Additionally, §71.55 does not require DER to notify the Township or Dran of its determination that the submittal cannot be treated as an "exception to the requirement to revise" within 60 days of its receipt of the Planning Module. The Planning Module does not qualify for the "exceptions to the requirement to revise" and must be evaluated as a revision submission for purposes of reviewing the timeliness of DER's action. We conclude that the Buckhill Subdivision Planning Module was a residential subdivision plan which was submitted within one year of the effective date of Act 26. Thus, the Planning Module was subject to §5(e) of the SFA, which required that DER approve or disapprove the Planning Module

within 90 days of the date of a complete submission. Since DER disapproved the planning module 61 days following its receipt of the module, its disapproval was timely given.[5]

U.S. Constitution

In his post-hearing brief, Dran next contends that DER denied him the opportunity to market the lots in the time frame in which he desired to market them, constituting a taking of his property without due process and just compensation and violating his rights under the 5th amendment of the U.S. Constitution. This issue was not raised in Dran's notice of appeal. Under Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), it has thus been waived.[6] Further, Dran presented no

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[5]Because DER acted within 61 days of its receipt of the planning module, we need not address the argument raised in the parties' post-hearing briefs concerning whether DER had a 10 day completion review period in addition to the 90 days under the terms of §5(e).

[6]In Game Commission, *supra*, the Commonwealth Court pointed out that 25 Pa. Code §21.51(e) clearly states "[A]ny objection not raised shall be deemed waived provided that, upon good cause shown, the Board may agree to hear such objection or objections." Reading this section in conjunction with 25 Pa. Code §21.52, the Court concluded that the failure to file a specific ground for appeal within the thirty-day period is a defect going to jurisdiction and the time period for adding those grounds cannot be extended *nunc pro tunc* absent appellant showing of good cause. Recently, in Croner, Inc. v. Commonwealth, DER, ___ Pa. Cmwlth. ___, 589 A.2d 1183 (1991) the Commonwealth Court held that a statement from a paragraph of Croner's notice of appeal that DER's conditioning of a permit "is otherwise contrary to law and in violation of the rights of Appellant" was sufficient to be considered to raise the issue of whether a specific regulation violated a section of a statute, even though this issue was not raised explicitly in the notice of appeal. In our decision in Croner, Inc. v. DER, 1990 EHB 846, we did not mention the Game Commission decision, but, rather, we relied upon ROBBI v. DER et al., 1988 EHB 500, and NGK Metals Corporation v. DER, 1990 EHB 376.

Dran's notice of appeal sets forth numerous objections to DER's action and concludes, "[t]he Department's action in this case can only be deemed arbitrary and capricious and should be overturned." Dran's notice of appeal (footnote continues)

evidence to establish that his property has been taken and his due process rights violated.

Prosecutorial Discretion

Finally, Dran's post-hearing brief contends that by failing to require the Township and Stavovy to rescind their approval of the Planning Module, DER failed to perform the duty imposed on it by 25 Pa. Code §72.43(c),[7] and, as a result, Dran was left without a remedy for Stavovy's "less than proper" actions. Again, Dran did not raise this specific objection in his notice of appeal and it is waived pursuant to Game Commission, *supra*. Additionally, Dran did not attempt to present evidence to establish this claim.[8]

(continued footnote)
cannot be fairly read as raising issues of taking and due process as it does not raise these objections in the manner discussed by the Court in Croner. Dran also did not seek and was not granted leave to amend to add these issues.

[7]Section 72.43(c) of 25 Pa. Code provides:

> (c) If the Department finds that a local agency has failed to effectively administer section 7 of the act (35 P.S. §750.7) or this part, the Department, in addition to other remedies it may seek at law or in equity, may order the local agency to take actions the Department deems necessary to obtain effective administration.

[8]Even if Dran had included this issue in his notice of appeal and offered evidence on it, we would have rejected this argument. Section 72.43(c) states that it is within DER's discretion to order a local agency to take action. Thus, Dran seeks our review of DER's prosecutorial discretion. We have repeatedly held that a refusal by DER to exercise its prosecutorial discretion in a particular fashion is not an adjudicatory action by DER and thus is not subject to review by this Board. Edward Simon v. DER, EHB Docket No. 91-064-E (Opinion issued May 9, 1991); Ralph D. Edney v. DER, 1989 EHB 1356. As such, DER's failure to take action pursuant to §72.43(c) was not an adjudicatory action subject to our review. To the extent that Dran is suggesting that DER could have provided him a remedy for Stavovy's "less than proper" actions, we note that Stavovy is an employee of the Township and not DER. (Finding of Fact No. 9)

As Dran has not proven any of his challenges by a preponderance of the evidence, he has failed to sustain his burden of proof. We accordingly must dismiss his appeal.

CONCLUSIONS OF LAW

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

2. Dran, as the appellant, has the burden of proving by a preponderance of the evidence that DER committed an abuse of discretion. 25 Pa. Code §21.101(c)(1).

3. The Township's providing Dran with an outdated Planning Module for submission to DER created no right in Dran vis à vis DER, especially where the Township had been instructed by DER to use new planning modules. DER was not obligated to notify Dran within 15 days following DER's receipt of the Planning Module that it needed additional tests and information.

4. No deemed approval of the Buckhill Subdivision planning module occurred 60 days after DER's receipt of the Planning Module pursuant to 25 Pa. Code §71.55(d) because the soils and site conditions at the Buckhill Subdivision have not been determined to be generally suitable for on-lot sewage disposal under §71.62.

5. The Buckhill Subdivision Planning Module was a revision of the Amwell Township official sewage service plan constituting a residential subdivision plan and the time limitations set forth in §5(e) of the SFA, 35 P.S. §750.5(e), governing DER's review of such plans submitted within one year of the effective date of Act 26, applied to DER's review of the Planning Module. DER's disapproval on June 19, 1990 of the Buckhill Subdivision Planning Module, which was submitted to DER on April 19, 1990, was timely under §5(e),

as it was given 61 days following DER's receipt of the submission, well within the §5(e) review period.

6. Dran waived his argument that DER's action constituted a taking of his property without due process and just compensation by his failure to raise the issue in his notice of appeal; he also failed to sustain his burden of proof as to this claim. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

7. Dran waived his contention that DER failed to perform the duty imposed on it by 25 Pa. Code §72.43(c) through his failure to raise this issue in his notice of appeal; he also failed to carry his burden of establishing this claim. Game Commission, *supra*.

ORDER

AND NOW, this 13th day of August, 1991, it is ordered that the appeal of Ward I. Dran is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 13, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Bruce Herschlag, Esq.
Western Region
For Appellant:
Ward I. Dran
McMurray, PA

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M. DIANE SMITH
SECRETARY TO THE BO

ROBERT F. FREEAUF	:	
	:	
v.	:	EHB Docket No. 91-146-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and PERRY BROTHERS COAL COMPANY, Permittee	:	Issued: August 16, 1991

OPINION AND ORDER SUR
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

The Board denies a third party appellant's motion for summary judgment where the motion, pleadings, and answers to interrogatories do not show that the Department of Environmental Resources ("DER") abused its discretion in recommending Stage I bond release of the permittee's bonds.

OPINION

On April 15, 1991, Robert F. Freeauf ("Freeauf") commenced this appeal from a letter dated March 14, 1991 from DER's Phillip Newell, Compliance Manager of DER's Bureau of Mining and Reclamation, recommending Stage I bond release for Perry Brothers Coal Company's ("Perry Bros.") surface mine site located in Plain Grove and Springfield Townships, Lawrence and Mercer Counties. In the notice of appeal, Freeauf makes the following assertions amongst others: 1) Perry Bros.' application for its Mine Drainage

Permit ("MDP") No. 37830104 [1] failed to submit to DER information required by the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations thereunder; 2) Perry Bros. illegally disposed of demolition waste on the mine site; 3) Perry Bros. has failed to remove all debris from the mine site as required by §315 (b) of the CSL; 4) Perry Bros. has failed to faithfully comply with the CSL, the "Mining Act", and the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.101 *et seq.*; and 5) Perry Bros.' continued willful violations of the law are a nuisance.

After some discovery, on July 12, 1991, Freeauf filed a motion for summary judgment, requesting us to enter summary judgment in its favor and to substitute our discretion for that of DER to the extent that we not only reverse DER's bond release decision but we also forfeit Perry Bros.' bonds in this matter. Freeauf did not file any brief or memorandum of law in support of the motion which might have explained its rationale. Further, the motion is supported by neither affidavit nor verification.[2] We received Perry Bros.' Answer to Freeauf's Motion for Summary Judgment on July 31, 1991, and we received DER's response to the motion on August 5, 1991.

It is appropriate for us to grant summary judgment when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). The

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[1]MDP No. 37830104 is the same permit which is attached to Freehauf's pre-hearing memorandum as Surface Mining Permit ("SMP") No. 37830104.

[2]We have received a letter dated August 9, 1991 indicating we will soon receive an affidavit from Freeauf, but the letter indicates it will only deal with mining's impact on Freeauf's lake.

Board must view a motion for summary judgment in the light most favorable to the non-moving party. Robert C. Penoyer, 1987 EHB 131.

In its motion for summary judgment, Freeauf contends that Perry Bros. has failed to comply with the "mining laws", the CSL and the regulations dealing with applications for issuance of a permit and that Perry Bros. is not entitled to bond release. Freeauf also argues that under the CSL, the bonds are to be conditioned on compliance with the SWMA, that DER admits non-compliance with the SWMA by Perry Bros. at this mine, and that a statutory public nuisance thus exists on this site. The motion argues that since a public nuisance exists on the Perry Bros. mine site it would be an abuse of DER's discretion to release Perry Bros.' bonds.

In support of its contentions, Freeauf's motion points to DER's Responses to Freeauf's Interrogatories, filed with the Board on June 7, 1991. Interrogatories Nos. 4 and 6 deal with whether Perry Bros. submitted certain information, e.g., the quantity and quality of the groundwater and surface water systems, along with its permit application. The motion makes no allegation that this information was required by the regulations or any statute to be submitted before Perry Bros.' permit could be issued. Insofar as Freeauf's motion is requesting us to find that DER improperly issued Perry Bros.' permit because its application was deficient, we agree with DER that at least at this time it appears that it is too late for Freeauf to attack DER's issuance of Perry Bros.' permit. If Freeauf believed Perry Bros.' permit should not have been issued, it had thirty days from the date notice to it of the permit's issuance or from the date notice of issuance was published in the Pennsylvania Bulletin in which to appeal to this Board. McCutcheon, et al. v. DER, et al., 1988 EHB 1114. Freeauf's motion does not

indicate when Perry Bros.' permit was issued, however, the copy of the permit attached to Freeauf's pre-hearing memorandum indicates that it was issued on September 23, 1983 and revised and renewed on February 7, 1989. We can and do infer that more than thirty days should have passed since notice of the permit's issuance was published. Thus, as to this motion's merits, Freeauf has not established that it is timely raising the inadequacy of Perry Bros.' permit application. Further, insofar as Freeauf intends for this argument to serve as a ground for denying post-mining bond release, Freeauf's motion makes no attempt to demonstrate to the Board that Perry Bros.' failure to submit information with its permit application is any basis at all for DER to deny Stage I bond release or forfeit bonds posted pursuant to Perry Bros' permit.

One of the problems facing us in this case is that the bonding requirements for surface mining are found in both the Surface Mine Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* and in Section 315 of the CSL. The language in the two statutes is not coextensive, so to define the extent of bonding obligations, one must flip between the two statutes and the regulations. For example, it is the SMCRA which spells out specific bond release requirements, while the CSL is silent thereon and it is Section 315 which indicates that the posting of bonds under Section 315 shall be conditioned on compliance with SMCRA and that no separate bond need be posted under SMCRA (while SMCRA is silent on this issue).

25 Pa. Code Chapter 86 is promulgated under both the CSL and SMCRA. In part it deals with bond release and at Section 86.171(f) says that DER's bond release decision will include determining whether the permittee (Perry Bros.) has complied with the acts (defined at 25 Pa. Code §86.1 to include the

SWMA). 25 Pa. Code §86.172(c) then goes on to state that the criteria for bond release or adjustment include a requirement of compliance with these acts.

Freeauf's motion does not assert that Perry Bros. has not met the Stage I bond release criteria; rather, it asserts Perry Bros.' non-compliance with the requirement in Section 315 of the CSL of compliance with the SWMA. Freeauf's motion asserts that DER admits Perry Bros.' violation of the SWMA in DER's answers to Freeauf's interrogatories and that a statutory public nuisance exists at the site, i.e., the SWMA non-compliance.

DER's unsworn and unverified response admits the interrogatories' answers but denies a public nuisance exists. Perry Bros.' Answer asserts Stage I bond release is controlled by 25 Pa. Code §86.174 and it is entitled to release, thus overlooking the question of whether Section 86.174 must be read in light of Section 86.172(c). Perry Bros.' verified Answer to Freeauf's motion also denies there is a public nuisance at the site or violation of any applicable laws or regulations. It also asserts as to bond release that if there were violations, they were *de minimus*.

If the bonds require compliance with the SWMA then the argument in Freeauf's motion based on violation of that act has at least some initial attractiveness. Unfortunately, Freeauf has not provided the Board admissions by DER and Perry Bros. that the actual bond documents posted by Perry Bros. in this case require compliance with this statute as is mandated by the statute. Moreover, Freeauf's motion does not contain an affidavit asserting this and copies of the bonds in question have not been provided to us, either.

Accordingly, Freeauf has not shown there are no genuine issues of material fact and that he is entitled to summary judgment as a matter of law and we must deny the motion.

Since there is no adequate basis established to grant this motion and overturn DER's bond release decision, we never reach the point of deciding if we can or should substitute our discretion for that of DER and forfeit Perry Bros.' bonds as Freeauf seeks.[3]

ORDER

AND NOW, this 16th day of August, 1991, it is ordered that Robert F. Freeauf's Motion For Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 16, 1991

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Western Region
For Appellant:
Robert P. Ging, Esq.
Confluence, PA
For Permittee:
Leo M. Stepanian, Esq.
Butler, PA

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[3]Because we do not reach the forfeiture question, we need not address whether this request is not a "back door" attempt to have this Board review DER's exercise of its prosecutorial discretion. See Edward Simon v. DER, EHB Docket No. 91-064-E (Opinion issued May 9, 1991).

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M. DIANE SMITH
SECRETARY TO THE BC

WILLIAM RAMAGOSA, SR., et al.	:	
	:	
v.	:	**EHB Docket No. 89-097-M**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 23, 1991**

OPINION AND ORDER
SUR
MOTION FOR SANCTIONS

By Robert D. Myers, Member

Synopsis:

Where objections to interrogatories are first raised by Appellants in response to a Board Order directing them to provide "written answers" to interrogatories, the objections will not be considered and sanctions will be imposed pursuant to Pa. R.C.P. 4019. After discussing the propriety of dismissing the appeals as a sanction when Appellants frustrate DER's discovery efforts on issues where DER has the burden of proof, the Board elects to impose less severe sanctions.

OPINIONS

On April 12, 1989 William Ramagosa, Sr., William Ramagosa, Jr., Robert Ramagosa, Sunrise Ventures, Inc. and Sunnylands, Inc. (Appellants) jointly filed a Notice of Appeal at Board Docket No. 89-097 seeking review of a Compliance Order issued by the Department of Environmental Resources (DER) on March 10, 1989. The Compliance Order, inter alia, found that Appellants had engaged in certain activities at seven sites in Dingman Township, Pike

County, that amounted to unpermitted earthmoving, failure to prevent accelerated erosion and sedimentation and unpermitted encroachments on bodies of water. They were directed to cease their activities and to restore the sites to their prior condition. Appellants' objections to the Compliance Order were set forth in 13 separate paragraphs of their Notice of Appeal.

After some delay occasioned by proceedings in Commonwealth Court, the Board denied Appellants' Petition to Dismiss (Opinion and Order issued September 14, 1990) and Appellants' Petition for Stay and Supersedeas (Opinion and Order issued November 21, 1990). An Order issued January 29, 1991 required discovery to be completed by March 4, 1991 and required Appellants to file their pre-hearing memorandum by March 15, 1991.[1]

On February 26, 1991 the same Appellants filed a Notice of Appeal at Board Docket No. 91-078 seeking review of a DER letter of February 1, 1991 detailing needed modifications to Appellants' restoration plans for the Dingman Township sites. Appellants' objections to DER's action are set forth in numerous paragraphs covering about eight pages. On May 31, 1991 the two appeals were consolidated at Board Docket No. 89-097.

In the interim the parties had become mired in discovery disputes. The Board disposed of four discovery motions in an Opinion and Order issued on June 4, 1991. Paragraph 4 of this Order provided as follows:

> DER's Motion to Compel Answers to Interrogatories, filed on May 7, 1991, is granted. Appellants shall provide written answers to DER's First Set of Interrogatories and produce documents in response to DER's Request for Production of Documents, in accordance with the Rules of Civil Procedure, within fifteen (15) days after the date of this Order. Failure on

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[1] These dates were later extended. Discovery is scheduled to be concluded by August 30, 1991 and Appellants' pre-hearing memorandum is scheduled to be filed by September 10, 1991.

> the part of Appellants to comply with this portion of the Order will result in the imposition of sanctions upon Appellants which could include the dismissal of these consolidated Appeals.

DER had served its First Set of Interrogatories and Request for Production of Documents on March 4, 1991. Pursuant to Pa. R.C.P. 4005, 4006 and 4009 (incorporated by reference into the Board's discovery rules at 25 Pa. Code §21.111), Appellants were required to answer or object to these discovery requests within 30 days. They did neither. As a result, the Board granted DER's Motion to Compel Answers to Interrogatories.

In timely obedience to the Board's June 4, 1991 Order, Appellants responded to the interrogatories on June 19, 1991 - one response by William Ramagosa, Sr. and a joint response by the other Appellants. Deeming the responses to violate the Board's Order, DER filed a Motion for Sanctions on July 2, 1991. Appellants filed a joint Reply on July 24 and DER filed a further response on July 26. The matter is now ready for decision.

The Appellants (other than William Ramagosa, Sr.) who joined in their response to DER's Interrogatories began with the following:

> **General Objection:**
>
> Appellants object and refuse to provide any answers to these interrogatories on the grounds that provision of any information or answer would require appellants to give evidence against themselves in violation of Article I, Section 9 of the Constitution of the Commonwealth of Pennsylvania. This right and other rights apply and protect Appellants in light of the pending criminal prosecution in United States v. Ramagosa, et al. pending before the United States District Court for the Middle District of Pennsylvania.

This objection might have been appropriate (at least for the individual Appellants, William Ramagosa, Jr. and Robert Ramagosa) if it had

been made in a timely fashion. However, these Appellants not only failed to raise it by filing objections to the Interrogatories, they never even mentioned it in their response to DER's Motion to Compel Answers to Interrogatories. They objected, for the first time, after being directed by a Board Order to provide "written answers." To permit the objection to stand under these circumstances would make a mockery of the discovery process and vitiate the effect of Board Orders.

This reasoning applies as well to the objections raised by all of the Appellants to Interrogatories Nos. 3, 22, 23, 24, 25, 34, 35 and 36 and to the objections raised by all but William Ramagosa, Sr. to Interrogatories 5 through 18. These objections violate the Board's Order to provide "written answers" and will not be entertained.[2]

Deciding upon appropriate sanctions to be imposed against Appellants under Pa. R.C.P. 4019 is not a simple matter, because appeals before this Board are not identical to civil actions in the law courts. Appellants, having invoked the jurisdiction of the Board by filing Notices of Appeal, appear to stand in the position of civil plaintiffs. However, the Board's procedural rules place the burden of proof on DER in appeals of this nature. See 15 Pa. Code §21.101(b)(3). Thus, while the issues before us are framed by Appellants' listing of objections, DER is burdened with the duty of presenting a prima facie case initially and a preponderance of the evidence case ultimately.

Appellants' obstruction of DER's discovery into the very issues Appellants have raised can seriously frustrate DER's burden-carrying

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[2] DER claims that the Answers provided by William Ramagosa, Sr. to Interrogatories 5 through 18 also are deficient. We disagree and will impose no sanctions against him with respect to these answers.

responsibilities. For this reason, sanctions in the form of dismissal of the appeals often is the appropriate remedy even though it may appear severe. We have given serious consideration to using that remedy against these Appellants, because of their obvious disregard for Board Orders, but have decided that sanctions short of that final step will be sufficient. Accordingly, we will enter the following:

ORDER

AND NOW, this 23rd day of August, 1991, it is ordered as follows:

1. DER's Motion for Sanctions is granted in part and denied in part in accordance with this Opinion and Order.

All Appellants

2. The factual allegations in paragraphs 4 through 9, and 11 of DER's Compliance Order of March 10, 1989 shall be deemed to have been established by a preponderance of the evidence. No evidence concerning these factual allegations shall be admitted during the hearing on the merits.

3. Appellants shall be prohibited from offering evidence or legal arguments with respect to the contentions in paragraphs 3(e) and 3(f) of the Notice of Appeal filed originally at Board Docket No. 89-097.

4. Appellants shall be prohibited from presenting evidence concerning any communications they have had with agents or employees of the United States of America, the Commonwealth of Pennsylvania, or any regional or local government concerning activities conducted at the sites in Dingman Township.

All Appellants except William Ramagosa, Sr.

5. The factual allegations in paragraphs 15, 16, 21 and 25 of

DER's Compliance Order of March 10, 1989 shall be deemed to have been established by a preponderance of the evidence. No evidence concerning these factual allegations shall be admitted during the hearing on the merits.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 23, 1991

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BO

ROBERT K. GOETZ, JR.	:	
	:	
v.	:	**EHB Docket No. 89-509-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 23, 1991**

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

By Robert D. Myers, Member

Synopsis

The Board upholds the assessment of civil penalties totalling $19,500 for violations of the Solid Waste Management Act (SWMA), the regulations and an Administrative Order of DER. The Board finds no abuse of discretion in the use of a penalty assessment matrix (suggesting ranges of penalty amounts for each of 4 degrees of wilfulness and each of 3 degrees of severity), developed by DER as a guidance tool for Compliance Specialists in an effort to bring more objectivity into the assessment process, but makes no determination on the reasonableness of the ranges. The Board finds no abuse of discretion, however, in the assessment of $1,500 for each violation considered to involve a minor degree of wilfulness and a minor degree of severity. The Board finds no factual support for assessing separate penalties for unlawful conduct under §610(4) and (9) of the SWMA when penalties have already been approved

for unlawful conduct under §610(1), (2) and (3) of the SWMA. Despite the Board's disapproval of these elements of the assessment, the Board finds the total amount of the penalty to be appropriate.

Procedural History

Robert K. Goetz, Jr., Appellant, filed a Notice of Appeal on October 27, 1989 from an Assessment of Civil Penalties in the amount of $19,500 issued by the Department of Environmental Resources (DER) on September 29, 1989. On March 13, 1990 the Board issued an Opinion and Order granting DER's Motion to Limit Issues. Pursuant to this Opinion and Order, the sole issue remaining to be litigated was the reasonableness of the amount of the civil penalty.

A hearing scheduled to begin on September 18, 1990 was continued to enable Appellant to retain replacement legal counsel. The continued hearing reconvened in Harrisburg on February 12, 1991 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented evidence in support of their positions. DER filed its post-hearing brief on March 21, 1991; Appellant filed his on April 9, 1991.

The record consists of the pleadings, hearing transcripts of 52 pages and 4 exhibits. After a full and complete review of the record, we make the following.

FINDINGS OF FACT

1. Appellant is an individual residing at 649 Bingaman Road, Orrtanna (Adams County), Pennsylvania 17353. He is engaged in the excavating and demolition business and owns two contiguous 10-acre tracts of land (Cashtown Site) on the southern side of U.S. Route 30 in Franklin Township, Adams County (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and has the responsibility for administering the provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq*; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes.

3. On August 7, 1987 DER issued to Appellant a Notice of Violation for the operation of a construction/demolition waste landfill on the Cashtown Site without a permit from DER. The Notice of Violation was based on a July 27, 1987 inspection of the Cashtown Site by a representative of DER who observed the unpermitted storage/processing/disposal of demolition material including metals, insulation and wood (Notice of Appeal).

4. On March 23, 24, and 27, 1989 representatives of DER inspected the Cashtown Site and observed several piles of burning demolition materials - wood, brick, insulation, a porcelain sink and metal pipes (Notice of Appeal).

5. On May 17, 1989 DER issued an Administrative Order to Appellant directing him to cease and desist the depositing and burning of solid waste on the Cashtown Site and to submit a closure plan to DER (Notice of Appeal).

6. When Appellant failed to comply with the May 17, 1989 Administrative Order, DER issued the Assessment of Civil Penalties on September 29, 1989, assessing penalties for the violations observed on July 27, 1987, the violations observed on March 23, 24 and 27, 1989 and the failure to comply with the Administrative Order of May 17, 1989 (Notice of Appeal).

7. DER also initiated an enforcement action in Commonwealth Court at No. 255 Misc. Docket 1989. On November 20, 1989 the Court issued an Order

finding that Appellant had engaged in the unpermitted disposal and burning of demolition waste on the Cashtown Site.

8. In calculating the civil penalty, DER's Richard J. Morgan used a DER matrix suggesting a range of penalty amounts for each of 4 degrees of wilfulness and each of 3 degrees of severity. (N.T. 11-14; Exhibit C-1).

9. The matrix is intended as a guide to Compliance Specialists in an effort to bring some objectivity into the assessment process (N.T. 11).

10. In arriving at a civil penalty for Appellant's conduct observed on July 27, 1987, Morgan

(a) concluded that the conduct constituted two separate violations - unpermitted disposal contrary to §§201(a), 501(a) and 610(1) and (2) of the SWMA, 35 P.S. §§6018.201(a), 6018.501(a) and 6018.610(1) and (2), and to 25 Pa. Code §75.21(a); and unlawful conduct contrary to §610(4) and (9) of the SWMA, 35 P.S. §6018.610(4) and (9);

(b) concluded that the unpermitted disposal violation fell within the "minor" category for both wilfulness and severity and assessed a civil penalty of $1,500, the lowest amount in the suggested range of $1,500 to $10,000;

(c) concluded that the unlawful conduct violation also fell within the "minor" category for both wilfulness and severity and assessed a civil penalty of $1,500 for it.

(N.T. 15-16, 18-20; Exhibits C-1 and C-2).

11. In arriving at a civil penalty for Appellant's conduct observed on March 23, 24 and 27, 1989, Morgan

(a) concluded that the conduct constituted three separate violations - open burning contrary to §§201(a), 501(a) and 610(3) of the SWMA, 35 P.S. §§6018.201(a), 6018.501(a) and 6018.610(3), and to 25 Pa. Code

§277.217(c); unpermitted disposal contrary to §§201(a), 501(a) and 610 (1) and (2) of the SWMA, 35 P.S. §§6018.201(a), 6018.501(a) and 6018.610 (1) and (2), and to 25 Pa. Code §277.201(a)[1]; and unlawful conduct contrary to §610(4) and (9) of the SWMA, 35 P.S. §6018.610(4) and (9);

(b) concluded that the open burning violation fell within the "minor" category for both wilfulness and severity and assessed a civil penalty of $4,500 - $1,500 for each of 3 days during which the violation continued;

(c) concluded that the unpermitted disposal violation fell within the "moderate" category for wilfulness and the "minor" category for severity and assessed a civil penalty of $6,000, the lowest amount in the suggested range of $6,000 to $17,500; and

(d) concluded that the unlawful conduct violation also fell within the "moderate" category for wilfulness and the "minor" category for severity and assessed a civil penalty of $6,000.

(N.T. 16-18, 20-21; Exhibits C-1 and C-2).

12. After arriving at a civil penalty of $3,000 for the conduct observed on July 27, 1987 and a civil penalty of $16,500 for the conduct observed on March 23, 24 and 27, 1989, Morgan considered Appellant's failure to comply with DER's Administrative Order of May 17, 1989, the fact that Appellant's conduct had continued sporadically for two years and the possibility that Appellant had realized monetary savings by using the Cashtown

---

[1] There is no explanation why the unpermitted disposal in 1987 was considered a violation of 25 Pa. Code §75.21(a) but the unpermitted disposal in 1989 was considered a violation of 25 Pa. Code §277.201(a). Since both sections appear to be applicable, the distinction has no bearing on our decision.

Site for disposal purposes. Finding no mitigating circumstances in these considerations, Morgan made no reduction in the recommended civil penalty amounts (N.T. 22-23).

DISCUSSION

DER has the burden of proof under 25 Pa. Code §21.101(b)(1). It must establish by a preponderance of the evidence that the Assessment of Civil Penalties was authorized by law and was an appropriate exercise of discretion. The Assessment was made pursuant to §605 of the SWMA, 35 P.S. §6018.605, which authorizes a penalty of up to $25,000 for each violation of the SWMA, the regulations, permit conditions or DER orders. Each separate day on which a violation occurs and "each violation of any provision of [the SWMA], any rule or regulation under [the SWMA], any order of [DER], or any term or condition of a permit shall constitute a separate and distinct offense...." Appellant violated the SWMA, the regulations and DER's Administrative Order. Since the total amount assessed is less than the $25,000 maximum permitted for each violation, the assessment clearly falls within DER's statutory authority.

The assessment also must reflect DER's employment of sound discretion. Appellant's attack upon the assessment focuses on this area. Section 605 of the SWMA removes DER's discretion by mandating the assessment of a civil penalty whenever the violation leads to the issuance of a cessation order (as is the case here), but merely guides DER's exercise of discretion in determining the amount (up to the $25,000 limit). DER is told to consider the "willfullness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors."

Wilfulness and the severity of damage to the environment are, of course, two of the most critical considerations. DER has attempted to produce some degree of uniformity statewide in the penalty amounts attributable to these two factors by compiling the penalty assessment matrix. This is intended as a guidance document to inject a measure of objectivity into what otherwise could be a highly subjective exercise. Compliance Specialists who do the assessing are not bound by the matrix but apparently find it to be a useful tool.

Richard J. Morgan, who calculated the assessment against Appellant, used the matrix. He considered the environmental damage to be "minor" for each violation. He also considered the wilfulness to be "minor" the first time each violation was committed. For subsequent violations, be considered the wilfulness to be "moderate." There is no abuse of discretion apparent in these decisions. The range of penalties suggested for a "minor/minor" violation is $1,500 to $10,000; Morgan used the low figure. The range suggested for a "moderate/minor" violation is $6,000 to $17,500; again Morgan used the low figure.

Appellant argues that the matrix range for the "minor/minor" category should start at zero for cases like this where the violation is a first offense and where no apparent environmental damage occurred. Appellant overlooks the legislative mandate to assess a penalty in some amount when a cessation order is issued. While the minimum amount conceivably could be

lower than $1,500, it could not be much lower and still be looked upon as a penalty. We find no abuse of discretion in the use of $1,500 for the "minor/minor" category.[2]

Morgan calculated penalties for 2 violations related to the July 27, 1987 inspection and 3 violations related to the March 23, 24 and 27, 1989 inspections. The 1987 violations were for unpermitted disposal and unlawful conduct. The unpermitted disposal is proscribed, as cited by DER, by §§201(a), 501(a), 610(1) and 610(2) of the SWMA and by 25 Pa. Code §75.21(a). The unlawful conduct is a separate violation, according to DER, under §610(4) and (9) of the SWMA, which read as follows:

> It shall be unlawful for any person or municipality to:
>
> ***
>
> (4) Store, collect, transport, process, treat, beneficially use, or dispose of, or assist in the storage, collection, transportation, processing, treatment, beneficial use or disposal of, solid waste contrary to the rules or regulations adopted under [the SWMA], or orders of [DER], or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare.
>
> ***
>
> (9) Cause or assist in the violation of any provision of [the SWMA], any rule or regulation of [DER], any order of [DER] or any term or any condition of any permit.

From the facts available to us (including the allegations in the Assessment of Civil Penalties), Appellant's conduct in 1987 consisted of the storage, processing and disposal of demolition materials without a permit required by the SWMA and the regulations. Section 610(1) and (2) of the SWMA

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[2] Since Appellant made no specific objection to the minimum amount ($6,000) provided in the matrix for the "moderate/minor" category, we will not deal with it separately but only in the context of the overall assessment.

make such conduct unlawful and support the assessment of a civil penalty. We find no factual basis to sustain a separate penalty, however, for this same conduct under §610(4) and (9) of the SWMA.[3]

The 1989 violations for which penalties were calculated were open burning, unpermitted disposal and unlawful conduct. The open burning is proscribed, as cited by DER, by §610(3) of the SWMA and by 25 Pa. Code §277.217(c).[4] The unpermitted disposal is a violation of §§201(a), 501(a) and 610(1) and (2) of the SWMA and of 25 Pa. Code §277.201(a), as cited by DER. There can be no doubt that the open burning and unpermitted disposal are separate violations. DER argues that the unlawful conduct also is a separate violation under §610(4) and (9) of the SWMA. The facts do not support a separate penalty, however, on the basis of the same rationale discussed in connection with the 1987 violations.

The elimination of the penalty assessments for §610(4) and (9) would reduce Morgan's calculation to $12,000. He made no separate calculation, however, for Appellant's disregard of the Administrative Order of May 17, 1989 - considering it only in connection with the overall amount of the assessment. That conduct of the Appellant can only be viewed as being in the "major" category for wilfulness. Even if the severity is still considered to be "minor", the penalty suggested by the matrix is a minimum of $13,500. While we do not adopt this suggested amount as our own, we view the violation of the

---

[3] We are not holding that separate penalties cannot be assessed under the various subsections of §610; but there must be a factual basis to sustain each of them independent of the others. For example, if the evidence here had shown the creation of a public nuisance (other than the statutory nuisance created under §601), we would have sustained the assessment of a separate penalty under §610(4).

[4] DER also cites §§201(a) and 501(a) of the SWMA, 35 P.S. §§6018.201(a) and 6018.501(a), but we will not deal with these sections since the citations mentioned in the text are enough to sustain the assessment.

Administrative Order as sufficiently serious to warrant a penalty of at least $7,500, the amount eliminated in connection with §610(4) and (9).

Thus, while we do not approve all of the elements making up the civil penalty assessment, we find the total amount to be reasonable.[5]

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that the Assessment of Civil Penalties is authorized by law and was an appropriate exercise of discretion.

3. Section 605 of the SWMA, 35 P.S. §6018.605, authorizes DER to assess a civil penalty, up to a maximum of $25,000 per offense, for each violation of the SWMA, the regulations, permit conditions or DER orders.

4. Appellant violated the SWMA, the regulations and DER's Administrative Order.

5. Since Appellant's violations led to the issuance of a cessation order, DER was required to assess a civil penalty.

6. In determining the amount of the civil penalty, DER was required to consider wilfulness, damage to the environment, cost of restoration and abatement, savings resulting to the violator and other relevant factors.

7. Richard J. Morgan's conclusions regarding the degrees of wilfulness and the degrees of severity involved in Appellant's violations were not an abuse of discretion.

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[5] We also note that, while a separate open burning penalty was assessed for each of the 3 days in 1989 when it was observed, only 1 unpermitted disposal penalty was assessed. Since the unpermitted disposal was observed on the same 3 days as the open burning, 3 penalties could have been assessed instead of 1.

8. Morgan's assessment of $1,500 for violations he deemed to involve a minor degree of wilfulness and a minor degree of severity was not an abuse of discretion.

9. While Appellant's conduct observed on July 27, 1987 supports the assessment of a civil penalty for violations of §610(1) and (2) of the SWMA, there is no factual basis to support a separate assessment under §610(4) and (9).

10. While Appellant's conduct observed on March 23, 24 and 27, 1989 supports the assessment of civil penalties under §610(1) and (2) and under §610(3) of the SWMA, there is no factual basis to support a separate assessment under §610(4) and (9).

11. Appellant's violation of DER's Administrative Order which involved a major degree of wilfulness and a minor degree of severity, would support the assessment of a civil penalty at least in the amount of $7,500.

12. The $19,500 civil penalty assessed against Appellant is reasonable.

ORDER

AND NOW, this 23rd day of August, 1991, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 23, 1991

cc: **Bureau of Litigation**
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Central Region
sb

For the Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOA

MIDWAY SEWERAGE AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 90-231-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 26, 1991**

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

By Richard S. Ehmann, Member

Synopsis

When a party waits until just before the hearing on the merits of its appeal to amend its Pre-Hearing Memorandum to add expert testimony in a new field and opposing counsel moves for a sanction barring same, the order of the Board member hearing the appeal barring the expert testimony under 25 Pa. Code §21.124 will not be disturbed. A party before the Board may not delay for over five months the revelation of possible expert testimony when the expert has been consulting with the party since before the filing of the appeal and the party thus could have noticed the potential for its expert's utilization sufficiently timely for its opponent to conduct discovery as to this new evidence and to prepare to rebut it.

Where an appellant bearing the burden of proof fails to show more than that the evidence in favor of its position is equal to that opposing same, it fails to show sufficient evidence to satisfy the Board as to the existence of

the factual contentions it advances. When this occurs, the Board never reaches the point, in adjudicating the dispute before it, of deciding whether and to what extent to substitute its discretion for that of the Department of Environmental Resources ("DER").

Background

On June 7, 1990, Midway Sewerage Authority ("Midway") filed an appeal from DER's denial of a planning module component ("PMC") proposing sewerage facilities to serve Midway Borough plus immediately adjacent portions of Smith and Robinson Townships in Washington County. DER's denial of the PMC was contained in its letter of May 14, 1990. Thereafter, the parties filed their Pre-Hearing Memoranda and, on an unopposed motion by DER, we allowed the parties a further period in which to conduct additional discovery. The appeal was also scheduled for a trial in December of 1990.

Within this period, Midway filed a proposed Supplement to its Pre-Hearing Memorandum in which it sought to add 24 new witnesses. On November 2, 1990, DER filed a Motion For Sanctions addressing this supplement. After a pre-hearing conference concerning discovery issues, Board member Ehmann issued his Order of November 6, 1990, directing that Midway supplement its answers to DER's interrogatories, requiring that DER produce certain documents for Midway and allowing DER to depose certain Midway witnesses. The Order further directed, on agreement of the parties, that all but two of Midway's proposed 24 witnesses (who would offer only cumulative testimony) would not testify.

Thereafter, on Midway's next attempt to amend its Pre-Hearing Memorandum, DER filed a second Motion For Sanctions, alleging Midway failed to comply with

the Order of November 6, 1990 as to a witness named Victor Lynch, who Midway was now seeking to add as an expert witness. On November 26, 1990, DER filed with this Board an amended version of this second Motion For Sanctions. Thereafter, on November 28, 1990, we received Midway's response to DER's second Motion and, on December 3, 1990, we received Midway's Response to the amended version of this second Motion. By Order of December 3, 1990, we granted DER's Motion in part and, as a sanction, barred Midway from calling Victor Lynch as an expert witness, while still allowing him to testify as a fact witness. DER's Motion had sought to bar all testimony from Attorney Lynch.

On December 6, 1990, Board member Ehmann issued his opinion in support of the December 3, 1990 Order concerning the sanctions imposed on Midway relating to Lynch's testimony. On December 10, the parties filed an amended Joint Pre-Trial Stipulation with us. The merits of this appeal were heard on December 12 and 13, 1990.

On February 20, 1991, we received the transcript of the hearing on the merits and issued our Order scheduling the filing of the parties' Post-Hearing Briefs. Midway's initial Post-Hearing Brief was filed on March 20, 1991. After we granted DER's unopposed request for an extension of the deadline for its Post-Hearing Brief, we received same on April 19, 1991. On April 29, 1991, Midway filed a Reply to DER's Post-Hearing Brief.

After a complete review of the entire record in this matter, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant is Midway Sewerage Authority, a municipal authority incorporated in December of 1987 to address sewage issues in the Borough of Midway, Washington County, Pennsylvania. (B-42)[1]

2. DER is the agency of the Commonwealth with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1-691.1001 ("Clean Streams Law"); the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§750.1-750.20 ("Sewage Facilities Act"); and the rules and regulations promulgated thereunder. (B-42)

Midway Borough

3. Currently, sewage collection and treatment in Midway Borough ("the Borough") consists of a system of wildcat sewers and individual septic systems, many of which malfunction. (B-42)

4. The Borough is a working class residential town with about 50% of its population being elderly and with a median family income of $26,000 per year. (T-98)

5. The citizens of the Borough desire a sewerage system's construction. (T-97)

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[1]References in these Finding of Facts are as follows: T-___ references a page in the merits hearing's transcript; C-___ references a DER Exhibit; B-___ references Exhibits of the Board; M-___ references a Midway Exhibit. The parties were able to stipulate to 41 joint exhibits which were admitted at the hearing's commencement and are considered Board Exhibits. (T-14) B-42 is the parties' Amended Joint Stipulation containing a partial stipulation of facts.

6. The residents of the Borough do not care whether the plant is located next to Midway or at McDonald, as long as they can afford it. (T-106, 124, 341)

7. The upper Robinson Run municipalities consist of the Borough and portions of Smith, Cecil, Mt. Pleasant and Robinson Townships. The Borough is located on the extreme upper reaches of the Robinson Run watershed. (B-22, B-27, B-33, B-42)

8. Growth projections for the upper Robinson Run watershed show virtually no growth in the Borough but substantial growth in the surrounding townships. (T-162)

9. Robinson Run is polluted by mine drainage and sewage, with the main pollutant being mine drainage. (T-254)

Sewage Planning Background

10. In 1982, the United States Environmental Protection Agency ("EPA") funded a 201 Facilities Plan for the Robinson Run watershed. This report recommended that a new secondary treatment facility be constructed at Oakdale Borough in Allegheny County and that this plant treat the sewage generated in nine municipalities in this watershed, including the Borough. The report found existing sewers in Oakdale and McDonald to be adequate for continued use but recognized sewers would need to be constructed for the other municipalities. (B-42)

11. On October 7, 1982, the Borough, along with each of the eight other municipalities in the Robinson Run watershed, adopted the 201 Facilities Plan

as its Official Plan, pursuant to Section 5 of the Sewage Facilities Act, *supra*, 35 P.S. §750.5. (B-42)

12. Subsequently, EPA did not provide any construction funds for implementing the 201 Facilities Plan; therefore, no secondary treatment facility was constructed at Oakdale. (B-42)

13. Oakdale, McDonald Borough, North Fayette Township and South Fayette Township are the four municipalities located in the lower (downstream) portion of the Robinson Run watershed served by the Oakdale interceptor. (B-42)

14. McDonald Borough is located partially in Washington County and partially in Allegheny County. (T-279)

15. EPA developed a national municipal policy to press municipalities to comply with the federal Clean Water Act and, pursuant thereto, notified Oakdale that it had to upgrade its sewage treatment plant to provide secondary treatment. (T-247)

16. Upon receipt of this EPA notice, Oakdale started negotiations with ALCOSAN to convey its sewage to the ALCOSAN sewage system for treatment at ALCOSAN's plant, rather than upgrading Oakdale's treatment plant. DER pressed Oakdale and ALCOSAN for McDonald's inclusion in the conveyance proposal because both McDonald and Oakdale already had sanitary collector sewers and needed only to construct an interceptor sewer to convey the sewage to ALCOSAN. (T-247-248)

17. Oakdale entered into an agreement whereby sewage from Oakdale, McDonald Borough and North and South Fayette Township was conveyed via an interceptor sewer to ALCOSAN's treatment facilities. (B-27, 42)

18. DER approved the Oakdale-ALCOSAN arrangement for the four lower watershed communities largely because the existence of adequate sewers in Oakdale and McDonald made the project economically feasible without outside funding. (B-42)

19. The upper Robinson Run municipalities were not included in the Oakdale-ALCOSAN agreement because, *inter alia*, these municipalities needed to construct collector sewers and the cost projections for such sewers showed project cost would exceed local financial resources. (B-42, T-248)

20. The Pennsylvania Infrastructure Investment Authority came into existence in 1988 and provides a program known as Pennvest to provide low interest loans and grants to fund water supply and sewage projects. (B-2, B-22)

21. The Commonwealth inaugurated the Pennvest program shortly before Oakdale began construction of the interceptor to ALCOSAN. The lower watershed communities received a Pennvest commitment for the Oakdale-ALCOSAN project. (B-42)

22. About this same time, DER began a review of whether, with Pennvest funding, the upper watershed municipalities could participate in the Oakdale-ALCOSAN project. Both Oakdale and McDonald modified their interceptor designs and included flow allocations to accommodate the upper watershed communities. However, ALCOSAN then informed DER and Midway that its conveyance facilities, originally designed solely to serve communities in Allegheny County, did not have capacity to serve the upper watershed municipalities, all of which are located in Washington County. (B-7, B-42)

23. In this appeal Midway disputes ALCOSAN's determination that its conveyance facilities do not have capacity to serve the upper watershed communities. (B-42) Despite Midway's position on this issue, it offered no evidence on this point in the hearing on the merits of its appeal.

24. Following ALCOSAN's determination that it could serve only the lower watershed municipalities, DER met at various times with representatives of the Borough and Midway. Although the Borough and Midway indicated an interest in building a sewage treatment plant ("STP") near the Borough, DER informed Borough and Midway officials that the only environmentally-sound option to serve the existing and future needs of the watershed was to build an STP downstream of the Borough near McDonald Borough, where the STP could service all of the portions of the upper watershed municipalities lying within the watershed. (B-42)

25. On January 3, 1990, DER received a PMC submitted on behalf of Midway, the Borough and Robinson and Smith Townships by Gannett-Fleming, Inc., (Gannett-Fleming). The PMC proposed construction of collector sewers and an STP located near the Borough to serve Midway and immediately adjacent portions of Smith and Robinson Townships. (B-33, B-42) DER returned the PMC as incomplete. (B-30) Midway had Gannett-Fleming resubmit a completed PMC to DER on January 30, 1990. (B-33, B-42)

26. Midway's PMC proposes the construction of an STP and a system of collecting sewers which would serve all of the Borough and the small numbers of homes in Smith and Robinson Townships, which are both immediately adjacent to the Borough and are located upstream of the proposed STP ("hereinafter the

local option"). The STP itself would be located on Robinson Run in Smith Township, immediately downstream of the Borough. (B-33; M-1)

27. Midway's PMC seeks revision of the existing Washington County Sewage Facilities Plan (B-33) which provides for sewage disposal as outlined above in the 201 Facilities Plan described in Finding of Fact No. 10 above. (B-33)

28. At the time Gannett-Fleming initially undertook the study which produced the local option, as reflected in Midway's PMC, it was aware that DER wished to see a proposal for sewerage system construction which would address not only sewage disposal needs of the area covered by the PMC but also the remaining developed portion of the upper Robinson Run watershed, including the Gladden Heights community in Cecil Township, the community known as Primrose in Robinson Township, the area which includes the Fort Cherry Junior-Senior High School in Mount Pleasant Township and the portions of Smith and Robinson Townships connecting all of these areas (hereinafter "the watershed or regional option"). Accordingly, Gannett-Fleming reviewed such a concept as part of the Report dated 1989 it prepared for Midway. (B-22, B-33; M-1)

29. By letter dated May 14, 1990, the Department denied approval of the PMC because it proposed to build the STP to serve the Borough area alone, as opposed to a project which would serve the entire upper Robinson Run watershed. (B-42)

30. M-1 is a map of the upper Robinson Run watershed initially put together as part of a 1969 sewage feasibility study prepared by

Gannett-Fleming for a committee of four upper watershed communities. (T-22, 23) Among other things, this exhibit shows a sewerage system to serve the entire upper watershed. (M-1)

31. The Department has an established sequence for reviewing and approving proposals to construct or upgrade sewage facilities: 1) the applicant submits planning modules setting forth the scope of the proposed project to the Department for its review and approval; 2) the applicant next submits an application for an NPDES permit for its sewage treatment facilities; 3) after the applicant receives its NPDES permit and knows the effluent limitations for its discharge, the applicant then designs an STP and sewage collection system which will meet those limits and it applies for a Water Quality Management ("Part II") permit to construct its treatment and collection facilities; 4) after the applicant has obtained both an NPDES and a Part II permit, it may then begin the process of applying for Pennvest or other subsidized funding. (B-42)

32. Midway and Gannett-Fleming first met with DER about building a sewerage system to serve the Borough in January of 1988. (T-31)

33. In 1988, Midway hired Gannett-Fleming to study, plan, prepare plans and specifications and provide construction phase services in regard to building a sewerage system including an STP to serve the Borough. (T-26)

34. In the summer of 1988, Midway obtained bank loans of $150,000, the purpose of which was to cover all engineering costs, the rights-of-ways, the legal fees and the interest on the loan for the first two years. (T-33-34, 102-104)

35. At that time in 1988, DER wanted the five upper watershed municipalities to work together to press ALCOSAN to accept their sewage, but Gannett-Fleming's 1988 study concluded that the cost of this option was higher than the cost to residential customers of a plant located at Midway. Gannett-Fleming's report asserts that Midway would have to pay a portion of the cost of an interceptor laid from Midway to the Borough of McDonald, plus a portion of the interceptor to Oakdale cost, a portion of the Oakdale to ALCOSAN interceptor cost, ALCOSAN's tap-in fee and ALCOSAN's user fees using the ALCOSAN option. (T-34-36)

36. Gannett-Fleming's study concludes the watershed or regional option is not financially feasible even if there is $500,000 grant from Pennvest and the remainder of the construction cost is financed by a Pennvest 1% interest rate loan or revenue bond issue. (T-40, 43) According to Gannett-Fleming, the watershed option costs $44.13 per residence per month, assuming the Fort Cherry Junior-Senior High School is required to connect to this regional sewer system. (T-40-41, 43)

37. After ALCOSAN also rejected serving the upper watershed communities, DER then said a sewerage system and plant should be built downstream in the watershed near McDonald to serve the upper watershed. (T-39)

38. If there is to be a sewerage system constructed to serve Borough residents now, as opposed to construction at some future time, then Gannett-Fleming's study says the only alternative which is even potentially financially feasible is the local option described in the PMC. (T-48, 59)

39. Midway has been advised by its bond counsel that it cannot sell revenue bonds in the bond market to finance any sewerage system's construction if the monthly cost for the sewerage system's financing and use per residence or dwelling unit ("EDU") exceeds $35. (T-44)

40. DER and Midway both use $35 per month per EDU as the cut off point to determine if a proposed sewerage system is financially feasible. (T-43, 44, 165, 197-198)

41. Midway has not submitted a PMC to DER for a regional option system and DER has not reviewed planning specifics with regard thereto, but Gannett-Fleming has picked a potential site for a sewage treatment plant which would serve the entire upper watershed. However, Gannett-Fleming projects serious opposition thereto because the site which Gannett-Fleming selected is in McDonald Borough's park. (T-50-52, 61; M-1)

Midway's Sewer Line Design

42. The system of sewer lines to collect the sewage in Midway has already been designed for Midway by Gannett-Fleming, even though it knew that DER had yet to approve the PMC and despite the fact that this puts the cart before the horse in terms of the standard procedure for DER approvals set forth in Finding of Fact No. 29. (T-44, 62)

43. Midway's engineering design for collector systems was not made obsolete by the Department's denial of the PMC; the Authority can use the design for collector sewers if and when a regional sewage system is constructed to serve the entire upper watershed. (B-42)

44. While the parties provided the Board no evidence as to the cost to Midway of Gannett-Fleming's work, in the spring of 1990 the legislature inserted in DER's budget a special DER budget grant to the Authority of $70,000 to defray the Authority's engineering costs. (B-42)

Midway's Financial Feasibility

45. Gannett-Fleming's Ed Monroe testified as an expert in sewerage system design on behalf of Midway. His credentials (B-41) were stipulated to by DER. (B-42; T-13-14) Monroe is a licensed professional engineer and vice president of Gannett-Fleming. (B-41) It is he who submitted the PMC to DER on Midway's behalf. (B-33) He was Midway's only expert witness.

46. Monroe is of the opinion that DER's cost figures for assessing the financial feasibility of various sewering options are not valid. (T-54)

47. In preparing the study which is Exhibit B-22 and dated 1989, Mr. Monroe used assumptions as to the amount of Pennvest grants available to fund the project which he recognized at the hearing as being invalid in 1991. (T-68)

48. In preparing Exhibit B-22, at least a portion of which is included in the PMC submitted to DER, Monroe assumed each municipality involved in the project would receive a $500,000 Pennvest grant, whereas he testified that he now believes it is likely the maximum grant total for all municipalities combined would be $500,000. Accordingly, the local option would not receive $1.5 million in grants and the regional option would not receive $2.5 million in grants, as shown on Exhibit B-22, but either option would receive only $500,000 in grants to finance the project. (B-22, B-33; T-68-69)

49. Monroe's financial feasibility estimate is also no longer reliable insofar as it is based on assumption of a Pennvest loan bearing an interest rate of 1% for 20 years for 100% of the project's cost. Monroe recognizes that interest rates on Pennvest loans are higher now. (T-69-70)

50. Monroe agrees that if the financing costs for the local option set forth in the PMC rise above $35 per EDU per month, it would be very difficult to finance. (T-72)

51. According to Monroe's experience, approximately half of the sewerage projects actually constructed end up having a higher cost than initially estimated at the planning stage. (T-75)

52. Monroe testified that average tap-in fees in Western Pennsylvania run from $1,500 to $1,700 per EDU, but there is usually a $20 per front foot assessment fee for each residence served when the tap-in fee is in this range. (T-75-76)

53. Monroe recommends a $2,000 tap-in fee per EDU for Midway's project and says that $2,000 tap-in fee is reasonable if there is no money assessed to each residence on a "front foot" basis. (T-76)

54. Monroe testified that up-front costs to homeowners should not exceed from $5,000 to $6,000 dollars. Monroe admitted however that in his deposition he testified that a $2,000 tap-in fee needs to be augmented in some cases by a front foot assessment of up to $20 per foot and, on top of that, each homeowner will have to spend $1,000 to $2,000 to install the private sewer connecting the home to the municipal sewer, so that with a 100-foot-wide lot, up-front costs could rise to $5,000 to $6,000. Monroe testified this would

adversely impact on the rate homeowners pay their connection and use fees, i.e., the delinquency rate of Midway's customers. (T-76-78)

55. Although at the hearing Mr. Monroe felt that construction of the local option project was only marginal financially, unless it had 100% Pennvest funding, at his deposition he opined that it was probably infeasible unless financed 100% by Pennvest. (T-78-79)

56. Midway has not applied to Pennvest for any funding of the local option set forth in the PMC but has applied to Pennvest for funding of the regional option. (T-79-80)

57. Monroe agrees his testimony as to Midway's ability to finance this project through sale of municipal bonds is only educated speculation. (T-82)

58. Monroe is not sure of the financial impact on the residents of the Borough if the local option were approved and constructed but before its financing were paid off (in 20 years), Midway's sewage treatment plant would have to be abandoned because of the construction of the regional option. (T-85)

59. Midway made the local option proposal set forth in the PMC because it believes it is the cheapest option. (T-118)

DER's Cost Evidence

60. Timothy Dreier is chief of the Grants Section of DER's Pittsburgh Office. He has been with DER for 20 years. Dreier is a registered professional engineer with a B.S. and an M.S. in civil engineering from the University of Pittsburgh. (T-241-242)

61. Dreier's section reviews all municipal sewage system proposals which seek either federal grants funding or monies from the Pennvest program. (T-241)

62. Steve Weitz has worked for DER for seventeen years (T-134), dealing with EPA funded and Pennvest funded sewerage projects. (T-129)

63. Midway stipulated that Weitz may testify as an expert in review of sewage projects. (T-131) Weitz testified as an expert witness. (T-136)

64. Midway stipulated to Dreier's qualification, declined *voir dire* as to his expertise and allowed that he could provide expert testimony in this matter, so Dreier testified as an expert. (T-243-244)

65. Pennvest has an unofficial policy of limiting grants to $500,000 per project. (T-138) Thus, the cost figures in Monroe's comparison of the local option and watershed or regional option in Exhibit B-22 as related to the local option and how much must be financed by Midway versus how much of the cost could be funded by a Pennvest grant are off by $1 million out of a total cost of $2.4 million.

66. At present, Pennvest does not lend money at 1% interest for 20 years, but charges 2% interest for the first five years and 4% for the remaining 15 years. (T-138) The higher a loan's interest rate the higher the monthly EDU costs.

67. Weitz believes that Monroe's estimate of operations costs (in Exhibit B-22) are doubled for the regional option over the local option and this is an error because economies of scale bring down the cost of treating each gallon of sewage. (T-139)

68. Weitz prepared Exhibit C-1 to address what DER feels are the errors in Monroe's estimate. (T-139-140)

69. With the DER corrections for certain error in assumptions by Monroe but using the remainder of Gannett-Fleming's figures, the monthly EDU cost for the local option, assuming a 100% Pennvest loan but no grant, is $40. If Midway were to receive a $500,000 grant and the remainder were covered by a Pennvest loan the cost would fall to $32.50 per EDU per month. (T-142-143)

70. In a regional system, costs per EDU for township residents are higher than those for Borough residents. (T-188-189, 305)

71. Using DER's modifications to Gannett-Fleming's figures for a regional system and a 100% Pennvest loan, the average EDU monthly rental is $47, but with a grant, this drops to an average of $39 per month per EDU to pay for the whole regional system. (T-146-147) Assuming the cost of the plant and interceptor being divided amongst more municipalities, based on the numbers of EDUs in each municipality EDU costs for the Borough residents drops still further because the Borough has no room left to expand as do the townships. Accordingly, monthly costs to Borough residents would be $33 per month, which DER believes compares favorably with the $32.50 per EDU per month local option figure. (T-145-149)

72. Exhibit B-22's Table 14 is comparable with the table shown in Weitz's C-2. (T-148-149) It shows that with the regional option, the townships would pay higher EDU costs at present to cover sewer service for future growth. (T-151)

73. The EDU figures prepared by Weitz make no assumption for the impact of abandoning the Midway plant if a regional plant is built and Midway is compelled to tie into it before loans for design and construction of the local option are paid off. If that happens, costs per EDU will go up. (T-143-144)

74. If the regional system were to be built while Midway's customers are paying off the financing of local option plant and sewers, the local option plant would have to be abandoned because it is only an interim plant. In turn, this would mean Borough residents would be saddled with the remaining local option's costs, coupled with the Borough's share of the regional plant and interceptor sewer. (T-153-154)

75. Costs per EDU if the Midway plant is abandoned in ten years and the regional plant comes on line rise to $56 per month per EDU for Borough residents. (T-154-157)

76. While Gannett-Fleming figures and those of DER assume the construction costs do not exceed the estimates, in Weitz's experience actual costs usually exceed estimates and this would increase monthly EDU costs. (T-158)

77. Midway wants Pennvest funding for the local option set forth in its PMC, but it does not have the necessary DER approvals and Pennvest has said it will not act on the Midway request until Midway receives these DER approvals. (T-267-268)

78. Because of the lack of a DER okay for the local option in the PMC and the fact the proposal is neither a long term solution nor a basin-wide solution, Dreier opines that Pennvest will not fund it. (T-269-270)

79. DER contends it would be very difficult financially for Midway's customers to abandon the Midway plant when a regional system is built. (T-259)

80. If a watershed approach were used instead of that in the PMC, Dreier believes Pennvest would give some funding to the project. (T-268)

81. In the recent past, Pennvest has been giving fewer and fewer grants and has begun only offering partial loans rather than full loans. (T-159)

82. From Weitz's experience, Pennvest is more likely to fund a watershed or regional option than the local option. (T-152)

83. Dreier also believes, based on Pennvest's past practices, that this watershed option's high cost would produce a grant offer from Pennvest, but the grant offer would not exceed $500,000. (T-269)

84. From Dreier's experience, to improve eligibility for Pennvest funding in a regional option scenario, it is better to have each municipality build its own portion of the regional system and pay its own cost than to have Midway build and own the entire system. (T-259-260)

85. Because Midway's local option set forth in the PMC is not a regional solution, it does not comply with DER's policy regarding comprehensive watershed management and it is not a long term solution to the regional sewage problems and would not lead to regional compliance with state and federal statutes and regulations. Thus, in Weitz's opinion, it does not meet Pennvest's published criteria for financial assistance and, from his experience, he doubts Pennvest would give it a grant or a 100% loan. (T-159-161)

86. In Weitz's opinion, a regional option sewage system meets the criteria for funding by Pennvest. (T-189)

87. It is possible that Pennvest might offer only partial funding of a regional system in the upper watershed, but Dreier opines this is unlikely because Pennvest seems to offer partial funding only where local municipalities can fund a portion of the project privately. (T-308-311)

88. Midway's proposal is not a low priority for Pennvest; it has no priority until it secures the necessary DER approvals. (T-310-311) Dreier opines that once DER's approval is received for a sewerage proposal, Midway's priority with Pennvest would be moderately high to high. (T-312)

89. In order to secure Pennvest construction funding, an applicant for same must first complete all of the steps outlined in Finding 21 in Exhibit B-22. (T-266)

90. Without Pennvest grants, there is presently no way to finance the regional option which lowers the monthly EDU cost to $35. (T-197-198)

91. Generally, in Weitz's experience, tap-in fees are fixed at a lower amount when the population to be served has a low income level or have fixed incomes. Weitz knows of only one community of a type similar to the Borough as to income levels, which has a tap-in fee of similar amount (to that proposed by Monroe) and it is having difficulty collecting these fees. (T-162-163)

92. Contrary to Monroe's testimony, in addition to the $2,000 tap-in fee Monroe mentioned, the PMC he submitted to DER on Midway's behalf proposes the $2,000 tap-in fee and a $22 front foot assessment. (B-33; T-164)

93. When Weitz conducted a review of Monroe's 1989 report, he looked at cost projections; he did not review the engineering in the options discussed. (T-169)

94. DER would not push for a regional treatment plant if Midway's local option costs were shown to be significantly lower than those of the regional option. (T-169)

The School's Treatment Plant

95. The existing treatment plant serving the Fort Cherry Junior-Senior High School is an interim plant, according to a condition in the plant's permit, so, if a regional option system is built, DER will require this interim plant's abandonment and connection of the school to the regional system. (T-183-186, 281)

96. In calculating costs of the regional option, DER included the equivalent of 120 EDUs for abandonment of the school's interim treatment plant. (T-213)

97. In the event a regional option sewer system were built, the Junior-Senior High School would be the biggest single customer. (T-280)

98. A meeting was held in January of 1988 between Midway and DER. It occurred because of Midway's opposition to an application for permit for an interim treatment plant to serve the Junior-Senior High School. Midway wanted this school's sewage to be conveyed to a plant it would build in the future. DER rejected Midway's position because Midway was only at the stage of reviewing alternative future options, whereas the school district was ready to commence construction. (T-235-237)

99. When Midway sought to block building of the school's sewage treatment plant, this was not to further either the local option or the regional option, but rather, Midway proposed to move its future plant a short distance downstream to the area known as Primrose and thus pick up all sewage discharges upstream, including the school. (T-281)

100. In the meeting with DER in January of 1988, Midway was told that the proposal which later became the local option in Midway's PMC was not consistent with a regional plan for sewage disposal. (T-236-237)

DER's Sewage Planning Evidence

101. When Midway first contacted DER concerning sewage treatment, it was saying it could build its own system, and, without approving this concept, DER told Midway to study it. (T-250)

102. DER has never told Midway it would approve a local option project. (T-123-124, 252-253)

103. Originally, DER wanted the upper Robinson Run communities to handle sewer disposal by connection to ALCOSAN, since that is a regional approach and system operation costs are reduced based on the economies of scale of the operation of larger treatment plants. (T-251) ALCOSAN torpedoed this idea because it said there was insufficient remaining capacity in its interceptor to handle the projected volume of flow from this area. (T-252)

104. In saying it lacked capacity for this volume of sewage, ALCOSAN relied on the 1 million gallon per day figure in the 1982 EPA report. (T-287)

105. DER does not agree with Finding Nos. 1, 3, 6, 16, 18, and 19 in Gannett-Fleming's Report (Exhibit B-22). (T-255-260) DER did not agree with

the local option concept. (T-255-256) DER does not think a 2.5 million dollar grant from Pennvest is at all likely. (T-258)

106. DER denied the Borough's PMC because it was not a regional approach to sewage disposal and it did not appear financially feasible. (T-261-262)

107. DER believes the upfront charges proposed in the PMC for each lot in the PMC were unreasonable and it estimates they will average $4,000 per lot, with some costing less and some costing more. (T-261)

108. If the PMC were approved and the proposed system were built, there would then be two sewage treatment plants in the upper watershed (one for Midway and one for the school) and, as development would occur, there would probably be the need for a third plant, all of which is contrary to DER's desire to minimize any proliferation of plants through comprehensive basin-wide approaches to sewage treatment. (T-262-263)

109. From DER's experience, an increased number of smaller sewage treatment plants means increased numbers of plant malfunctions. (T-263)

110. From his experience, Dreier cannot think of even one municipality which has built a collector sewer system and a sewage treatment plant without outside grants or financial aid. (T-249)

111. DER has not taken any action to force the upper Robinson Run municipalities to build a sewerage system because such a system's high estimated cost makes the project economically unfeasible. (T-270) DER believes no system should be built now, but all parties should wait to see how real estate development generated by expansion of the Greater Pittsburgh International Airport will impact the area's sewage system needs. (T-271)

112. There is a health threat from sewage in the Midway area similar to that in other areas, but the cost to abate the threat may prohibit its immediate abatement. (T-271-272)

113. ALCOSAN now tells DER it is saving remaining capacity in its interceptor sewer system for the development in Allegheny County from the airport's expansion. (T-272-274)

114. DER has conducted no study of the capacity of ALCOSAN's interceptor sewers to handle the upper Robinson Run area's projected sewage discharge. It relies on the information submitted to it by ALCOSAN. (T-285-286)

115. If Midway were to submit a PMC proposing connection to ALCOSAN, DER would deny it absent a showing by Midway of sufficient capacity in the ALCOSAN interceptor sewer, but would approve it if capacity were shown to exist. (T-287-288)

116. DER does not see any option which is currently financially feasible, but the most environmentally and logically sound option is connection to ALCOSAN. (T-294)

117. Dreier is of the opinion that real estate development in the watershed occurring ten years or more in the future will permit the regional option's construction. (T-314)

118. DER says there is currently no sewering option which is financially feasible. (T-322)

119. Building the local option today would have adverse financial impact on the ability to build a regional system ten or more years from now because once Midway is saddled with the debt from the local option, neither it nor its

residents could afford to abandon its plant and pay their portion of the regional system's cost. (T-322)

120. Janice Demnyan, as a member of Midway's Board, would be in favor of a regional system if the costs of a local and a regional system were equal. (T-339-341) In her experience, the upper limit in monthly costs affordable by local residents is $35 per month. (T-340)

DISCUSSION

Since under Lucky Strike Coal Co. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988), a party is deemed to abandon those issues not raised in its Post-Hearing Brief, we turn to the Post-Hearing Brief filed on behalf of Midway (as the appellant) to determine which issues we must review in preparing this adjudication.

The first issue raised by Midway's Brief concerns allegations that Board Member Ehmann erred in precluding Midway from presenting the expert testimony of Victor K. Lynch at the hearing on the merits of this appeal. As pointed out by Midway's Brief, on June 21, 1990 we issued Pre-Hearing Order No. 1, which directed the parties to conduct and complete discovery within seventy-five days of June 21, 1990. Paragraph 3 of the Order also directed Midway to file its Pre-Hearing Memorandum with us by September 4, 1990 and indicated this Pre-Hearing Memorandum was to include a "summary of testimony of experts" and the list of its witnesses in the order in which Midway expected to call them to testify. Paragraph No. 5 of Pre-Hearing Order No. 1 states in part, "The Board may enter other appropriate sanctions against a party failing to observe the provisions of Nos. 3 and 4 above." When Midway

filed its Pre-Hearing Memorandum, it neither listed Mr. Lynch as an expert nor identified him as a fact witness.

Our docket indicates Midway conducted no discovery in the seventy-five day period provided for discovery by Pre-Hearing Order No. 1. After both parties' Pre-Hearing Memoranda were filed, on Motion of DER and by Order dated September 25, 1990, the period for discovery was extended to October 31, 1990.

On October 23, 1990, with only seven days remaining in the extended discovery period, we docketed receipt of a copy of Midway's Request For Production Of Documents. The documents sought fell into three classes, all of which dealt with use of the ALCOSAN sewage system. Midway did not seek documents dealing with the issues on which it subsequently sought expert opinion testimony from Victor K. Lynch.

On October 31, 1990, the Board received Midway's Supplemental Pre-Trial Memorandum ("Supplement"). At no time prior to our receipt of this document did Midway petition the Board for leave to amend its Pre-Hearing Memorandum. This Supplement proposed the addition of twenty-four witnesses to corroborate testimony as to DER's alleged assurance given to the municipalities in the upper Robinson Run watershed concerning connection to ALCOSAN. In it Victor K. Lynch was listed as a witness in the Supplement, but only for the "DER assurance" testimony. He was not listed as an expert witness.

On November 13, 1990, Midway delivered to the Board a Second Supplemental Pre-Trial Memorandum ("Second Supplement"). Again, no leave to supplement was sought by Midway as to this Second Supplement. In this Second Supplement, Victor Lynch was listed as a person who will testify primarily as an expert

witness. No summary of expert testimony was provided in the Second Supplement, contrary to Paragraph 3 of Pre-Hearing Order No 1. On November 14, 1990, this filing by Midway produced a new responding Motion For Sanctions from DER and, on November 26, 1990, an Amended Motion For Sanctions. On November 27, 1990, we received a copy of a Narrative Opinion of Victor K. Lynch, apparently as the "summary of expert testimony" required by Paragraph No. 3 of Pre-Hearing Order No. 1 and Paragraph 3 of our Order of November 6, 1990. This narrative indicated Mr. Lynch would testify from the perspective of a "bond counsel" for Midway. His expert testimony would not go to the issues on which Midway sought discovery, except as they might tangentially relate to the financial feasibility issue; thus, there can be no claim that Midway had to wait for DER compliance with its Request For Production Of Documents before listing Lynch as a witness.

By order of December 3, 1990, DER's Motion For Sanctions was granted. The order indicated an opinion explaining it would be forthcoming shortly and that Opinion was issued on December 6, 1990. Board Member Ehmann's opinion speaks for itself and sets forth the reasons why he granted DER's Amended Second Motion For Sanctions.

In its Post-Hearing Brief, Midway asserts that the Opinion and Order were wrong and that the testimony should have been allowed. One basis for Midway's contentions which is recited in its Brief, is that its Request For Production of Documents to DER did not produce the information it sought, so it decided to change tactics and present the grounds for appeal in a different fashion. The Brief says Midway began to finalize its case only in the month before

trial (which comports with when it began discovery). It then argues hearings before this Board are not like trials in Courts of Common Pleas, so DER could prepare quickly on the issues raised and thus was not prejudiced by Midway's actions. Finally, it argues that since it did not object to receipt of a DER expert report right before trial, absent prejudice (of which it says there is none), the record should contain all relevant information "as long as no security interest is compromised."

We affirm Board Member Ehmann's prior decision. As explained by Board Member Ehmann's Opinion, the procedure before this Board is a winnowing process which, if it functions properly, narrows the numbers of issues before us. This process allows and requires the statement of every issue and contention by an appellant in his Notice Of Appeal. Discovery, the filing of Pre-Hearing Memoranda, motions practice before this Board, the hearing, and the filing of Post-Hearing Briefs all work to cause the parties and their counsel to focus on the issues which must be presented for adjudication, while the remaining issues fall by the appeal's wayside. This winnowing may occur through discovery of facts contrary to a particular contention, the settlement of an issue, the granting of a Motion To Limit Issues or Motion For Partial Summary Judgment, the abandonment of an issue by failure to raise it in a Post-Hearing Brief, or any one of a number of other reasons. Midway would have us throw out this procedure and reverse this process without justification therefor solely to suit Midway's purpose. This we will not do. The time to conduct the discovery needed to decide what theory or theories to advance at the merits hearing was in the seventy-five day discovery period

prior to the filing of the appellant's Pre-Hearing Memorandum. It is that Pre-Hearing Memorandum, not first and second supplements thereto prepared shortly before trial, in which the theories of a party are to be finalized.[2] This is the reason we warn parties in Paragraph 5 of Pre-Hearing Order No. 1, that they can be found to have abandoned contentions not set forth therein. Our docket reflects no attempt at discovery by Midway in the aforesaid period and only one attempt at discovery near the end of the extension of the discovery period. The burden of Midway's failure to conduct more timely discovery or to finalize its case at some point, other than immediately prior to trial, cannot be placed on DER or this Board but must fall on Midway.

This becomes even more apparent when we realize Midway could have erred on the side of caution and advanced both theories in its Pre-Hearing Memorandum. Here, Mr. Lynch was known to Midway long before this appeal was filed. According to Exhibit B-23, DER sent a copy to him of its letter of review of Mr. Monroe's 1988 feasibility study. He was also sent a copy of Exhibit B-21, dated February 21, 1989, by DER. Further, he is listed as an attendee in Exhibit B-15 at the September 29, 1988 meeting at the Midway Community Center held to discuss sewerage options for the upper Robinson Run basin.[3] Thus,

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[2]There is nothing in our rules of procedure creating an absolute right of amendment(s) of a Pre-Hearing Memorandum or authorizing same. When there is no objection thereto or when cause to do so is shown, however, and there is no prejudice to other parties we generally allow amendment.

[3]Discussions by Midway with its "bond counsel" are also referenced at least once in the transcript. (T-107)

he could have been listed at least as a potential expert witness from this appeal's inception.

We also reject Midway's argument that DER is not prejudiced by the eleventh hour announcement of Lynch as a proposed expert. Lynch was not proposed by Midway as a new expert in a field previously identified as one in which DER could expect "expert evidence" to be offered by Midway. Midway's only previously identified expert was Monroe who designed the Borough's sewers and conducted the feasibility study that resulted in the PMC's submission. In the Second Supplement, Lynch is not listed as an expert on the same issues as Monroe. Thus, it is unreasonable to assume DER needed no preparation time as to Lynch's testimony or time to prepare to counter Lynch's testimony. A party's tardy announcement of an expert does not justify limiting the party's opponent in trial preparation to cross-examining the newly revealed expert based on the hasty deposition of the expert or review of an expert's report. Yet, even as to his deposition, DER could not be expected to conduct a deposition of this expert until after DER had knowledge of the extent of his proposed expert testimony. Midway elected to wait to produce that information until approximately two weeks prior to trial. In light of DER's prior interrogatories asking for a summary of the breadth of this testimony (which were not responded to until two weeks prior to trial), we are hard put to understand how Midway can boldfacedly assert a lack of prejudice to DER here.

Passing beyond the deposition issue, however, new expert testimony in a new field of expertise, if allowed, might prompt some rebuttal from DER. As lawyers, the members of this Board all recognize that if as trial lawyers they

were confronted with such a scenario, their reaction (beyond trying to secure a deposition of the opponent's expert) is likely to be to begin a search for rebuttal expert testimony. This means trial counsel's launching a search for the appropriate responding expert and preparing that expert for testimony on the specific issues to be raised by the initial expert's projected trial testimony. Clearly, this search and witness preparation could not begin until DER's counsel had some idea of what evidence its witness testimony would have to rebut or deflect. Seen in this light, Midway's "easy preparation and no prejudice to DER" argument does not hold water. It was properly rejected.[4] BethEnergy Mines, Inc. v. DER, EHB Docket No. 90-050-MJ (Opinion issued May 28, 1991).

Finally, Midway argues it did not object to an allegedly late-filed DER report because it was not prejudiced thereby. It then says since it did not object, its witness should have been allowed to testify so that the record would contain all relevant information "as long as no security interest is compromised." This assertion lacks coherency. Our docket does not reflect any late-filed DER "expert" report or exhibit and obviously cannot show a lack of objection thereto by Midway except by implication. Even if such a late file exists, if there was no prejudice to Midway concerning same, we can understand the lack of objection thereto on Midway's behalf. Moreover, any lack of objection or lack of prejudice to Midway from DER's report does not

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[4]Board Member Ehmann's Order allowed Midway to call Mr. Lynch as a fact witness, but the transcript reflects an apparent election by Midway to use other witnesses since Mr. Lynch did not testify.

mean there was no prejudice to DER from Midway's conduct concerning use of Lynch as an expert. If Midway had attempted to substitute another engineer witness from the Gannett-Fleming engineering firm for Monroe in this case and DER had objected thereto, Midway's argument might have more attraction, but that is not the situation before us. Finally, while we agree with the concept that where all other factors are equal the record should contain all relevant evidence, as Board Member Ehmann's opinion pointed out, all factors were not equal, and, on motion by DER, he properly prevented trial by expert ambush.[5]

Midway's next argument deals with the merits of the contentions raised in its Notice Of Appeal. In regard thereto, Midway bears the burden of proof pursuant to 25 Pa. Code §21.101. Municipality of Bethel Park, et al. v. DER, 1984 EHB 716; Palisades Residents In Defense Of The Environment (PRIDE) v. DER, 1990 EHB 1038.

Before this Board, burden of proof means proof by a fair preponderance of the evidence. This concept has been defined as requiring:

> the evidence of facts and circumstances on which [the party] relies and the inferences logically deducible therefrom must so preponderate in favor of the basic proposition he is seeking to establish as to exclude any equally well-supported belief in any inconsistent proposition.

Henderson v. National Drug Co., 343 Pa. 601, ___, 23 A.2d 743, 748 (1942). In evaluating this concept, it is clear that more is necessary than that the

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[5]We do not comment further on the last portion of Midway's argument suggesting that the record should contain all relevant information "as long as no security interest is compromised" as we have no idea what this phrase is intended to mean.

evidence in favor of the proposition be equal to that opposed to it. The evidence in favor must preponderate. It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established. Standard Pennsylvania Practice 2d §49:47, citing Rasner v. Prudential Ins. Co., 140 Pa. Super. 124, 13 A.2d 118 (1940); and Waldron v. Metropolitan Life Ins. Co., 347 Pa. 257, 31 A.2d 902 (1943).

We point this out to establish the importance of the substance of this concept, since a review of the evidence in the record before us shows Midway has failed to meet this burden.

In addition to the stipulated facts and documents, Midway offered testimony from Violet Cochran, George Kozik and Edward Monroe. Violet Cochran lives in the Borough and is a former Midway Board member. George Kozik is also a resident of the Borough and is a current member of Midway's Board. Their testimony generally was that there is a need to remedy the current sewage situation, that the Midway Board believes that the proposal in the PMC is the least expensive alternative, that residents of the Borough do not really care where the sewage treatment plant is located as long as they can afford it, and that the $35 per month per EDU is the maximum monthly cost for sewage treatment which the Borough residents can afford. Mr. Kozik also opined that he feels Pennvest monies are needed to make this project viable and that he thinks DER wants any treatment plant built to be located near McDonald so as to facilitate clean-up the remainder of the upper end of the

Robinson Run watershed.[6] DER did not offer testimony rebutting this evidence and certainly did not dispute the real and understandable desire of the local residents to eliminate the existing sewage problems.

The bulk of Midway's evidence came from Edward Monroe, the engineer of the Gannett-Fleming firm who conducted that firm's sewerage feasibility study (Exhibit B-22), prepared and submitted the PMC to DER for Midway and gave the expert testimony and opinion on that alternative's financial feasibility. From his resume, there is no question that he is an expert on sewerage system design and construction and that he has had substantial experience with sewage planning issues and the financial feasibility concerns which are involved with selecting amongst sewerage options. Monroe did not disagree with DER's contention that the PMC's proposal was not a regional approach to sewage disposal or contend that "local options" for sewage disposal are conceptually preferable to regional or watershed options. Instead, the thrust of his testimony was that since the Borough's residents want municipal sewage collection and treatment now, the only way this could occur from a fiscal standpoint, because regional sewage solution is too costly, is through DER approval of the local option.

DER offered testimony from three DER witnesses.[7] Deborah McDonald testified as to a meeting between DER and Midway as to approval of the local

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[6]There was other testimony and findings of fact have been made from it. This summation is only that, not a repetition of all that was said.

[7]DER also read a portion of the deposition of Janice Demnyan into the record.

option. She and Mr. Kozik agree DER did not officially approve that option at that meeting. (T-123; T-238) Weitz and Dreier both testified as expert witnesses for DER. Generally, Weitz's testimony involved critical analysis of the portion of Monroe's study dealing with the costs of the local and regional options and the assumptions underlying same. He also testified as to his calculations of the costs of these options on behalf of DER and, to a limited degree, as to financing via Pennvest. Mr. Dreier testified at length as to the options available to Midway and the other municipalities in the watershed (past, present, and future), ALCOSAN's role as to sewage disposal in the Robinson Run watershed, DER's analysis of the financial feasibility of these sewerage options, the desirability of regional solutions to sewage disposal needs, and how DER came to the conclusion that this PMC must be denied. Dreier also testified that while at present construction of any sewage system was both financially infeasible and potentially injurious to the future financial feasibility of a regional system, future regional development might change that situation.

We point out that Midway did not agree that DER's experts were sufficiently well-qualified to testify as rebuttal experts to Monroe, because Midway contends they are not sewage engineers. (T-131-132, 243) The issues before us in this appeal do not deal with the design parameters of sewers or a sewage treatment plant but deal more precisely with sewage facility planning, analysis of the sewerage options and their financial feasibility in light of possibly Pennvest loans and grants. Here, DER denied a PMC containing a proposed sewering option (a concept), not a permit application containing that

concept's design. Moreover, it denied same because it was not financially feasible and because if the local option were constructed as an interim system, the residents of Midway could not afford the costs involved in paying for it and then pay on top of that cost their share of the cost of any regional sewerage system which might be built in the next ten to twenty years (which regional system's construction would necessitate abandonment of Midway's local option sewage treatment plant). It is precisely with these types of issues which Weitz, and more particularly Dreier have been dealing on behalf of DER for many years. It is true that they have not designed sewage treatment plants, but they are nevertheless experts in the sewage planning/grants field before us in this matter and at least of equal stature therein to Monroe.

We are thus faced with the situation where the critical credible evidence is split between the parties before us. On one hand, Monroe says the local option is its only potentially feasible current option. On the other, Dreier and Weitz say not only is that option infeasible and undesirable regionally, but also currently that no option is financially feasible. Since, from Midway's perspective, the most we have is two equally credible positions, we must find Midway has not met its burden of proof. The evidence offered by Midway does not so preponderate in Midway's favor as to exclude the belief in DER's proposition. This being so, we do not reach the issues of the standard of review by this Board under Warren Sand and Gravel Company v. Commonwealth,

DER, 20 Pa. Cmwlth. 1987, 341 A.2d 556 (1975), nor do we reach an evaluation of the evidence itself to determine whether we should modify DER's decision. Sussex, Inc. v. DER, 1986 EHB 350.

Accordingly, we make the following conclusions of law and enter the following Order.

CONCLUSIONS OF LAW

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

2. Board Member Ehmann properly granted DER's Motion For Sanctions which sought to bar the testimony of Victor K. Lynch as an expert witness on behalf of Midway in the field of municipal finance.

3. Where a party fails to timely disclose the existence of an expert witness and the party intends to utilize that witness at the hearing on the merits, upon an opponent's motion, the Board may bar that testimony pursuant to 25 Pa. Code §21.124.

4. On the issues raised in its Notice Of Appeal, Midway bears the burden of proof pursuant to 25 Pa. Code §21.101.

5. Before this Board, a party with the burden of proof must produce such evidence in the form of facts and circumstances, inferences logically deducible therefrom and expert opinion to so preponderate in favor of its position as to exclude any equally well-supported belief in any inconsistent position.

6. A party with the burden of proof must show more than that the evidence in favor of its position is equal to that opposing same; that party's evidence

must be sufficient to satisfy an unprejudiced mind as to the existence of the facts sought to be proven.

7. In review of a DER decision to deny a PMC, this Board evaluates DER's actions pursuant to the abuse of discretion test set forth in Warren Sand and Gravel.

8. When a party with the burden of proof fails to establish more than that the evidence is equally in its favor on the issues before us, this Board never reaches the point in adjudicating the merits of the matter before it of deciding whether or to what extent to substitute its discretion for that of DER on the issues before it.

ORDER

AND NOW, this 26th day of August, 1991, it is ordered that the appeal of Midway is dismissed and DER's denial of Midway's PMC is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

TERRANCE J. FITZPATRICK*
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

* Board Member Fitpatrick concurs in the result only.

DATED: August 26, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

C & K COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-138-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 26, 1991**

OPINION AND ORDER SUR
C & K COAL COMPANY'S
MOTION TO WITHDRAW ADMISSIONS AND
THE DEPARTMENT OF ENVIRONMENTAL RESOURCES'
MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

Under the language of Pa.R.C.P. 4014(a), C&K Coal Company ("C&K") is deemed to have admitted the facts set forth in the Commonwealth of Pennsylvania Department of Environmental Resources' ("DER") Request For Admissions by virtue of C&K's failure to have filed timely responses thereto. Pursuant to Pa.R.C.P. 4014(d), however, C&K's Motion To Withdraw Admissions is granted because a hearing on the merits is subserved by allowing withdrawal and DER has failed to show it will be prejudiced in defending its position on the issues raised in this appeal at a hearing on the merits.

As DER's Motion For Summary Judgment is based on the facts in the deemed admissions which C&K has been allowed to withdraw, the Motion must be denied since DER failed to establish that there are no disputes as to material facts.

Background

On April 5, 1991, C&K appealed from DER's denial of C&K's request for the release of bonds posted in connection with C&K's mining of a tract in Monroe Township, Clarion County, pursuant to Surface Mining Permit No. 16850106. DER's March 7, 1991 letter denying this bond release request speaks of a discharge of mine drainage located adjacent to C&K mine site and C&K's responsibility therefor.

On April 16, 1991, C&K appealed from a DER Compliance Order which required C&K to provide both interim treatment of this same discharge and a plan for permanent treatment or the abatement thereof. This appeal was assigned Docket No. 91-147-E. By Order of the Board dated June 7, 1991 and on motion of DER, the two appeals were consolidated at Docket No. 91-138-E.

Prior thereto, on May 14, 1991, DER had served a Request For Admissions on C&K's counsel. Pursuant to Pa.R.C.P. 4014(b) made applicable here by 25 Pa. Code §21.111(f), C&K's responses thereto were due on or before June 13, 1991.

On July 12, 1991, DER filed its Motion For Summary Judgment with this Board. A large portion of its factual underpinnings are based upon the apparent failure of C&K to timely respond to DER's Request For Admissions and DER's assertion that under Pa.R.C.P. 4014 the Admissions are thus deemed to be admitted by C&K.

C&K filed its Answer To Department's Motion For Summary Judgment and supporting Brief. It also filed a Motion To Withdraw Admissions and its responses to DER's Interrogatories, Request For Production and Request For Admissions with us on July 30, 1991. DER's Response To Appellant's Motion To Withdraw Admissions was filed with the Board on August 12, 1991.

Since, as set forth below, our ruling on DER's Motion For Summary Judgment is based on the ruling on the Motion To Withdraw Admissions, this opinion deals with the latter first.

Motion To Withdraw Admissions

According to C&K's Motion To Withdraw Admissions, on June 5, 1991 C&K's counsel wrote to counsel for DER stating that he would be on a two week vacation as of June 6, 1991 and requesting a 20 day extension of the June 13, 1991 deadline for responding to the Request For Admissions. The letter (Exhibit A to C&K's Motion) also asked DER's counsel to call the office of C&K's counsel if this was not agreeable. According to DER's response to C&K's Motion, DER's counsel received this letter on June 7, 1991 (after counsel for C&K had apparently departed for vacation without waiting to determine whether doing so without answering the Request For Admissions might jeopardize his client's position). According to DER's Response, its counsel wrote back to C&K's attorney on June 10, 1991 declining to agree to the 20 day extension but agreeing to a two week extension. The effect of this letter made C&K's Answers to DER's Request For Admissions due on June 27, 1991 rather than the July 3, 1991 deadline urged by counsel for C&K.

Whether the deadline for C&K to file its Answers to DER's Request For Admissions was June 27, 1991 or July 3, 1991 is irrelevant to this opinion and to whether the admissions are deemed admitted. The language in the rule leaves no room for equivocation on this point. Pa.R.C.P. 4014(b) provides in relevant part:

> The matter *is admitted* unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by his attorney ... .

Thus, as of July 10, 1991, when DER filed its Motion For Summary Judgment, the admissions were deemed admitted because this date was after both June 27, 1991 and July 3, 1991.[1] Under this rule's language, admissions are deemed admitted automatically by expiration of the deadline. Jackson v. Travellers Ins. Co., 48 D&C 3d 28 (1988).

With the Admissions admitted, C&K now seeks the withdrawal of these deemed admissions and the substitution of actual responses on its behalf, some of which deny the Admissions.

According to the relevant portion of Pa.R.C.P. 4014(d):

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 212 governing pre-trial conferences, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Initially, like Judge Wettick in Jackson, *supra*, we observe that this rule favors resolution of matters by hearings on their merits rather than through "paper" procedures. This is evident from the first-prong of the test in Rule 4014(d) of whether presentation of the case on its merits will be subserved by withdrawal. The second-prong also displays this intent by requiring the party which obtained the admissions, such as DER, to show the Board it will be prejudiced in maintaining its action or defense *on the merits*

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[1]Had DER filed its Motion on June 28, 1991, the same result would obtain. DER only agreed to a two week extension of this deadline and cannot be held to a longer deadline extension based on any argument that it failed to object to a longer period within any arbitrary window for objection set by C&K's counsel.

if the Board allows the withdrawal of the admission. Neither DER's response to C&K's Motion nor its Brief in support thereof shows how DER will be prejudiced in presenting its merits position in a hearing on the issues raised in C&K's appeal. Rather, DER argues it will be prejudiced if its motion for summary judgment is denied and it is forced to go to a hearing on the merits because of the time and effort which must be put into trial preparation and participation. In support of its position, DER cites Commonwealth v. Diamond Shamrock Chemical Co., 38 Pa. Cmwlth. 89, 391 A.2d 1333 (1978); Innovate, Inc. v. United Parcel Service, 275 Pa. Super. 276, 418 A.2d 720 (1980); Kufera v. Murphy, 46 D&C 3d 337 (1986); and Nichols v. Horn, 363 Pa. Super. 301, 525 A.2d 1242 (1987).

Rule 4014 had its Subsection (d) added to it on November 20, 1978. According to the notes following the rule, this amendment became effective 120 days after December 16, 1978. Clearly Diamond Shamrock, *supra*, which was argued on April 10, 1978 and decided on October 5, 1978 was not decided during Subsection (d)'s life and is thus not on point. That case did not arise on a Pa.R.C.P. 4014(d) Motion For Withdrawal and does not mention or discuss this new Subsection. Innovate, *supra*, differs from Diamond Shamrock, *supra*, as to applicability only insofar as the Superior Court notes that Subsection (d) was added to Pa.R.C.P. 4014 prior to its preparation of its opinion in this appeal which arose and was decided by the lower court prior to Rule 4014's amendment. Innovate never discusses the issues before us in this appeal. The inapplicability of Innovate to the issues before us is even pointed out in Kufera, *supra*. Kufera, moreover, allowed the answering party to withdraw admissions because there was no prejudice in allowing same, not, as suggested by DER, solely because there was no pending Motion For Summary Judgment.

Nichols, *supra*, is also cited favorably by DER but it addresses prejudice to movants in not granting summary judgments rather than Rule 4014(d), the language of which aims to permit withdrawals to get the parties to merits hearings.

Returning to the first-prong of Rule 4014(d), it is clear that allowing withdrawal would subserve presentation of the merits of the action to this Board as the trier of facts. Without withdrawal the factual issues surrounding C&K's responsibility for the discharge because of C&K's coal stripping is foreclosed in favor of DER. By allowing withdrawal as mandated here by this Rule, we provide ourselves the opportunity to hear the evidence offered by both parties as to the cause of this discharge. In such a circumstance withdrawal promotes a hearing on these disputed facts. Jackson, *supra*.

Contrary to DER's argument, we do not grant this motion as a reward to counsel for C&K or in any way approve of C&K's untimely actions in responding or the excuses offered therefor. The issue before us is not the relative efforts or merits of the conduct of parties' counsels. The rules of procedure governing hearings before this Board and those rules of civil procedure incorporated thereby hopefully make for blind justice for all parties before this Board without regard to their counsels' conduct. Rather, it is the clear intent of this Rule Of Procedure which led to the result set forth in this opinion. DER will have a full and complete opportunity to convince us of the merits of its contentions at the hearing thereon.

Motion For Summary Judgment

On ruling on DER's Motion For Summary Judgment, the Board is guided by the principle that summary judgment is only appropriate when the pleadings,

depositions, answers to interrogatories, admissions on file and affidavits, if any, show that there is no genuine issue of material fact and that the movant is entitled to summary judgment as a matter of law. Snyder v. Commonwealth, DER, ____Pa. Cmwlth.___, 588 A.2d 1001 (1991). When faced with such motions the Board views them in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

Here, DER's Motion is supported by affidavits of William Allen, Richard Stempeck and DER's counsel. It was also supported by the deemed admissions. Amongst the deemed admissions were: (1) the existence of a hydrogeologic connection between C&K's mine and the discharge; (2) the cause of the discharge being C&K's mining operation; (3) the discharge existing within the area of C&K's surface mining permit; and (4) C&K disturbing the area within fifty feet of Pennsylvania's Route 839, which is topographically up gradient of the discharge.[2] DER's Motion contends that since C&K admitted its mining caused the discharge which is acid mine drainage and its mine is connected thereto, C&K is liable for the discharge under the Clean Streams Law, Act of June 22, 1987, P.L. 1118, as amended, 35 P.S. §691.1 *et. seq.* and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* We need not get further involved in this motion, however, because having granted C&K's Motion To Withdraw Admissions, DER no longer has adequate factual support for its Motion. C&K's substitute responses to DER's Request For Admissions deny that a hydrological connection of discharge and mine exists, that C&K's mining

[2]Seven of the thirty-two numbered paragraphs in DER's Motion are supported exclusively by or nearly exclusively by citations to the Request For Admissions.

caused the discharge and that the discharge occurs within the boundaries of C&K's Surface Mining Permit No. 16850106 (Admissions Nos. 4, 5, and 6). DER has not directed us toward any other source for these prerequisite facts and, with these C&K factual denials of record, even if it did do so, we do not see how it could meet the test in Snyder of showing these material facts are not in dispute.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 26th day of August, 1991, it is ordered that C&K's Motion To Withdraw Admissions is granted pursuant to Pa.R.C.P. 4014(d) as to the deemed admissions and C&K's written Answers to DER's Request For Admissions are substituted for its deemed Admissions. It is further ordered that DER's Motion For Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 26, 1991

cc: **Bureau of Litigation:**
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For the Commonwealth, DER:
Steven Lachman, Esq.
Western Region
For Appellant:
Henry Ray Pope, III, Esq.
Clarion, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

P.O.E., INC.	:	
	:	
v.	:	**EHB Docket No. 91-134-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: August 28, 1991**
and SMITHKLINE BEECHAM CLINICAL LAB.,	:	
PERMITTEE	:	

OPINION AND ORDER
SUR
PRELIMINARY OBJECTIONS, MOTION TO DISMISS
AND MOTION TO LIMIT ISSUES

Robert D. Myers, Member

Synopsis

The Board refuses to dismiss an appeal from a plan approval and solid waste management permit issued for an incinerator but limits the issues to objections which are legally sufficient. Objections stricken relate to (1) an alleged lack of substantial evidence in DER's files to support issuance of the approval and permit, (2) DER's alleged failure to give notice to Appellant, (3) an alleged absence of certain correspondence from DER's files, and (4) an alleged shortage of personnel interfering with DER's ability to monitor the incinerator after it begins operating.

OPINION

This appeal was filed on April 3, 1991 by P.O.E., Inc. (Preserve Our Environment, Inc.), contesting the issuance on March 1, 1991 by the Department of Environmental Resources (DER) of Plan Approval No. 46-301-251 and Solid Waste Management Permit No. 400599 to Smithkline Beecham Clinical Laboratories

(Permittee) for an incinerator to be constructed in West Norriton Township, Montgomery County.

On May 16, 1991 Permittee filed Preliminary Objections, Motion to Dismiss, and Motion to Limit Issues to which P.O.E., Inc. filed an Answer on June 6, 1991. In conformity to its general policy with respect to third party appeals from permit issuances, DER has indicated that it will not play an active role in the appeal. Consequently, it has taken no position on Permittee's Motions.

The relief sought by Permittee is in the alternative, ranging from (1) dismissal of the appeal for failure to state legally sufficient objections, to (2) dismissal of the appeal as to the Solid Waste Management Permit because of the failure to state objections applicable to that permit, to (3) limitation of issues by striking legally insufficient objections. Permittee attacks each of the 8 paragraphs of the Notice of Appeal where P.O.E., Inc. sets forth its objections to DER's actions.

Paragraph 1 complains that DER abused its discretion because "the dry-dry scrubber technology for effluent materials was not based on substantial evidence in the record." This statement is followed by 8 sub-paragraphs elaborating on the complaint. In its Answer to the Motions, P.O.E., Inc. makes clear that its objection is that "there was no substantial evidence in the record on which to base the granting of the permit. Rather, the permit was granted on information not part of the record...." P.O.E., Inc. misconstrues the Board's function. While affected parties have a statutory right to "appeal" to this Board (section 4(c) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(c)), proceedings before the Board are *de novo:* Warren Sand & Gravel Co., Inc. et al. v. Commonwealth, Dept. of Environmental Resources et al. 20 Pa. Cmwlth.

186, 341 A.2d 556 (1975). The Board "is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board" (341 A.2d 556 at 565). Accordingly, paragraph 1 of P.O.E., Inc.'s objections does not present a legally sufficient claim.

Paragraph 2 reads as follows: "DER abused their discretion when it failed to notify P.O.E., per se, of its action to grant permits." Four sub-paragraphs provide additional detail. In its Answer to Permittee's Motions, P.O.E., Inc. claims that DER was required to give it notice of permit issuance and failed to do so. This objection would have merit if P.O.E., Inc.'s appeal had been filed in an untimely manner. However, there is no indication that this occurred. Consequently, P.O.E., Inc. has not been adversely affected and the objection has no other significance.

Paragraph 3 complains of "abusive use of discretionary power by DER" and specifically cites DER's delay in making its files available to P.O.E., Inc. prior to the public hearing. This interfered with P.O.E., Inc.'s ability to present meaningful comments at the public hearing, it is alleged. If P.O.E., Inc. can prove this claim by a preponderance of the evidence, it will be entitled to some form of relief: County of Schuylkill et al. v. DER et al., 1989 EHB 1241. Hence, the objection is legally sufficient.

Paragraph 4 also complains of "abuse of discretionary power by DER on final permit granting" but deals with a different set of circumstances. As detailed in 13 sub-paragraphs, P.O.E., Inc. objects to certain correspondence allegedly missing from DER's files and not made available until after the permit had been issued. The correspondence dealt with DER's request for additional information from Permittee, Permittee's requests for additional

time and DER's granting of it. While P.O.E., Inc. alleges that this correspondence shows a lack of diligence on the part of Permittee and an abundance of patience on the part of DER, there is no allegation explaining how this correspondence and the attitudes it represents is prejudicial to P.O.E., Inc. or in violation of statutory or regulatory requirements. Unable to perceive any such relationship ourselves, we find the objection to be legally deficient.

Paragraph 5 is similar to paragraph 4 but complains that DER abused its discretion in not being as liberal with time extensions granted to P.O.E., Inc. as it was with those granted to Permittee. To the extent that this may have affected P.O.E., Inc.'s opportunity to participate meaningfully in the review process as in County of Schuylkill, *supra*, the claim is justiciable. Consequently, it will not be stricken.

"Proliferation of incinerators" is the label given to paragraph 6. In the four underlying sub-paragraphs P.O.E., Inc. accuses DER of abusing its discretion by permitting another incinerator in an area where incinerator-density is already high. P.O.E., Inc. claims that this constitutes a "detriment to public safety, health, and welfare." The objection is legally sufficient.

In paragraph 7 P.O.E., Inc. claims that DER's staff shortages will affect its ability to monitor Permittee's incinerator, thereby creating serious potential health and safety hazards. The objection relates to post-permit issuance enforcement which is not properly within the scope of an appeal challenging the permit itself.

Paragraph 8 deals with permission to operate the incinerator 24 hours per day, 7 days per week. The precise basis for P.O.E., Inc.'s complaint is still unclear, but the 8 sub-paragraphs and P.O.E., Inc.'s Answer to the

Motions indicates that the concern relates to the effect of continuous operation on air quality. As such, it constitutes a legally sufficient objection.

Having concluded that the objections stated in paragraphs 3, 5, 6 and 8 are adequate, we will not dismiss the appeal. Because the objections stated in those paragraphs overlap, to a certain degree, both the Plan Approval and the Solid Waste Management Permit, we will not dismiss the appeal as to either. However, we will limit the issues by striking the objections stated in paragraphs 1, 2, 4 and 7.

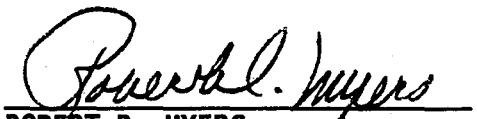
ORDER

AND NOW, this 28th day of August, 1991, it is ordered as follows:

1. Permittee's Preliminary Objections, Motion to Dismiss, and Motion to Limit Issues are granted in part and denied in part in accordance with this Opinion and Order.

2. The objections stated in paragraphs 1, 2, 4 and 7 of P.O.E. Inc.'s Notice of Appeal are stricken and the issues are limited to the objections stated in paragraphs 3, 5, 6 and 8.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 28, 1991

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M. DIANE SMITH
SECRETARY TO THE BOARD

CARL E. BRUNECKE	:	
	:	
v.	:	EHB Docket No. 91-170-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 28, 1991

OPINION AND ORDER
SUR MOTION TO DEEM ADMITTED
ALL MATTERS CONTAINED IN THE DEPARTMENT'S
REQUEST FOR ADMISSIONS

By Joseph N. Mack, Member

Synopsis

A motion to deem admitted all matters contained in a request for admissions filed by the Department of Environmental Resources is denied where at least two extensions for responding to the request for admissions were orally granted to the appellant, making the record unclear as to when the appellant's responses were finally due, and where an order of the Board extending the deadline for completion of discovery could be misread as extending the time in which the appellant's responses were due.

OPINION

This matter commenced with the filing of a notice of appeal by Carl E. Brunecke ("Mr. Brunecke") on April 26, 1991, challenging an order issued by the Department of Environmental Resources ("the Department") on March 26, 1991 which charged Mr. Brunecke with the unlawful disposal of solid waste at a dump

site on his property in violation of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq.

On August 5, 1991, the Department filed with the Board a Motion to Deem Admitted All Matters Contained in the Department's Request for Admissions ("the motion") and a brief in support thereof. The motion avers that on May 28, 1991, the Department mailed to Mr. Brunecke's counsel the Department's First Set of Interrogatories, Request for Production of Documents, and Request for Admissions, which were allegedly received by Mr. Brunecke's counsel on May 29, 1991. Although the motion claims to have attached a copy of the certified mailing receipt as Exhibit A, in fact, a copy of the certified mailing receipt was not included with the motion. Rather, attached to the motion as Exhibit A was a copy of the Department's order. Therefore, we have no verification that the aforesaid discovery requests were received by Mr. Brunecke's counsel on May 29, 1991. However, attached to the motion as Exhibit B is a copy of a letter dated June 27, 1991 from Mr. Brunecke's counsel to the Department confirming his conversation with the Department's counsel in which he had requested an extension of time to July 8, 1991 in which to respond to the discovery request. Therefore, we can be certain that Mr. Brunecke's counsel was aware of the discovery request at least as of June 26, 1991. According to the motion, the Department's counsel orally consented to the request for an extension.

The motion goes on to aver that on or about July 11, 1991, the undersigned Board member and counsel for the parties held a telephone conference call in which counsel for the Department noted that Mr. Brunecke's responses to the discovery request were overdue. The motion states that at the request of counsel for the Department, the undersigned Board member set a

final due date of July 29, 1991 for Mr. Brunecke to answer the interrogatories, request for documents, and request for admissions. Finally, the motion avers that as of its filing, Mr. Brunecke had not yet responded to the discovery requests. The Department requests that, pursuant to Pa.R.C.P. 4014(b), the matter contained in the request for admissions be deemed admitted for failure to file timely responses.

On August 12, 1991, Mr. Brunecke, through his counsel, filed a response and brief in opposition to the Department's motion, which asserted that Mr. Brunecke had responded to the Department's discovery requests in two stages: first, on July 9, 1991 with the production of various documents and, secondly, on July 31, 1991, when answers to the interrogatories and requests for production of documents and admissions were served on the Department and filed with the Board. Mr. Brunecke asserts, first of all, that the Department has not been prejudiced by a two-day delay in receiving the responses, i.e., from July 29, 1991 to July 31, 1991, and, secondly, that July 29, 1991 was a "target date" for responding to the discovery request and was not set by order of the Board.

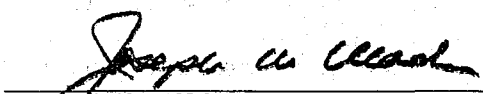
Pa.R.C.P. 4014(b) provides that matter contained in a request for admissions is admitted unless answered within 30 days of service of the request, or within such shorter or longer time as the court may allow. In the present case, the Department's motion avers that Mr. Brunecke's counsel was served with the request for admissions, as well as interrogatories and request for production of documents, on May 29, 1991, although we do not have proof of service on this date, as stated previously. The motion also avers that counsel for the Department orally consented to an extension until July 8, 1991 for responding. Finally, the motion avers that during a conference call

between the parties' counsel and the presiding Board member, a final date of July 29, 1991 was set for responding to the request for admissions and other discovery requests. A review of the docket shows that Mr. Brunecke's responses were not filed with the Board until August 1, 1991. However, other than the averment in the Department's motion which states that Mr. Brunecke's answers were due July 29, 1991, we have nothing in the record confirming that date. The only document in the record to this effect is an order of the Board, issued the same day as the aforesaid conference call, which states that the deadline for completion of discovery is extended until September 6, 1991. It is possible that this order could have been misread by Mr. Brunecke's counsel as extending the date for filing his responses to September 6, 1991. Since there is nothing in the record reflecting that a deadline of July 29, 1991 was set for Mr. Brunecke's responses, and since it is conceivable that our order of July 11, 1991 could have been misread as extending the deadline to September 6, 1991, thereby making Mr. Brunecke's August 1, 1991 filing of his responses timely, we are unable to grant the Department's motion to deem the matter contained in the requests for admissions as being admitted.

O R D E R

AND NOW, this 28th day of August 1991, the Department's Motion to Deem Admitted All Matters Contained in the Department's Request for Admissions is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 28, 1991

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Western Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BC

FALCON OIL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 91-249-B**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 28, 1991

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

By Thomas M. Ballaron, Hearing Examiner

Synopsis

A petition for allowance to appeal *nunc pro tunc* is denied for failure to demonstrate fraud or breakdown in the operation of the Board or unique and compelling circumstances, and the appeal from the Department of Environmental Resources' (DER) civil penalty assessment is dismissed for lack of jurisdiction, since it was not filed within thirty days as mandated by 25 Pa. Code §21.52(a).

OPINION

Falcon Oil Company (Falcon) has filed a petition for allowance to appeal *nunc pro tunc* and a notice of appeal with the Board from a civil penalty assessment of four thousand dollars ($4000.00) imposed pursuant to the Storage Tank and Spill Prevention Act, the Act of July 6, 1989, P.L. 169, 35 P.S. §6021.101 *et seq.* Falcon, a field distributor of petroleum products, allegedly violated §503(b) of this statute on August 8, 1990, August 28, 1990, October 16, 1990, and November 8, 1990, when it knowingly filled an

unregistered, underground storage tank with gasoline.

The civil penalty assessment was received by Falcon on May 18, 1991, yet its notice of appeal was not filed with the Board until June 24, 1991, seven days after the appeal period expired. Falcon explained in its petition that on June 21, 1991, Falcon's counsel learned that his secretary had neglected to forward the notice of appeal to the Board, having mistakenly thought that service upon DER, effected on May 31, 1991, was sufficient. (notice of appeal, Ex. B). Falcon contended that its appeal *nunc pro tunc* was justified essentially because its mistake was promptly corrected, the late filing was due to "reasonable inadvertence and non-negligent conduct," and the late filing was not prejudicial since DER was served with the notice of appeal within the appeal period. In its accompanying brief, Falcon cited Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979), in support of its contention that the clerical inadvertence of its counsel provided a basis for its appeal.

On July 12, 1991, DER filed its objections and a motion to dismiss in response to Falcon's petition. In objecting to the petition, DER asserted that the facts in this case could be readily distinguished from Bass, where the delay was caused by the serious illness of the counsel's secretary. In contrast, DER contended that Falcon's counsel failed to properly instruct his secretary where to file the notice of appeal and failed to follow up to determine that it was properly filed. Suggesting that the negligent conduct of an attorney was outside the scope of Bass, DER urged the Board to deny the petition.

In its motion to dismiss, DER alleged that Falcon failed to post the amount of the assessed penalty or an appeal bond by June 17, 1991, as required by §1307(b) of the Storage Tank and Spill Prevention Act. DER contended that perfecting the appeal by prepaying the proposed penalty or providing a bond

within the appeal period was a jurisdictional prerequisite. Therefore, Falcon's failure to comply with §1307(b) required dismissal of its appeal.

Falcon's petition will be considered initially. Falcon's failure to file its appeal in a timely fashion deprives the Board of jurisdiction to hear the controversy, Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), unless the Board grants Falcon's petition. Guidance in evaluating the merits of a petition for allowance to appeal *nunc pro tunc* is provided by the Board's rules of practice and procedure at 25 Pa. Code §21.53(a):

> (a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in the Courts of Common Pleas in the Commonwealth.

It is well settled that "good cause" constitutes fraud or a breakdown in the operation of the Board. Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986); Kerry Coal Company v. DER, 1990 EHB 1206. In addition, an appeal *nunc pro tunc* may be allowed when the delay is caused by "non-negligent happenstance," but only when unique and compelling circumstances are presented, and when the tardy filing is discovered quickly and the party promptly requests leave to appeal *nunc pro tunc*. Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133 (1979); C & K Coal Co. v. DER, 112 Pa. Cmwlth. 505, 535 A.2d 745, alloc. denied, 546 A.2d 60 (1988); American States Insurance Co. v. DER, 1990 EHB 338.

Applying these standards, Falcon's arguments are not persuasive. It is apparent that Falcon has not demonstrated good cause for the delay in filing. Falcon has not alleged, nor is there any evidence, that its tardy filing was due to fraud or a breakdown in the operation of the Board. Falcon's failure to comply with the filing instructions which are printed on

the notice of appeal form, and its allegation that the tardy filing was not prejudicial to DER, does not constitute good cause. West Caln Township v. DER, No. 2352 C.D. 1990 (Pa. Cmwlth. July 15, 1991).

Similarly, Falcon is unable to rely upon the applicability of Bass. As limited by the Pennsylvania intermediate appellate courts, In Re Interest of C. K., 369 Pa. Super. 445, 535 A.2d 634 (1987); Guat Gnoh Ho v. Unemployment Compensation Board of Review, 106 Pa. Cmwlth. 154, 525 A.2d 874 (1987), the actions of Falcon's counsel do not satisfy the criteria of Bass. While discovered and remedied in a prompt manner, counsel's mistake in filing the notice of appeal with DER, rather than with the Board, does not constitute unique and compelling circumstances and, therefore, does not provide a basis for an appeal *nunc pro tunc*. Borough of Bellefonte v. DER, 131 Pa. Cmwlth. 312, 570 A.2d 129 (1990), alloc. denied, 577 A.2d 891 (1990).

In summary, Falcon has not provided the Board with any factual or legal basis, pursuant to 25 Pa. Code §21.53, upon which to grant its petition; as such, the petition must be denied. Since Falcon's notice of appeal was not filed in a timely manner as required by 25 Pa. Code §21.52(a), the appeal must be dismissed for lack of jurisdiction. It is, therefore, unnecessary to consider DER's motion to dismiss for failure to file a bond or to prepay the civil penalty assessment.

ORDER

AND NOW, this 28th day of August, 1991, it is ordered that:

1. The petition for allowance to appeal *nunc pro tunc* filed by Falcon is denied; and

2. The appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 28, 1991

cc: **Bureau of Litigation**
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Daniel Dutcher, Esq.
Northeastern Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOARD

EDGAR NEWMAN, JR.	:	
	:	
v.	:	**EHB Docket No. 91-259-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** August 29, 1991

OPINION AND ORDER
SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

An appeal will be dismissed where it is clear that it was filed with the Board beyond the 30-day period established by 25 Pa.Code §21.52(a).

OPINION

This appeal was filed with the Board by Edgar Newman, Jr. (Newman), the appellant, on June 26, 1991. The appeal is from an order of the Commonwealth of Pennsylvania, Department of Environmental Resources (Department or DER) requiring the registration and plugging of abandoned wells on the Miller farm in Foster Township, McKean County, issued under the authority vested in DER by the Oil and Gas Act, the Act of December 19, 1984, P.L. 1140, 58 P.S. §601.101 *et seq.* The order of the Department was sent to the appellant Newman by certified mail on May 1, 1991 and received by Newman on May 7, 1991.

On July 22, 1991, the Department filed a motion to dismiss, alleging the above recited facts and including a copy of the certified mail return receipt card evidencing that Newman received the order on May 7, 1991. The Department argues that Newman's failure to file his appeal within the 30-day period following receipt of the order deprives the Board of jurisdiction over the appeal by virtue of the language of 25 Pa.Code §21.52(a), which reads as follows:

> (a)...jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action....

Newman filed a reply to the Department's Motion to Dismiss on July 26, 1991. The reply admits that DER's order was issued on May 1, 1991; that Newman received the order on May 7, 1991 by certified mail; that the 30-day appeal period mandated by 25 Pa.Code §21.52(a) expired on June 6, 1991; and that Newman's appeal was not filed until June 26, 1991 and is therefore untimely.

The reply, however, goes on to assert that "the Board does have jurisdiction over appeals, regardless of when filed, where the question raised is that of jurisdiction of the Department of Environmental Resources which may be raised at any time where the question is jurisdiction over the individual against whom an Order may be issued.... The Board never loses jurisdiction over a question of the Department's jurisdiction."

Newman does not cite us to any authority for his argument of continuing jurisdiction specified above, and we know of no such authority.[1] The language of 25 Pa.Code §21.52(a) is clear and has been strictly interpreted by the Commonwealth Court and adhered to by the Board. See Rostosky v. Commonwealth, DER, 26 Pa.Cmwlth. 478, 364 A.2d 761 (1976); Davis Coal v. DER, 1990 EHB 1355; Bison Coal Co. v. DER, 1989 EHB 358. We are aware of no precedent which would allow us to deviate from this rule, as Newman odserts, where the issue involves DER's jurisdiction.

Given these facts and admissions, we must grant DER's motion to dismiss.

O R D E R

AND NOW, this 29th day of August, 1991, DER's Motion to Dismiss is granted and the appeal of Edgar Newman Jr. at EHB Docket No. 91-259-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

[1]Newman may have confused his argument with the principle that a question of the Board's jurisdiction over an appeal may be raised at any time. Carter Farm Joint Venture v. DER, 1990 EHB 709, 714, rev'd on other grounds, No. 1650 C.D. 1990, (Pa. Cmwlth. filed August 7, 1991)

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: August 29, 1991

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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Western Region
For Appellant:
Anthony H. Chambers, Esq.
CHAMBERS & CRISMAN
Bradford, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

T. C. INMAN, INC. and THEODORE C. INMAN	:	
	:	
v.	:	**EHB Docket No. 88-417-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 6, 1991

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

By Terrance J. Fitzpatrick, Member

Synopsis

A decision of the Department of Environmental Resources (DER) recalculating a closure bond after a remand from the Board is affirmed. DER met its burden of proving the number of acres upon which waste had been deposited at the landfill. Furthermore, the landfill operator waived its right to argue that a bond may not be required for an unpermitted landfill by failing to raise this argument in the prior proceeding.

INTRODUCTION

This is an appeal by T. C. Inman, Inc. and Theodore C. Inman (Inman) from a letter of DER dated September 14, 1988. In this letter, DER determined that Inman must file a bond in the amount of $176,750 to guarantee proper closure of the former Inman landfill in New Brighton, Beaver County, Pennsylvania.

DER's letter arose from a prior Adjudication issued by the Board - T. C. Inman, Inc., *et al.* v. DER, 1988 EHB 613. In that decision, the Board

affirmed DER's denial of Inman's landfill permit application, and reversed, in part, DER's assessment of civil penalties (reducing the penalty from $5,000 to $500). The Board also reversed, in part, DER's order requiring Inman to close the landfill and file a bond of $140,000; the Board found that the amount of the bond was not supported by the evidence because DER did not establish the number of acres upon which Inman had deposited waste at the site. Therefore, the Board remanded the closure bond issue to DER and directed DER to recalculate the bond in accord with its bonding policy and regulations. The letter under appeal here represents DER's recalculation of the bond amount.[1]

A hearing was held on June 29, 1990. DER presented three witnesses; Inman presented two. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Appellants are T. C. Inman, Inc., a Pennsylvania corporation, and Theodore C. Inman, both located at R.D. #2, Box 432, Allendale Road, New Brighton, PA 15066.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which is the Commonwealth agency responsible for administering and enforcing the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §6018.101 *et seq.*, 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 adopted under these laws.

3. Inman operated a landfill in New Brighton, Beaver County, from approximately 1955 to December 31, 1985. At that point, Inman ceased

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[1] As we will explain below, DER stated at the hearing that the correct bond amount should be $97,500. We will treat this statement as a revision to the letter under appeal.

operations pursuant to a closure order issued by DER (Transcript (T.) 132-133).[2]

4. On September 14, 1988, following a remand by the Board in a prior proceeding, DER sent a letter to Inman stating that the closure bond for the landfill had been recalculated and that the new bond amount was $176,750 (Commonwealth Exhibit (Commw. Exh.) 1).

5. In calculating the bond, DER applied 25 Pa. Code §101.9 (repealed) and the bonding policy based upon that regulation. Although this regulation has since been superseded, it was in effect at the time of the prior proceeding (Commw. Exh. 1, T. 16-17).

6. DER applied the method for calculating a bond for a natural renovation landfill (one in which water is purified as it passes through soil beneath the waste), rather than the method for a sanitary landfill (one in which leachate is collected and treated), because it lacked information regarding the volume of waste which was deposited at the landfill[3] (T. 18-21).

7. Under 25 Pa. Code §101.9(f)(1) (repealed), the bond calculation for natural renovation landfills calls for multiplying the number of acres where waste was disposed by $5,000, then adding a fixed sum of $7,500. DER's calculation of a $176,500 bond was based upon a finding that Inman disposed of waste on 33.85 acres (T. 17-19, 27).

8. DER employees John D. Pastelock, a sanitary engineer in the Bureau of Waste Management, and Anthony Orlando, regional manager for the

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[2] The opening date of 1955 was not put in evidence here, but it was placed in the record in the prior proceeding. Inman, 1988 EHB 613, 615 (Finding of Fact 3).

[3] Information regarding the waste volume, stated in tons per day, was necessary to calculate a bond for a sanitary landfill. 25 Pa. Code §101.9(f)(2) (repealed).

Bureau of Waste Management's Southwestern Regional Office, visited the site on May 8, 1990 to survey the areas of the landfill where waste had been deposited (T. 28, 64).

9. Mr. Inman showed Mr. Orlando and Mr. Pastelock where waste had been deposited on the site. Waste was deposited in three discrete areas - identified as Areas I, II, and III (T. 25, 28-29, 65-68).

10. In many cases, the boundaries of these areas were obvious due to differences in vegetation and to the steep slopes leading up to the former disposal areas (T. 68, 72, 85-88).

11. On the basis of his experience (performing 73 surveys), Mr. Pastelock was qualified to conduct land surveys (T. 63).

12. Mr. Pastelock surveyed Areas I and II, listed the measurements in his log book, then performed arithmetic and geometric calculations to determine the acreage in these areas (T. 73).

13. To confirm his acreage calculations, Mr. Pastelock plotted the survey measurements onto a map, then measured the areas with a digital planimeter - a device which is used to trace the boundaries of an area and which automatically calculates the surface area (T. 74).

14. Mr. Pastelock did not survey Area III because of high vegetation or trees along the western boundary of the area, although he did tour the area on foot and by car. Mr. Pastelock determined the acreage in Area III by tracing from a map Mr. Inman submitted to DER in 1970 (showing where waste had been deposited as of that time) and then using a digital planimeter (T. 71-74).

15. The total acreage where waste was deposited at the landfill is 18 acres. Area I consists of 4.12 acres, Area II consists of 3.88 acres, and Area III consists of 10 acres (T. 73-74).

16. The Inman landfill has not been closed properly - as evidenced by lack of proper vegetation and the presence of erosion gullies and excessive slopes (T. 166-170).

17. Using the methodology for natural renovation landfills contained in 25 Pa.Code §101.9(f)(1) (repealed) and DER's bonding policy, Inman is required to submit a bond in the amount of $97,500 (T. 95-96). This number is derived by multiplying $5,000 by 18 acres and adding $7,500 (*Id.*).

18. Inman posted a bond in 1973, the value of which at the time of hearing was $12,172.82 (Inman Exhibits B, C, T. 135-137). The face of the bond instrument does not indicate the purpose of the bond (Inman Exhibit B).

DISCUSSION

This is an appeal from DER's recalculation of a closure bond for the Inman landfill. The September 14, 1988 letter stated that Inman must submit a bond in the amount of $176,750; however, at the hearing, DER revised the amount to $97,500. As in the earlier proceeding, DER bears the burden of proof regarding the bond amount. 25 Pa. Code §21.101(b)(3).

Inman contends, first, that DER lacks authority to require him to submit a closure bond because the Inman landfill was never granted a permit. Inman argues that Section 505 of SWMA, 35 P.S. §6018.505, and 25 Pa. Code §101.9 (repealed) only authorize DER to require closure bonds for permitted landfills. Second, Inman argues that if it must submit any bond, the bond amount should be $10,000 - the minimum amount under Section 505 of SWMA. This is so, Inman contends, because the landfill does not pose a threat to the public health and safety. Finally, Inman contends that if the bond is calculated on the basis of acreage where waste was deposited, that DER overstated the acreage in Areas I and II, and that Area III should not have been included because no waste has been deposited there since 1976.

DER argues that Inman should be required to file a closure bond in the amount of $97,500. DER contends that it acted reasonably in calculating the bond for Inman's landfill using the method for natural renovation landfills. DER further argues that the evidence supported its finding that Inman deposited waste on 18 acres at the landfill. Finally, DER contends that the need for a bond is obvious in light of the excessive slopes, erosion gullies, and inadequate vegetation at the landfill.

In order to put the issues in their proper perspective, it is helpful to examine the discussion of the closure bond issue in the prior Adjudication:

> The final issue with regard to DER's order of September 11, 1985 is the amount of the bond Inman was required to file. Inman has made a bare assertion that the bond amount is excessive (Inman Brief, p. 6). Our review of the record indicates that DER has not explained how it calculated the $140,000 bond in this case. DER's witness, Michael Forbeck, testified that under DER's bonding policy for natural renovation landfills, which parallels DER's regulations at 25 Pa.Code §101.9(f)(1), the method for calculating a bond for a landfill such as Inman's is to multiply the number of acres by $5,000, and then to add $7,500 to the amount (T. 291-292; Commw. Exh. 8). However, Mr. Forbeck did not know the number of acres used in the calculation to derive the $140,000 bond (T.292)... . Therefore, we conclude that DER has not carried its burden of proof on this issue, and we have no choice but to remand this matter to DER to calculate the bond amount.[6]
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> [6] Inman has not raised the issue whether section 505 of the Solid Waste Management Act, 35 P.S. §6018.505, authorizes DER to require a bond in a situation involving an unpermitted landfill which has already been ordered to close. Therefore, this Adjudication does not rule on the question.

T. C. Inman Inc., *et al.* v. DER, 1988 EHB 613, 629-630.

In this case, we find that DER has met its burden of proving that a

$97,500 bond is appropriate.[4] Inman's argument that DER may not require it to file any bond, because the landfill was never granted a permit, comes too late in the day. As footnote 6 in the above quotation of the prior Adjudication makes clear, Inman failed to raise this argument in the prior proceeding. Therefore, Inman waived its right to raise this argument. In addition, Commonwealth Court's Opinion affirming our prior Adjudication stated that it was proper for DER to require a closure bond for the Inman landfill. I. C. Inman, Inc., *et al.* v. Commonwealth, DER, 124 Pa. Commw. 332, 556 A.2d 25, 28 (1989).

We also disagree with Inman's argument that DER was compelled to set the bond amount at $10,000 - the statutory minimum under Section 505 of SWMA, 35 P.S. §6018.505. Inman is arguing that DER should deviate from its standard bonding policy. We do not believe that DER was required to do so in light of the evidence establishing a lack of proper vegetation and the presence of erosion gullies and excessive slopes at the site (FOF 17). Moreover, Inman did not submit any evidence that a $10,000 bond would be sufficient to guarantee that the above problems would be remedied.

Finally, we disagree with Inman's argument that DER overstated the acreage amount used to calculate the bond. Mr. Pastelock was DER's primary

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[4] In calculating the bond amount, DER was not required to grant credit to Inman for the bond which Inman filed in 1973. (See FOF 18) The value of this bond at the time of the hearing was $12,172.82. (*Id.*) Inman contends that the bond was filed in conjunction with its landfill permit application in 1973; DER contends that the bond was filed in conjunction with an industrial waste permit issued to Inman in 1973 authorizing construction and operation of leachate treatment facilities. Although neither party could document the purpose of the bond, we think it is more likely that the bond was filed in conjunction with the permit Inman did receive (the industrial waste permit) rather than the permit Inman did not receive (the landfill permit). This conclusion is consistent with Anthony Orlando's testimony that DER does not ask a permit applicant to submit a bond until DER is certain that a permit will be granted. (T. 33-34)

witness regarding the acreage calculation. Mr. Pastelock conducted seventy-three (73) previous surveys for DER (FOF 12). Mr. Inman instructed Mr. Pastelock and Mr. Orlando where the boundaries of the waste areas were, although in many cases these boundaries were obvious because of the steep slopes leading up to the waste areas and due to sparse vegetation on the waste areas (FOF 10, 11). Using the measurements from the survey, Mr. Pastelock performed standard calculations to determine the acreage in Areas I and II, and he plotted the areas on a map (FOF 13). He then confirmed the acreage by measuring the areas on the map with a "digital planimeter" (FOF 14). For Area III, which could not be surveyed due to high vegetation or trees along the western boundary, Mr. Pastelock simply traced the area from a map submitted to DER by Inman in 1970, and then he calculated the acreage by applying the digital planimeter to the area on the map (FOF 15).

This testimony satisfied DER's burden to show by a preponderance of the evidence the amount of acreage upon which Inman deposited waste at the landfill.[5] Mr. Inman's testimony regarding the acreage was not persuasive. His estimate that Areas I and II occupied "three or four acres at most" was based solely upon his looking at the Areas on a map and using points of reference (T. 142). Mr. Inman stated that "[t]he only way I would accept this

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[5] We will not disregard Mr. Pastelock's testimony on the basis that the accuracy of the surveying equipment was not established. He stated that this equipment, which consists of a transit and an electronic measuring device, should be sent to the factory for an accuracy check "every year or two" and that the equipment used was last checked in "early 1988" (T. 82, 83). Since Mr. Pastelock surveyed the Inman site in May 1990, it was at least two years, and possibly more, since it had last been checked. These facts do not preclude us from relying on Mr. Pastelock's testimony. Mr. Pastelock was not very precise in describing how often an inspection of the equipment was required, and the interval between inspections here was roughly the maximum period - two years. Furthermore, while these facts might cause us to give less weight to Mr. Pastelock's testimony, Inman did not introduce any countering evidence regarding survey results.

is to have a surveyor of my own." (*Id.*) Since Mr. Inman did not introduce any survey results of his own, his testimony is insufficient to rebut the testimony offered by DER.

We also agree with DER that it was proper to include Area III in the bond calculation. It is irrelevant that Inman may have ceased depositing waste on this Area in 1976, and that Inman did not propose depositing waste on this Area in the permit application he submitted to DER in 1982. Even though the Area may have been closed fifteen years ago, some parts of it are still not adequately vegetated and the slopes leading to the waste area are excessive (T. 167, 170). Furthermore, DER's requiring a bond is appropriate because Inman operated the site as a landfill, not because Inman submitted a permit application (which was denied) to operate a landfill.

To summarize, we conclude that DER met its burden of proving that Inman should submit a closure bond in the amount of $97,500. Accordingly, we will dismiss Inman's appeal.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding.

2. DER bears the burden of proof in an appeal from its recalculation of a closure bond. 25 Pa. Code §21.101(b)(3).

3. Inman waived its right to assert that DER lacked authority to require a closure bond by failing to raise this issue in his earlier appeal from DER's initial closure order.

4. DER was not required to impose the minimum closure bond amount allowed by statute where the evidence established that the landfill did not have adequate vegetation, and where erosion gullies and excessive slopes were present.

5. Under 25 Pa. Code §101.9(f)(1) (repealed), the amount of a closure bond for a natural renovation landfill is calculated by multiplying the number of acres where waste was deposited by $5,000, and then adding $7,500. DER acted reasonably in calculating Inman's closure bond according to this method since it lacked sufficient information to calculate the bond according to the method for sanitary landfills.

6. The preponderance of the evidence supported DER's determination that Inman deposited waste on 18 acres at the landfill, and, thus, that Inman should submit a closure bond in the amount of $97,500.

ORDER

AND NOW, this 6th day of September, 1991, it is ordered that DER's September 14, 1988 decision, as amended by DER's testimony decreasing the bond amount from $176,750 to $97,500, is affirmed, and the appeal filed by T. C. Inman, Inc. and Theodore C. Inman is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: September 6, 1991

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